No. 121293

IN THE
SUPREME COURT OF ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD,	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-15-0522
Plaintiffs-Appellees,	)	There on Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No. 15-MR-16
v.	)	The Honorable JOHN MADONIA, Judge Presiding.
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,	)	
Defendant-Appellant.	)	

**BRIEF OF PLAINTIFFS-APPELLEES
CHRISTOPHER JENNER, ET AL.**

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POINTS AND AUTHORITIES

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ISSUE PRESENTED

Plaintiffs, who are Illinois taxpayers, allege that Defendant Illinois Department of Commerce and Economic Opportunity exceeded its authority by adopting a regulation that purports to authorize the Department to award business tax credits in amounts greater than the underlying statute allows. Illinois courts have long held that taxpayers have standing to challenge the misuse of public funds, including the use of public funds to administer an invalid provision of law. Do Plaintiffs therefore have standing to seek to enjoin the use of public funds to administer the regulation they challenge? Alternatively, do Plaintiffs have standing to seek to enjoin the Department's excessive tax credit awards because tax credits deplete public funds just as expenditures do?

STATEMENT OF FACTS

Plaintiffs, Illinois taxpayers, challenge a regulation adopted by Defendant Illinois Department of Commerce and Economic Opportunity that purports to authorize the Department to award business tax credits in amounts greater than the underlying statute allows. For their remedies, Plaintiffs seek declaratory relief and an injunction to prevent the Department from issuing any further tax credit awards that exceed the statutory limit.

The EDGE Act authorizes the Department to award tax credits to select Illinois businesses.

In 1999, Illinois enacted the Economic Development for a Growing Economy Tax Credit Act ("EDGE Act"), which authorizes the Department to

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award tax credits to select businesses "that propose[] a project located or planned to be located in Illinois" and meet certain other criteria set forth in the statute. 35 ILCS 10/5-15(b), 5-20(a)-(b). R. C3, C6. The Act provides that when the Department awards an EDGE tax credit, the Department and the business receiving the credit must enter into an "Agreement," which must include, among other things, a "detailed description of the project that is the subject of the Agreement"; the duration and amount of the tax credit, which the Department determines; a minimum number of years for the project; a "specific method of determining the number of New Employees employed during a taxable year"; and a requirement that the business report to the Department "the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information [the Department's] Director needs." 35 ILCS 10/5-45, 5-50. R. C7.

The EDGE Act limits the amounts of its tax credits.

The Department cannot issue EDGE tax credits in any amount that it wants. Rather, the EDGE Act limits the amount of the tax credit that the Department can award to a business to the amount of state income taxes paid by new employees the business hires in the state after entering into the tax-credit Agreement. R. C7-8.

Specifically, the Act provides that a business's tax credit under an Agreement "shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement." 35 ILCS 10/5-15(d). R. C8. The

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Act defines the "Incremental Income Tax" attributable to a project as "the total amount withheld during the taxable year from the compensation of New Employees under Article 7 of the Illinois Income Tax Act [which provides the amount and method that an Illinois employer must withhold from an employee's paycheck] arising from employment at a project that is the subject of an Agreement." 35 ILCS 10/5-5 (internal footnote omitted). R. C8. "New Employees" are those employees of the business who are both: (1) "first employed by [the business] in the project that is the subject of an Agreement" and (2) "hired *after* the [business] enters into the tax credit Agreement." 35 ILCS 10/5-5 (emphasis added). R. C8. The Act contains two exceptions to this general rule controlling who may be considered a "New Employee": Certain employees who were hired within 15 days of the Act's enactment in 1999 may be considered "New Employees" even though they do not satisfy the criteria, and so may an "old" employee who fills a job previously held by a "New Employee" who was promoted to another position. 35 ILCS 10/5-5. R. C8.

Otherwise, in summary, the Act limits the amount of the tax credit that the Department may award to a business under an Agreement to the amount of income tax withheld from the business's employees who are both (1) hired to work on the project that is the subject of the business's tax-credit Agreement and (2) hired after the business enters into the Agreement. R. C8.

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The Department has adopted a regulation that purports to authorize tax credits in greater amounts than the EDGE Act allows.

After the EDGE Act became law, the Department adopted regulations to implement it. Despite the EDGE Act's language limiting EDGE tax credits to the amount of taxes withheld from *new* employees hired *after* a business enters into an Agreement, the Department adopted a regulation that purports to authorize EDGE tax credits based on taxes withheld from both new employees and certain *old* employees hired *before* a business entered into an Agreement. R. C9.

