STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT, STEVE DUCHANE, RANDALL BLUM, and SARA KANDEL,

Plaintiffs,

Case No. 334663

vs.

THE STATE OF MICHIGAN, THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET OF THE STATE OF MICHIGAN; and the MICHIGAN OFFICE OF THE AUDITOR GENERAL.

Defendants.

_____/

REPLY BRIEF ON NEW ISSUES/AFFIRMATIVE DEFENSES RAISED BY DEFENDANTS' ANSWERING BRIEF

NOW COME Plaintiffs, Taxpayers for Michigan Constitutional Government, Steve Duchane, Randall Blum, Sara Kandel, by and through their attorneys and for their *Reply Brief on New Issues Raised by Defendants' Answering Brief* do hereby state as follows,

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I. STATEMENT OF ISSUES PRESENTED

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   Plaintiffs Answer: Yes
   Defendants Answer: No

2. DO PLAINTIFFS MEET MICHIGAN COURT RULES 7.206(E)(1)(a) AND 2.112(M)'S PLEADING REQUIREMENTS WHERE EACH CLAIM INVOLVES DEFENDANTS' VIOLATIONS OF ART. 9, § 30 OF MICHIGAN'S 1963 CONSTITUTION?

   Plaintiffs Answer: Yes
   Defendants Answer: No

3. IS APPLICATION OF RES JUDICATA IMPROPER WHERE DEFENDANTS CANNOT SHOW A SINGLE PRIOR CASE WHERE PLAINTIFFS ARE IN PRIVITY TO ANY PRIOR PARTIES AND WHERE THE PENDING CLAIM CLEARLY DOES NOT ARISE FROM THE SAME TRANSACTION AS ANY PRIOR CASE?

   Plaintiffs Answer: Yes
   Defendants Answer: No

II. DISCUSSION

A. Plaintiffs Possess Legal Standing to Request Mandamus Relief When Defendants Violate Implementing Legislation of The Headlee Amendment.

Plaintiffs allege that Defendants have failed to comply with the clear legal requirements set forth in MCL 21.235, MCL 21.241, and MCL 21.242. (Pls' Compl, at 14-16 and 22, ¶¶ 83, 86-90, 121). Defendants improperly assert that Plaintiffs lack standing to enforce a statutory obligation due from one branch of state government to another. Much of Defendants' argument rests on *Waterford School Dist v State Bd of Educ*, 130 Mich App 614 (1983). Defendants however misinterpret this case and do not give proper weight and deference to the conferral of standing and explicit cause of action created under art. 9, § 32.

The Michigan Constitution provides that:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit. Const 1963, art 9, § 32.

To be entitled to relief, a Plaintiff must have standing. "Standing is the legal term used to denote the existence of a party's interest in the outcome of a litigation; an interest that will assure sincere and vigorous advocacy." *Waterford Sch Dist v State Bd of Educ*, 98 Mich App 658, 662 (1980). Defendants further cite *Waterford* as precedent for a limitation on Plaintiffs standing to vindicate a public wrong or enforce a public right where Plaintiff is not hurt in any manner differently than the citizenry at large. However, it appears that Defendants failed to continue reading the rest of *Waterford*. The proposition cited by Defendants was set out by this Court to contrast it with the constitutional and statutory changes that have been made to standing requirements in Michigan. *Waterford Sch Dist*, 98 Mich App at 663.

Defendants also fail to address the decision in *Lansing Sch Educ. Ass'n v Lansing Bd. of Educ*, where the Michigan Supreme Court held that anytime there exists a legal cause of action, the plaintiff has standing. 487 Mich 349, 372 (2010). Defendants argue that Plaintiffs must show harm that is different from the harm to the public at large, however, that is not the law where there is an explicit cause of action. Article 9, § 32 creates a legal cause of action to enforce art 9, §§ 25-34 and its associated implementing legislation, which is integral to the enforcement of the constitutional provisions. *Lansing Sch Educ Ass'n* 487 Mich 349, 372 (2010).

