STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(BORRELLO, P.J. (CONCURRING IN PART AND DISSENTING IN PART) AND METER, J. (CONCURRING IN PART AND DISSENTING IN PART) AND SHAPIRO, JJ.)

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

Plaintiffs-Appellants/Appellees,

Supreme Court Case No. 160658
Supreme Court Case No. 160660

v.

Court of Appeals Case No. 334663

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-Appellees/Appellants.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS/APPELLEES TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT, STEVE DUCHANE, RANDALL BLUM, AND SARA KANDEL

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Defendants argue for the patently absurd result that Michigan *voters intended* explicit language within art 9, §§ 25, 29, 30 and 33 *to be entirely meaningless* within the Headlee Amendment's balanced framework of revenue restrictions and guaranteed state spending to local governments. They seek total freedom to spend as they see fit, contrary to the voters' will. A quarter century of shorting and destabilizing local governments is enough.

Plaintiffs have shown that the State of Michigan annually fails to make the constitutionally required payments to local governments required by §§ 25 and 30. Count I of Plaintiffs' Complaint alleges that Proposal A of 1994 ("Prop. A") revenue that is paid to local governments is properly excluded from the § 30 numerator because it is spending from a tax shift that substantially increases the tax burden upon local government. Count II alleges that spending paid to public school academies ("charter schools") is properly excluded since charter schools are not local governments as defined by § 33 and Count IV alleges that spending to pay the necessary costs of new and expanded activity and services that the state requires local governments to perform ("new state mandates") must be excluded because inclusion violates prohibitions found in § 25 and the first sentence of § 29 and defeats the purpose of § 30.

Instead of meeting Plaintiffs' allegations head on, Defendants sow confusion and obfuscate, offering an indigestible stew of logical fallacies and contradictory, straw man, and red herring arguments, each of which fails to overcome clear rules of constitutional construction and the undisputed facts. An example is Defendants' absolutist argument that, regardless of the Amendment's prohibitions, all state spending paid to local governments must be included in the § 30 numerator. Defendants' argument is contradicted by their recognition of, and presumed compliance with, the holding in *Oakland Cnty v Dep't of Mental Health*, 178 Mich App 48; 443

NW2d 805 (1989*)* appeal dismissed and remanded sub nom *Cnty of Oakland v Michigan Dep't of Mental Health*, 437 Mich 1041; 471 NW2d 619 (1991) (Monies "technically paid" to local governments to fulfill a state obligation are properly excluded. *Id*. at 58).

Another example is Defendants' claim that the Headlee Amendment's Drafters' Notes form one of three strands in a "cable-like steel braid" the Defendants. (See Defendants' *Appellees Brief*, Doc 185, at 2). The Defendants however break their own cable by then claiming that the Drafters' Notes have no real import. (*Id*. at 13, 32, and fn8). Rather than a supporting cable, the notes represent a steel dagger to the heart of Defendants' tortured arguments. The plain language of the Drafters' Notes overwhelmingly supports Plaintiffs' common sense understandings of the text. (See Plaintiffs' *Appellants Brief* at 18-19, 41-43, and 45; and Plaintiffs' *Appellees Brief* at 8-9, 25, 28-29, and 43-45). Plaintiffs' understandings are confirmed by an affidavit from the notes' author, William Shaker, and by an amicus brief from the organization that led the effort to place the Headlee Amendment on the ballot and that is led by the Amendment's only surviving author, William McMaster. (See Affidavit of William Shaker, Pls' App Vol 8, at 01288a; and Taxpayers United MI Foundation's *Amicus Brief*, Doc. 192, at 6-11).

Other such examples abound. Defendants invent a straw man argument that the Headlee Amendment does not require funding of "programs of choice." (See Plaintiffs' *Appellees Brief* at 20-21). It is undisputed that a significant percentage of the § 30 proportion in 1978 funded the necessary costs of *existing* activities and services required of local governments. The percentage that funded discretionary programs, if any, is entirely unknown. It is unknown because the Defendants intentionally fail to compile the data required by state law. (See *Id.* at 19-21). More importantly however, *the Headlee Amendment does not make the distinction that Defendants seek to impose*. Instead, the Amendment seeks to maintain the proportion of spending that existed in

1978, without distinction between such categories, to preserve the ability of local governments to perform activities and services at the level existing in 1978.