The Department's regulations limit the amount of an EDGE tax credit that the Department can award to "the incremental payroll attributable to the applicant's project." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15). R. C9. That language might appear similar to the statute's language limiting the amounts of EDGE tax credits, but the definitions the Department adopted in the regulation, which it applies in determining the amounts of the tax credits it awards, reveal that the regulation's limit is actually higher – potentially much higher – than the limit provided in the statute. The regulation defines "incremental payroll" as "the total amount withheld by the taxpayer during the taxable year from the compensation of new employees *and retained employees* under Article 7 of the Illinois Income Tax Act [35 ILCS 5/Art. 7] arising from such employees' employment at a project that is the subject of an Agreement." 14 Ill. Admin. Code § 527.20 (citing 35 ILCS 10/5-15) (emphasis added). R. C9. The regulation defines "retained

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employee," in turn, to include any "full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related (sic) to the project." 14 Ill. Admin. Code § 527.20. R. C9. For purposes of the regulation's definition, "'directly and substantially-related (sic) to the project' means at least two-thirds of the employee's job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project." 14 Ill. Admin. Code § 527.20. R. C9.

Thus, Plaintiffs allege in their complaint that the Department's regulations allow a business to receive a larger tax credit than that Act allows: Instead of having its tax credit limited to the amount of income tax withheld from new employees' paychecks, as the statute requires, a business can receive a tax credit up to the amount of income tax withheld from the paychecks of both new and retained employees who work on the project that is the subject of an Agreement. R. C10. And Plaintiffs have alleged that the Department's issuance of these tax credits depletes public funds. R. C11.

Procedural History

Plaintiffs are Illinois taxpayers who are liable to replenish any deficiency in the state's treasury. R. C11. Plaintiffs filed their complaint challenging § 527.20 and the Department's awards of tax credits that exceed the amounts authorized by the EDGE Act on January 9, 2015. R. C3. Plaintiffs seek a declaration that the Department has exceeded its authority by adopting

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§ 527.20 and by issuing tax credits in amounts that exceed the amounts authorized by the EDGE Act. R. C12. Plaintiffs also seek an injunction to prevent the Department from granting any additional tax credit awards that exceed the amounts authorized by the statute. R. C13.

The Department moved to dismiss Plaintiffs' complaint under 735 ILCS 5/2-619 on the basis that Plaintiffs lacked standing. R. C66. The trial court granted the Department's motion, R. C121, but the Appellate Court reversed, concluding that, under this Court's precedents, the Plaintiffs have standing as taxpayers to challenge § 527.20 because the Department uses public funds to administer it. *Jenner v. Ill. Dep't of Commerce & Econ. Opportunity*, 2016 IL App (4th) 150522, ¶¶ 17-54.

ARGUMENT

For more than a century, Illinois courts have recognized taxpayers' standing to challenge unlawful government actions that deplete public funds because taxpayers are the equitable owners of public funds and will be liable to replenish the treasury for any misused public funds.

The regulation and tax-credit awards that Plaintiffs challenge here deplete public funds in two ways. *First*, they deplete public funds through the resources the Department uses to administer the regulation. This Court has long recognized that taxpayers have standing to enjoin the misuse of public funds to administer an invalid provision of law, and this case requires nothing more than a straightforward application of that well-established

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rule. *Second*, the regulation and tax-credit awards Plaintiffs challenge deplete public funds because illegal tax credits are equivalent to illegal expenditures because they deprive the state of funds to which it is entitled under the law.

And, contrary to the Department's assertions, Plaintiffs are not seeking an order directing the state to collect taxes, nor are they seeking to collect money from tax-credit recipients on the state's behalf, which they indisputably could not do. Rather, Plaintiffs only seek to enjoin illegal government actions that harm their interests as taxpayers, as this Court's longstanding precedents allow them to do.

This Court should therefore affirm the Appellate Court's decision recognizing Plaintiffs' standing to bring their claim.

I. Plaintiffs have standing as taxpayers to enjoin the Department from using public funds to administer an illegal regulation.

It is beyond dispute that Illinois taxpayers have standing to seek to enjoin a state agency from misusing state funds, whether through illegal cash payouts or through the use of state resources to administer an invalid provision of law. This appeal requires nothing more than a straightforward application of that well-established rule: Plaintiffs have alleged that the Department has adopted an unlawful regulation and is administering it in an unlawful manner; therefore, Plaintiffs have standing to challenge that regulation and to seek to enjoin any further use of state resources to administer it.

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A. Taxpayers have standing to challenge the misuse of public funds, including the use of public funds to administer an invalid provision of law.

"It has long been the rule in Illinois that . . . taxpayers have a right to enjoin the misuse of public funds" – *i.e.*, that "[t]he misuse of public funds for illegal or unconstitutional purposes is a damage which entitles [taxpayers] to sue." *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956). This taxpayer standing is based on taxpayers' equitable ownership of public funds: Public funds are the taxpayers' money, and taxpayers are liable to replenish the treasury when public funds are depleted. *Id.* So when public funds are misused, taxpayers are injured. *Id.* And that is true whether the amount of misused funds is great or small. *Snow v. Dixon*, 66 Ill. 2d 443, 450 (1977) (citing *Krebs v. Thompson*, 387 Ill. 471, 475-76 (1944)).

