Comment

An Examination of Georgia's Film Tax Incentive: Is There No Business like Show Business in Georgia?*

I. INTRODUCTION

Governor Nathan Deal accurately proclaimed 2017 to be the "year of Georgia Film."[1] In 2016, Georgia hosted more feature films than any other state or country.[2] Georgia's annual Financial Report for the Fiscal Year 2017 reported that the entertainment industry had a direct economic impact of $9.5 billion and that production companies spent a combined $2.7 billion in the State.[3] Governor Deal's proclamation reflected something that was already known to the State's 92,000 entertainment-related workers.[4]

*I would like to thank Professor Anne Johnson for her advice, her time in reading and editing, and her words of encouragement during the process that was this Comment. Mom, Dad, Grandmother, Rowan, and my siblings, you know who you are, thanks for listening to me talk about this topic for hours and hours without forcing me to be quiet. To all my friends in Locals 479, 728, and 44, thanks for the good times and experiences.

1. FILM L.A., 2016 FEATURE FILM STUDY 5 (2016), https://www.filmla.com/wp-content/uploads/2017/05/2016_film_study_WEB.pdf. The study analyzes data collected from the top 100 grossing films at the domestic box office. *Id.* at 2.

2. *Id.* The United Kingdom came in a close second at sixteen, with Canada following in third at thirteen and Louisiana and New York, respectively, finishing out the top five. *Id.* The collective total of the United States outnumbered Georgia's total, but among the states, Georgia hosted the production of the largest amount of films. *Id.*

3. GA. DEP'T OF ECON. DEV., FISCAL YEAR 2017: YEAR IN REVIEW 4 (2018), https://online.flowpaper.com/79590748/FY17GeorgiaYearInReview/. The report considers data from the 2017 fiscal year of July 1 to June 30. The data represents investments by the film industry in that time frame.

4. *Id.*

Since 2005, the film industry has increasingly called Georgia home and turned to the state for major productions.[5] This increase in the use of the State as a production center can be traced to the implementation of a film tax credit.[6] Governor Sonny Perdue signed Georgia House Bill 539 (HB 539) in 2005, which established Georgia's first incentive program entitled Georgia Entertainment Industry Investment Act.[7] The goal of this act was to "position[] the state as a premiere location for film, music, and entertainment technology."[8] Prior to this enactment, Georgia already had a long history with the entertainment industry. Projects such as Driving Miss Daisy, Forrest Gump, In the Heat of the Night, and The Dukes of Hazard all called the State home.[9] Governor Jimmy Carter established the Georgia Film, Video & Music Office in 1973, thereby setting the stage for HB 539.[10] Due to the increasing development of the industry in the State and its increasing importance to Georgia workers, a thorough examination of the incentive program is required. There have been other articles written concerning the issue of film tax credit programs, but none have focused on Georgia to the extent that this Comment will. In addition to discussing Georgia's incentive program, this Comment will address (1) in Part II, the methods that make incentive programs effective, beginning with a discussion explaining general tax terms that are relevant to incentive plans; (2) from there, Part II will continue by studying general incentive plans and typical features of such plans; (3) Part III will be an examination of the film tax credit program in Georgia with discussions of California, New York, Louisiana, and New Mexico's incentive programs; (4) Part IV will then discuss the benefits of incentive programs by going through the financial benefits conferred upon the states and a discussion of how incentive programs have changed the traditional understanding of the film industry; (5) Part V addresses potential issues that are associated with tax credit policies; and (6) Part VI will conclude this Comment by tackling some implications that are raised by Georgia's wholehearted adoption of its film tax credit.

5. *Id.*

6. Ga. H.R. Bill 539, Reg. Sess., 2005 Ga. Laws 1125 (codified at O.C.G.A. § 48-7-40.26 (2005)).

7. *Id.*

8. 2005 LEGIS. BILL HIST. GA. H.B. 539 (governor's message, May 9, 2005).

9. *Id.*

10. *Id.*

II. GENERAL TAX INCENTIVE INFORMATION: DON'T WORRY, THE READER DOESN'T NEED TO BE "THE ACCOUNTANT" TO UNDERSTAND

Tax is generally a daunting topic. People are not fans. This could be related to the relationship that taxes have with death,[11] or taxation without representation, or even more apropos, taxation with representation. Whatever the reason, taxes and the film industry have an interesting relationship, specifically in states that have a film tax credit. There are several standard forms that tax credits take for the film industry: income tax credits, cash rebates, refundable credits, transferrable credits, production grants, labor rebates, regional incentives, and use taxes.[12] Each of these credits have their pros and cons; however, any credit, in the eyes of a production company, is a boon.

Income tax credits are the most popular and simple to use.[13] Production companies receive a credit for a certain percentage of qualified costs expended for qualified productions in the State.[14] The percentage of the allowed credit, the permissible expenses, and the conditions for receiving the credit are generally established by statute.[15] Common percentages of tax credit range from 15% to 42%.[16] Qualified

11. Common adage, "There are only two certain things in life: death and taxes."

12. Randle B. Pollard, *"CUT–and That's a Wrap"–The Film Industry's Fleecing of State Tax Incentive Programs*, 50 AKRON L. REV. 425, 428 (2016); Adrian McDonald, *Down the Rabbit Hole: The Madness of State Film Incentives as a "Solution" to Runaway Production*, 14 U. PA. J. BUS. L. 85, 109, 110 (2011). Production grants are based on the percentage of total production costs, often on the prediction of total production costs, and can be disbursed at the start of production. McDonald, *supra*, at 109. Labor rebates allow for funds to be returned to the production companies during filming, allowing the company to reinvest the money in the production. *Id.* States like New York, Texas, Louisiana, and California offer regional incentives for filming that occurs outside of metropolitan areas. *Id.* Use taxes are charged to companies who try to circumvent state taxes by renting equipment from outside of the state; the taxing state charges the companies a tax for storage and for availing themselves of the benefits of the taxing state. Joshua R. Schonauer, *Star Billing? Recasting State Tax Incentives for the "Hollywood" Machine*, 71 OHIO ST. L.J. 381, 390 (2010).

13. Pollard, *supra* note 12, at 428.

14. McDonald, *supra* note 12, at 109.

15. *See* O.C.G.A. § 48-7-40.26 (2018); O.C.G.A. § 48-7-40.26A (2018); CAL. REV. & TAX. CODE § 23685 (Deering 2018); N.Y. TAX LAW § 24 (LexisNexis 2018); LA. STAT. ANN. § 47:6007 (2018); TEX. GOV'T CODE ANN. § 485.023 (West 2018); N.M. STAT. ANN. § 7-2F-1 (LexisNexis 2018).

16. Amy McIntire, *Louisiana's "Motion Picture Investor Tax Credit": A Uniquely Effective Economic Policy*, 13 VA. SPORTS & ENT. L.J. 211 (2014); Alexander Malyshev, *Financing Film Through Aggressive Tax Incentives–A Losing Proposition for the States?*, 19 MEDIA L. & POL'Y 229, 231 (2010); *U.S. Tax Incentive Info*, FILM PRODUCTION CAPITAL, http://www.filmproductioncapital.com/taxincentive.html (last visited on Aug. 28, 2018).

expenditures commonly include costs for labor, material, services, camera rental, recording equipment, and hotel rooms.[17]

Although labor costs are normally included in qualified expenditures, states often draw a line between "above-the-line" and "below-the-line" employees.[18] Above-the-line employees are the principal talent, directors, producers, writers, or anyone who receives more than $500,000 in salary for a production.[19] Below-the-line employees are the crew members, grips, carpenters, painters, production staff, teamsters, and other crew members who receive less than $500,000.[20] When in doubt, if the employee's salary is fixed, then they are an above-the-line employee whose salary does not generally count towards the minimum expenditure production companies must meet.[21]

Income tax credits are either refundable or transferrable.[22] Production companies prefer a refundable credit.[23] Refundable credits take the form of checks made out to the production companies in the amount of the percentage of their credit.[24] Since refunds are often large, most states utilizing refundable credits have established installment plans based on the amount of money the production company is entitled to and the payments are usually spread across a three-year period.[25] Transferrable tax credits are transferrable to other state taxpayers, subject to the statutory regulations.[26] States regulate the transfer of the credits by limiting the transfer to single buyers or single transactions,

17. Schonauer, *supra* note 12, at 389; McDonald, *supra* note 12, at 109.

18. Pollard, *supra* note 12, at 428.

19. O.C.G.A. § 48-7-40.26(B)(14) (2018); Pollard, *supra* note 12, at 428.

20. Pollard, *supra* note 12, at 428.

21. Most states have a minimum amount of investment that production companies must meet in order to qualify for a tax credit. Often, the statutes outlining the minimum investments discuss differences between above-the-line and below-the-line employees by labeling them based on the $500,000 salary cap. *See* O.C.G.A. § 48-7-40.26(B)(14); O.C.G.A. § 48-7-40.26(C) (2018); CAL. REV. & TAX. CODE § 23685(b)(6), (b)(15) (Deering 2018); N.Y. TAX LAW § 24(a)(2) (LexisNexis 2018); LA. REV. STAT. ANN. § 47:6007(C)(1)(a)–(c) (2018) (allows above-the-line costs to apply to meet the statutory minimum); TEX. GOV'T CODE ANN. § 485.023(1)(A) (West 2018).