The Constitution states:

> The Legislature shall implement the provisions of Sections 25 through 33, inclusive, of this Article. Const 1963, art 9, § 34.

Article 9, §§ 25-33 are not self-executing. *Durant v. State Bd. of Educ.*, 424 Mich 364, 381(1985).

In order for Plaintiffs, and taxpayers generally, to hold State government accountable to the requirements of art 9, §§ 25-34, the State must be mandated to comply with its implementing legislation. The Supreme Court and this Court have repeatedly recognized the Headlee Amendment as a "taxpayer revolt." *Durant v State Bd. of Educ*, 424 Mich 364, 378 (1985); *Oakland Cty. v Dep't of Mental Health*, 178 Mich App 48, 53 (1989). It is inconsistent with this judicially recognized intent to hold that taxpayers are entitled to enforce the constitution, but are not entitled to enforce the implementing legislation requiring the State to give taxpayers the information necessary for such enforcement. The Section 30 Compliance Report prepared by Defendants, which is mandated by MCL 18.1497, contains the following representation,

> [T]he reports have been presented in accordance with the *legal requirements* set forth in Sections…18.1497 of the Michigan Complied Laws. These Sections provide statutory language *to implement Article 9, Section 30* of the State Constitution. Ex 1 of Pls' Compl. (emphasis added).

The implementing legislation is a necessary and integral part of the interpretation, implementation, and enforcement of the Headlee Amendment. *Durant v. State Bd. of Educ*, 424 Mich 364, 381(1985).

While mandamus may be an extraordinary remedy, it should be remembered that art 9, § 32 is an extraordinary constitutional provision. At no time in the State's history has the Michigan Constitution included an explicit cause of action for taxpayers to enforce the Constitution's provisions, other than the rights granted to taxpayers under § 32. The People of the State of Michigan thought it imperative to grant to the taxpayers of this State the responsibility of holding the State accountable. It is inconsistent with the intent of the People to hold that the taxpayers are entitled to enforce art. 9, §§ 25-34 under art. 9, § 32, but are not entitled to the information required to be furnished under the implementing legislation of those sections.

B. Plaintiffs Meet Michigan Court Rule Pleading Requirements For Their Claims Challenging Defendants' improper and Inaccurate Article 9, § 30 Calculations.

Claimants seeking enforcement pursuant to art 9, § 32 of the 1963 Michigan Constitution must "conform[] with the special pleading requirements of MCR 2.112(M)." MCR 7.206(E)(1)(a). The first sentence of MCR 2.112(M) applies to counts I-IV of Plaintiffs' Complaint and provides:

> In an action brought pursuant to Const 1963, art 9, § 32, alleging a violation of Const 1963, art 9, §§ 25-34, the pleadings shall set forth with particularity the factual basis for the alleged violation or a defense and indicate whether there are any factual questions that are anticipated to require resolution by the court. MCR 2.112(M).

Plaintiffs claim and Defendants admit that Proposal A spending and payments to public school academies are included within the amount of state spending in the form of aid that is paid to Local Governments. The Parties' dispute regarding whether certain payments to county road commissions for state trunk line roads and for other state obligations is within state calculations is irrelevant to the issue of whether Plaintiffs sufficiently state a claim under § 30.

Plaintiffs also specifically identify in Count IV of their Complaint the mandates involved in *Mahaffey v Attorney Gen*, 222 Mich App 325 (1997), *Durant v State of Michigan*, 456 Mich 175 (1997) and *Adair v State*, 486 Mich 468 (2010) as being included in Defendants' calculation of the amount of state spending in the form of aid that is paid to Local Governments under § 30. Defendants admit that the State payments made in *Mahaffey*, *Durant* and *Adair* were to fund mandates to Local Governments and, thereafter, the payments were included in calculating the § 30 proportion of state spending that is paid to Local Governments. (D's Ans. Brief at 6, ¶ 3 and 7, ¶ 1). Funding of mandates is not permitted to be included in calculating the § 30 proportion, since doing so reduces the proportion of funding to which Local Governments are otherwise entitled.