Public funds can be misused in various ways. One obvious way is through illegal payouts of money to individuals or organizations. *See, e.g., Littler v. Jayne*, 124 Ill. 123 (1888) (taxpayer had standing to enjoin issuance of vouchers for payments under an illegal state contract); *Beauchamp v. Bd. of Supervisors*, 45 Ill. 274 (1867) (taxpayer obtained injunction against illegal payment and collection of taxes to fund the payment); *Perry v. Kinnear*, 42 Ill. 160 (1866) (same).

Another way that public funds can be misused, injuring taxpayers, is through the state's administration of an invalid provision of law. For example, in *Krebs v. Thompson*, this Court held that a taxpayer had standing

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to seek to enjoin the use of public funds to administer a statute for the licensing of professional engineers that the taxpayer alleged was unconstitutional special legislation. 387 Ill. at 473-76. It did not matter that the statute did not directly apply to the taxpayer, who was not seeking a license himself. *Id.* at 473. It was enough that his tax dollars were being used to administer the statute's licensing scheme. *Id.* at 475-76. Similarly, in *Snow v. Dixon*, this Court held that a taxpayer had standing to seek to enjoin the use of public funds to collect an unconstitutional tax. 66 Ill. 2d at 450-53.

In both *Krebs* and *Snow*, the Court rejected arguments that taxpayers lacked standing because the statutes they challenged generated a "profit" for the state. *See Snow*, 66 Ill. 2d at 450-51; *Krebs*, 387 Ill. at 474-75. For example, in *Snow*, the state argued that the challenged tax could not injure the taxpayer plaintiffs because it only cost the state a "*de minimis*" amount to collect but generated $5.6 million in revenue. 66 Ill. 2d at 450. In both cases, the Court concluded that the misuse of public funds, in itself, injured taxpayers. The state's receipt of revenue after the fact did not cure taxpayers' injury. *See id.* at 450-51; *Krebs*, 387 Ill. at 475-76.

Following *Krebs* and *Snow*, the Appellate Court recognized a taxpayer's standing to challenge an allegedly unconstitutional executive order by the Cook County Board President that authorized the provision of elective abortions at the Cook County Hospital, in *Martini v. Nestch*, 272 Ill. App. 3d 693, 695-97 (1st Dist. 1995). The Appellate Court also recognized a taxpayer's

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standing to enjoin the use of public funds to administer an unconstitutional statute governing the issuance of riverboat gambling licenses in *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44, 49-53 (1st Dist. 2004).

To be clear, not all funds in the government's possession are "public funds" in which taxpayers have an equitable interest. Taxpayers are the equitable owners of the general revenue funds of the state, but they are not the equitable owners of special funds paid in and replenished by some source other than general tax revenues. *Barco*, 10 Ill. 2d at 160. Therefore, taxpayers do not have standing to challenge the misuse of funds other than general revenue funds unless they show "a special injury not common to the public generally." *Id.* at 161.

Several of this Court's decisions provide examples of taxpayers who lacked standing because they had no equitable interest in the funds whose misuse they sought to prevent.

In *Golden v. Flora*, taxpayers sought to challenge a municipal ordinance that authorized municipally owned utilities to enter into a collective bargaining agreement with a labor union. 408 Ill. 129, 130-31 (1951). The Court held that the taxpayers lacked standing because the city would not use any public funds to implement the ordinance: state law required the utilities to pay for their operation of rates charged to consumers, so the utilities operated "independently of the [city's] general revenue." *Id.* at 132-33. With no general revenue funds – *i.e.,* no taxpayer dollars – involved in operating

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the utilities, the utilities' payment of funds pursuant to the challenged collective-bargaining ordinance could not cause taxpayers any injury. In other words, the Court concluded that taxpayers could not be injured by the illegal use of funds that would be paid in and then replenished by utility consumers, not by taxpayers. *Id.* Similarly, in *Price v. City of Mattoon*, the Court held that taxpayers lacked standing to challenge the construction of a waterworks project that would be paid "solely out of revenue derived from the sale of water to consumers and not out of any tax or taxes levied or to be levied." 364 Ill. 512, 514-15 (1936).

In *Barco*, taxpayers sought to enjoin the payment of unemployment benefits to people who allegedly were not entitled to them. 10 Ill. 2d at 159. These unemployment benefits were not paid out of the state's general revenue funds but were instead paid from a special trust fund that consisted entirely of contributions made by employers. *Id.* at 160-61. The taxpayer plaintiffs lacked standing to challenge the payments because they were not the equitable owners of the money in the trust fund, nor could they show that the challenged benefit payments would cause them any harm. *Id.* at 161-66.