22. McDonald, *supra* note 12, at 109; Tina Xu, *Staying in Hollywood and the Big Apple: The Effectiveness and Design of Film Production Tax Credits in New York and California*, COLUM. BUS. L. REV. 426, 459 (2016).

23. McDonald, *supra* note 12, at 109.

24. *Id.*

25. N.Y. TAX LAW § 24(a)(2); N.M. STAT. ANN. § 7-2F-1(G) (LexisNexis 2018).

26. O.C.G.A. § 48-7-40.26(G) (2018); CAL. REV. & TAX. CODE § 23685(c)(3)(A) (2018) (only transferable for independent films).

or putting a cap on the price per credit.[27] Any taxpayer in the state can purchase the credit, and to further these ends, an entire industry catering to these sales has started.[28]

As mentioned above, to be eligible for the tax incentive, states often have requirements for productions to meet in order to be a qualified production. These requirements often involve a minimum spending amount, minimum days of principal photography, minimum budgets, and minimum amounts of resident hires.[29] State specific qualifications will be addressed later in this Comment.

Overall, tax incentives work.[30] They encourage production companies to do business in states like Georgia or New Mexico that lack any significant history with the film industry because the programs make the states attractive.[31]

III. INCENTIVE PROGRAMS THAT TAKE US ON A "RIDE ALONG" AS "PASSENGERS" IN A "HUNGER GAMES" STYLE COMPETITION FOR FILMS

Historically, bad economics, like a recession, translate into good news for the film industry, those who work on these projects, and the states that compete for these projects.[32] States offer incentive programs in order to entice production companies to spend money in their state, benefitting citizens, small businesses, and a myriad of other companies.[33] Salaries in the film industry are generally higher than the

27. Transferrable credits rarely, if ever, sell for full price. Often, they are sold for around 60% of face value or more. LA. REV. STAT. ANN. § 47:6007(C)(4)(f) (2018); O.C.G.A. § 48-7-40.26(h)(3) (2018); McIntire, *supra* note 16, at 221; Malyshev, *supra* note 16, at 234. Some states, such as Louisiana, allow for the state to repurchase the credit for a statutorily determined amount. In Louisiana this amount was 80% of face value in 2009. McDonald, *supra* note 12, at 110. Georgia requires that the credits sale for a minimum amount of 60% of face value. O.C.G.A. § 48-7-40.26(G)(6) (2018).

28. Xu, *supra* note 22, at 459. However, the Internal Revenue Service considers the sale of credits to be a sale of property, ensuring that the government will always get its bite. *Id.* Any individual or company that has incurred tax liability in the state is eligible to purchase the credits, even banks like Bank of America and Wachovia, who received government funds during the recession. McDonald, *supra* note 12, at 110.

29. *See* O.C.G.A. § 48-7-40.26; O.C.G.A. § 48-7-40.26A; CAL. REV. & TAX. CODE § 23685; N.Y. TAX LAW § 24; LA. REV. STAT. ANN. § 47:6007; TEX. GOV'T CODE ANN. § 485.023; N.M. STAT. ANN. § 7-2F-1.

30. McDonald, *supra* note 12, at 116.

31. *Id.* at 113.

32. Schonauer, *supra* note 12, at 389.

33. *Id.* at 385.

national average and stimulate film related tourism.[34] However, film incentives in the United States were originally adopted to prevent runaway productions to foreign countries.[35] Films are classified as runaway productions when they are developed in the United States and filmed in a foreign country.[36]

Runaway productions became an imminent problem when Canada enacted its Film or Video Production Services Tax Credit of 1997.[37] Canada's incentive program offered a credit of 25% on top of what the provinces already offered[38] and resulted in productions fleeing to Canada.[39] To stem the tide of fleeing productions, President George W. Bush signed the American Jobs Creation Act of 2004[40] that resulted in a reduction of runaways.[41] Once runaways decided to stay, they began to look for even more incentives to film in specific locations, and the states obliged.[42] As a result, the productions began to run away from California.[43]

In 2002, Louisiana enacted the first state incentive plan[44] followed by a number of other states, including Georgia in 2005.[45] New York

34. Scott Ahmad, *Can the First Amendment Stop Content Restriction in State Film Incentive Programs?*, 16 UCLA ENT. L. REV. 395, 403 (2009); FISCAL YEAR 2017: YEAR IN REVIEW, *supra* note 3, at 17 (450,000 direct and indirect tourism jobs).

35. McDonald, *supra* note 12, at 86; Pollard, *supra* note 12, at 430–33.

36. McDonald, *supra* note 12, at 85. The three types of runaway productions are artificial economic, natural economic, and artistic. *Id*. Artificial economic runaways occur when films are produced abroad due to legislatively created incentives. *Id*. Natural economic runaways occur when a foreign locale offers cheaper labor and materials, and production companies take advantage of natural occurring benefits. *Id.* Artistic runaways are the result of the benefits a location receives because the location matches the scenes or setting in the script, for example, a film set in Paris probably needs to be filmed in Paris due to the iconic imagery and buildings. *Id.*

37. Pollard, *supra* note 12, at 430.

38. FILM L.A., 2017 FEATURE FILM STUDY 5 (2017), https://www.filmla.com/wp-content /uploads/2018/08/2017_film_study_v3-WEB.pdf. British Columbia (BC) along with Ontario still benefit from this plan as Canada had 20 of the top 100 films in 2017 with BC being home to 11 and Ontario with 7. *Id.* at 4.

39. Pollard, *supra* note 12, at 431. Canada's percentage of runaway productions increased to 81% from 63% following their tax credit. *Id.*

40. Pub. L. No. 108-357, 118 Stat. 1418.

41. Pollard, *supra* note 12, at 431. The Act gave films a boost for manufacturing and allowed them to deduct certain expenditures, which allowed production companies to stay in the United States instead of fleeing. *Id.*

42. *Id.* at 433.

43. *Id.*

44. *Id.* at 432.

45. 2005 LEGIS. BILL HIST. GA. H.B. 539. Georgia's first incentive plan required a minimum amount of expenditures on services, material, and labor in the amount of

adopted their original plan in 2004,[46] and New Mexico began their plan in 2003.[47] Currently, thirty-six states have incentive plans.[48] As a result of the over saturation of states with tax credit plans, a phenomenon called "race to the bottom" has occurred.[49] This phenomenon "occurs when states compete with each other, gradually ramping up incentives to attract production, and in the process decreasing their own return on investment."[50] Since the early 2000s, states' incentive programs, including Georgia's, have changed to reflect incentive norms in a manner that supports a race to the bottom assumption. If there is a race to the bottom, Georgia is winning—as reflected in numerous studies.[51]

A. Georgia

Georgia's incentive plan, codified at Official Code of Georgia Annotated (O.C.G.A.) section 48-7-40.26, continues to evolve in the face of competition from other states' programs. The plan has modified its requirements for qualification and has adopted new features that make it competitive.[52] The goal of the program has always been to "position[] the state as a premiere location for film, music, and entertainment technology[]"[53] by allowing companies to receive credits for preproduction, production, and postproduction expenditures.[54]

$500,000. The plan gave 9% towards production company's total investment, an additional 3% for hiring Georgia residents, and another 3% for filming in an economically disadvantaged county, with another 2% available for television shows that spent more than $20 million in a year, for a potential total of 17%. *Id.*

46. Xu, *supra* note 22, at 427. New York's tax credit was entitled Empire State Film Production Credit. The original New York plan allowed a 10% credit that was capped at $25 million with a sunset provision for 2008. New York City had their own incentive that expired in 2009. *Id.* at 430–32.

47. McIntire, *supra* note 16, at 228. The original New Mexico incentive allowed up to a 25% refundable incentive, with no minimum spending amount. *Id.* The program also provided an interest free loan of $15 million for qualifying productions. *Id.* Following the adoption of their program, New Mexico became known as "Tamalewood." *Id.*

48. *U.S. Tax Incentive Info*, *supra* note 16.

49. Malyshev, *supra* note 16, at 230.

50. *Id.* at 230 n.6.

51. 2017 FEATURE FILM STUDY, *supra* note 38, at 4; 2016 FEATURE FILM STUDY, *supra* note 1, at 7.

52. *See* O.C.G.A. § 48-7-40.26.

53. 2005 LEGIS. BILL. HIST. GA. H.B. 539.

54. O.C.G.A. § 48-7-40.26(b)(8) (2018).

The Georgia Entertainment Industry Investment Act (the Act) is one of the leading incentive plans in the United States.[55] This Act covers production expenditures[56] incurred by production companies[57] filming or producing projects within the State.[58] Production expenditures that fall under the Act include set construction, make-up, wardrobes, the renting of facilities, and "other direct costs of producing the project in accordance with generally accepted entertainment industry practices."[59] Production projects that are eligible for the incentive include production of new films, videos, music videos, and digital projects.[60] Entertainment programs such as news, sports, athletic events, and corporate videos are not covered under the Act.[61]

To qualify for a tax credit for the expenditures discussed above, a production must meet certain criteria.[62] A film or television production must meet a minimum base investment of $500,000.[63] The total aggregate payroll can contribute to the minimum;[64] however, it does not include the above-the-line employees whose salaries exceed $500,000.[65] If an applicant meets the requirements, they submit an application to the Georgia Department of Economic Development within ninety days of the start of production[66] to receive the 20% transferrable tax credit.[67]

Georgia's film tax credit is a transferrable credit.[68] A production company must claim the credit before they are allowed to transfer it.[69]

55. 2017 FEATURE FILM STUDY, *supra* note 38, at 4; 2016 FEATURE FILM STUDY, *supra* note 1, at 5. These sources contain studies demonstrating that Georgia is leading in film production for the country.

