

**IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA**

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

Appellants,

v.

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 SEEKER,

Intervenor-Appellees

Case No. S17A0177

**BRIEF *AMICUS CURIAE* OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLEES
AND INTERVENOR-APPELLEES**

Jay G. Wall
Georgia Bar No. 558311
Law Office of Jay G. Wall, LLC
1190 Buckhead Crossing, Suite D
Woodstock, GA 30189
Phone: (678) 362-3176
Fax: (678) 669-2604
Email: Jay@JayGWallLaw.com

Johanna B. Talcott, *Of Counsel*
Joshua P. Thompson, *Of Counsel*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Fax: (916) 419-7747
Email: jbt@pacificlegal.org
Email: jpt@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

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Pacific Legal Foundation (PLF) respectfully submits this brief *amicus curiae* in support of Appellees Georgia Department of Revenue, et al., Intervenor-Appellees Ruth Garcia, Robin Lamp, Teresa Quinones, and Anthony Seeker, and in support of affirming the lower court's decision.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has offices in California, Washington state, Florida, and Washington, D.C. PLF has participated as *amicus curiae* in the United States Supreme Court in many cases involving K-12 education reform, including *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Mitchell v. Helms*, 530 U.S. 793 (2000).

PLF has also participated in state courts across the country in cases involving K-12 education reform, including *Taxpayers for Public Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *petition for cert. filed, Doyle v. Taxpayers for Pub. Educ.* (U.S. Oct. 27, 2015) (Nos. 15-556, 15-557, 15-558); *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E.2d 884 (Ga. 2013); *Duncan v.*

New Hampshire, 102 A.3d 913 (N.H. 2014); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); and *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006).

This case raises issues of constitutional law as well as important policy considerations for K-12 education. PLF believes that its public policy perspective and litigation experience provide an additional viewpoint on the issues presented in this case, which will assist the Court in its deliberations.

INTRODUCTION

The “school choice” movement embodies a simple proposition: the more choices and autonomy parents and students have in selecting a school, the better the education students will receive. Traditional public schools provide a one-size-fits-all model that is resistant to improvement and innovation. Students whose families lack the financial means for private school can become trapped in public institutions that cannot meet the student’s educational needs (at best) or are inadequate and dangerous (at worst).

With the Qualified Education Expense Tax Credit, the Georgia Legislature introduced a welcome alternative to the public school monopoly. Enacted in 2008, the program allows private individuals and businesses to apply for a limited number of dollar-for-dollar credits against their state income tax liability. *See* O.C.G.A. § 20-2A-1, *et seq.* The credits are earned in exchange for voluntary donations to

Student Scholarship Organizations (SSOs)—private charities that provide scholarships for tuition and fees so recipient students may attend the qualifying private school of their parents’ choice. The program has proved immensely popular—by 2015, nearly 13,000 scholarships were awarded to students at an average value of \$3,425. EdChoice, Georgia-Qualified Education Expense Tax Credit.¹

A group of anti-choice taxpayers challenge the validity of the program under several provisions of the Georgia Constitution, including the Establishment Clause, which reads: “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any . . . sectarian institution.” Ga. Const. art. I, § 2, ¶ VII. They also claim violations of the Gratuities Clause, the Educational Assistance Provisions, and various statutes. The Appellants argue that the tax credits are equivalent to tax expenditures, and thus constitute the impermissible use of public funds to aid religious schools. The trial court held that Appellants lacked taxpayer standing to challenge the program because the money used for the scholarships comes exclusively from private donations, rather than public funds. *See Gaddy v. Ga. Dep’t of Rev.*, No. 2014CV244538, slip op. at 8-11 (Ga. Sup. Ct., Feb. 4, 2016). The court also ruled that, even if standing existed, all of the constitutional claims would fail on the merits because the program does not utilize public funds. *Id.* at 16-18. This appeal followed.

¹ Available at <https://www.edchoice.org/school-choice/programs/georgia-qualified-education-expense-tax-credit/>.