No further proof with respect to the extent of Plaintiffs' harm is necessary to sustain

Plaintiffs' claims concerning Defendants' accounting practice of counting the payment items identified in Counts I - IV of Plaintiff's Complaint. Plaintiffs' claims can be established merely by proving that Defendants' calculations were improperly made since, as Defendants' acknowledge, Plaintiffs' claims present legal issues concerning whether Defendants properly include certain categories of state spending within their calculations of the amount of state spending in the form of aid that is paid to Local Governments.

Finally, Plaintiffs fulfill MCR 7.206(E)(1)(a)'s pleading requirements by requesting discovery and development of a factual record for Counts I - IV of Plaintiffs' Complaint.

Defendants' attempt to reframe Plaintiffs' properly pleaded claims alleging Defendants' improper calculation of the proportion of total state spending paid to all units of Local Government as involving either: 1) state mandates to Local Governments to provide new services without corresponding state funding (Provision on Unfunded Mandates, or "POUM"); or 2) state reduction of the state-financed proportion of the necessary costs of existing activities or services required of Local Governments by state law (Maintenance of Support Provision, or "MOS") under MCR 2.112(M). (Answr at 20, ¶¶ 15, 16; D's Ans. Brief at 14-16). POUM and MOS claims are art 9 §29 claims **not** art 9 §30 claims which are alleged in this case.

Defendants fail to distinguish between pleading standards for actions challenging the State's characterization of state spending paid to Local Governments as in this case and *Oakland County v Dept of Mental Health*, 178 Mich App 48 (1989) and those requiring heightened pleading requirements under MCR 2.112(M) for POUM or MOS claims as in the *Durant* and *Adair* decisions. Defendants' misguided interpretation of Headlee Amendment precedent mischaracterizes Plaintiffs' allegations and improperly seeks to impose § 29 standards of pleading on Plaintiffs' properly pleaded § 30 claims by incorrectly suggesting that only one applicable

pleading standard exists for all Headlee Amendment actions.

Plaintiffs may not, however, adopt Defendants' recommended pleading standards for either PUOM or MOS claims under MCR 2.112(M) as Plaintiffs' claims in the present case unequivocally involve violations of art. 9, § 30, read in conjunction with § 25. Finally, Defendants overlook MCR 2.112(M)'s directive that the pleading standards they urge Plaintiffs to adopt apply solely to "action[s] involving Const 1963, art 9, § 29." MCR 2.112(M).

Plaintiffs seeking enforcement under § 32 have a right to have the § 30 proportion properly calculated by Defendants as well as Defendants' payments made to items ineligible to be counted excluded from the § 30 calculation. Defendants' improper application of MCR 7.206(E)(1)(a) and 2.112(M) to Counts I-IV of Plaintiffs' Complaint would deprive Plaintiffs of relief afforded them under art. 9, § 32 of Michigan's 1963 Constitution. (See *supra*, p 2, ¶ 1)

C. Res Judicata Does Not Apply to Any of Plaintiffs' Claims.

Defendants wholly fail to meet ***their burden*** of showing the applicability of res judicata to any of Plaintiffs' claims. "[T]he burden of proving the applicability of res judicata is on the party asserting it." *Sloan v Madison Heights*, 425 Mich 288, 295 (1986). Here, the Defendants bear that burden and have not met it.

To invoke res judicata, the proponent must show three elements. The Michigan Supreme Court requires Defendants to show that: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies, and (3) matters in the second case that arising out of the same transaction as the first case were, or could have been, resolved in the first. *Washington v Sinai Hosp*, 478 Mich 412, 418 (2007) (citations omitted). See also *Adair v Michigan*, 470 Mich 105, 121 (2004) and *Dart v Dart*, 460 Mich 573, 586 (1999).

