STATE OF MICHIGAN
IN THE COURT OF APPEALS

ON REMAND FROM THE MICHIGAN SUPREME COURT

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

Plaintiffs,

-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.
_____/

Supreme Court Nos. 160658, 160660

Court of Appeals No. 334663

AMICUS CURIAE BRIEF BY MICHIGAN MUNICIPAL LEAGUE (MML), GOVERNMENT LAW SECTION (GLS) OF THE STATE BAR OF MICHIGAN, MICHIGAN TOWNSHIPS ASSOCIATION (MTA), AND MICHIGAN ASSOCIATION OF COUNTIES (MAC) IN SUPPORT OF PLAINTIFFS-APPELLEES TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT, ET AL.

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The Michigan Supreme Court remanded this matter to the Court of Appeals in its Opinion dated July 28, 2021.

STATEMENT OF THE QUESTION PRESENTED

WHETHER CHARTER SCHOOL/PSA FUNDING SHOULD BE COUNTED AS SPENDING PAID TO A UNIT OF "LOCAL GOVERNMENT" FOR PURPOSES OF § 30 OF THE HEADLEE AMENDMENT, IF THE AUTHORIZING BODY OF THE CHARTER SCHOOL/PSA IS A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR COMMUNITY COLLEGE.

Plaintiffs answer: No.
Defendants will likely answer: Yes.
This Court on Remand should answer: No

STATEMENT OF INTEREST

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership comprises hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund (LDF). The Michigan Municipal League operates the LDF through a board of directors that is broadly representative of its members. The purpose of the LDF is to represent the member cities and villages in litigation of statewide significance.

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 852 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to governmental law. The GLS provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of

Michigan website, public service programs and publications. The GLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the GLS participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The position expressed in the *amicus curiae* brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of more than 1,225 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan. The MTA is governed by a Board of Directors who are township government officials.

The Michigan Association of Counties (MAC), a non-profit association founded in 1898, consists of 83 Member Michigan Counites. It is a statewide organization dedicated to representing the interests of Michigan's county commissioners. It promotes the education of those county officials and communication and cooperation between them, and it advocates on their behalf in the Michigan and federal legislatures.

The governing bodies of the above entities have all authorized and directed this office to file an *amicus curiae* brief in the within cause in support of Plaintiffs.

This Court's Order on remand from the Michigan Supreme Court, dated September 8, 2021, as amended September 24, 2021, states that *Amici* may file a brief by October 13, 2021.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amici acknowledge that the "Factual Background & Procedural History" Section of the Supreme Court's Opinion in *Taxpayers for Michigan Constitutional Government v State of Michigan*, ___ Mich ___ (2021), Slip Op. dated July 28, 2021, pp. 5-6, contains all the necessary factual and procedural information regarding this case, except for the determinations of that Court relevant to the matters now back before this Court. The Michigan Supreme Court issued its Opinion on July 28, 2021. It remands two separate questions to this Court:

1. "[W]e remand this case to the Court of Appeals to consider whether PSA funding should be counted as spending paid to a unit of "Local Government" if the authorizing body of the PSA is a school district, intermediate school district, or community college."
2. "[W]e remand so that the Court of Appeals may clarify its grant of mandamus relief or take other action not inconsistent with this opinion."

Taxpayers, Slip Op., p. 31-32.

This Brief substantively addresses only Question 1 above, relating to charter schools. It is *Amici's* understanding that Plaintiff Taxpayers for Michigan Constitutional Government (TMCG) will be seeking additional relief from the Court and/or clarifying its claims on the mandamus issue, and *Amici* will therefore leave TMCG to address Question 2.

STANDARD OF REVIEW

The Constitutional issues raised on appeal are reviewed *de novo*, with the primary goal of ascertaining the purpose and intent of any constitutional provisions at issue. *Mahaffey v Attorney General*, 222 Mich App 334, 335; 564 NW2d 104 (1997).

INTRODUCTION AND SUMMARY OF ARGUMENT

The two issues on remand from the State Supreme Court—whether payments to charter schools authorized by a local or intermediate school district or community college are payments in aid of local government and whether the state should be forced to file reports required by

law—present an opportunity for this Court to provide a rare corrective to a couple obvious deviations from what the voters expected and intended when they approved, by passing Headlee, some severe limitations on local government financing in exchange for the "hold harmless" concept set forth in §30 of Headlee providing that "the proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79."