Following this Court's precedents, the Appellate Court has likewise consistently denied taxpayers standing to challenge the misuse of funds that were not general revenue funds, of which taxpayers were not the equitable owners. For example, in *Illinois Association of Realtors v. Stermer*, the Appellate Court held that taxpayers could not challenge the transfer of

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money from the state's Real Estate License Administration Fund to the general revenue fund. 2014 IL App (4th) 130079. The Administration Fund was a "special fund" that received its money from licensing fees, not from general tax revenue. *Id.* at ¶¶ 18-20, 30. Therefore, the taxpayer plaintiff could only have standing if it could show a special injury to itself. *Id.* at ¶ 30. The plaintiff could not do so – paying license fees into the Fund, by itself, gave it no equitable interest in the Fund's money – and therefore it lacked standing. *Id.* at ¶¶ 30-39. *See also, e.g., Marshall v. Cnty. of Cook*, 2016 IL App (1st) 142864, ¶ 16 (taxpayer lacked standing to challenge court clerk's alleged misapplication of court fees paid by individuals with business before the court); *Schact v. Brown*, 2015 IL App (1st) 133035, ¶ 20 (same).

In sum, then, Illinois courts have consistently held that taxpayers have standing to challenge the alleged misuse of the state's general revenue funds, whether that misuse involves an illegal payout of cash or the use of state resources to administer an invalid provision of law. But taxpayers do not have standing to challenge the alleged misuse of other funds held by the state unless they can show a special injury to themselves.

B. Plaintiffs have standing as taxpayers because they seek to enjoin the misuse of public funds to administer an unlawful regulation.

Under this Court's precedents discussed above, the Plaintiffs in this case have standing because they simply seek to enjoin the misuse of public funds –

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specifically, the use of public funds to administer a regulation they allege to be unlawful.

The Department applies public funds to administer the regulation Plaintiffs challenge through a series of activities Plaintiffs have identified in their complaint: The Department considers applications for EDGE tax credits; it determines the amounts of tax credits to be awarded; it enters into agreements to award tax credits; it issues tax credits; and it receives reports from businesses that have received tax credits regarding the number of employees the business has hired, the amount of income taxes withheld from new employees, and other information the Department's director requests. R. C7.

It is undisputed that the Department's actions necessarily entail the application of public funds because the Department is a state agency. *Cf. Crusius*, 348 Ill. App. 3d at 51 (allegation that state agency was implementing challenged statute implied state was using public funds). The Department – which bears the burden to prove any lack of standing, *Greer v. Ill. Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988) – has never argued, much less shown, that its administration of the regulation is funded by any source other than the state's general revenue funds.

Plaintiffs allege in their complaint that they are Illinois taxpayers, which means that they are the equitable owners of the funds the Department uses to administer the regulation they challenge and will be liable to replenish

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those funds.[1] R. C5. And, in reviewing a motion to dismiss under 735 ILCS 5/2-619, the Court of course must accept the Plaintiffs' allegations, and all inferences that can reasonably drawn from them, as true. *Int'l Union of Operating Eng'rs, Local 148 v. Ill. Dep't of Empl. Sec.*, 215 Ill. 2d 37, 45 (2005).

Therefore, under this Court's longstanding precedents – particularly *Snow* and *Krebs*, which recognized taxpayers' injury from the use of public resources to administer an invalid provision of law – the Plaintiffs have alleged an injury that establishes their standing.

C. The Department seeks unwarranted new restrictions on taxpayer standing.

As the discussion above shows, the Department's assertions that Plaintiffs are asking this Court to "sweep away all of the traditional limits on taxpayer standing" and seeking an "extravagant expansion of taxpayer standing" are false. (*See* Dept. Br. 17-18.) Plaintiffs simply ask the Court to apply its

[1] The Appellate Court apparently considered the question whether Plaintiffs are liable to replenish the treasury for the misused funds to be non-essential and declined to address it. *Jenner v. Ill. Dep't of Commerce & Econ. Opportunity*, 2016 IL App (4th) 150522, ¶ 50. But the case law makes clear that the taxpayers are always inherently liable to replenish misused general revenue funds of the state, which provides the basis for their standing. *See Barco*, 10 Ill. 2d at 160. So where, as here, taxpayers allege the misuse of general revenue funds, they implicitly allege the depletion of funds they are liable to replenish.

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longstanding rule that taxpayers may seek to enjoin the misuse of their tax dollars.

Snow and *Krebs* directly control because they establish that taxpayers are injured, and therefore have standing to sue, when the state uses public funds to administer an invalid provision of law. *See Snow*, 66 Ill. 2d 450-53; *Krebs*, 387 Ill. at 473-76. The Department tries to distinguish these cases by observing that they involved facial challenges to statutes, not challenges to regulations. (Dept. Br. 18.) But that difference is irrelevant: Although *Snow* and *Krebs* involved taxpayer challenges to statutes, their reasoning equally supports taxpayer challenges to regulations. Regulations, like statutes, have "the force and effect of law." *Celotex Corp. v. Pollution Control Bd.*, 94 Ill. 2d 107, 126 (1983). And regardless of whether the state acts pursuant to an unlawful statute or an unlawful regulation, the injury to taxpayers is the same: the misuse of public funds, of which they are the equitable owners.