SUMMARY OF THE ARGUMENT

This brief focuses on the broader implications of the Establishment Clause issue raised in this case. The trial court, Appellees, Appellee-Intervenors, and Co-Amici have all explained why Appellants' Establishment Clause claim must fail—tax credits are categorically not an appropriation of public funds. And even if they are deemed public funds, they do not violate the Establishment Clause because they are not “in aid of” religious organizations. To the contrary, the tax credits benefit the students, parents, and families who are given the opportunity to choose the school that best suits their needs. Amicus PLF joins these analyses, and incorporates them, as the foundation of our discussion.

Instead of rehashing the reasons Appellants' claim must fail, this brief will focus on the drastic implications on Georgia law and Georgia families if their Establishment Clause claim were to prevail. A ruling by this Court that the Georgia Establishment Clause forbids the scholarship program would lead to negative impacts for the many Georgia citizens who benefit from various tax credits, exemptions, and deductions. Many private organizations, including religious institutions, utilize tax benefits to help in the administration of programs that promote social well-being. Appellants' position calls into question the constitutionality of many established and socially beneficial Georgia tax credit programs. Furthermore, Appellants' arguments

threaten many tax exemptions and deductions that are only tangentially connected to religion.

Striking down the scholarship program would eliminate the educational benefits it provides to students, parents, families, schools, and taxpayers. Infusing choice into education improves educational outcomes, drives improvement in public schools, encourages parental involvement in education, and reduces educational expenditures. The decision below should be affirmed.

I

APPELLANTS' ESTABLISHMENT CLAUSE CLAIM THREATENS THE CONSTITUTIONALITY OF MANY ESTABLISHED STATE PROGRAMS

The Georgia Constitution's Establishment Clause provides that, "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Ga. Const. art. I, § 2, ¶ VII. Neither the State nor any of its political subdivisions may "own or control, or give monetary aid, to a church or religious institution." *Taetle v. Atlanta Indep. Sch. Sys.*, 280 Ga. 137, 138 (2006). The purpose of the provision is to ensure that the state does not "promote the sectarian handiwork of the institution." *Id.* at 138.

If a state program does not utilize public funds, it cannot run afoul of the Establishment Clause. *See Bennett v. City of La Grange*, 153 Ga. 428, 112 S.E. 482, 484 (1922). The scholarship program at issue here involves only private donations that

are given to private organizations and ultimately awarded to private scholarship recipients. The money never enters public coffers. Thus, even if these funds were used for an explicitly religious purpose, the Establishment Clause is not implicated because no funds are taken from the public treasury to support it. Courts have routinely held that tax credits are not expenditures of public money. *See Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 144 (2011) (“Private bank accounts cannot be equated with the . . . state treasury.”); *Magee v. Boyd*, 175 So. 3d 79, 121 (Ala. 2015); *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (en banc); *McCall v. Scott*, 199 So. 3d 359 (Fla. 2016).

Appellants dispute this broadly established legal rule, and instead argue that tax credits qualify as expenditures taken from the public treasury because Georgia law 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). Such a broad definition of public funds would have implications well beyond this case and the scholarship program at issue. Georgia provides dozens of tax credits to incentivize socially beneficial behavior, some of which may be used by, or may indirectly benefit, religious organizations. Dick M. Carpenter II & Angela C. Erickson, *On Common Constitutional Ground: How*

Georgia's Scholarship Tax Credits Mirror Other State Programs and Expand Educational Opportunity, Inst. for Justice (Mar. 2016).² None of the programs have ever been held unconstitutional under the Establishment Clause of the Georgia Constitution or otherwise.

If this Court accepts the position that tax credits are equivalent to expenditures of public funds, and that the purpose of such expenditures is to aid religion or sectarian institutions, the constitutionality of many socially beneficial tax credit programs will be suddenly called into question. And because the proposed definition of “expenditure” is so expansive, it could also threaten long-standing Georgia tax deductions and exemptions.