Both issues seem clear enough. The private companies that run the charter schools (or Public School Academies, or PSAs) for the state and get the state's money as a pass through from an authorizing body—even if that body happens for some reason to be a local or intermediate school district or community college—aren't engaged in anything remotely like local governance. Indeed, they are intentionally and proudly just the opposite of that. The school districts or community colleges that have facilitated those charter schools/PSAs have no claim on the state's money being sent to those private companies, and only the barest role in the governance of those private companies—one the Supreme Court calls "merely symbolic." *Taxpayers, supra*, Slip Op. p. 19. As explained further below, the relevant school laws say that the school aid money from the state is for the charter school/PSA, not for the school district that acts as the mere agent for that private company; those laws make clear that it must be directly passed through to that PSA, with no exceptions. That's not a payment "to" the school or the community college, but rather a payment to the company.

When the charter school/PSA concept was created with the 1993 amendments to the Revised School Code—at essentially the same time the Legislature decided to turn all local school funding on its axis—the result was to create, out of whole cloth, a new and different kind of school. More private than public—but just public enough to keep it constitutional, of course, as the State Supreme Court found in an early challenge to the constitutionality of the concept. *Council of Organizations & Others for Ed About Parochiad, Inc. v Governor* 455 Mich 557; 566

NW 2d 208 (1997). But more importantly, an independent school, accountable to parents (customers) basically through free market choice, and to state and/or local government really only through a set of contractual obligations.

When the applicable provisions of the Revised School Code, MCL 380.501, *et seq.*, and the State School Aid Act, MCL 388.1601, *et seq.*, are read with the pretty ambitious goals of school reformers in mind, it is clear that a bright line of demarcation was drawn between the charter schools/PSAs and their authorizers. It's no longer important to talk about whether that was a good idea. For this Court's task on remand, it matters only that this clear and intentional separation of the private companies that run these PSAs from the school districts/community colleges that might authorize them exists. Because that answers the question on remand whether the payments to the PSAs (who are not political subdivisions of the state) are really payments to their authorizers (who are political subdivisions of the state). The answer is that, no, the payments are not to the authorizer, but to the charter school/PSA—even if that authorizer is a traditional school district or community college—and therefore cannot count toward the state's obligations to local governments under §30 of Headlee.

THE SUPREME COURT'S OPINION IN *TAXPAYERS*

The Supreme Court's Opinion frames a narrow question for this Court on remand on the charter school issue: Is funding for charter schools/PSAs that are authorized by a school district (local or intermediate) or a community college actually spending on (or paid "to") the district or the college that then counts as state aid to local governmental units for purposes of §30 of Headlee? Note that this question is framed quite a bit differently than the way the charter school issue was discussed and decided in this Court originally. The Supreme Court *rejected* both of the alternatives (majority and dissent) talked about by this Court in *Taxpayers for Michigan Constitutional Gov't v Michigan (on Reconsideration),* 330 Mich App 295; 948 NW2d 91 (2019), when it found that PSAs are (a) not school districts, and (b) not, by themselves, political

subdivisions of the state. Instead, the Supreme Court's Opinion eventually boils the issue down to the question whether, if its authorizer *is* a political subdivision, can the spending by the state on that PSA be considered spending on the authorizer—and therefore spending on local government.

The Court's starting question, under Headlee, was whether money paid to charter schools/PSAs from the School Aid Fund is part of state spending "to all units of local government, taken as a group." If a payment is made by the state "to" a "unit of local government," then it gets to count toward the Headlee fraction. "Local Government" is defined in Headlee as "any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government."

The Supreme Court's initial approach to the question was consistent with this Court's analysis below—to see if it can be said that a charter school is one of those things specifically listed in Headlee. The Supreme Court starts with this Court's finding that a charter school is a "school district." The Supreme Court disagreed, explaining that it doesn't matter if the Legislature equates charter schools to school districts in the Revised School Code or the State School Aid law. *Taxpayers,* Slip Op. pp 13-16. The Court essentially concluded that because a charter school is essentially a private company, voters who approved Headlee in 1978 would not have considered such an entity to be a school district. *Taxpayers,* Slip Op. p 16.

