



## Supreme Court of Georgia

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## CASES DUE FOR ORAL ARGUMENT

### Summaries of Facts and Issues

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**Monday, January 23, 2017**

### 10:00 A.M. Session

**GADDY ET AL. V. GEORGIA DEPARTMENT OF REVENUE ET AL. (S17A0177)**  
**GEORGIA DEPARTMENT OF REVENUE ET AL. V. GADDY ET AL. (S17X0178)**

A group of taxpayers are appealing a **Fulton County** court's dismissal of all but one piece of their lawsuit, in which they claim that the Georgia statute establishing a K-12 tax credit scholarship program is unconstitutional because it allows the use of public tax funds for private religious schools.

**FACTS:** This high-profile case stems from a dispute between some taxpayers and the State over the Qualified Education Tax Credit Program (Georgia Code 20-2A-1). Under the program, which is managed by the state Department of Revenue, individuals may donate up to \$1,000, couples up to \$2,500, and corporations thousands more to "student scholarship organizations," which are private charitable 501 (c) (3) organizations. These student scholarship organizations in turn must allocate at least 90 percent of the funds to award scholarships of up to \$8,983 per student to use at qualifying private schools. In return for their donations, the contributors receive dollar-for-dollar tax credits. The annual amount of tax credits available under the program is \$58 million.

Four Georgia taxpayers, including Raymond Gaddy, sued the Department of Revenue and Revenue Commissioner Lynnette Riley, arguing the program is unconstitutional because it

redirects public tax funds to private religious schools. In their lawsuit, the taxpayers sought “injunctive” relief to stop the illegal use of tax funds for private schools and a “writ of mandamus” to compel Riley as a public official to do her duty and revoke the status of any school scholarship organization that solicited contributions by claiming it would award a scholarship for a specific student. The trial court ruled mostly in favor of the Department and of parents who support the program and were permitted to intervene in the lawsuit. The trial court ruled that the taxpayers lacked standing to challenge the constitutionality of the statute and that its claims for injunctive relief were barred by the doctrine of sovereign immunity, the legal doctrine that protects the government or its departments from being sued without consent. But the court did rule the mandamus claim could go forward. The taxpayers now appeal the bulk of the ruling, while the State appeals the mandamus ruling to the Georgia Supreme Court.

**ARGUMENTS (S17A0177):** Attorneys for Gaddy and the taxpayers argue the trial court made several errors, including that the trial court erred by finding they lacked “standing” to sue “as their tax burdens have increased.” This Program transfers State money into private hands, they argue. The student scholarship organizations receive funds that would otherwise be paid as taxes and facilitate transferring donations to students attending private schools. The program does not require reporting on which private schools receive the funds. “Many of these student scholarship organizations promote donations by pointing out that they are tax dollars that can be paid to the SSO’s instead of the State,” the attorneys argue. “Like the SSO’s, numerous private schools ask taxpayers to redirect their tax dollars for the benefit of the schools and their religious missions.” The taxpayers have standing to assert their constitutional claims to stop unauthorized actions by the state government “because this case involves questions of public rights and Appellants [i.e. taxpayers] seek to procure enforcement of public duties,” the attorneys argue in briefs. The program certainly involves public rights and affects the public at large because it implicates both public and private education in Georgia, the separation of church and state, and the expenditure of tax revenues. “Georgia authority holds that taxpayers have standing to enjoin the [unauthorized] acts of public officials regardless of whether they suffered an injury,” the attorneys argue. In 1982, the Georgia Supreme Court ruled in *Newsome v. City of Union Point* that a “citizen and taxpayer...has standing to sue to prevent officials...from taking actions or performing acts which they have no authority to do.” “If a showing of injury was required (and it is not), Appellants do, in fact, allege injury.” The taxpayers claim that “they have to shoulder, directly or indirectly, a greater portion of Georgia’s tax burden because of the illegal tax credits received by others under the program.” The trial court itself correctly noted that, “Taxpayer standing can be used to challenge a government act resulting in an expenditure of public revenue or an increased tax burden.” These tax credits “represent an allocation of government resources in the form of taxes that could have been collected and appropriated if not for the preferential tax treatment given to the expenditure by the Georgia Legislature,” the taxpayers’ attorneys argue. The trial court also erred because sovereign immunity does not bar the taxpayers’ injunctive relief claim. In its 2014 decision in *Georgia Department of Natural Resources v. Center for a Sustainable Coast*, the state Supreme Court ruled that “only the Constitution itself or a specific waiver by the General Assembly can abrogate sovereign immunity.” “Here there is a statute,” the attorneys argue. They point to Georgia Code § 9-6-24 as a statutory waiver of immunity. Adopting the State’s position “would eliminate a core vehicle to challenge legislative action on constitutional grounds, and would in effect shift the power of constitutional review – a judicial