Several tax credits similar to the scholarship program would be directly implicated by defining tax credits as public expenditures. At least six Georgia tax credits either reimburse individuals who obtain services at private, religious institutions, or religious organizations themselves may claim the credits. They are the Child and Dependent Care Expense, Employer’s Credit for Basic Skills Education, Employer’s Credit for Providing or Sponsoring Child Care for Employees, Low Income Housing credit, and Qualified Caregiving Expense. O.C.G.A. § 48-7-29-10; O.C.G.A. § 48-7-40.6; O.C.G.A. § 48-7-41; O.C.G.A. § 50-26-89(a); O.C.G.A. § 48-7-29.2. These programs incentivize behavior that confers a net positive on the state and its

² Available at www.ij.org/report/on-common-constitutional-ground.

citizens by encouraging employers to cover the child-care expenses of their employees, encouraging organizations to build and maintain low-cost housing facilities, or easing the financial burden on individuals and families who require caregiving services.

The sectarian motivations of these programs and the organizations that administer them are self-evident. For example, parents may earn Child and Dependent Care Expense tax credits to offset fees paid to the Bethesda Baptist Church Childcare Center (BCC). *Mission & Philosophy*, Bethesda Baptist Church Childcare Center.³ On its website, the facility shares its approach to childcare: “BCC desires to give quality Christian childcare and a Pre-school education that meets children’s spiritual, mental, and physical needs all while partnering with their parents in leading them to a saving knowledge of Jesus Christ at an early age.” In addition, individuals can claim the Qualified Caregiving Expense credit to obtain senior care services from Southwest Christian Care, whose mission is to

glorify God as guardians of the sanctity and dignity of life by providing physical, emotional, and spiritual care to our patients and their families and offer hope based on faith in Jesus Christ as Lord of life and death. We serve people from all walks of life, without regard to economic status, race or religion.

Our Ministry, Southwest Christian Services.⁴

³ Available at www.bethesdachildcare.com/mission--philosophy.html.

⁴ Available at www.swchristiancare.org/ministry/.

These are just two examples of the many religiously affiliated organizations that may be associated in one way or another with a tax credit program.⁵

The scholarship program is functionally identical to these programs. The Appellants have not suggested, at least not directly, that parents should be prevented from choosing a daycare center that shares their personal religious beliefs and child-rearing philosophy, or that families should not be allowed to choose an appropriate religious facility to care for an elderly loved one, but that is the necessary implication of their argument. There is no principled reason in law or logic to single out K-12 education as the only tax credit program that offends the Georgia Constitution. If the scholarship program were to be eliminated under the Establishment Clause, so too would these other valuable programs.

Appellants purport to limit the definition of tax expenditures to tax credits on the basis that tax credits give a taxpayer a “substantially greater benefit than tax deductions[, etc.],” but the Georgia statute they cite makes no such distinction. Br. of Appellants, at 25 n.10. Nor is there any constitutional or legal principle to provide a basis for this Court to draw such a distinction. If this Court accepts that tax credits are “tax expenditures,” then the same definition must logically apply to deductions and exemptions as well. This argument thus places a substantial portion of Georgia’s tax

⁵ A more exhaustive list of organizations is provided in Carpenter & Erickson, *supra*, at 15.

code at risk and could disrupt the long-standing expectations of Georgia citizens. It is settled law that individuals are entitled to claim deductions for donations made directly to religiously affiliated charities, and religious organizations themselves may claim exemptions from certain tax liabilities. *See, e.g.*, O.C.G.A. § 48-7-27, O.C.G.A. § 48-7-30.