That leaves us, the Supreme Court then said, with evaluating the question whether a charter school/PSA is some other kind of political subdivision of the state. And the Supreme Court answers that question in the negative too: "We further hold that PSAs are themselves not a 'political subdivision of the State' as voters would have understood the term when the Headlee Amendment was ratified." *Taxpayers,* Slip Op. p 3.

So, if a charter school isn't a school district (or any of the listed kinds of units of local government), and isn't "itself" a political subdivision of the state, then why didn't that end the Court's analysis? Couldn't the Court have ended the discussion there and ruled that payments to these PSA's was not spending on local government? The answer is that basically the Court shifted the inquiry to a different one, focusing not on the defining characteristics of a charter school, but on those of the ***authorizing body*** for the charter school instead.

The Supreme Court found first that a charter school whose authorizing body was a state university "definitively" could not be included in the definition of a unit of "local government" because a state university is clearly not a political subdivision of the state. *Taxpayers,* Slip Op. p 21.

But the Court then went on to focus on the other kinds of entities that can authorize charter schools: specifically "school districts, intermediate school districts, and community colleges." All of those bodies, the Court pointed out, ***are*** political subdivisions of the state, so maybe a payment to PSAs authorized by them is a payment to the authorizing political subdivision, which might then count for Headlee. It then decided that it would not answer that question itself, but would defer back to this Court. It framed the narrow question that is before this Court:

> We express no opinion on this issue because we believe it to be worthy of further briefing and full consideration by our Court of Appeals. **Accordingly, although we hold that a PSA is not a political subdivision of the state, we remand this case to the Court of Appeals to consider whether state funding to PSAs authorized by a school district, an intermediate school district, or a community college should be counted as state spending to a unit of local government for purposes of § 30 of the Headlee Amendment**.

Amici submit that the answer to the Court's question is straightforward: In no meaningful or legal sense is a payment to a charter school/PSA—even though it comes through a school district or community college as a conduit and might be for a school authorized by a school

district—a payment "to" those units of local government. It's still just a payment to the private company that is the PSA.

ARGUMENT

IN NO MEANINGFUL OR LEGAL SENSE IS A PAYMENT TO A CHARTER SCHOOL/PSA—EVEN THOUGH IT COMES THROUGH A SCHOOL DISTRICT AS A CONDUIT, AND MIGHT EVEN BE FOR A CHARTER SCHOOL/PSA AUTHORIZED BY A SCHOOL DISTRICT OR A COMMUNITY COLLEGE—A PAYMENT "TO" A UNIT OF LOCAL GOVERNMENT FOR PURPOSES OF § 30 OF THE HEADLEE AMENDMENT. IT IS STILL JUST A PAYMENT TO THE PRIVATE COMPANY THAT IS THE CHARTER SCHOOL/PSA ITSELF.

The Supreme Court hit the nail on the head when it found that, just because the state Legislature has passed a law that deems charter schools/PSAs to be school districts for purposes of the receipt of state school aid, that does not mean that a PSA is a school district for Headlee purposes. *Taxpayers,* Slip Op. p 15. *Amici* will take that conclusion one step farther and say that the determination by the state to so classify these state-sponsored private companies as public school districts cannot possibly confer upon them a *constitutional* status as a local unit of government either, if the voters who approved Headlee would not have contemplated such a determination.

1. PSAs are really part of a statewide system of schools, ostensibly public but quite different from any existing public schools, that was created to compete, as rivals, with local school districts.

Before Proposal A, K-12 school funding was primarily a local endeavor. Most school funding came from local real and personal property taxes. Those locally-raised dollars were "neutral" as far as Headlee was concerned, since they were not part of the state aid to local governments calculation.

In 1993, the state passed a law (not a constitutional amendment), PA 145 of 1993, that basically took away local governments' ability to impose taxes for their schools, leaving us collectively with a school funding crisis to resolve. Having created the problem, the state then led the crafting of a proposed solution in the form of Proposal A, which operates essentially as a

state "takeover" of local school funding, with a collection of property and other taxes levied by the state and then paid over to local school districts according to a formula.[1]

As part of the overall "education reform" package of 1993, the state added the charter school option through PA 362 of 1993. This new concept sprang from the efforts of state legislators, school reformers, education and political consultants, and think tanks—not, in other words, from the voters by way of initiative. Part of a national movement interested in finding alternatives to local public schools, these groups found in charter schools a way to fund what are in reality non-public, non-local schools that are expected to compete with local public schools. It is not hyperbole to say that the charter school/PSA concept was intended to be a radical departure from the status quo:

> One of the most widely discussed reforms in education, charter schools are a new breed of public school—a hybrid that mixes elements of traditional public schools (universal access and public funding) with elements usually associated with private schools (choice, autonomy, and flexibility). The movement is part of a larger set of national and international trends toward subjecting the delivery of public services to market forces. This, its proponents hope, will make education and other public services more efficient and responsive. It is, in short, an attempt to harness private interests and institutions in the service of public interests.

What's Public About Charter Schools: Lessons Learned About Choice and Accountability, Miron and Nelson, 2002, page 2. According to the authors of that study, the Michigan version of the charter school experiment:

> . . . is widely regarded as one of the most permissive in the country. Not surprisingly, the state has more charter schools than just about any other in the country. Of equal interest, Michigan's charter schools are unsurpassed in their efforts to employ privatized services, mainly through contracts with educational management organizations (EMOs).

Id. at 194.

[1] There are some continuing local aspects to school funding to deal with existing funding levels in various school districts throughout the state, but this description is generally accurate.

What the state created in 1993, then, was a new thing, born out of the idea that, while government ought to support "public" education, there's nothing that says government needs to ***run*** it. But that idea ought to also count for something when it comes to the state's efforts to treat those privately-organized, "free market" things that it created as part of the normal concept of local government when it comes to adding up the state's spending on actual government entities. Charter schools/PSAs—even when authorized by a unit of local government like a school district—aren't actually those governments. That's the whole point of the charter school exercise.

a. PSAs are private companies, and should be recognized as such.

Regardless of the description of them by the state Legislature, charter school/PSA entities are private companies, literally set up under the state's Nonprofit Corporation Act, MCL 450.2101, *et seq*. Any person or entity can apply to open and operate a charter school as a non-profit corporation guided by a board of directors, although a contract to operate a PSA is awarded by the authorizing entity on a competitive basis. MCL 380.502. They are governed by articles of incorporation that must meet only the minimum standards required by state law, as set forth in MCL 380.502(3)(c) of the Revised School Code. Those standards include a governance structure for the school, its educational goals, an admission policy complying with the School Code, a school calendar and day schedule, a description of staff responsibilities, and an agreement to comply with the School Code. The charter school/PSA provisions of the Revised School Code, and these standards, make up the "charter" of the school pursuant to which it is obliged to operate—which, while it sounds more grand, is basically just a contract between the authorizing entity and the private company organized under the Nonprofit Corporation Act.

The Supreme Court's description of charter schools/PSAs as something very different from what we have traditionally understood public schools to be is helpful in framing the issue now before this Court:

> Instead of a locally elected school board directly beholden to the voters of a school district, the governing body of a PSA is made up of a board of directors comprised of privately selected members. MCL 380.503(11). Unlike a school district board, the board of directors of a PSA may enter into a contract with an education-management corporation to manage or operate the PSA or to provide the PSA with instructional or other services. See MCL 380.503c; MCL 3800(k) and (n). A PSA is funded solely by the state and may not levy taxes like a school district. A PSA, in fact, is often viewed as an *alternative* to the traditional educational services offered by a school district, not an equivalent. Accordingly, we conclude that a PSA is not a "school district" as Headlee voters would have understood the term.

In other words, the Legislature in 1993 set out to create something very different from what we understood as local government public schools—and it succeeded!

What the State has created is an alternative not just to traditional educational services, as the Supreme Court held, but an alternative to traditional local ***governmental*** service itself. Given that reality, the cost to the state of providing for that alternative service through private companies—even if those companies are lightly (or symbolically) overseen by a local/intermediate school district or a community college under a contract—should not be counted by the state as a payment "to" units of local government in aid of *their* services. Those payments aid a *state* service.

b. The involvement of local school districts is strictly as a conduit/pass-through to a completely separate, private legal entity.