There is no reason why the Court should now limit the holdings in *Snow* and *Krebs* to authorize only taxpayer "claims asserting statutes to be facially invalid," as the Department urges. (Dept. Br. 19.) The Department asks the Court to limit *Snow* and *Krebs* because, the Department says, they "are in considerable tension with this Court's overall jurisprudence on taxpayer

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standing" and declining to limit their holdings could lead to an unmanageable flood of taxpayer litigation. (*Id.*)

In fact, however, *Snow* and *Krebs* are not at all in "tension with the Court's overall jurisprudence on taxpayer standing." To the contrary, they are consistent with the Court's entire taxpayer-standing jurisprudence, under which taxpayers always have had standing to enjoin the misuse of their tax dollars. *See Snow*, 66 Ill. 2d at 450-52. On the other hand, carving out an exception to the longstanding rule that taxpayers may enjoin any misuse of public funds to disallow taxpayer challenges to facially invalid regulations would *create* needless tension in the Court's jurisprudence.

And there is no reason to believe that recognizing taxpayers' standing to challenge the use of public funds to administer unlawful regulations would unduly burden the courts or state government generally, as the Department suggests. This Court has recognized taxpayers' standing to enjoin the misuse of public funds for well over a century, and it has specifically recognized taxpayers' standing to enjoin the misuse of public funds to administer an invalid provision of law since it decided *Krebs* in 1944. During that time, taxpayer lawsuits have not overwhelmed the courts or significantly disrupted the operation of government. Presumably that is partly because lawsuits are costly, and taxpayers are therefore unlikely to bring them except where the

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alleged abuse is significant and the plaintiffs' likelihood of success on the merits appears to be high.

The Department essentially asks this Court to overrule *Snow*, *Krebs*, and other cases recognizing taxpayers' standing to enjoin any misuse of public funds. But the Department has not shown that any of the criteria for departing from *stare decisis* are met here – *i.e.*, it has not shown that the Court's past decisions on taxpayer standing are badly reasoned, unworkable, or likely to cause serious harm to public interests. *See People v. Colon*, 225 Ill. 2d 125, 146 (2007). And, in fact, the criteria are not met. This Court's body of law on taxpayer standing is consistent and coherent: As shown above, this Court and the Appellate Court have consistently applied this Court's precedents over many decades, allowing taxpayers to pursue claims where general revenue funds were being misused and denying taxpayer standing where no general revenue funds were being misused. And this Court's taxpayer-standing doctrine has not threatened the public interest at all; rather, it has *served* the public interest by giving taxpayers a way to protect their interests and prevent governmental abuses.

The Department argues that taxpayers have enough other ways of protecting their interests, such as lobbying and participating in the notice-and-comment process for regulations. (Dept. Br. 21.) But ordinary taxpayers' ability to correct governmental wrongdoing by these means is limited, particularly where taxpayers' interests are opposed by powerful special

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interests. And it is especially difficult for taxpayers to influence officials at public agencies such as the Department who are unelected and relatively insulated from democratic accountability. Moreover, this Court has recognized that the theoretical availability of other avenues of redress is not a sufficient reason to deny taxpayers standing. Taxpayer standing exists so taxpayers can protect their interests when other means fail. *See People v. Holten*, 287 Ill. 225, 231 (1919) ("If those charged with the duty of protecting and conserving the public money fail or refuse to act . . . for the benefit of the tax-payers . . . the tax-payers may resort to equity to redress the wrong. It certainly cannot be that in such cases the tax-payers are helpless.").

The Department expresses concern that accepting Plaintiffs' arguments could "convert the courts into perpetual monitors of all manner of official actions." (Dept. Br. 20.) But of course the judicial branch is *supposed to* serve as a check on the other branches of government and rein them in when they exceed their authority. As this Court has stated, "the judicial branch may, indeed must, intervene in matters generally reserved to the other branches of state government when an action of the executive or legislative branches

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offends the Illinois or United States Constitutions." *In re K.L.P. v. R.P.*, 198 Ill. 2d 448, 458 (2002).[2]

And taxpayers' ability to challenge any unlawful action involving public funds in the courts should have beneficial consequences: If state agencies know – and are occasionally reminded – that their actions are subject to taxpayer challenges, they will be less likely to overreach in the first place, eliminating the need for lawsuits or other corrective actions. And while the Department's arguments focus on the hypothetical harm the government might suffer from too much taxpayer litigation, the Department ignores the great harm taxpayers would suffer if this Court were to reduce their ability to hold state agencies and officials accountable when they use taxpayer dollars for illegal purposes.

The Department suggests that the courts can consider the validity of regulations even without taxpayer standing because "any person adversely affected by application of [a] regulation to that person in a specific matter may contest its validity in the courts, either directly or on administrative review." (Dept. Br. 21-22.) But not every regulation can be challenged in that way. Indeed, the regulation Plaintiffs challenge could never be challenged in

[2] To be clear, Plaintiffs seek to remedy a violation of the Illinois Constitution: If, as Plaintiffs allege, the Department effectively rewrote the law by adopting a regulation that contradicts a statute, then it usurped the General Assembly's exclusive authority to legislate under Article IV, Section 1 of the Illinois Constitution and violated the separation of powers mandated by Article II, Section 1.