While Michigan adopts a "broad" approach to res judicata through expanded application

of the third element, our courts have not adopted the cursory application of res judicata that the Defendants' suggest. Rather, all three elements must be rigorously met before the defense applies.

Defendants seek to marshal the *Adair* line of cases in support of res judicata. Defendants however fail to identify which specific case they are arguing bars the present action. A review of each reveals that none apply.

- In *2004 Adair*, school districts and taxpayers brought suit based on alleged violations of Mich. Const. art. 9, § 29. *Adair v State*, 470 Mich 105 (2004). Plaintiffs' allegations were based on the costs of: a) seven new administrative rules requiring new special education activities; b) Mich. Comp. Laws § 380.1284, requiring an increase in the hours of pupil instruction; and c) record keeping requirements related to the creation of Michigan's Center for Educational Performance and Information (CEPI) by Mich. Exec. Order No. 2000-9. *Id* at 115.
- In *Adair I*, school districts and taxpayers again brought suit based on alleged violations of Mich. Const. art. 9, § 29. *Adair v State*, 486 Mich 468 (2010). Plaintiffs' allegations were based on the costs of recordkeeping and reporting requirements imposed by Mich. Exec. Order 2000-9, which created the CEPI, and MCL 388.1752 which required school districts to maintain records and report information to the CEPI. *Id* at 473-474.
- In *Adair II*, school districts and taxpayers again brought suit based on alleged violations of Mich. Const. art. 9, § 29. *Adair v State*, 497 Mich 89 (2014). Plaintiffs alleged that the State failed to fund the costs of recordkeeping and reporting requirements related to the CEPI during the 2010-2011 and 2011-2012 fiscal years. *Id* at 97.
- In *Adair III*, the identical school districts and taxpayers that were in the previous *Adair* litigation again brought suit based on alleged violations of Mich. Const. art. 9, § 29. *Adair v Mich Dep't of Ed*, ___ Mich App ___, 2016 Mich. App. LEXIS 1742 (2016). Plaintiffs alleged that the State failed to fund the costs of recordkeeping and reporting requirements related to the CEPI during the 2012-2013, 2013-2014, and 2014-2015 fiscal years. *Id* at 1. The Court of Appeals upheld the special master's application of res judicata, finding that the suit sought to reopen litigation of the base rate established in *Adair II*. *Id* at 14-15.

Defendants wholly fail to meet ***their burden*** to show that any of the parties in the *Adair* cases are in privity to those in the present case or that the present case concerns the same transaction arising from the same operative facts as those in any *Adair* case.

1. Plaintiffs are Not in Privity to any Parties in a Prior Action.

The second element of res judicata requires "that the parties in the later suit be the same or be those in privity with them." *Adair v State*, 470 Mich. 105, 121 (2004). To establish privity, the present Plaintiffs must be shown "to be so identified in interest with another party that the first **litigant represents the same legal right that the later litigant is trying to assert**." *Id* at 122 (emphasis added). At its *most encompassing and least restrictive*, privity "requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id* (quoting *Baraga Co v State Tax Comm*, 466 Mich 264, 269 -270 (2002)).

In this case, there is no privity between the Plaintiffs or any of the parties in any prior litigation. No fair analysis could find that the *Adair* litigants represented the same legal right that the Plaintiffs have asserted. Defendants have not articulated any substantial identity of interest or any functional relationship between the Plaintiffs and the parties in *Adair*. And, in no way can the interests of the present Plaintiffs be said to have presented and represented in the *Adair* litigation.

In *Adair*, the plaintiffs were hundreds of school districts – many identical between cases. The individual plaintiffs were taxpayers from within the party school districts. Those cases were art. 9, §29 claims based on unfunded state mandates. If successful, the individual school districts would have received payments for the costs of the mandated activity and this money would have counted against the total allocation of funds to all local governments. Counties, cities and townships would have received none of these funds and likely seen their funding reduced.