56. O.C.G.A. § 48-7-40.26(b)(8) ("[P]reproduction, production, and postproduction expenditures incurred in this state that are directly used in a qualified production activity, . . . shall not include postproduction expenditures for footage shot outside the State of Georgia.").

57. O.C.G.A. § 48-7-40.26(b)(7) (2018) ("[A] company . . . primarily engaged in qualified production activities which have been approved by the Department of Economic Development.").

58. *See* O.C.G.A. § 48-7-40.26.

59. O.C.G.A. § 48-7-40.26(b)(8).

60. O.C.G.A. § 48-7-40.26(b)(11) (2018).

61. *Id.*

62. O.C.G.A. § 48-7-40.26(c).

63. O.C.G.A. §§ 48-7-40-26(c)–(d) (2018).

64. O.C.G.A. § 48-7-40.26(b)(14).

65. O.C.G.A. § 48-7-40.26(b)(14)(A) (2018).

66. GA. DEP'T OF ECON. DEV., GEORGIA: FILM, MUSIC, & DIGITAL ENTERTAINMENT 4 (2014), https://www.georgia.org/sites/default/files/wp-uploads/2014/05/Tax-Brochure-Incentives-Film-Music-Digital-Entertainment-2014.pdf.

67. O.C.G.A. § 48-7-40.26(c)(1) (2018).

68. O.C.G.A. § 48-7-40.26(g).

A credit can only be transferred or sold to another Georgia taxpayer.[70] The claimer of the credit can only make a single transaction of credits per year, but the transaction can involve multiple transferees.[71] In order for the transfer to be valid, the production company must submit a written notification to the Department of Economic Development and the Department of Revenue within thirty days after the transfer or sale detailing the balance of credit along with other tax information.[72] If a company fails to comply with these requirements, the State will put a hold on the credit until the company corrects the mistakes in the transfer.[73] The transfer of the credit does not extend the time frame in which the credit must be claimed.[74] The company that receives the credit must still use the credit within the five year limit.[75] Georgia, cognizant of shenanigans in the industry that have developed around the transfer or sale of incentives, put a minimum amount on the price for which the credit can be sold or transferred; the minimum amount that a credit may be sold at is 60% of the face value of the credit.[76]

In addition to the 20% credit Georgia extends to qualified productions, the State also offers an additional 10% uplift if a production company includes a Georgia promotional logo in the credits.[77] A movie production must include a five-second logo that promotes Georgia and the logo must be before the "below-the-line crew crawl."[78] Furthermore, a production does not have to use a logo that promotes Georgia, the company can offer an alternative method for marketing the State that must be approved by the Department of Economic Development.[79] Not all projects will qualify for the extra 10%: "The GEP [Georgia Entertainment Promotion] tax credit uplift will [only] be allowed for projects which the Georgia Department of Economic Development (GDEcD) has determined will create valuable promotions that will enhance the State's brand."[80]

69. *Id.*

70. *Id.*

71. O.C.G.A. § 48-7-40.26(g)(1) (2018).

72. O.C.G.A. § 48-7-40.26(g)(2) (2018).

73. O.C.G.A. § 48-7-40.26(g)(3) (2018).

74. O.C.G.A. § 48-7-40.26(g)(4) (2018).

75. O.C.G.A. § 48-7-40.26(h)(3).

76. O.C.G.A. § 48-7-40.26(g)(6) (2018).

77. O.C.G.A. § 48-7-40.26(c)(2) (2018).

78. O.C.G.A. § 48-7-40.26(b)(9)(A) (2018) (Below-the-line employees rank below a peach in the order credits appear at the end of a film. What does that say about the value the State places on workers or, more importantly, its taxpayers?).

79. O.C.G.A. § 48-7-40.26(c)(2).

80. GEORGIA: FILM, MUSIC, & DIGITAL ENTERTAINMENT, *supra* note 66, at 4.

Georgia's incentive plan was not the first of its kind.[81] Georgia's plan, while not following in the steps of giants, benefitted from the trials and errors of early plans and continues to be adapted to meet the ever changing needs of the industry. California, New York, Louisiana, and New Mexico are several of the giants that Georgia modeled its plan on, and as these incentive programs are discussed, the similarities between the plans will become apparent.

B. California

California, the land of swimming pools and movie stars, is the traditional and actual home of Hollywood and was one of the last states to adopt a film tax credit. California had a prior incentive in 2000 that faded out and was not replaced until 2009.[82] Governor Arnold Schwarzenegger signed the plan in 2009 to help lessen the runaway productions to other states.[83] Following the Job Creations Act of 2004, the number of runaway productions to foreign countries had diminished, but the threat of runaway productions had not disappeared for California because other states had taken the place of the competing countries.[84] California, while benefiting from its historical comparative advantage, held off from approving an incentive plan until it became apparent that production companies were going to follow the money instead of staying loyal to the panache and amenities offered by California.[85] In order to retain productions, California enacted its first serious incentive plan in 2009.[86]

California's 2009 plan, the California Film & Television Tax Credit Program, had many similar characteristics to its current plan.[87] The

81. Pollard, *supra* note 12, at 432. Louisiana adopted a film tax credit in 1992 and became the first state to implement this sort of program. *Id.* at 432–33.

82. Xu, *supra* note 22, at 433.

83. *Id.*

84. *Id.*

85. *Id.* at 449–53. "Historical comparative advantage" can be simplified by saying that films had always been filmed in California and they would continue to film in the state. California also possessed many infrastructure essentials that made filming in the state easy. Some of these essentials include skilled workers in specific fields that possess inside knowledge, often handed down from family members (the Author, during his brief stint in the film industry, knew four individuals who were the third generation of their family to work in the industry); large sound stages equipped with state of the art equipment; production companies; above-the-line employees; vendors; and talent; as well as a myriad of other desirable essentials. *Id.*

86. *Id.* at 433.

87. *Id.*

credit allocated up to $100 million[88] in tax credits for qualified productions.[89] Independent films were allotted $10 million of the total credit.[90] To apply for the credit, productions had to meet certain criteria based on the type of project it was.[91] Feature films had different criteria than movies of the week, and television shows were subject to further requirements.[92] If the productions met the requirements set out, they were qualified to be eligible to receive a 20% credit.[93] California further offered a credit of 25% for television shows[94] and indie films that relocated to the state.[95] To be considered for the credit, California also required the productions to have 75% of its production days in the state or 75% of the total budget was to be spent in state.[96] The credit program operated on a lottery system, and the credits were only allocated once a year.[97] The credit plan had a sunset provision that called for the plan to be reevaluated in five years, or in 2014.[98]

In 2014, California reassessed its film tax credit plan, renamed the program,[99] and made substantial modifications.[100] Perhaps the most

88. 2015 LEGIS. BILL HIST. CA. A.B. 1199 cmt. (2)(a) (2015) (Bill analysis, Apr. 27, 2015). When states put a limit on the amount of credit they will give, they are said to put a "cap" on the credit. In most states, once the cap is reached the state does not accept additional productions into its credit plan. Xu, *supra* note 22, at 427.

89. 2015 LEGIS. BILL HIST. CA. A.B. 1199 cmt. (2)(a)(i)–(ii) (2015). Qualified expenditures included below-the-line salaries and production materials.

90. *Id*. cmt. (2)(a).

91. *Id*. cmt. (2)(a)(i)–(ii).

92. *Id*. To be eligible for a 20% credit, a feature film's budget had to exceed $1 million, but be smaller than $75 million. *Id*. Movies of the week were required to have a minimum budget of $500,000 and television shows' budgets needed to be a minimum of $1 million with a run time of one hour. *Id.*

93. *Id.*

94. *Id.* Television productions that filmed all prior seasons outside the state and relocated to California were eligible to receive the 25% credit for their first season filmed in the state. *Id.*

95. *Id.* Independent films with budgets between $1 million and $10 million were eligible to receive the 25% credit if they were not owned by any publicly traded company. *Id.*

96. *Id.*

97. *Id.*

98. Xu, *supra* note 22, at 433–34. Sunset provisions state a firm time limit for the incentive.

99. *Id*. at 427. The new program is called California Film and TV Tax Credit Program 2.0.