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that way: No business that seeks an EDGE tax credit would ever have a reason to object, in administrative proceedings, to the Department issuing awards that are unlawfully high.

Accepting the Department's position in this case would both break from longstanding precedent and reduce citizens' ability to hold their elected and unelected officials accountable – for no good reason. This Court should therefore decline to do so and conclude that Plaintiffs have standing to pursue their claim.

II. Plaintiffs also have standing as taxpayers to enjoin the Department's awards of excessive tax credits because tax credits deplete public funds.

As the Appellate Court correctly concluded, the Department's use of public funds to administer the regulation Plaintiffs challenge suffices by itself to give Plaintiffs standing as taxpayers. But Plaintiffs also have standing to challenge the Department's regulation for a second independent reason: because the tax credits that the Department awards under the regulation deplete public funds, and therefore make Plaintiffs liable to replenish the public treasury, just as ordinary expenditures do.

A. Taxpayers have standing to challenge illegal tax-credit awards because tax credits are equivalent to expenditures.

In substance, tax credits are indistinguishable from government spending. As courts and scholars have long recognized, granting a tax credit is no different in effect from collecting tax money and then issuing a check back to the taxpayer. In other words, tax credits simply allow the government to

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grant subsidies without going to the trouble of collecting and disbursing funds. *See, e.g., Rainbow Apts. v. Ill. Prop. Tax Appeal Bd.*, 326 Ill. App. 3d 1105, 1108 (4th Dist. 2001) (tax credits "practically equivalent to a government subsidy"); *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 933 (Mo. 1987) (tax credit is "as much a grant of public money . . . and is as much a drain on the state's coffers as would be an outright payment by the state").[3] As a leading tax scholar put it, "[a] dollar is a dollar – both for the person who receives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label." Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705, 717 (1970). Indeed, tax credits intended to provide subsidies and encourage particular behaviors – like the EDGE tax credits at issue in this case – are commonly

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[3] The Department might point out, as it did below, that four Missouri Supreme Court judges later concluded that Missouri taxpayers lacked standing to challenge illegal tax credits. *See Manzara v. State*, 343 S.W.3d 656, 657-64 (opinion of Russell, J.); *id.* at 678-79 (opinion of Stith, J.). But one of those judges concluded that the tax credits at issue "constitute[d] an expenditure of public funds" and noted that "strong arguments can be made that the taxpayer standing test should be expanded to allow a taxpayer to challenge an illegal tax credit because the policy for allowing taxpayer standing would be the same for tax credits as it is for direct expenditures of public funds generated through taxation." *Id.* at 678-79 (opinion of Stith, J.). And the three other judges concluded that taxpayers had standing to challenge illegal tax credits. *Id.* at 665-78 (opinion of Wolff, J.). Further, Missouri applies a more restrictive test for taxpayer standing than Illinois, requiring a plaintiff to establish: "(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." *Id.* at 659 (opinion of Russell, J.).

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referred to in federal tax and spending policy and legal scholarship as "tax *expenditures*." Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 861 (1993) (emphasis added).

Accordingly, the same reasoning that justifies recognizing taxpayer standing to challenge unlawful expenditures also justifies recognizing taxpayer standing to challenge unlawful awards of tax credits. Like unlawful spending, unlawful tax credits create a "deficiency" in the public treasury and therefore injure taxpayers, who will be liable to replenish the treasury with their own tax payments. *Cf. Barco*, 10 Ill. 2d at 160. From the taxpayer's perspective, it makes no difference whether the state chooses to award an illegal subsidy, and thus create a deficiency, through ordinary spending or through a tax credit.

Here, Plaintiffs have alleged that the Department has enacted a regulation purporting to authorize EDGE tax credit awards in amounts far exceeding the statutory limit and that the Department has issued excessive tax credit awards pursuant to that regulation. Because those unlawful tax credit awards are equivalent to government expenditures and deplete public

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funds,[4] this Court should hold that Plaintiffs have standing as taxpayers to bring their claim challenging the regulation and the awards.

B. Contrary to the Department's argument, taxpayers have an equitable interest in funds wrongfully withheld from the public treasury.

The Department argues that Plaintiffs lack standing because they supposedly have no equitable interest in funds retained by recipients of tax credits, which were never paid into the state treasury. (Dept. Br. 11.) But it makes no sense to allow the state to avoid accountability to taxpayers by issuing a tax credit instead of collecting the same amount of money from a business and then giving it back. Again, there is no substantive difference between the two forms of subsidy.