The law creating PSAs as part of the Revised School Code makes clear that any efforts of oversight or management of charter schools by a local school district is not being done by that district as a local unit of government delivering its usual services, but rather as essentially a kind of private independent contractor, being paid to undertake the state's obligations by monitoring the charter schools under the School Code on a fee-for-services basis, with such fee not to exceed 3% of that charter school's total budget:

> (6) An authorizing body shall not charge a fee, or require reimbursement of expenses, for considering an application for a contract, for issuing a contract, or for providing oversight of a contract for a public school academy in an *amount that exceeds a combined total of 3% of the total state school aid received by the public*

> *school academy in the school year* in which the fees or expenses are charged. An authorizing body may provide other services for a public school academy and charge a fee for those services, but shall not require such an arrangement as a condition to issuing the contract authorizing the public school academy. (Emphasis added.) Emphasis added.

MCL 380.502(6).

The cost of operating a charter school/PSA is paid by the state directly from the State School Aid Fund, and is based on the charter school's budget. MCL 380.507. The authorizing body receives the payment from the state from the School Aid Fund as the state's "middleman," and the authorizing body then issues the check to the charter school, passing on all the money to the charter school. MCL 380.507(3). It does so as the "fiscal agent" for the PSA—which does exactly describe the relationship between the two entities: the PSA is the principal, not the school district. As the above-quoted language of the MCL 380.502(6) makes clear, it is not the school district that is getting the aid—it is the PSA. When a charter school is established, no additional monies are paid to a local or intermediate school district to benefit the local school district's operations overall, except those minimal fees paid directly for the cost of the oversight—and then only if, of course, the local or intermediate school district is the authorizing body overseeing the charter school.

Except for that nominal fee for services, then, a local or intermediate school district gains little for authorizing a charter school, other than perhaps the dubious honor of having a competing state public school within its borders. Other sections of the Revised School Code make it abundantly clear that charter school/PSA stands alone and apart from both its authorizer and the local school district that passes through the state's aid to it. For example, MCL 380.503b says that the debt of a PSA is not an obligation of the authorizing body. MCL 380.504a provides that a charter school/PSA can sue and be sued in its name, can enter into contracts in its own name, can solicit and accept grants in its own name, and borrow money in its own name. It can also

enter into agreements with private entities (e.g., educational management organizations) to provide various services, including class instruction. MCL 380.503c.

This clear separation between the local school district and any charter school/PSA is made even more clear in the State School Aid law. In fact, there is no other legal service that makes it more clear that the state considers its payments to charter schools/PSAs as being made to them—to those private companies—as opposed to the local school districts that simply pass those payments along.

The same is clear in the language of the State School Aid law, which confirms the school district only as a delivery system. For example, MCL 388.1769, literally titled "State aid to public school academies:"

> In order for ***a public school academy to receive state aid*** under this act, the public school academy shall demonstrate to the satisfaction of the department that the public school academy has made a good faith effort to advertise, throughout the entire area of the intermediate district in which the public school academy is located, that the academy is enrolling students and the procedures for applying for enrollment. The department shall not make any ***payments to a public school academy*** until the public school academy supplies evidence satisfactory to the department demonstrating compliance with this section. If a public school academy is a successor to a nonpublic school and more than 75% of the pupils enrolled in the public school academy during its first school year of operation were previously enrolled in that nonpublic school, there is a rebuttable presumption that the public school academy did not make the good faith effort required under this section. (Emphasis added.)

See also MCL 388.1608b, which relates to assigning a "district code" to each individual PSA. The state's payment isn't to the authorizer of the PSA. It's to the PSA.

c. The statewide, alternative character of these schools—their fundamental lack of any characteristic of local government in any meaningful sense—confirms that payments by the state in support of them are not in support of local government.

Charter schools are thus in every real sense *state schools.* Which is probably why, as the Supreme Court recognized in *Taxpayers*, they are predominantly overseen by state public. Charter schools are thus not in any normal sense of the term *local* public schools.

The State delegated its inherent authority to oversee the operation of its privately-run, competing state school system to various entities, which receive payment for services rendered for oversight. While MCL 380.502(4) of the Act delegates oversight responsibilities, it does not relieve the state itself of its ultimate enforcement and supervisory responsibility for such schools:

> (4) An authorizing body shall oversee, or shall contract with an intermediate school district, community college, or state public university to oversee, each public school academy operating under a contract issued by the authorizing body. The authorizing body is responsible for overseeing compliance by the board of directors with the contract and all applicable law. This subsection does not relieve any other government entity of its enforcement or supervisory responsibility.