100. CAL. REV. & TAX. CODE § 23685. Other characteristics of the current plan are similar to the 2009 version. Feature films are eligible for a 20% credit if their budgets are between $1 million and $75 million, which represents an increase of $25 million in the top end of the budget. CAL. REV. & TAX. CODE § 23685(b)(15)(A)(i) (Deering 2018). New or first

substantial changes to the plan were the increase in the cap, the adding of uplifts,[101] and removal of the lottery system;[102] however, other changes merit attention as they helped California regain its position in the film industry.[103]

California increased its yearly cap from $100 million to $330 million,[104] more than tripling the incentive offered, thereby, allowing more productions to get a bite of the apple. By increasing the state's cap, the program made the state more attractive to production companies by placing it on a more even footing with states having higher caps or no caps at all.[105] The state now reserves 35% of the cap for feature films.[106]

The new program offers incentives for production companies that film in out-of-zone areas or at principal production facilities.[107] By filming in out-of-zone areas, areas outside the Los Angeles zone, productions qualify for an additional 5% credit.[108] However, the increase in the credit for out-of-zone filming is only available to those productions limited to the 20% credit.[109]

The state ended the lottery system that left production companies at the tender mercies of chance, meaning there was a possibility of their projects not being selected for the program, and replaced it with a job ratio analysis.[110] This analysis was instituted to "identify those projects which create the most jobs and increase economic activity in the

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season television programs became eligible for the 20% credit so long as the shows' minimum budgets are $1 million per episode. Credits available to independent films remained unchanged. CAL. REV. & TAX. CODE § 23685(b)(15)(A)(iii) (Deering 2018). The 2014 update still gave the most favorable credit to television shows that relocated to California and had a budget of $1 million per episode. CAL. REV. & TAX. CODE § 23685(a)(4)(B) (Deering 2018).

101. *Tax Credit Program 2.0,* CAL. FILM COMMISSION, http://film.ca.gov/tax-credit/the-basics-2-0/ (last visited on Aug. 28, 2018). Uplifts are increased incentives for things like film in out-of-zone counties or economically disadvantaged counties. *Id.*

102. Xu, *supra* note 22, at 462.

103. CAL. REV. & TAX. CODE § 23685.

104. *U.S. Tax Incentive Info*, *supra* note 16, at California. California increased the cap from $100 million in fiscal year 2014–2015 to $230 million for fiscal year 2015–2016 then $330 million through the end of fiscal year 2019–2020. *Id.*

105. *Id.*

106. CAL. FILM COMMISSION, *supra* note 101.

107. Xu, *supra* note 22, at 462.

108. CAL. FILM COMMISSION, *supra* note 101.

109. *Id.*

110. Xu, *supra* note 22, at 462.

state."[111] The job ratio is calculated by adding qualified wage expenditures and 35% of qualified non-wage expenditures, then dividing the total amount by the credit requested.[112]

California's tax credit is essentially a nonrefundable, nontransferable state tax credit.[113] Under the California 2.0 program, the credit can only be transferred to an affiliate corporation that is a member of the generally controlled group.[114] Independent films are an exception to the nonrefundable, nontransferable rule,[115] meaning they are free to sell their credit, leaving the majority of productions with only the option to apply the credit to their qualified expenditures. The credits can be carried over for five years in order for the companies to maximize their benefits.[116]

Other changes in California's film tax credit involve increases in the amount for visual effects (VFX) work and music scoring.[117] However, even with additional bonus points for out-of-zone filming and VFX, the most a production can receive in credit is 25% of their qualified expenditures.[118] From California, we turn to another classic center of the entertainment industry: New York.

C. New York

"New York, New York. The city so nice, they named it twice. Manhattan's the other name."[119] From The Office to music and films, New York has played host to thousands of films, television programs, and film productions, and has held a prominent role in the entertainment industry for the last 100 years. Like California, New York was able to hold off runaway productions due to its comparative

111. *Id.* (quoting CAL. FILM COMM'N, CALIFORNIA FILM & TELEVISION TAX CREDIT PROGRAM 2.0 GUIDELINES 10 (2015), http://film.ca.gov/tax-credit/program-guidelines/ [http: //perma.cc/JPV5-K2LP]).

112. *Id.*

113. *Id.* at 457.

114. *Id.* at 458.

115. *Id.* at 457.

116. *U.S. Tax Incentive Info, supra* note 16, at California. There are incentives to hold on to credits, consider the following: a production company produces a qualifying project that leaves them eligible to claim a full 25% on their qualifying expenditures, but the production company knows they have smaller projects that might not receive a credit scheduled for the following year. If they hold on to them, they will be able to apply the credit to a production that, individually, would not have received a credit.

117. *Id.*

118. *Id.*

119. *The Office: Valentine's Day* (NBC television broadcast Feb. 9, 2006).

historical advantage.[120] Unlike California, New York saw the dangers of other states attracting films with incentive plans and acted early (in 2004) to adopt their very own incentive.[121]

New York's original incentive plan was designed to positively impact the state's economy by strengthening film production in New York. The original incentive worked towards this by allowing a 10% credit, capped at $25 million with a sunset in 2008.[122] The state expanded the cap before the sunset provision expired, when, in 2006, it increased the cap to $60 million.[123] The increased cap was in response to other states' incentive plans, which also led to additional modifications.[124] In 2008, New York increased the credit to 30% with incremental increases in the cap to eventually reach $420 million.[125]

New York's incentive plan shares many of the same characteristics as Georgia's and California's.[126] Common characteristics include sunset provisions, minimum budgets, qualified expenditures, and uplifts, but New York strays from the common path for several of its requirements and its options for incentive plans.[127] Some differences involve the use of qualified film production facilities, time to claim the credits, priority for filing, and credits for postproduction expenses.[128]

Productions are required to spend a certain amount of money at a qualified production facility as well as spend a certain amount of principal photography days in New York.[129] New York divides productions into two levels.[130]

Level One productions must have budgets under $15 million and a public company cannot have more than a 5% ownership in a production company.[131] A Level One production must shoot at a qualified facility for a minimum of one day and 75% of its expenses for work completed at any type of facility must be done at a qualified production facility.[132]

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120. *See supra* text accompanying note 86.

121. Xu, *supra* note 22, at 433–34.

122. *Id*. at 429–30.

123. *Id*. at 430.

124. *Id*.

125. *Id*.

126. *See generally* O.C.G.A. §§ 48-7-40.26 to -40.26A; CAL. REV. & TAX. CODE § 23685; N.Y. TAX LAW § 24.

127. *See generally* O.C.G.A. §§ 48-7-40.26 to -40.26A; CAL. REV. & TAX. CODE § 23685; N.Y. TAX LAW § 24.

128. *See* N.Y. TAX LAW § 24.

129. *Id.* § 24(a)(2).

130. *U.S. Tax Incentive Info*, *supra* note 16, at New York.

131. *Id.*

132. *Id.*

Level Two productions must have a budget over $15 million or a publicly traded company must own more than 5% of the production company.[133] They must utilize a qualified facility for a minimum of 10% of their principal photography shooting days.[134] Similar to Level One productions, Level Two productions must spend 75% of their facility expenses at a qualified facility and a minimum of $3 million must be spent at a qualified production facility.[135] For work not done at a qualified production facility to qualify for the incentive, 75% of the filming must be shot in New York State. [136]

New York's credit is a fully refundable credit.[137] If the production company is entitled to a refund of less than $1 million, the state will refund the amount within one year of it being claimed.[138] For credits between $1 million to $5 million, the state has two years to refund it.[139] Any claim for a credit over $5 million can be paid over three years.[140] In order to claim the tax refund, a film must file their application for certification within sixty days.[141]

Similar to California, New York offers uplifts on out-of-zone filming.[142] Productions that film in upstate counties may be eligible to receive a 10% bonus on their credit.[143] To be eligible to receive this bonus, a production's budget must meet a minimum of $500,000, and the state only allocates $5 million for this program.[144] The program contains a sunset provision calling for a re-examination in 2022.[145] Additionally, each production that takes advantage of the tax credit must include a promotion logo, video, or the phrase "filmed with the support of the New York State Governor's Office of Motion Picture and Television Development."[146]

133. N.Y. TAX LAW § 24(a)(2).
134. *Id.*
135. *Id.*
136. *Id.*
137. Xu, *supra* note 22, at 457.
138. N.Y. TAX LAW § 24(a)(2).
139. *Id.*
140. *Id.*
141. *U.S. Tax Incentive Info*, *supra* note 16, at New York.
142. N.Y. TAX LAW § 24(a)(5) (LexisNexis 2018).
143. *Id.*
144. *Id.* For a full list of counties included under this provision see the statute. The following are a few counties falling under this statute: Albany, Erie, Montgomery, Niagara, and Saratoga. *Id.*
145. *From Montauk to Buffalo, New York State Is Camera-Ready and Film-Friendly*, EMPIRE ST. DEV., https://esd.ny.gov/industries/tv-and-film (last visited Aug. 28, 2018).
146. N.Y. TAX LAW § 24(a)(4) (LexisNexis 2018).

D. Louisiana

Georgia, California, and New York adopted their film tax credit plans in 2005, 2009, and 2004, respectively. Louisiana claims the honor of being the first state to enact an incentive plan,[147] and the state has not looked back. Due to Louisiana's early adoption of a film incentive, they have used their "first mover advantage"[148] to good effect and hold a steady place near the top of the chart for the number of films per state.

The state's "primary objective . . . is to encourage development in Louisiana of a strong capital and infrastructure base for motion picture production in order to achieve an independent, self-supporting industry."[149] This goal has been achieved as supported by studies that reported Louisiana was number six for film production in 2016, fourth in 2015, and first in 2013.[150] Louisiana's success with the film industry began in 2002 when it adopted its first successful plan.