A scholarship program that appropriates public funds does not violate the Georgia Constitution unless it is “in aid of” religion. *See Bennett*, 112 S.E. at 484. The program at issue here is not in aid of religion. The secular purpose of the scholarship program is to help children receive the best education possible to suit their individual needs. And even if religious schools, hospitals, homeless shelters, and other charities indirectly benefit from the existence of tax credits, exemptions, and deductions, their core function and purpose is to provide services to individuals in need. The programs are in aid of students, families, the elderly and infirm, and others, not religion. *See, e.g., Magee*, 175 So. 3d at 135; *Meredith*, 984 N.E.2d at 1213; *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999). In most cases, the connection between the state and religion is even further attenuated, because it is individuals, not the government, that make the decisions to donate to, or use their tax credits with, religious organizations. *See, e.g., Zelman*, 536 U.S. at 652-53 (2002).

II

UNLEASHING CHOICE IN EDUCATION BENEFITS STUDENTS, FAMILIES, SCHOOLS, AND TAXPAYERS

Choice enhances virtually every aspect of Americans' lives. From pizza parlors and cell phone providers to cars and universities, a business's pathway to success is providing exceptional service to its customers. But in one of the most important areas of life—the education of children—many Americans' choices are limited to one school, based solely on the family's home address. *See* Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, at 4 (4th ed. 2016).⁶ This monopolistic system forces students to stay at their designated school, even when it underperforms or fails to meet their educational needs. *Id.* Consequently, public schools have little incentive to improve—their “customers” can't take their business elsewhere. *Id.*

Of course not all students are stuck. Wealthy families can move to a new area or pay to send their children to a private school. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 1063-65 (2013). This is not the case for lower income families, whose only option is to endure substandard education for their children. *Id.* School choice programs help reduce this disparity by empowering families to send

⁶Available at <https://edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>.

their children to a school that is right for them. *Id.* Scholarship tax credits are just one form of a growing, nationwide trend to infuse public education with choice and healthy competition. The results are overwhelmingly positive: educational outcomes improve, and parental involvement increases; public schools improve, and taxpayers save millions of dollars. Affirming the trial court's decision will help ensure that Georgia families will continue to enjoy these benefits.

A. School Choice Improves Students' Academic Achievement in Both Private and Public Schools

School choice is credited with improving student achievement in K-12 education, and the reasons are simple. Choice enables parents to seek out a school that best meets their child's unique educational needs. In addition, choice gives parents a meaningful way to hold schools accountable for their performance. When families are no longer captive to the public school monopoly, schools must take notice: produce satisfactory results or people will take their business elsewhere.

Empirical studies have confirmed the value of competition. Eighteen empirical studies utilized random assignment sampling methods to compare school choice program participants with a control group of nonparticipants, controlling for external factors like previous academic achievement. *See Forster, supra.* Fourteen of those studies concluded that school choice has overall positive impacts on student outcomes,

while two studies found no visible impacts.⁷ Those positive results—including increases in math and reading scores—were correlated to school choice with a high degree of statistical certainty. *Id.* at 7.

School choice also has a positive effect on graduation rates. A study of Washington, D.C.’s Opportunity Scholarship Program (OSP), which opens up school choice to low-income families, revealed that the offer of an OSP scholarship raised students’ probability of completing high school by 12 percentile points. *See* Patrick Wolf, et al., U.S. Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* 41 (June 2010).⁸ A more recent study on the same program concluded that the use of vouchers increased the likelihood of high school graduation by 21%. *See* Patrick J. Wolf, et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 *J. Pol’y Analysis & Mgmt.* 246 (2013). Another study in Milwaukee revealed that students who use vouchers were more likely to graduate from high school, enroll in a four-year university, and remain enrolled in that university. Joshua M. Cowen, et al., *School Vouchers and Student Attainment*, 41 *Pol’y Stud. J.* 147, 161 (2013).

⁷ Two anomalous studies in Louisiana identified negative impacts, which some researchers attributed to a hostile regulatory environment and poor program design, which discouraged quality private schools from entering the program. *See* Forster, *supra*, at 12-13.