In the present case, the claims are based on art. 9, §30 and no school districts are a party. This lawsuit is based on the failure of the State to properly calculate and pay the proper proportion of total state spending to all units of Local Government, *taken as a group* – including counties,

cities, and townships. The group interests of funding for all units of Local Government rather than increased funding for a specific subgroup (school districts) that may detract from the amount allocated to the other subgroups (counties, cities, townships, etc.) clearly has the potential for conflict such that it cannot be found, as a matter of law, that the Plaintiffs in this case were represented and protected by the parties in the *Adair* litigation

2. Same Transaction or Occurrence That Could Have Been

The Michigan Supreme Court "has taken a broad approach … holding that it bars not only claims already litigated, but also every claim **arising from the same transaction** that the parties, could have raised but did not." *Adair v State*, 470 Mich at 121 (emphasis added). The present claim was not litigated in any previous lawsuit. As a result, the Defendants must prove that Plaintiffs' claim arises from the same transaction as the claims in the *Adair* cases.

Defendants thus must meet "the "**transactional test.**"[1] *Washington v Sinai Hosp*, 478 Mich 412, 420 (2007) (emphasis added); See also *Askew v Ann Arbor Public Schools*, 431 Mich 714, 731-732 (1988) (emphasis added). Under the test, the matter concerns the same transaction as the prior claim when it arises from "**a single group of operative facts**." *Washington*, at 420 (emphasis added) and *Adair*, 470 Mich at 124 (emphasis added). The Michigan Supreme Court clarifies further that courts must pragmatically ask: "**whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit**." *Adair*, 470 Mich at 125 (emphasis added). The Defendants have not and cannot show that the present case arises from the same transaction and from the same group of operative facts as any of the *Adair* cases.

[1] Notably, the "same transaction" requirement is substantially the same as that for compulsory joinder of claims under MCR 2.203 (A). Res judicata has traditionally be used to bar claims that were required to be joined in a previous action. Defendants seek to expand the doctrine to now also bar claims subject to the rules of permissive joinder under MCR 2.203 (B). If permitted, the doctrine of res judicata would be radically altered to render permissive joinder rules null in Headlee claims with likely unintended results in all other causes of actions.

None of the *Adair* litigation can be fairly said to arise from the same transaction as the present case. In *2004 Adair*, the case arose from new state-mandated activity arising from seven new administrative rules concerning special education activities; a new statute requiring an increase in the hours of pupil instruction; and CEPI recordkeeping and reporting requirements arising from a new executive order. *Adair I, Adair II,* and *Adair III* related to the same recordkeeping and reporting requirements as *2004 Adair*. Neither the Plaintiffs' claims for relief, nor any of the administrative rules, statutes, or the executive order, nor the facts of the mandated activity underpinning any of the *Adair* claims are at issue in the present case. Since the facts raised by and at issue in the *Adair* cases are unrelated to those in the present case in time, space, origin, motivation and would not form a convenient trial unit, they cannot fairly be found to compose a single operative group of facts and thus, do not arise from the same transaction. Res judicata therefore does not apply.

D. Factual Issues

Defendants' argue that no factual discovery is needed concerning Counts I; Count II; and Count IV. Plaintiffs agree that liability can be determined first, and that factual development would only become necessary to determine the amount of underspending - at the remedy stage.

III. CONCLUSION

Plaintiffs respectfully pray that this Honorable Court enter an order denying Defendants standing, insufficient pleading, and res judicata arguments and grant a briefing schedule to directly proceed to a full hearing on the merits under MCR 7.206 (E)(3) on the legal liability issues raised by Counts I, II, and IV of Plaintiffs' Complaint and that factual development be reserved until after a decision on the merits of the legal issues.

Respectfully Submitted,

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Date: December 21, 2016

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Defendants.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the attached *Reply Brief On New Issues/Affirmative Defenses Raised By Defendants' Answering Brief* with the Clerk of the Court using the TrueFiling system, which will send notification of such filing to all electronic case filing participants.

Respectfully Submitted,

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