The state's initial plan allowed production companies to claim tax credits on qualified expenditures they utilized in the state.[151] This was a change from the 2002 plan that only allowed productions to claim losses in the state.[152] The Motion Picture Production Tax Credit was again amended in 2003 to make the credit received transferrable.[153] By 2005, the Louisiana legislature decided to significantly amend the incentive.[154]

One of the first changes the legislature made concerned the amount of credit a certified production was eligible to receive. Starting in 2004, productions that spent between $300,000 and $8 million became eligible for a 10% income tax credit, while productions that spent more than $8 million were entitled to a 15% credit.[155] For 2006, the state increased the base credit to 25% for any production spending at least $300,000.[156] An additional 10% was available if a production hired Louisiana

147. McIntire, *supra* note 16, at 211; LA. REV. STAT. ANN. § 47:6007.

148. McIntire, *supra* note 16, at 212. Louisiana has first mover advantage over other states because of its early adoption of the incentives benefits from incidental benefits: job creation, increased tourism, and infrastructure development. *Id.*

149. LA. REV. STAT. ANN. § 47:6007(a) (2018).

150. 2017 FEATURE FILM STUDY, *supra* note 38, at 4.

151. LA. REV. STAT. ANN. § 47:6007(c) (2018); McIntire, *supra* note 16, at 218.

152. McIntire, *supra* note 16, at 217.

153. *Id.* at 219.

154. *Id.*

155. *Id.* at 220.

156. *Id.*

residents.[157] The resident credit was amended in 2009 to provide productions with a 5% credit.[158]

Another significant amendment to the Louisiana tax credit involved the transferability of the credit. The state authorized the film office to purchase the credits back from a qualified production company.[159] The initial price the state was to pay was 72% of the credit's value with a gradual increase of 2% per year until a maximum amount of 80% was achieved.[160]

Today, Louisiana's film tax credit retains the majority of the characteristics that were added to it in the mid-2000s.[161] The state has instituted a $20–25 million cap for individual projects and a cap for the amount of state funds allocated for the program.[162] The incentive program has been expanded to include out-of-zone uplifts, Louisiana specific programs, and has modified the state's buyback plan.[163] Individual productions in Louisiana can now claim a maximum credit of 40% or up to $180 million.[164] Additionally, the state has capped the amount of credit it is willing to issue per year at $150 million.[165]

In order to promote more economic benefit in the state, Louisiana has implemented uplifts that specifically target out-of-zone areas and Louisianans.[166] For productions that film outside the New Orleans metropolitan area, the production is eligible to receive an additional 5%.[167] If a production is based on a screenplay written by a Louisianan, the production can take advantage of another 10%.[168]

157. *Id.*

158. *Id.*

159. *Id.* at 220–21.

160. *Id.*; LA. REV. STAT. ANN. § 47:6007(C)(4)(f).

161. LA. REV. STAT. ANN. § 47:6007.

162. LA. REV. STAT. ANN. § 47:6007(C)(1)(d) (2018); *U.S. Tax Incentive Info*, *supra* note 16, at Louisiana.

163. LA. REV. STAT. ANN. § 47:6007(C)(1)(d).

164. *Id.*; *Motion Picture Production Program*, LA. ENT., https://louisianaentertainment.gov/film/motion-picture-production-tax-credit (last visited Aug. 28, 2018).

165. LA. REV. STAT. ANN. § 47:6007(C)(1)(d)(i) (2018).

166. LA. REV. STAT. ANN. § 47:6007(C)(1)(c) (2018); *Motion Picture Production Program*, *supra* note 164.

167. *Motion Picture Production Program*, *supra* note 164.

168. *Id.*

E. New Mexico

New Mexico's film tax credit has been classified as "aggressive."[169] Originally offering interest free loans up to $15 million, the incentive program has been amended into a plan that is more reasonable due to negative reports of the efficacy of the program.[170] After the state enacted its tax credit program in 2002, production in the state between 2003 and 2008 included ninety projects.[171] Production companies were taking advantage of the benefits being offered by "Tamalewood."[172]

Despite the effectiveness of the state's plan, New Mexico's credit plan was limited in 2011 due to studies emphasizing losses sustained under the incentive.[173] The results of these studies will be addressed in Part IV of this Comment. The major effect of the 2011 reforms was that New Mexico's film tax credit was capped.[174] In 2011, the state instituted a $25 million dollar rolling cap on the program.[175] However, by 2018 the incentive program had rebounded and, like the other tax credit programs, now provides common features, as well as some characteristics that are uniquely New Mexican.[176]

New Mexico's credit has several standard features that follow along with the theme that has developed for such plans. Each production wishing to partake of the incentive must include a promotion for the state in the end of screen credits.[177] Departing from the developed theme, New Mexico does not require a production to meet a minimum budget threshold in order to qualify for the incentive.[178] In order for a production to qualify for a credit of 25%, the production expenditures must be made in New Mexico.[179] An additional credit of 5% is available for television productions containing a minimum of six episodes whose

169. Danielle M. Cantrell, *New Mexico as Hollywood's Backlot: An Examination of Film Financing, State Tax Incentives, and Constitutional Limitations*, 37 N.M. L. REV. 533, 533 (2007).

170. McIntire, *supra* note 16, at 228.

171. *Id.*

172. Tamalewood is a colloquial name for New Mexico emphasizing the state's Hispanic heritage and its status as a film center. *Id.* "Wood" comes from Hollywood. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* A rolling cap allows for funds not utilized in the plan to be added to the following year's budget. *Id.* If a state distributes $20 million in credit from a $25 million dollar cap, the following year's budget will then be $30 million. *Id.*

176. N.M. STAT. ANN. § 7-2F-1.

177. N.M. STAT. ANN. § 7-2F-1(M) (LexisNexis 2018).

178. N.M. STAT. ANN. § 7-2F-1(B)(1) (LexisNexis 2018).

179. *Id.*

budgets are at least $50,000.[180] If the production hires a New Mexico resident as a below-the-line worker, a 5% credit may be applied unless the production has already claimed the 5% offered based on the television requirements.[181] The statute further requires certain amounts of principal photography to be filmed at a qualified production facility.[182]

New Mexico has increased their cap on the credits to be distributed from $25 million to $50 million.[183] This cap is a rolling cap,[184] and priority for distributing the credit is dependent on the date the claim is received.[185] Distribution is predicated on the funds being available; if the funds are not available, recipients with priority will receive their benefits the next year in the order of their applications.[186] Disbursements of credits between $2 million and $5 million must be taken over two years, while credits for more than $5 million will be distributed over three years, providing the availability of funds in the cap.[187]

The effectiveness of incentive plans is controversial. There are different methods for computing their benefits or their harm; however, as with most things, the benefits, or lack thereof, that result from film tax credits lie in the eyes of the beholder.

IV. THE ECONOMIC PROS AND CONS OF INCENTIVE PLANS

Even the economic benefits created by tax credits are controversial. By forgiving the tax credit owed by production companies, states appear to be losing a substantial amount of revenue. Indeed, in 2013, Louisiana only appeared to earn $0.15 for every $1 worth of credit it extended.[188] Michigan, whose plan at its height offered up to 42% of credit, suffered such negative losses that they capped their plan in 2011 in an effort to stem the perceived loss.[189] In response to this perceived loss of revenue, since 2009 ten states have either directly ended, indirectly ended, or reduced their incentive plans to such a degree that productions have

180. N.M. STAT. ANN. § 7-2F-1(C)(1) (LexisNexis 2018).
181. N.M. STAT. ANN. § 7-2F-1(C)(2) (LexisNexis 2018).
182. N.M. STAT. ANN. § 7-2F-1(C)(2)(a) (LexisNexis 2018).
183. N.M. STAT. ANN. § 7-2F-1(E) (LexisNexis 2018).
184. N.M. STAT. ANN. § 7-2F-1(F) (LexisNexis 2018).
185. N.M. STAT. ANN. § 7-2F-1(E).
186. N.M. STAT. ANN. § 7-2F-1(H) (LexisNexis 2018).
187. N.M. STAT. ANN. § 7-2F-1(G)(1)–(3).
188. McIntire, *supra* note 16, at 232.
189. *Id.* at 230.

abandoned the state.[190] By reducing the caps or percentages offered, a state effectively ends their program.[191] When Michigan capped their plan in 2011, Marvel fled to other states with the projects they had planned on producing within the state.[192] Some states, however, like Kentucky, Pennsylvania, California, and Georgia, are actively expanding their plans.[193] Even though tax credits might not appear to be truly revenue neutral, the investments made by the companies during the production are beneficial to states.[194]

One method for determining the amount of benefits stemming from incentive plans involves two different strategies for calculating the return benefit.[195] This method for calculation is based on the simple concept that incentive plans are only beneficial if the credit the state extends is less than the taxes they collect.[196] When this basic method is used, every movie that receives any amount of incentive appears to be a losing proposition for the state.[197] Common sense will tell even the most math adverse individual that collecting only $10 million in tax revenue while allowing companies to write-off $20 million is an ineffective method for earning revenue for a state. This method only considers the direct effects, like initial changes in employment and direct spending of the companies in the state, and fails to consider soft, indirect effects.[198]

Indirect effects are the effects that the film industry has on seemingly unrelated businesses in the state (like job creation in businesses that support the film industry).[199] Induced effects relate to increased wages in the industries that appear to be unrelated to film production, but still manage to increase in amount.[200] Small businesses, hotels, restaurants, and bars all benefit indirectly and from induced

190. Pollard, *supra* note 12, at 440. In 2011, Arizona, Arkansas, Idaho, Kansas, Maine, and Washington either suspended or permanently eliminated their programs. *Id*. In 2016, Michigan, Alaska, and New Jersey also ended or reduced their programs. *Id.*

191. McIntire, *supra* note 16, at 231.

192. *Id.*

193. Pollard, *supra* note 12, at 441.

194. Xu, *supra* note 22, at 463.

195. McIntire, *supra* note 16, at 224, 226.

196. *Id.* at 226.