⁸ Available at <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

The benefits of school choice programs are not limited to children who attend charter schools or use choice programs to attend private schools. Studies reveal that when competition is introduced, traditional public schools also provide higher quality services. For example, one survey revealed that 31 out of 33 studies found that choice improves academic outcomes at traditional public schools.⁹ One of those studies found that the positive effects of choice were so strong that a school where all students were given educational choice could be expected to outperform by 15 percentile points over schools where only half of the students were given that choice. David Figlio & Cassandra M.D. Hart, *Does Competition Improve Public Schools?: New Evidence from the Florida Tax-Credit Scholarship Program*, 11 *Educ. Next*, no. 1, Winter 2011, at 78-79.¹⁰ Likewise, in Florida, students enrolled in schools facing competition improved their test scores more than students attending schools not facing such competition. *Id.*

These results are consistent with a study of the Edgewood School District of San Antonio, Texas, where every student in the district was granted school choice. Edgewood was a low-income, high-minority district where 93% of students were eligible for subsidized lunch programs and the population was 97% Hispanic.

⁹ One of the 33 studies found no visible impact, and one found a negative impact. Forster, *supra*, at 16.

¹⁰ Available at <https://educationnext.org/does-competition-improve-public-schools>.

Researchers found that Edgewood’s year-to-year test score gain outperformed those of 85% of school districts in Texas. They concluded that strong competition from private schools “[drove] public school improvements.”

B. School Choice Enables Autonomy and Encourages Parental Involvement in Education

The United States Supreme Court has long recognized the fundamental liberty of parents to “direct the upbringing and education of [their] children” *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Nevertheless, monopolistic public education systems have long denied many parents the autonomy to make the most critical decisions about their children’s education. School choice restores that autonomy. As a result, parents become more invested and involved in their children’s education.

One study compared the parental involvement of choice families with that of nonchoice families in Milwaukee and found that parents of children participating in the choice program:

- read with or to their children 10-15% more often;
- work with their children on math homework 5-10% more often;
- work with their children on writing or penmanship 10-20% more often;
- watch an educational television program with their children 5-10% more often; and
- participate with their children in a sports activity up to 10% more often.

Phillip Vassallo, *More Than Grades: How Choice Boosts Parental Involvement and Benefits Children*, Cato Pol’y Analysis No. 383, at 3 (Oct. 26, 2000).¹¹ Similar findings were reached in a study on the San Antonio Horizon Scholarship Program. Compared with parents whose children attended public school, those participating in the program worked with their children on homework 22% more often and on nonhomework-related math and reading lessons 15% more often. *Id.* at 3-4. These studies also indicated that parents of children in choice programs communicate more often with school officials and are involved more frequently in school activities. *Id.* at 4.

Increased parental involvement in turn leads to well-documented benefits. When parents are involved in their child’s education, they have higher grades, test scores, and graduation rates. Students also have better school attendance, increased motivation, and higher self-esteem. Mich. Dep’t of Educ., *What Research Says About Parent Involvement in Children’s Education, in Relation to Academic Achievement*, at 1 (Mar. 2002).¹² In one study, family participation in education was twice as predictive of students’ academic success as family socioeconomic status. *Id.* Another report reviewed national data and determined that increased parental involvement has

¹¹ Available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa383.pdf>.

¹² Available at www.responsiveclassroom.org/what-research-says-about-parent-involvement.

a larger positive effect on student achievement than student expenditures and parental education levels. William H. Jeynes, *Parental Involvement and Student Achievement: A Meta-Analysis*, 42 Urb. Educ. 82, 90 (2007). This same pattern emerges whether the outcome measures were grades, standardized test scores, or a variety of other measures. *Id.*