function – from the courts to the legislature,” the attorneys argue. “It would allow the legislature to pass unconstitutional laws and then immunize that activity by refusing to waive immunity to challenge that activity, in contravention of the Georgia Constitution.” “Under Georgia law, sovereign immunity does not bar actions to enforce constitutional rights.” Finally, the trial court erred in its ruling on the merits of the taxpayers’ constitutional claims. Georgia’s Constitution prohibits indirectly taking funds from the public treasury in aid of religious institutions. “The tax credit program necessarily involves money taken directly from the state treasury,” the attorneys argue. Under Georgia law, the tax credits under the program are defined as “direct expenditures of State tax revenues.”

The state Department of Revenue, represented by the Attorney General’s office, “respectfully submits that every one of Plaintiffs’ claims fails as a matter of law and the complaint should be dismissed in its entirety.” First, the plaintiffs lack standing to challenge the constitutionality of the statute because they have not been harmed or adversely impacted by it. The trial court correctly ruled they did not allege an actual harm or possessed any rights allegedly violated by the tax credit program. “Indeed, the U.S. Supreme Court has concluded that taxpayers did not have standing to challenge an educational tax credit program that is nearly *identical* to the program at issue here,” the State’s attorneys argue, referring to the high court’s 2011 decision in *Arizona Christian School Tuition Organization v. Winn*. The State argues that the taxpayers’ claims “all hinge on whether the grant of tax credits is the expenditure of public funds; it is not, and so Plaintiffs’ claims must fail.” The statute “does *not* authorize or mandate that public funds be spent on private religious schools, but merely authorizes a tax credit for taxpayers that wish to donate *their own funds* to a scholarship organization *of their own choice*.” As a result, this Program, “and other programs similar to it, are no different from any other tax-deductible charitable contribution, and such programs have been upheld against attacks under both the U.S. and various state constitutions.” Also, the trial court correctly ruled that sovereign immunity bars the taxpayers’ claims for injunctive relief “because the legislature has not provided a waiver of immunity.” Contrary to the taxpayers’ argument, the legislature did not include a specific provision waiving sovereign immunity in § 9-6-24. “In fact, § 9-6-24 makes utterly no mention of sovereign immunity,” the State argues. The Constitution also does not waive it. Finally, even if the taxpayers had standing to sue, their constitutional claims lack merit. The Program does not violate educational assistance provisions of the Georgia Constitution, nor does it violate the Establishment Clause or the Gratuities Clause.

**ARGUMENTS (S17X0178):** In the cross appeal, the State is appealing the trial court’s ruling allowing the taxpayers mandamus claim to go forward. In it, the taxpayers seek to force the Department of Revenue to revoke the approved status of any school scholarship organization that solicits contributions by claiming it will award a scholarship to a specific student. Under the State’s tax credit statute, § 48-7-29.16 (d) (1), a tax credit will not be allowed if the taxpayer designates the taxpayer’s contribution to a scholarship program for the direct benefit of any particular individual. The statute also prohibits scholarship organizations from soliciting contributions by representing that a taxpayer may contribute to a scholarship for the direct benefit of a particular individual. In this case, the trial court found that the taxpayers cited specific examples where Riley “may have failed to comply with the specific statutory duty in question.”

The State argues the taxpayers' mandamus account should also be dismissed because they do not have an interest that can be tried in a court. Also, the taxpayers cannot establish that the Department of Revenue has a "clear legal duty" to penalize or revoke a scholarship organization's status if it is found in violation of the solicitation prohibition in the tax credit statute. Among other arguments, the State argues the taxpayers have not alleged an actual violation has occurred.

The taxpayers argue that the trial court correctly found they have standing under § 9-6-24 to seek mandamus relief. The tax credit statute requires revocation of the status as a scholarship organization if it violates the prohibition against representing that in exchange for a contribution, a scholarship will be offered for the direct benefit of any particular individuals. The taxpayers' complaint cites to a specific example of a specific organization's non-compliance. Plaintiffs have a clear legal right to mandamus relief because the tax credit statute imposes a mandatory duty on the Department. Mandamus is available when the law has prescribed and defined the duty with such precision and certainty as to leave no room for the exercise of judgment or discretion, as is the case here. The statutory duty involved in the taxpayers' claim leaves no room for the Department to decide whether the scholarship organization's status should be revoked but directs the Department to do so. Finally, the taxpayers have presented an example of an actual violation, and the trial court correctly concluded that it could not find that taxpayers were not entitled to relief under provable facts.