197. *Id.*

198. Pollard, *supra* note 12, at 435.

199. *Id.*

200. *Id.* Induced effects have been seen in industries like printers, nurseries, office supply companies, delivery companies, and so forth. *Id.* Industries that do not appear related to the film industry often benefit as a result of supplying a production's ancillary needs. *Id.*

effects.[201] Positive attention to the state, long-term infrastructure, and the tourism industry are some of the soft factors that should be considered when calculating the effects the film industry has on a state's revenue stream.[202] If the calculations determining the benefits conveyed by a strong incentive plan do not consider soft factors, an incomplete picture will lead to a negative portrayal of the tax program.[203]

Georgia has benefited from its tax incentive program.[204] The economic impact on the State has seen more than a tenfold increase since 2008.[205] The increase of the impact from year to year has been drastic with 2017 spending growing by a third from 2016.[206]

The film industry had a $9.5 billion dollar impact on the State in 2017 with productions directly spending $2.7 billion.[207] Over 3000 businesses benefited, $4.6 billion in wages were paid out, and 450,000 people were employed in Georgia's tourism industry.[208] On top of all these fiscal benefits, Georgia is currently the top film production area in the world and has been in the top ten locations since 2013.[209] Excluding Canada, California was ranked as the second most productive state in 2016 with New York and Louisiana following at third and fourth.[210] New Mexico ranked the lowest of the discussed states at ninth in 2016.[211]

201. Schonauer, *supra* note 12, at 385.

202. *Id*. at 385–86.

203. McIntire, *supra* note 16, at 236.

204. Tom Cunneff, *Move Over, Hollywood. Atlanta Is Becoming a Major Film Mecca*, CNBC (Nov. 1, 2016), https://www.cnbc.com/2016/11/01/atlanta-rivals-hollywood-to-become-major-film-mecca.html; FISCAL YEAR 2017: YEAR IN REVIEW, *supra* note 3, at 5; GA. DEP'T OF ECON. DEV., 2014 YEAR IN REVIEW 6 (2014), https://online.flowpaper.com/79590748 / yearinreview2014/; GA. DEP'T OF ECON. DEV., FISCAL YEAR 2015: YEAR IN REVIEW 8 (2015), https://online.flowpaper.com/79590748/yearinreview2015/; GA. DEP'T OF ECON. DEV., FISCAL YEAR 2016: YEAR IN REVIEW 8 (2016), https://online.flowpaper.com/79590748/yearin review2016/.

205. J. Scott Trubey, *Will New Tax credits, Hollywood Changes Boost Georgia Film Spending*, ATLANTA J. CONST. (Jan. 4, 2018), https://www.myajc.com/news/local-govt-politics/will-new-tax-credits-hollywood-changes-boost-georgia-film-spending/zA7bbGG8DPwsNvM8oVgkaN/.

206. *Id.*

207. FISCAL YEAR 2017: YEAR IN REVIEW, *supra* note 3, at 4.

208. *Id.* at 4, 17. This number of people employed in Georgia's tourism industry includes people directly employed in film tourism and in other tourism sectors. *Id*. at 17.

209. 2017 FEATURE FILM STUDY, *supra* note 38, at 4; 2016 FEATURE FILM STUDY, *supra* note 1, at 3.

210. 2016 FEATURE FILM STUDY, *supra* note 1, at 3.

211. *Id.*

Critics of incentive plans will look at Georgia's performance for the last five years and discuss how the state distributed an average incentive of $258 million between 2012 and 2014, $438 million in 2015,[212] and $606 million in 2016.[213] Critics will compute the numbers and discover that for every $1 million of credit given, the State only collects taxes on around $650,000.[214] Furthermore, naysayers will call attention to the fact that production companies are able to sell their claimed credit for around $0.90 on the dollar.[215] This critical position may find support in a study by the Georgia Budget Policy Institute that examines the potential 2019 Georgia budget.[216] The budget is set at $26.2 billion and tax breaks and credits across every industry are estimated to cost the State $8.8 billion in revenue with the film industry's credit expected to be around $533 million.[217] However, these critics fail to address a simple truth: without the incentive, production companies would not spend any money in the State and Georgia would fail to collect any revenue from them.

Illinois' film office asks itself a simple question when considering the efficacy of their incentive program, "[I]f not for the credit, [would] applicant's production . . . occur in Illinois."[218] If critics of Georgia's tax credit program consider this question, they may realize that a bird in hand is better than two in the bush. Without the incentive plan, production companies would not bring their films to Georgia and the State would not be able to collect an income tax on around 70% of the films' qualified expenditures. Nor would Georgia's bottom line benefit from the indirect benefits that films bring to the State like the 92,000 direct industry jobs or the $4.6 billion in wages earned during the year.[219]

Depending on the approach one takes to the issue of whether film tax credits benefit states, there are two reasonable outcomes. Firstly, film incentives hurt a state's revenue by causing it to lose revenue. Often, the language used is that incentive plans "cost" the state money.[220] Cost implies that the state would have the money to spend regardless of the

212. Cunneff, *supra* note 204.

213. 2016 FEATURE FILM STUDY, *supra* note 1, at 17.

214. Cunneff, *supra* note 204.

215. Trubey, *supra* note 205.

216. *See* GA. BUDGET & POLICY INST., GEORGIA BUDGET PRIMER 2019 (2018), https://gbpi.org/2018/Georgia-state-budget-overview-fiscalyear-2019/.

217. *Id.* at 1, 18.

218. 35 ILL. COMP. STAT. 16/30(a)(5) (2018).

219. FISCAL YEAR 2017: YEAR IN REVIEW, *supra* note 3, at 4.

220. *See supra* text accompanying note 12.

amount of industry that is actually in the state and fails to consider that the state would not benefit from any revenue at all if the films were not there. However, states with refundable credits do write checks to the production companies, so it is understandable (to a certain extent) to use the word cost in describing credit. But, at the end of the day, some revenue is better than no revenue due to production companies not utilizing the state, its employees, or local businesses.

V. MUCH LIKE "OFFICE CHRISTMAS PARTY(IES)," INCENTIVE PLANS ARE NOT ENTITLED TO A "HALL PASS" EVEN IF THE "NICE GUYS" ARE "THE BOSS"

As with most things, there are several possible issues that might arise out of a state's use of a tax credit. Here, two issues might become prominent as incentive programs develop: first, there is a potential for First Amendment[221] violations by states that restrict the content of productions that take advantage of the incentive programs; second, requirements placed upon production companies forcing them to hire resident employees in order to qualify for the credit may raise issues with the Privileges and Immunities Clause.[222] These potential issues will be briefly addressed in the following paragraphs.

A. First Amendment Content Restriction

The First Amendment guarantees freedom of speech.[223] "Congress shall make no law . . . abridging the freedom of speech."[224] This statement applies to states that give or refrain from giving an economic benefit.[225] Here, the issue arises when states limit the content allowed to be produced using its tax credits. States like Texas, New Mexico, and Georgia all engage in some form of content restriction for productions hoping to take advantage of their incentive programs.[226] The states often formulate their film tax credits in facially discriminatory language, which should subject them to a strict scrutiny test to determine if the policy is narrowly tailored to further a compelling state interest.[227] However, states care about what content they sponsor and have a legitimate interest in what they put their brand on.[228]

221. U.S. CONST. amend. I.
222. U.S. CONST. art. IV, § 2, cl. 1.
223. U.S. CONST. amend. I.
224. *Id*.
225. Ahmad, *supra* note 34, at 419.
226. *Id*. at 412–17.
227. *Id*. at 419–20.
228. *Id*. at 410.