C. Tax Credit Scholarship Programs Reduce Education Spending

Not only do school choice programs achieve positive results, they also save taxpayers money by providing quality education at a lower cost than traditional public school systems. These savings are significant. A recent study estimated the financial savings of Georgia’s scholarship tax credit program at \$33,619,392 from 2011 to 2014. Martin F. Lueken, *The Tax-Credit Scholarship Audit: Do Publicly Funded Private School Choice Programs Save Money?*, EdChoice, at 45 (Oct. 2016).¹³ This result is consistent with those of other similar programs. The same study found that nine states’ tax credit scholarship programs alone generated somewhere between \$1.7 billion and \$3.4 billion in taxpayer savings from 1998 to 2014—roughly \$3,000 per each of the 1.2 million students involved in a tax credit program. *Id.* at 1. Of 30 empirical studies on the fiscal effects of school choice programs, 27 found that they actually saved money and the other 3 found that they were revenue neutral.

¹³Available at www.edchoice.org/wp-content/uploads/2016/11/2016-11_Tax-Credit-Scholarship-Audit-by-Martin-F.-Lueken-Jacob-UPDATED.pdf.

Breaking Down “The Tax-Credit Scholarship Audit” (slideshow), EdChoice.¹⁴ No studies have found that school choice loses money.

Private schools generally operate on narrower budgets and are able to educate children more efficiently than public schools. In Arizona, for example, one survey of 150 private schools found that the private schools spent an average of \$5,545 per pupil, more than \$2,000 less than the \$7,644 spent by the average Arizona public school. Andrew J. Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Inst. Pol’y Report No. 213 (Oct. 17, 2006). The study also showed that the average Arizona private school tuition was less than half of the annual per-pupil public school average revenue. *Id.* at 7. Even though the public schools were spending more money, the private schools had higher high school graduation rates, higher college acceptance rates, and better school facilities. *Id.* at 3-6.

School choice programs do not, as some critics suggest, funnel money away from public schools. To the contrary, research shows that enabling some students to attend private school does not cause financial harm to the public schools they leave, and may even relieve some financial strain. Benjamin Scafidi, *The Fiscal Effects of School Choice Programs on Public School Districts*, at 15 (Mar. 2012).¹⁵

¹⁴ Available at www.edchoice.org/research/tax-credit-scholarship-audit.

¹⁵ Available at www.edchoice.org/wp-content/uploads/2015/07/The-Fiscal-Effects-of-School-Choice-Programs.pdf.

These empirical studies show that school choice has numerous positive benefits. School choice programs enable parents to find a school that best suit the needs of their children. This healthy competition creates positive incentives for schools to improve and provide higher-quality education. The results are better educational outcomes, greater parental involvement, and decreased education expenditures. If the Qualified Education Tax Credit is upheld, Georgia's parents, students, and taxpayers will continue to reap these benefits.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Pacific Legal Foundation respectfully requests that this Court affirm the lower court's decision.

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Respectfully submitted,

JOHANNA B. TALCOTT
JOSHUA P. THOMPSON
Pacific Legal Foundation

JAY G. WALL
Law Office of Jay G. Wall, LLC

By s/ Jay G. Wall
JAY G. WALL
Georgia Bar No. 558311

*Counsel for Amicus Curiae
Pacific Legal Foundation*

CERTIFICATE OF SERVICE

This is to certify that I have on this 18th day of January, 2017, electronically filed the foregoing Brief *Amicus Curiae* of Pacific Legal Foundation In Support of Appellees and Intervenor-Appellees with the Clerk of Court using the SCED system, and also certify that I further caused service of the foregoing by first-class USPS 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

Frank B. Strickland
John J. Park, Jr.
STRICKLAND BROCKINGTON LEWIS
Midtown Proscenium, Suite 2200
1170 Peachtree Street, N.E.
Atlanta, Georgia 30309

Attorneys for Other Party

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 Appellees

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

Perry James McGuire
SMITH, GAMBRELL & RUSSELL
1230 Peachtree Street, NE Suite 3100
Atlanta, Georgia 30309-3592

Attorneys for Other Party

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001

Attorneys for Other Party

DATED: January 18, 2017

s/ Jay G. Wall

JAY G. WALL