**Attorneys for Appellants (Gaddy):** William Whitner, Andrea Pearson, S. Tameka Phillips

**Attorneys for Appellees (State):** Samuel Olens, Attorney General Samuel Olens, W. Wright Banks, Jr., Dep. A.G., Alex Sponseller, Sr. Asst. A.G., Mitchell Watkins, Asst. A.G.

### **LATHROP, M.D. ET AL. V. NATHAN DEAL, GOVERNOR ET AL. (S17A0196)**

Three Georgia obstetrician-gynecologists are appealing a **Fulton County** court ruling dismissing their challenge of a state law that prohibits most abortions after 20 weeks of pregnancy. The physicians argue the law is unconstitutional.

**FACTS:** Eva Lathrop, M.D., Carrie Cwiak, M.D., and Lisa Haddad, M.D., sued Gov. Nathan Deal "in his official capacity" and the State of Georgia to stop the enforcement of certain provisions of 2012 Georgia Laws Act 631 (House Bill 954). The provisions at issue are §§ 16-12-140, 16-12-141, 31-9B-1, 31-9B-2 and 31-9B-3. The physicians claim the Act not only prohibits nearly all abortions after 20 weeks of pregnancy but also "appears to give district attorneys virtually unlimited access to the medical records of *all* abortion patients within their jurisdictions," in violation of their constitutional right to privacy. In their lawsuit, which the doctors filed on behalf of their patients and themselves, they sought "injunctive relief" – to prohibit enforcement of the Act's provisions – and "declaratory relief" – a court declaration that the provisions are unconstitutional. In December 2012, shortly before the new law was to take effect, the Fulton County Superior Court granted pre-trial injunctive relief, barring enforcement of the provisions of the Act "insofar as they prohibit pre-viability abortion care." In 2013, the State filed a motion to dismiss the physicians' claim against the particular provisions, but the trial court refused, denying the motion. In May 2014, the State filed a second motion to dismiss, arguing that based on the state Supreme Court's recent decision in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*, the case should be dismissed because the State was shielded by sovereign immunity – the legal doctrine that protects the government

or its departments from being sued without their consent. In May 2016, the superior court granted that motion, finding that sovereign immunity “bars any claims against [a defendant] in his official capacity,” and “can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.” The doctors now appeal to the Georgia Supreme Court.

**ARGUMENTS:** The physicians’ attorneys argue the trial court erred in ruling that without a waiver by the General Assembly, sovereign immunity shields the State from judicial review of laws challenged as violating individual rights that are protected by the Georgia Constitution. “Judicial review of legislative enactments is central to our system of constitutional government and deeply rooted in our history,” the attorneys argue. “This Court cannot renounce its power and duty to review statutes and declare void those that violate the Georgia Constitution.” Neither the *Sustainable Coast* decision nor any other decision by the Georgia Supreme Court “eviscerates long-standing subject matter jurisdiction over direct constitutional claims.” The trial court misapplied *Sustainable Coast* in holding that sovereign immunity barred the physicians’ claims for injunctive relief. The trial court “simply ignored *Sustainable Coast*’s articulation of the ‘bright line rule that only the [Georgia] *Constitution itself* or a specific waiver by the General Assembly can abrogate sovereign immunity,” the attorneys argue. Georgia courts have a constitutional duty to review the constitutionality of state laws that are challenged in cases such as this. The conclusion that sovereign immunity bars the physicians’ constitutional claims “unless and until the General Assembly says otherwise” would also be a “wholesale abandonment” of two fundamental guarantees of the Georgia Constitution: the duty of the judiciary to declare unconstitutional legislative acts void and the Separation of Powers clause that says the “legislative, judicial and executive powers shall forever remain separate and distinct.” “If Georgians enjoyed the rights guaranteed under the Georgia Constitution only at the pleasure of the then-current General Assembly, then those rights would be utterly hollow,” the attorneys argue. “Indeed, Georgia courts have no less than a constitutional mandate to ‘determine whether legislation enacted by the General Assembly is inconsistent with the Constitution.’” The physicians argue that enforcement of the Act would violate the right to privacy guaranteed by the Georgia Constitution’s due process clause. “The very essence of the constitutional right to privacy is that it provides *protection* from government interference with the most personal and intimate aspects of one’s life, including decisions about one’s body, the course of one’s medical treatment, and one’s sexuality,” the attorneys contend. This Court should reverse the trial court’s order dismissing the doctors’ lawsuit and send the case back to the trial court for a decision on the merits.