A fourth example is Defendants' clear logical fallacy that because art 9, § 11 establishes the school aid fund and guarantees a certain level of state aid to public schools, all monies paid from the school aid fund must be included in the § 30 numerator. The conclusion that Defendants' argue is clearly disconnected from the premise. Sections 11 and 30 serve separate and distinct purposes and the purpose of each is only upheld by excluding Prop. A and charter school spending from the § 30 numerator. When this spending is included in the § 30 numerator, other payments to local governments for existing activities and services are reduced, thus undermining § 30's purpose and increasing the tax burden on local taxpayers.

The Defendants' argument on each of the Counts reveals a pattern of engaging in the very schemes identified by Prof. Susan Fino in her article, (cited by the Court of Appeals), and these schemes violate the language of the Amendment and frustrate voters' intent. (See Pls' App Vol 9, at 01558a, Affidavit of Prof. Susan P. Fino). The effect of Defendants' schemes is not neutral, and their practices exert extreme pressure on local governments to increase taxes, assessments, and fees on local taxpayers. (See Plaintiffs' *Appellees Brief* at 11-12).

II. DISCUSSION & ARGUMENT

A. Including Prop. A Spending To Reduce Other Payments Under § 30 Violates The Headlee Amendment

There is no real dispute that Prop. A revenue that is paid to local governments arises from a tax shift. As stated throughout Plaintiffs' briefs, the violation occurs when payments generated by this tax shift are included as state spending in the form of aid under § 30 to sharply reduce other payments that the state makes to local governments. This practice increases the tax burden on local governments and violates § 25's antishifting prohibition.

Defendants' arguments would simply read § 25's antishifting prohibition out of the state Constitution. They would find the words meaningless and merely duplicative of the requirements of § 29. Such a reading is contrary to multiple rules of constitutional construction, most notably the principle that constitutional language should not be interpreted to render the words used as mere surplusage. (See Plaintiffs' *Appellees Brief* at 23-24 and 27-31). Such a reading also conflicts with this Court's finding in *Schmidt v Dep't of Educ*, 441 Mich 236, 254-255; 490 NW2d 584 (1992) (The text of § 25 "evidences the aggregate antishifting purpose embodied in the text of § 30."); and conflicts with voters' intent as evidenced by the plain language of the prohibition and the clear intent expressed within the Drafters' Notes. (See Drafters Notes, Pls' App Vol 6, at 00783a and Vol 9, at 01569a).

A violation of the Headlee Amendment's antishifting prohibition is determined entirely by an action's effect on local governments and not by the Defendants' intent. **There would be no question that the Headlee Amendment is violated if *for the purpose of freeing up revenue for use by the state,* the Defendants intentionally engaged in a scheme that: 1) eliminated and replaced a local property with a state tax where revenues are then paid to local governments; and 2) the new state payments are then used to reduce other spending previously paid to local governments to meet the requirements of § 30**. This is the very conduct that the Defendants engage in, and whether intended or not, these actions violate § 25's prohibition and § 30's purpose.

There is no inherent conflict between the Headlee Amendment and Prop. A. The two measures are consistent when spending from Prop. A revenue is excluded from the numerator of § 30 calculations. It is only when Prop. A spending is included within the numerator that a conflict arises. (See Plaintiffs' *Appellants Brief* at 21-23). Likewise, there is no inherent conflict between art 9, § 11 and the Headlee Amendment. The requirements of § 11 can be met regardless of

whether Prop. A monies are included within the § 30 numerator. The purpose of § 30 however is only upheld when Prop. A revenue is excluded from the numerator.

Defendants wrongly, and without a factual basis, claim that excluding Prop. A from the § 30 numerator will cripple the state's finances. Defendants exaggerate the monies at issue on Prop. A *by between 350% and 1,100%*. (See Plaintiffs' *Appellees Brief* at 12-16). When the correct numbers are used, the shortfall is well within the state's capacity to manage, by making the difficult choices that voters intended. (See *Id.*).

The Defendants' actions markedly contribute to ongoing fiscal crises in local governments across the state. More local governments have entered various forms of financial receivership over the past two decades than in the previous six decades combined. (See *Id*. at 11-16). Over the past two decades, Michigan's local governments have *cut first responders by more than 20% while nationwide local governments have increased such personnel by over 12%*. (*Id.*). As a result of Defendants' violations, hundreds of local governments go before voters *at each election* to maintain or increase local assessments, while State government has *never* had to do so. (*Id*.). It is past time for the Defendants to work within the Headlee Amendment's constraints and to make the hard choices that local governments have been making for decades.