In fact, MCL 380.504(5) of the Revised School Code ensures that the state retains the authority to enforce the charter, while MCL 380.504(6) sets the manner and limitations on payment by the state to the authorizing bodies for undertaking these monitoring services delegated by the state.

The Michigan Department of Education's Charter Schools Frequently Asked Questions (FAQ) publication, cited by the Supreme Court in *Taxpayers,* Slip Op. p. 13, fn 13, confirms the State's own understanding of its charter school system as a *separate and independent* statewide public school system:

> *What is a public school academy (PSA)?* Pursuant to the Revised School Code (RSC), also known as Public Act 451 of 1976, a *PSA is a state-supported public school* under the state constitution, operating under a charter contract issued by a public authorizing body [RSC §380.501(1)]. PSAs are also commonly referred to as charter schools.

The state argued before the Supreme Court that MCL 18.350 requires charter school funding must be included in Headlee §30 funding for local governments "because education services such as those provided by charter schools are a function previously performed by a unit of local government (i.e., traditional public schools), and are now performed by charter schools. . . ." (State's Combined Brief, pp 25.)

That isn't actually accurate. In fact, as the Supreme Court pointed out in its Opinion, the vast majority (70%) of charter schools/PSAs are run by state universities, which it determined are "definitely" not a "local" government at all. *Taxpayers,* Slip Op. pp 15, fn. 16, and 21, respectively. Although not discussed in the Supreme Court's Opinion, a review of the publication it refers to will show that another 40-plus charter schools/PSAs are run by "Bay Mills Community College"—which isn't a community college at all in the sense of a state-authorized unit of local government, but rather is a federal tribal college and land grant institution created and recognized under federal law.

For those vanishingly few charter schools/PSAs that are actually authorized to be local or intermediate school districts, again, those are fee-based oversight services the districts get paid for—not local government educational services undertaken as school districts.

Local governments do not need charter schools to provide a local public education. Local governments are not required to undertake opening charter schools to provide public education, and most local governments do not. Where they do, their participation is merely as a paid contractor for the state government under MCL 380.503a, or as an overseer of other contractors acting on behalf of the state government with respect to the statutory requirements for charter schools under MCL 380.502. Charter schools are schools that compete with local schools for attendance. They are an *alternative form* of public school that local government has no specific interest in providing. Local and intermediate school districts can and do function as intended without any charter schools in their districts.

While charter schools admittedly function in some respects like a local school district, simply because they are *public* and *provide education*, that is not enough to find that they are equivalent to "local government" as it is contemplated in the State Constitution for purposes of Headlee.

Although the state's argument in the Supreme Court dismissed *Paquin v City of St. Ignace*, 504 Mich 124, 135; 934 NW2d 650, 656 (2019), as inapplicable because tribal government is not a "creature of state law," *Paquin* supports the premise that just because an entity functions in some ways like a local government, it does not follow that it is local government. The Court in *Paquin* stated:

> Nowhere in our Constitution does it state that local-government equivalency suffices; the provision simply states "local ... government." It is thus irrelevant to note all of the functions that the Tribe provides that are similar to that of, for example, the city of St. Ignace—*that the two entities function similarly in some respects does not make them the same.* (Emphasis added.)

In fact, that's exactly what the Supreme Court found in this case, when it declined to find PSAs to be a political subdivision of the state.

The state created this "hybrid" school concept that allows local and intermediate school districts, and community colleges, to provide a service that is not part of their usual or traditional role as local governments—and is instead a contracted-for oversight service that the state pays them for. Their status or role as "authorizers" of charter schools/PSAs is not the same as their status/role as local government. If it were, then the Supreme Court would have decided that state universities, when stepping into a role as authorizer, suddenly becomes a local government. And yet, the Supreme Court found just the opposite.

2. Taking money from other non-school local governments and giving it to private companies is not what voters in 1978 would have contemplated when voting to cast the proportion of State funding for local governments in stone.