Further, this Court has long recognized that money need not arrive at the state treasury before taxpayers have an equitable interest in it. In an early case on taxpayer standing, the Court held that a taxpayer had standing to challenge a county treasurer's retention of certain tax funds he collected, which the law required him to send to the state treasury, because the funds he wrongfully retained would have to be "made up by taxation." *Jones v.*

[4] It does not matter that the Department's issuance of the award does not, by itself, deplete funds (putting aside the administrative costs addressed above in Section I). It is enough that the issuance of the award will inevitably lead to the depletion of public funds. *See Littler*, 124 Ill. at 131-33 (taxpayers could enjoin issuance of vouchers for illegal purpose, even though that was not itself "a direct act of . . . misappropriation," because there could be "no reasonable doubt" that the vouchers would eventually be paid, which would deplete public funds).

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O'Connell, 266 Ill. 443, 444-47 (1914). Here, too, funds wrongfully retained by businesses that receive tax credit awards – *i.e.*, funds that will not be sent to the state treasury due to unlawful official actions – will have to be "made up by taxation," and taxpayers therefore have standing to prevent the loss of those funds.

The Department attempts to distinguish *Jones* by pointing out that the plaintiff in that case sued the person who possessed the funds at issue and that the funds were taxes that had already been paid. (Dept. Br. 11.) But those differences are irrelevant. In *Jones*, the plaintiff sued the government official whose unlawful actions he sought to enjoin, just as Plaintiffs here have sued the state agency whose unlawful actions they seek to enjoin. And the Department has not explained why it should matter that the county treasurer in *Jones* had already collected funds from taxpayers. In both that case and this case, unlawful government actions prevented funds from entering the state treasury and thus from becoming part of the state's general revenue funds.

C. Contrary to the Department's argument, the "fiscal effects" of tax credits and ordinary expenditures are identical.

There is no merit in the Department's argument that "from a purely economic perspective, a tax credit does not always have the same fiscal effects as a payment by a government of an equivalent amount of money." (Dept. Br. 15.) According to the Department, a tax credit is different from an ordinary expenditure because it "leave[s] money in the hands of private

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parties to spend as they choose, whereas the government can spend money only as legally authorized." (*Id.*) The Department further suggests that tax credits are somehow unique because they could "stimulate economic activity" and therefore "lead to *greater* tax receipts than the amount of the credit." (*Id.* at 16.)

But the Department has identified no relevant economic difference between tax credits and other government expenditures. It is true that the Department's tax credits leave funds in the hands of selected businesses to spend as they choose, which could stimulate economic activity, which could lead to a net increase in the State's tax revenue. But what if the state did not issue tax credits to those businesses but instead wrote them checks out of the state's general revenue fund? The effects would be identical, both for the businesses and, more importantly, for the state's treasury: the businesses could spend the funds as they choose, which could stimulate economic activity, which could lead to a net increase in the state's tax revenue. Thus, the Department has not shown any important difference between subsidies that take the form of tax credits and subsidies that take the form of cash payments.

Further, the possibility that tax credits could indirectly lead to greater tax revenues is irrelevant to whether taxpayers have standing to challenge them. Again, this Court has long held that the state cannot negate taxpayers'

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standing by showing that the state generates a profit from the illegal activity that they challenge. *See Krebs*, 387 Ill. at 476.[5]

D. Federal case law on taxpayer standing is irrelevant to Plaintiffs' standing under Illinois law.

The Department's position receives no help from the federal case on which it relies, *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), because the federal courts have explicitly rejected the reasoning that underlies Illinois taxpayer standing in general.

As the *Winn* decision itself explains, the federal courts – unlike Illinois courts – *never* recognize standing based on a taxpayer's liability to replenish the treasury for misused funds, regardless of whether the taxpayer alleges illegal spending or the issuance of illegal tax credits. 536 U.S. at 134-35. That is because the U.S. Supreme Court has concluded that illegal spending's "effect upon future taxation" is "too remote, fluctuating and uncertain to give rise to a case or controversy" under Article III of the U.S. Constitution. *See id.* at 135 (internal marks omitted).

This Court, on the other hand, has always taken the opposite view and held that a taxpayer's liability to replenish the treasury for misused general

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[5] For the same reason, the Appellate Court should not have expressed doubt over this theory of standing based on its uncertainty that one could "predict the legislature will probably raise taxes because of the excessively generous tax credits that defendant will grant." *Jenner*, 2016 IL App (4th) 150522, ¶ 21. (*See also* Dept. Br. 5.) The loss of revenue depletes public funds that taxpayers are (inherently, by definition) liable to replenish; taxpayers do not have to show that their personal tax rates actually have increased or will increase in the future.

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revenue funds *is* a sufficient injury to give the taxpayer standing to challenge the misuse. *See Barco*, 10 Ill. 2d at 160. Therefore, *Winn* and other federal cases on taxpayer standing are entirely irrelevant to whether an Illinois taxpayer has standing to challenge an Illinois law or regulation in the Illinois courts.