The Attorney General, representing the State, argues that the physicians failed to identify a waiver of sovereign immunity and therefore the courts have no authority to rule in the case. “The law in Georgia is clear: Sovereign immunity ‘can only be waived by an Act of the General Assembly’ or where the Constitution itself waives sovereign immunity,” the State argues in briefs. “Any waiver of sovereign immunity must be express; courts should not read in implied waivers.” The right to privacy does not waive sovereign immunity because it does not meet the waiver requirements set forth in the Georgia Constitution, which states that waiver of immunity is an exclusive power of the legislative branch. As the high court stated in *Sustainable Coast* and its decisions that followed, “The sovereign immunity of the State and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that

sovereign immunity is thereby waived and the extent of such waiver.” Sovereign immunity “explicitly bars suits against the State or its officers and employees sued in their official capacities until and unless sovereign immunity has been waived by the General Assembly.” The Georgia Constitution’s requirement of an express waiver to abrogate sovereign immunity cannot be satisfied by the mere assertion of a constitutional claim, the State contends. The physicians have failed to point to any Georgia court cases interpreting the right to privacy as a waiver of Georgia’s sovereign immunity. The correct analysis is whether any particular constitutional provision necessarily waives sovereign immunity. First, the Constitution’s text does not expressly waive sovereign immunity for privacy actions, and waivers of governmental immunity “must be express,” the State argues. The Constitution itself also does not “expressly state that an aggrieved party is entitled to” any particular remedy if the party prevails on a right to privacy claim. And sovereign immunity does not come into play to bar all actions seeking to enforce the right to privacy, the State argues. “To the contrary, the right to privacy is alive and well in Georgia because aggrieved parties can raise the right defensively.” Finally, neither the Judicial Review clause nor the Separation of Powers clause waives the State’s sovereign immunity for legal actions alleging violations of constitutional rights. The Georgia Supreme Court should therefore conclude that the physicians have failed to carry their burden of identifying a waiver of sovereign immunity and uphold the trial court’s decision to dismiss the case.

**Attorneys for Appellants (Physicians):** Donald Samuel, Susan Camp, Alexa Kolbi-Molinas  
**Attorneys for Appellees (State):** Christopher Carr, Attorney General, Sarah Warren, Dep. Solicitor General, Victoria Powell, Asst. A.G.

## **2:00 P.M. Session**

### **SCHUMACHER ET AL. V. CITY OF ROSWELL (S16G1703)**

Two Roswell property owners are appealing a Georgia Court of Appeals decision dismissing their appeal in a zoning related matter because they failed to follow proper procedure.

**FACTS:** Eric Schumacher and Mike Nyden live in Roswell where they own property. In 2014, the City of Roswell adopted a new zoning ordinance and map that rezoned their properties. Schumacher, Nyden and one other property owner sued the City in **Fulton County** Superior Court, challenging the manner in which the City Council had approved the new Unified Development Code. In their complaint, they alleged a number of things, including that the adoption of the new Code violated their due process rights under the state and federal constitutions. They alleged they were harmed by the rezoning of their properties and sought from the court a “declaratory judgment” – declaring the Code illegally enacted and unenforceable – and an injunction – prohibiting its enforcement. The City denied the allegations and filed a motion to dismiss the case. The residents then filed a motion asking the court to grant a pre-trial injunction to prohibit enforcement of the new Code while the litigation was pending. Following a hearing, the trial court ruled in favor of the City and dismissed the property owners’ lawsuit. Schumacher and Nyden then filed a direct appeal with the Georgia Supreme Court which transferred the case to the Court of Appeals. At issue in this case is whether the law regarding zoning decisions allowed the property owners to file a “direct” – or automatic – appeal, or whether they were required to file an application for discretionary appeal, which gives the Court

of Appeals or high court the discretion to consider an appeal or not. Here, the Court of Appeals ruled against the property owners, dismissing their appeal on the grounds that Schumacher and Nyden were required to follow the discretionary appeal procedure. They then appealed to the state Supreme Court, which agreed to review their case to determine whether the Court of Appeals erred in dismissing the property owners' appeal based on their failure to file an application for discretionary appeal.