Content restriction can take many forms,[229] but generally, it "targets an entire subject or topic, such as politics or religion."[230] Four common areas of content restriction are categorical, negative image, implicit, and carte blanche.[231]

Categorical content restriction limits itself to preventing productions from promoting entire categories of content.[232] Generally, categorical restrictions include topics like politics, commerce, and pornography.[233] As of 2009, six states prohibit the use of their tax credits for productions that have a purely political motivation—like smear campaigns.[234] Nineteen states do not allow their incentive to be used to promote commercial productions and thirty-three states prohibit pornographic or obscene material from benefiting from the state-provided tax credit.[235] Georgia's Entertainment Industry Investment Act restricts "[p]ornographic content, including sexually explicit content and content designated with an X rating."[236] Most states restrict their credits to creative productions and do not allow productions like news, sports, live coverage shows, or promotional videos to claim the credit.[237]

Negative image prohibition simply requires the production not to portray the state in a negative fashion.[238] In 2017, Texas would deny productions the opportunity to avail themselves of the state's credit for productions that contained "inappropriate content or content that portrays Texas or Texans in a negative fashion."[239] Six other states engage in this type of content restriction.[240] States that restrict allowable content often require the production to provide a copy of the script so the film office can determine if the content is appropriate or not.[241] Georgia only allows qualified productions to obtain the incentive once the "Georgia Department of Economic Development (GDEcD) has

229. *Id.* at 411.
230. *Id.* at 420.
231. *Id.* at 411.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 412–14.
236. GEORGIA: FILM, MUSIC, & DIGITAL ENTERTAINMENT, *supra* note 66, at 7.
237. O.C.G.A. § 48-7-40.26(b)(11).
238. Ahmad, *supra* note 34, at 415–16.
239. TEX. GOV'T CODE ANN. § 485.022(e) (West 2018).
240. Ahmad, *supra* note 34, at 415.
241. *Rules & Requirements*, TEX. FILM COMMISSION, https://gov.texas.gov/film/page/job_hotline_rules_requirements (last visited Feb. 23, 2018); GEORGIA: FILM, MUSIC, & DIGITAL ENTERTAINMENT, *supra* note 66, at 4.

determined [that the project] will create valuable promotions that will enhance the State's brand."[242]

Implicit content is more difficult to discern as it is embedded in neutral language and can be so broad as to not seem like a restriction at all.[243] However, one study discovered that six states engage in this type of restriction.[244] The last method employed by states, including Georgia, to restrict content is the carte blanche method.[245] This method prohibits any content that the state determines to be offensive or inappropriate. This method, though similar to categorical restrictions, is much more broad and allows the states, not the production companies, to determine what is offensive or inappropriate.[246]

B. Privileges and Immunities

The Privileges and Immunities Clause bars states from discriminating against citizens, companies, or other states in favor of their own citizens.[247] Privileges and immunity issues are more prevalent than First Amendment issues due to the requirements enforced by states that force production companies to spend a specified amount of filming days or money in the state, or to hire residents of the state, in order to qualify for the state's incentive plan. Texas, New Mexico, and Louisiana all have requirements or bonuses concerning resident hires.[248] New York, California, and New Mexico, as well as many other states, require a minimum number of filming days in the state.[249] These states also have requirements forcing the productions to spend a specified amount of money in the state as well as requiring the productions to film at qualified production facilities.[250]

The question that arises is whether states are unduly discriminatory against nonresidents. The states that employ requirements such as this allow production companies to employ nonresidents; they simply refuse to allow the tax credit to apply to the nonresidents' salaries.[251] This is

242. GEORGIA: FILM, MUSIC, & DIGITAL ENTERTAINMENT, *supra* note 66, at 4.

243. Ahmad, *supra* note 34, at 416.

244. *Id.*

245. *Id.* at 417–18.

246. *Id.*

247. U.S. CONST. art. IV, § 2, cl. 1.

248. N.M. STAT. ANN. § 7-2F-1; *U.S. Tax Incentive Info*, *supra* note 16, at Texas.

249. *See* CAL. REV. & TAX. CODE § 23685(b)(15)(B)(i) (Deering 2018); N.Y. TAX LAW § 24(a)(2); N.M. STAT. ANN. § 7-2F-1(C)(2)(a).

250. N.M. STAT. ANN. § 7-2F-1(C)(2)(a); N.Y. TAX LAW § 24(a)(2).

251. *U.S. Tax Incentive Info*, *supra* note 16, at New Mexico.

not unduly burdensome, as evidenced by the number of productions that flock to such states.[252]

State tax credit plans are designed to promote the promulgating state's economy. By their very nature, state tax incentives are discriminatory because they exist to entice a specific industry away from all other states.[253] However, as of the writing of this Comment, approximately thirty-five states possess some form of film tax credit.[254] At a certain point, incentives become a necessary competitive measure that states must have if they are intent on economic development.[255] The incentives serve an important governmental interest—economic growth—and discriminate no more than necessary.

VI. CASE CLOSED ON THE STATE THAT IS "THE FRONT RUNNER" FOR FILM INCENTIVES: IMPLICATIONS OF GEORGIA'S CURRENT PLAN AND POTENTIAL IMPACTS ON THE STATE IF THE PLAN IS CHANGED

Georgia is currently sitting at the forefront of the film industry.[256] Georgia's tax credit for film and digital production has elevated the State from being the home of the occasional production to being the home of more productions in a single year than the entire country of Canada and the birthplace of the film industry, California.[257] However, the film industry is a fickle mistress, subject to following the money and disregarding established industry leaders; much like the industry that essentially fled California to take advantage of incentives offered by other states. In order for Georgia to retain a lion's share of the industry, the State must continue to adapt and develop its incentive plan, grow its infrastructure, address potential future issues, and work to establish itself as an invaluable resource to the industry.

A. Growth of Georgia's Film Tax Credit

There are a large number of characteristics in Georgia's tax incentive plan that are effective and work to make Georgia the top film producing state in the nation. Georgia's lack of a cap means that production companies do not have to play a guessing game when determining if there will be enough funds to cover all of the productions. The State needs to maintain its cap free film tax credit plan in order to remain the

252. 2016 FEATURE FILM STUDY, *supra* note 1, at 3.
253. Cantrell, *supra* note 169, at 558.
254. *U.S. Tax Incentive Info*, *supra* note 16.
255. Cantrell, *supra* note 169, at 558.
256. 2017 FEATURE FILM STUDY, *supra* note 38, at 4.
257. *Id.*

top producing state. Unlike California, New York, Louisiana, and New Mexico, Georgia is ready and willing to give an unlimited amount of credits per year. The harm of applying a cap is exemplified by Louisiana and Michigan's application of caps to their credits that resulted in production companies abandoning them and the risk associated with the potential of not receiving any benefit. Any change or limitation, as demonstrated by the events in Michigan, Louisiana, and New Mexico, will most likely adversely affect Georgia.

On the other hand, Georgia has become an essential part of the film industry. As evidenced by the number of films produced here, Georgia's power and position in the industry has rapidly increased over the last ten years. The State needs to continue to make itself an indispensable part of the industry. Georgia is already well on its way to becoming an indispensable part of the industry through the rampant growth of production studios in the State. A quick search on the internet shows over twenty studios currently in existence in the metro area surrounding Atlanta. Names like Pinewood Studios, EUE Screen Gems, Tyler Perry Studios, and Atlanta Metro Studios are becoming an essential part of why production companies flock to Georgia. These are modern, state-of-the-art studios that, due to the film tax credit, act as a bedrock for the film industry in Georgia.

Continuing the theme of becoming an essential part of the film industry, Georgia is rapidly growing in the preproduction aspect of the film industry. Preproduction is all the fun things that happen before a film begins productions. This includes script development, casting, design, and art development. Traditionally, preproduction takes place in Los Angeles due to the talent pool of actors, directors, and producers that exist in the city. However, the number of films produced in Georgia is influencing a number of these creative types to relocate themselves—and their families—to the state where they will be working on the films they help develop. By enticing the creative movers in the film industry to Georgia, the State gains the power that California has exercised over the last century.

Georgia could adopt a provision similar to Louisiana's that allows for an increase in the incentive for films that utilize scripts written by Georgia residents. A new provision that provides for this might influence writers to move to Georgia in order to make their scripts more appealable to production companies. California, until recently, maintained a large amount of the industry due to their infrastructure and labor pool, and seemed to be impervious to film tax credit plans that have been offered by other states. Georgia is rapidly approaching this impervious position.

The more multifaceted the film industry in Georgia becomes the better off the industry will be. Once Georgia has the resources to perform preproduction, along with the State's current production capacity, Georgia will be approaching a level where it can compete with California for the entire film process and not just compete with California on the production level.

In January of 2018, Georgia took a step in the right direction to further its status as a place for the complete production of a film. Other states, California among them, offer postproduction tax credits on qualified postproduction expenditures. Georgia added a similar provision to its incentive plan.[258] The statutory section is entitled "Tax Credit for Postproduction Expenditures" and is similar in its language to the actual film tax credit statute. However, this statute applies only to postproduction expenses. There are limits on the aggregate amount of payroll, the location of the business, and the types of activities that are covered. For the qualified expenditures, the postproduction company may receive a 20% credit for postproduction expenditures.[259] An additional 10% credit is given if the postproduction involves editing production material that was filmed in Georgia.[260] There is an additional 5% tax credit available for postproduction companies that work in tier one or tier two counties.[261] This statute allows for an incentive of up to 35% for postproduction activities and allows the credit to be transferred.[262]

By enacting this statute, Georgia is consolidating its position as a complete production capital that might make Georgia impervious to the fickleness of the film industry. Much like California's status as a film industry powerhouse, Georgia, by adding preproduction and postproduction infrastructure and incentives, may eventually be on par with California. In an interview with Terrell Sandefur, he stated that "Georgia needs a complete industry from pre to post."[263] Once we have achieved this complete industry, Georgia may be immune from the fluctuations that are prevalent in the film industry. After Georgia has a

258. O.C.G.A. § 48-7-40.26A.

259. O.C.G.A. § 48-7-40.26A(c)(2)(A) (2018).

260. O.C.G.A. § 48-7-40.26A(c)(2)(B) (2018).

261. O.C.G.A. § 48-7-40.26A(c)(2)(C) (2018). Similar to Texas, New Mexico, California, New York, and Louisiana, Georgia offers tax credit for economic activity that occurs in certain counties that have been designated as counties of less developed areas under O.C.G.A. § 48-7-40 (2018).