B. Counting Payments To Charter Schools As Payments To Local Governments Violates The Headlee Amendment

On Count II, Plaintiffs show that payments to charter schools are not payments to local governments, and therefore must be excluded from the § 30 numerator. For this spending to be included, charter schools must be a local government, which § 33 defines as a political subdivision of the state. To determine whether charters schools are political subdivisions of the state, courts are required to apply the rule of common understanding.

Throughout, Defendants ignore the rule of common understanding and bypass the

definitional condition that charters schools be political subdivisions of the state. In effect, Defendants ask this Court to find that *voters intended the language defining local governments as political subdivisions of the state in § 33 to be mere surplusage and entirely meaningless*.

In 1978 through the present, the characteristics of a political subdivision of the state are well-recognized. (See Plaintiffs' *Appellants Brief* at 31-37). Political subdivisions of the state are entities possessing political power to act on behalf of and provide local services for citizens within geographically limited areas of the state. (See Plaintiffs' *Appellants Brief* at 31-37). Charter schools simply do not possess these characteristics. Instead, charter schools are nonprofit corporations operating under *a contract* with an authorizing body. (See Plaintiffs' *Appellees Brief* at 16-19). Extremely limited oversight exists over the contract and school operations. (See Citizens Research Council of Michigan, *Improving Oversight of Michigan Charter Schools and their Authorizers*, Report 409 (Feb. 2020), <https://crcmich.org/wpcontent/uploads/rpt409_Charter_School_Oversight-2020-1.pdf> (accessed Dec 2, 2020). As a result, charter schools cannot be found to be within voters' common understanding of local government as that term is defined in § 33 and as it is used in § 30.[1]

Failing under the rule of common understanding, the Defendants argue the ways that charter schools function similar to public schools and school districts. This is a functional

[1] Defendants acknowledge this in their argument that voters would have had no understanding of charter schools as a local government. Defendants draw the wrong conclusion however, inferring that the rule of the common understanding may therefore be modified or disregarded.

Defendants' argument again misses the point when stating that because charter schools are legislatively defined as a "governmental agency," they are therefore within § 33's definition. *Whether charter schools are local governments turns on a question of whether they are in form and substance a political subdivision of the state as commonly understood by voters in 1978* — not on any label attached to them by the Legislature or otherwise. Equally important however, to the extent that charter schools are a governmental agency, *they are agencies of the state performing governmental functions of the state*. (MCL 380.501. See also Plaintiffs' *Appellees Brief* at 16-19).

equivalency test, the type of which was explicitly rejected by this Court in *Paquin v City of St Ignace*, 504 Mich 124; 934 NW2d 650 (2019). (See Plaintiffs' *Appellees Brief* at 35-41).

Rather than seeking to meet § 33's definition and the rule of common understanding, the Defendants advance another straw man argument, strenuously arguing that charter schools are public schools for purposes of § 11. They are and that is not in dispute in this case. **However, it is again a clear logical fallacy to argue that because charter schools are public schools for purposes of receiving state payments, they are therefore local governments under the Headlee Amendment**. The logical disconnect is even more acute in the presence of § 33's explicit definition of a local government. An entity can be a public school for purposes of receiving state money under § 11, but not a local government under § 30, and the language and purposes of both provisions are only upheld upon such a finding. Moreover, this is exactly what the Legislature intended when it set up charter schools *as an alternative to and to compete* with the local government school districts.[2]

C. Including Spending To Pay The Costs Of New State Mandates To Reduce Other Payments Under § 30 Violates The Headlee Amendment

On Count IV of Plaintiffs' Complaint, Defendants argue that *voters intended for the prohibition*[3] *found in the first sentence of § 29 to be without meaning and for § 30 to be merely symbolic and not serve any substantive purpose within the Headlee Amendment's framework.*

Basing its arguments again on their discredited absolutist position, the Defendants argue for the absurd outcome that § 30 payments can be entirely composed of state spending required by

[2] The Legislature implicitly recognized this in the Public School Academies Act at MCL 380.501. (Stating that charter schools are school districts "for purposes of" art 9, § 11, but omitting any reference to § 30 or § 33. Under established law, the omission is presumed to be intentional.).

[3] Prohibiting the state from reducing the state financed proportion of the costs of *existing* activities and services required of local government. Const 1963, § 29.