**ARGUMENTS:** The attorney for Schumacher and Nyden argue the Court of Appeals erred, basing its decision entirely on the state Supreme Court's 1989 decision in *Trend Development Corporation v. Douglas County*. In *Trend*, the high court wrote that "all zoning cases appealed...must hereafter come by application..." But it is not clear whether *Trend* applies in a case such as this, the attorney argues. In 1989, as now, the vast majority of "zoning cases" involved a decision by a local zoning agency about a specific parcel of land that was then challenged in superior court. That was the situation in *Trend*. Rarely does the case involve the passage of an actual zoning ordinance, however, as is the case here. The statute governing discretionary appeals – Georgia Code § 5-6-35 – requires discretionary appeals for "Appeals from decisions of the superior courts reviewing decisions of...local administrative agencies." As the Court of Appeals observed, the reason the General Assembly passed that statute was to reduce the massive caseload of the appellate courts by giving them discretion not to entertain certain appeals. Therefore, the Court of Appeals' decision in this case can only be correct if by passing a new zoning Code, the Mayor and Council acted as a local "administrative agency." "They did not," the attorney argues in briefs. "An administrative agency is a governmental authority, *other than a court and other than a legislative body*, which affects the rights of private parties through either adjudication or rulemaking," the attorney argues. It cannot "seriously be argued that the Mayor and Council were acting in an administrative capacity when they *passed an ordinance*.... Passing an ordinance is the quintessential legislative function of a city council. Because the Mayor and Council were acting as a legislative body when they passed the Unified Development Code, the Superior Court did not review the act of a local administrative agency, and the discretionary appeals process does not apply to this case." Cases subsequent to *Trend* make it clear that not all zoning related matters had to follow the same procedural track. In its 2000 decision in *King v. City of Bainbridge*, for example, the Georgia Supreme Court ruled that, "Where a zoning case does not involve superior court review of an administrative decision, the trial court's order does not come within the purview of § 5-6-35 (a) (1) and no application for appeal need be filed." "Clearly, this Court contemplated that *some* cases involving zoning do not fall under the *Trend* penumbra," the property owners' attorney argues. Furthermore, nothing in the statute says that an appellate court has no jurisdiction if a party used the direct appeal process when he should have used the discretionary process, and "it was error for the Court of Appeals to conclude that it had no jurisdiction to convert the case to a discretionary appeal."

The City's attorneys argue the Court of Appeals properly applied the binding precedent of Georgia Supreme Court decisions regarding the appropriate mechanism for appealing zoning cases. "Because the underlying subject matter involved an appeal from the superior court's review of a zoning decision, the Court of Appeals applied the bright-line rule established by this Court in *Trend Development Corporation v. Douglas County*," the attorneys argue in briefs. In its decision, the Court of Appeals "properly adhered to this Court's unequivocal edict that 'all appeals in zoning cases require an application.'" Georgia litigants have been specifically advised

to “review the discretionary application statute to see if it covers the underlying subject matter of the appeal. If it does, then the party must file an application for appeal as provided under § 5-6-35.” The property owners did not file a zoning appeal specific to their own property, which they could have done. The Court of Appeals correctly rejected the property owners’ attempts to avoid the discretionary appeal requirements by characterizing the City’s decision as a “legislative” rather than an “administrative decision,” the City’s attorneys argue. “All zoning decisions are actions of local administrative agencies within the meaning of § 5-6-35 (a) (1), regardless of their ‘legislative’ or ‘administrative’ characteristics.” “As an initial matter, all zoning decisions, including parcel-specific zoning decisions, are legislative.” And under the Zoning Procedures Law, “the General Assembly has defined a ‘zoning decision’ as a ‘final legislative action by a local government,’ contemplating both ‘the adoption of a zoning ordinance (which is what happened in this case) and ‘the adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another’ (which is parcel-specific zoning), the attorneys argue. Under the rule advanced by the property owners, “only appeals involving a superior court’s review of ‘administrative’ zoning decisions would fall within the ambit of § 5-6-35 (a) (1).” Such a rule would cause confusion and “require a case-by-case determination of the underlying zoning decision’s ‘administrative’ or ‘legislative’ characteristics and the superior court’s role in reviewing that decision,” the City’s attorneys contend. “For the foregoing reasons, the judgment reached by the Court of Appeals should be affirmed and the appeal dismissed.”

**Attorney for Appellants (Schumacher):** John Monroe

**Attorneys for Appellee (City):** Dana Maine, Connor Bateman