262. O.C.G.A. § 48-7-40.26A(h)(3) (2018).

263. Telephone Interview with Terrell Sandefur, Founder of the Macon Film Festival, Dev. Dir. of the Rome Int'l Film Festival, and the Managing Dir. of FILMGEORGIA.COM (Aug. 21, 2018).

complete industry, the State may then begin to consider revising the current statutory scheme; until the State achieves this status, it is essential that the film tax credit plan remains the same so that Georgia does not lose the productions that are currently availing themselves of the credit. Once Georgia has put itself on par with California in regard to preproduction, production, and postproduction, then it may be appropriate to revisit applying a cap for the film tax credit.

B. Employment Issues

Georgia, as an at-will state, does not differentiate between resident workers and nonresident workers or between union and nonunion workers.[264] Both resident and nonresident workers' salaries count toward qualified expenditures as long as they are below-the-line employees.[265] The International Alliance of Theatrical and Stage Employees (IATSE) Local 479 has a strong presence in the State. IATSE works to educate, train, and employ members as well as to promote infrastructure projects in the State. The union is currently more than 5000 strong and thriving.[266] The International Brotherhood of Teamsters Local 728 is another union that benefits from the incentive plan. Local 728 represents thousands of teamsters and is instrumental in the film industry.[267] The unions guarantee hourly rates, health care, retirements, and safety standards for members through collective bargaining and representation.[268]

A few potential issues concerning unions have arisen following directives issued by President Trump's administration. A new directive issued to the National Labor Relations Board (NLRB) requires it to crack down on unions and their administration over member concerns.[269] The new directive orders the NLRB to start pursuing charges against unions for failing in their capacity as agents for their members. Issues, such as not responding to phone calls, losing complaints, and mishandling grievances, are now issues that could

264. O.C.G.A. § 34-7-1 (2018).

265. O.C.G.A. § 48-7-40.26(B)(14)(A).

266. *About Local 479: We Are IATSE*, IATSE 479, http://iatse479.org/about-local-479 (last visited on Oct. 31, 2018).

267. *Teamsters Local 728*, LOCAL 728, http://www.teamsterslocal728.org/index.cfm (last visited on Oct. 31, 2018).

268. *Unions Begin with You*, AFL-CIO, https://aflcio.org/what-unions-do (last visited on Jan. 12, 2019).

269. Sahid Fawaz, *Trump Administration Orders NLRB to Step Up Prosecution of Labor Unions*, LABOR 411 (Sept. 18, 2018), labor411.org/411-blog/trump-administration-orders-nl rb-staff-to-step-up-prosecution-of-labor-unions/.

possibly lead to charges against the unions under the new directive.[270] No longer will careless and unprofessional behavior be viewed as harmless error.[271]

The Supreme Court of the United States has recently issued a decision that stands for government employees having a constitutional right to not pay union dues.[272] This decision overturned *Abood v. Detroit Board of Education*[273] which held that public-sector unions could demand members to pay dues.[274] As a result of the weakening of unions' strength under the new directive and the decision in *Janus*, IATSE 479 and Local 478 may begin to experience a weakening in their power over production companies. Production companies may begin to assert more authority or try to dominate collective agreements concerning the area deals. As a result of this, production companies may begin to hire more nonunion workers, which they have the power to do anyway since Georgia is a right-to-hire state.

By hiring nonunion (and often unskilled) labor, production companies could save more money and benefit even more from the incentive plan. However, this is a double-edged sword. By the new directive and case law seeming to undermine the strength of unions, more jobs might be created in the film industry in Georgia. Now, instead of being required to be a member of a union, which is costly and becoming even more difficult, regular Georgians now have a better chance of becoming employed in the film industry. This might result in higher employment rates, as there are a lot more nonunion members than union members. But these new practices might harm the skilled labor force—consisting mainly of union members—that has developed in Georgia since the passage of the film tax credit.

C. Potential Constitutional Challenges to Georgia's Film Tax Credit

Georgia's incentive plan may violate the constitutional rights of corporations and individuals. Georgia's film tax credit plan uses content restriction to limit the types of productions that can benefit from the tax credit. Furthermore, Georgia's film tax credit, while not unconstitutionally discriminating against the several other states and their citizens, may cross the line into violating the Privileges and Immunities Clause.

270. *Id.*
271. *Id.*
272. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).
273. 431 U.S. 209 (1977).
274. *Id.*

1. Content Restriction

As discussed in Part IV of this Comment, Georgia's film tax credit restricts the content of the productions that choose to utilize the State's film facilities and infrastructure. Georgia is not alone in its decision to restrict what films can or cannot use the tax benefit for film production. Almost every state that utilizes a film tax credit limits the application of that credit.

Georgia limits the companies through a series of categorical content restrictions. In Georgia, a production company cannot benefit from the incentive plan if the company produces pornographic content or obscene material. The State also limits the types of productions that can avail themselves of the benefits of the tax credit plan. News programs, coverage of athletic events, instructional videos, and corporate videos are all examples of productions that cannot use the tax credit plan. Georgia's plan also engages in negative image prohibition by only allowing productions that will promote a positive image of the State's brand.

However, as the tax incentive plan currently exists, Georgia, along with the other states who utilize such restrictions will most likely not fall afoul of the Constitution. States have a legitimate interest in controlling where their money goes and what is accomplished with it. This might have to do with the availability of incentive programs and the number of states that offer incentives. Production companies are not bound to a particular state and are free to shop around to find the incentive plan that is the most beneficial to their type of programming. The availability of film tax credits is a likely reason for why there have not been any suits alleging content restriction.

In order for Georgia to avoid becoming a poster child for reform against content restriction, Georgia should maintain its current plan. The statute itself is vague about controversial topics like pornography, but the literature that comes from Georgia's Film Production Office is obvious (some would say explicit) concerning the State's prohibition against funding or supporting pornography. Georgia may be toeing the line here concerning this restriction, as the actual language of the statute does not explicitly ban what might be art to some. To prevent actions claiming limits on free speech through content restriction, Georgia needs to refrain from taking a stronger legal stance against content restriction.

2. Privileges and Immunities Issues That Might Arise

On its face, Georgia's film tax credit statute discriminates against multiple parties and against other states and their citizens. The purpose of the incentive plan is to promote and encourage the growth of the film industry in Georgia as well as to promote the State's economy by stimulating business and employing a variety of people directly or indirectly in relation to the incentive plan. While the plan does accomplish its goals, it may do so at the expense of other states and even other industries within Georgia.

The film credit plan requires production companies to be based in Georgia. As discussed in multiple other parts of this Comment, most production companies have their creative and financial base in California. Georgia's incentive plan, along with every other incentive plan, is designed to draw productions from California and other states. The purposes, though not stated, are to entice productions away from other locations. To put it bluntly, film tax credits are designed to steal money from other states. California, the traditional home of Hollywood, has a large infrastructure and workforce dedicated to film production. The States are accustomed to collecting taxes from productions spending large amounts of money and from the workers who pay income taxes, property taxes, and spend their money within their borders. By enticing the productions from other states, Georgia and the other incentive offering states are essentially stealing revenue from other states.

However, Georgia is not in danger concerning this enticement. States are allowed to compete with one another, and this competition promotes advancement in the industry. Furthermore, Georgia's film tax credit does not discriminate nearly as much as other states who require productions to hire certain percentages of local resident workers. Some plans, like New Mexico, make receiving the tax credit contingent on the hiring of residents over nonresidents. While the plans are designed to increase revenue for the states, policies like this discriminate against out-of-state workers who are supposed to have the same opportunities regardless of the state in which they reside. Some plans, like New York and California, require productions to film a certain number of days in the state. By requiring the productions to film a specific number of days, the states are causing their local economies and small businesses to benefit over other states' economies and small businesses. Georgia's plan, while requiring the production company to film in the State, does not approach the same level of discrimination as the other states. To prevent legal action from other states and their citizens, Georgia needs to keep the language of the statute as neutral as possible.

An additional issue might arise, concerning the amount of tax credit available to the film industry. Most industries receive some sort of tax break for certain actions, but the film industry seems to be on the receiving end of a very favorable credit policy. Other industries in Georgia do not receive the same extent of tax credit. This could lead these other industries to contest the amount of the incentive the film industry receives. To alleviate this concern, Georgia could possibly redistribute some of the unused credit that it buys back from production companies to the other industries.

VI. CONCLUSION

Georgia's film industry is dependent on the film tax credit plan laid out in the Official Code of Georgia. Without the film tax credit plan, Georgia would not be the world leader in film production and the State would not benefit from the influx of money spent by production companies in the State. Thousands of Georgians and small businesses benefit from the film tax credit as well as a variety of other indirect businesses. If Georgia desires for the industry to remain as prominent in the State as it currently is, the film tax credit incentive plan should remain unchanged until the State has secured its position in the industry through the development of its preproduction and postproduction facilities.

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