§ 29 to fund the necessary costs of *new* state mandates. There is no dispute that when the state includes funding for new state mandates within the § 30 numerator, the state reduces other spending previously paid to local government. In effect, the practice results in local governments, *and not the state,* funding the costs of new state mandates and in the extreme, could have the absurd result of eliminating all other spending paid to local governments under § 30. **Voters who adopted the Headlee Amendment certainly did not intend that every new mandate adopted by the state would reduce aid to local governments under § 30 and that, one day, funding of new state mandates could comprise the entire amount of spending paid to local governments**.

The Drafters' Notes confirms Plaintiffs' common sense understanding. Only a fantastical reading of the text and disregard of the uncontested evidence could find otherwise. The notes read: "[a]dditional or expanded activities mandated by the state, as described in Section 29, would tend to increase the proportion of total state spending paid to local government [in Section 30]." (Drafters' Notes, Pls' App Vol 6, at 00784a and Vol 9, at 01570a). A plain reading of the words "tend to" imparts a meaning of "inclined in … operation or effect" and "likely to behave in a particular way." (See *Random House Unabridged Dictionary*, at 1955 (2nd Ed.) and *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/tend> (accessed December 3, 2020)). The drafters thus recognized that new state mandates were *likely to* increase the proportion of state spending paid to local governments under § 30.[4] Appropriately, the drafters did not use the term "always", because not all new state mandates require additional payments to local governments. See MCL 21.233(6) (the state is not required to pay local governments for the costs of new state mandates where the costs are *de minimus*; where there are offsetting savings to local

[4] Defendants seek to read "tend to" *entirely opposite* from its dictionary definitions and plain meaning to find the word synonymous with "unlikely", "rarely", or "almost never."

government; and where other federal or external aid programs exist to recoup the costs); and *Adair v State,* 486 Mich 468, 499; 785 NW2d 119 (2010) (*de minimus* costs are excluded). Notably, Plaintiffs' plain language and common sense understanding of § 30 and the text of the Drafters' Notes is confirmed *by both* the only living author of the Headlee Amendment, William McMaster, and the author of the Drafters' Notes himself, William Shaker.

As recognized by the Court of Appeals, exclusion of new state mandate funding from the § 30 numerator is consistent with the requirements of the first sentence of § 29, while permitting such spending to be included within the § 30 numerator potentially erases that sentence's requirements. (See (Pls' App Vol 8, at 01423a; and Plaintiffs' *Appellees Brief* at 42-46).

D. The Auditor General And The Office Of The Auditor General Are Subject To Mandamus

The only mandamus relief at issue on this appeal is the Court of Appeals grant of mandamus prospectively requiring state officials, including the Auditor General, to exclude state spending to fund new state mandates from the numerator of the § 30 calculation. Defendants have not articulated any reasonable factual or legal basis for its argument that the Auditor General and its office are not subject to mandamus in this case. (See Plaintiffs' *Appellees Brief* at 48).

CONCLUSION & RELIEF

The Court of Appeals clearly erred in reaching its decision on Count I and on Count II of Plaintiffs' Complaint. On Count I, the court failed to properly consider the antishifting prohibition found in the plain language of § 25 and embodied in §30 of the Headlee Amendment. Spending from Prop. A revenue clearly results from a tax shift and when included in the §30 numerator supplants and reduces other payments previously made to local governments, causing a substantial increase in the tax burden on local taxpayers.

On Count II, the court failed to apply the rule of common understanding to terms found in

§33's definition of local governments and erred by finding that the Legislature can periodically change the meaning of constitutional terms. Under the §33, local governments are only those entities that are political subdivisions of the state. Charter schools are not political subdivisions of the state, but rather are nonprofit corporations operating under a contract with authorizers, who are overwhelming state entities.

The Court of Appeals reached the correct decision on Count IV of Plaintiffs' Complaint. State spending to cover the cost of new state mandates is not spending in the form of aid paid to local governments for purposes of § 30 and must be excluded from the numerator in the state's calculations of the constitutional aid proportion.

Wherefore, Plaintiffs request that this Court direct that judgment be entered in favor of the Plaintiffs on Count I and II and that the judgment and the relief granted by of the Court of Appeals on Count IV be upheld.

Respectfully Submitted,

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Defendants-Appellees/Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, I electronically filed the attached *Reply Brief of Plaintiffs-Appellants/Appellees Taxpayers For Michigan Constitutional Government, Steve Duchane, Randall Blum, And Sara Kandel* with the Clerk of the Michigan Supreme Court using the MiFILE system, which will send notification of such filing to all electronic case filing participants and attorneys of record for the parties.

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