To explain further, *Winn* involved a "narrow exception" to the "general [federal] rule" against taxpayer standing, which applies in certain cases where the government has allegedly used public funds in a manner that violates the Establishment Clause of the First Amendment to the U.S. Constitution. *See Winn*, 536 U.S. at 138-40. Specifically, taxpayers may have standing in federal court when "sectarian [organizations] receive government funds drawn from general tax revenues, so that money has been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience." *Id.* at 144. In *Winn*, the Court concluded that taxpayers lacked standing to challenge a law authorizing tax credits for donations to organizations that grant students scholarships to attend private schools, including religious schools, because the taxpayers could not show that funds extracted from them were given to a religious institution. *Id.* at 145.

Under the analysis in *Winn*, it is essential for a taxpayer to show that his or her funds are going to the treasury and, in turn, to sectarian organizations because, in the U.S. Supreme Court's view, only that kind of direct coerced support can give rise to a violation of freedom of conscience that would

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constitute a sufficient injury to give the taxpayer standing. *Id.* at 142-43. That analysis has no relevance, however, to a plaintiff's standing to sue on the liability-to-replenish theory for taxpayer standing that this Court has long recognized. Under this state's doctrine, it makes no difference whether a subsidy is granted in the form of a tax credit or through an ordinary expenditure because the taxpayer's injury – his or her liability to make up for the lost funds – is exactly the same either way.

III. Plaintiffs are not seeking to collect taxes or direct the state to do so.

Finally, the Department's assertions that Plaintiffs are seeking an order directing the state to collect taxes are false. (*See* Dept. Br. 12, 14, 15.) Plaintiffs are not seeking an injunction directing the state to collect taxes, nor are they seeking to recover funds retained by businesses that have received excessive EDGE tax credit awards. Rather, Plaintiffs are simply seeking an injunction to prevent the Department from issuing further unlawful tax credit awards.

It is well settled that taxpayers do *not* have standing to bring suits against private parties to recover money owed to the state; only the Attorney General has that authority. *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 497-500 (2005). This Court has therefore consistently rejected taxpayer

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"derivative" claims seeking to make private parties pay money into the state treasury. *See, e.g., id.*; *Lyons v. Ryan*, 201 Ill. 2d 529 (2002).

But the Court has made clear that, notwithstanding the rule against taxpayer derivative suits, taxpayers *do* have the right to bring actions against government entities and officials to enjoin unlawful actions that deplete public funds. In *Scachitti*, the Court explained that its "holding in *Lyons* [rejecting taxpayer derivative claims] does not interfere with a citizen's right to bring taxpayer actions . . . seeking relief from illegal or unauthorized acts of public bodies or public officials, which acts are injurious to their common interests as . . . taxpayers." 215 Ill. 2d at 501 (citing 74 Am. Jur. 2d Taxpayers' Actions § 1 (2001)). And that is all that Plaintiffs are seeking to do here: enjoin illegal acts by a public body.

The Department argues that this action is tantamount to a taxpayer derivative action because "Plaintiffs are asking the court to declare certain funds in the hands of private parties to be owed to the State." (Dept. Br. 13.) But that would be equally true in any a case in which taxpayers allege that the state is making unlawful cash payments to private parties – something taxpayers indisputably have standing to enjoin. And Plaintiffs' claim does not require any determination of whether businesses that have received excessive

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tax credits awards are legally obligated to repay the amounts they received that exceeded the statutory limit.

Therefore, there is no merit in the Department's assertion that recognizing Plaintiffs' standing here would turn taxpayers into "roving tax collectors" pursuing private parties for funds they believe should be paid to the state. (*See* Dept. Br. 12.) Again, Plaintiffs are not seeking to collect taxes or to recover funds from anyone, nor are they seeking to make the state do either of those things. They are only seeking to stop the Department – which is not responsible for collecting taxes – from continuing to issue EDGE tax credit awards that exceed the amounts allowed by statute.

CONCLUSION

More than a century of case law makes clear that Illinois taxpayers have standing to enjoin the use of state resources to commit unlawful actions, regardless of whether the unlawful actions involve the issuance of tax-credit awards or anything else. In addition, taxpayers have standing to challenge awards of tax credits in particular because awarding a tax credit is substantively the same as awarding a monetary subsidy because it creates a deficiency that taxpayers are liable to replenish.

Plaintiffs therefore respectfully ask this Court to hold that Plaintiffs have standing to challenge the Department's regulation that they allege to be unlawful, affirm the Appellate Court's decision recognizing Plaintiffs'

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standing, and remand this case to the Circuit Court so it can consider the merits of Plaintiffs' claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 31 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, and certify that I verily believe the same to be true.

/s/ Jacob H. Huebert
Jacob H. Huebert

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that on October 25, 2017, the foregoing brief of Plaintiffs-Appellees Christopher Jenner, et al., was (1) filed with the Clerk of the Supreme Court of Illinois through the Court's electronic filing system, and (2) served by transmitting a copy from my email address to all attorneys on the attached service list:

Upon this brief's acceptance by the Court's electronic filing system, I will mail the original and thirteen file-stamped copies of the brief to the Supreme Court of Illinois, 200 E. Capitol Avenue, Springfield, Illinois 62701.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Jacob H. Huebert
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