"The object of construction, as applied to a written constitution, *is to give effect to the intent of the people adopting it*." 1 Cooley, *Constitutional Limitations* (5th Ed) 1883, pg. 68 (emphasis in original). Headlee requires that a full and faithful respect be given to the voters' manifest intent as enforced by this Court. As the Court put it in *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979):

> The primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question. Also, while intent must be inferred from the language used, it is not the meaning of the particular words only in the abstract or their strictly grammatical construction alone that governs. *The words are to be applied to the subject matter and to the general scope of the provision, and they are to be considered in light of the general purpose sought to be accomplished or the evil sought to be remedied by the constitution or statute.* (Citation omitted) (Emphasis added)[2]

The cases that talk about applying constitutional provisions provide the general guidance that we are to look first to "the common understanding." *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 638 (1978). "'The cardinal rule of construction, concerning language, is to apply that meaning which it would naturally convey to the popular mind.'" *Id.,* citing *People v Dean*, 14 Mich 406, 417 (1866). *Advisory Opinion* adds a few other rules of construction, including (1) that specific provisions prevail over general ones; and (2) that when construing constitutional provisions where the meaning may be questioned, the Court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.

A reviewing court has an obligation to make sure that these constitutional provisions are applied in such a way that in fact carries out the voters' intent. But *Advisory Opinion* makes clear that this Court must try to find out what the voters meant and intended *given the task that they were engaged in* when passing the Headlee Amendment. And, as the Supreme Court noted in *Taxpayers, supra*, at 14, citing *Pillon v Attorney General*, 345 Mich 536, 547; 77 NW2d 257 (1956), "neither the Legislature, nor this Court, has any right to amend or change a provision in the Constitution." That includes one adopted by vote of the people.

[2] See also, *Adair v Mich*, 486 Mich 468, 477-478; 785 NW2d 119 (2010) ("When interpreting constitutional provisions, we are mindful that the interpretation given the provision should be "'the sense most obvious to the common understanding'" and one that "'reasonable minds, the great mass of the people themselves, would give it.'" "[T]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed....")

Basically, all the reasons for the Supreme Court's conclusion that charter schools don't qualify as a school district or as a political subdivision of the state work just as well to explain why the voters would not have considered payments to these private companies as the equivalent of payments to their local schools for purposes of Headlee's §30. It is not even remotely possible that voters in 1978 would have considered the likelihood of the state Legislature creating a new kind of school, funded by public dollars, but run by private nonprofit companies that elect their own boards, and have little—or only "symbolic"—oversight by the state or any other public entity. To then conclude that those voters would expect the state's financial support of these new entities to count toward "state spending paid to" local units of government is fantasy.

The main claim by MTCG in this case was that the Headlee voters in 1978 could not have expected the eventual passage of Proposal A and the school finance reform it cemented. But at least the Court was able to point (like the state did) to the fact that Proposal A was adopted by the voters, too. Charter schools/PSAs were not. Whatever the payments that the state Legislature has decided to make to charter schools/PSAs are, one thing they are clearly *not* is spending paid to local governments as local governments. Payments for contracted services to the state perhaps. But not the payments to local governments of the sort that a voter in 1978 would have considered state aid to the aims of local government.

Presumably it is not lost on the Court that the interest of *Amici* is as local governmental units that are *not* schools or school districts. Every dollar that the state succeeds in getting this Court to include in the category of "state spending paid to" local or intermediate school districts or community colleges is a dollar that is taken away from cities, villages, townships, and counties by the state. School districts and community colleges might not care what this Court finds on remand. But a finding that the state's payments to PSAs as private companies is essentially state spending on school districts does harm other, non-school local governments. As a matter of constitutional interpretation, this Court is obligated to take that into account, by virtue of its

obligation to construe the constitutional provisions and state laws *in favor* of cities, villages, townships, and counties to the extent possible.

The constitutional right of local governments to have all constitutional provisions construed liberally in *their* favor, Article 7, §34, is straightforward:

> *The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor*. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution. (Emphasis added.)

Citing the "Address to the People" portion of the new 1963 Constitution, this Court in *Associated Builders v City of Lansing*, 499 Mich 177, 186; 880 NW2d 765 (2016), highlighted the intention of the framers that this section be a "more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law."

The Headlee provisions of the State Constitution certainly concern cities, villages, township, and counties all over the state.

CONCLUSION AND RELIEF REQUESTED

The Supreme Court's Opinion at one point refers to a local or intermediate ("traditional") school district "experimenting" with a charter school model to provide educational services to local children. *Taxpayers,* Slip Op. p 21. But that's not really what happens under the Michigan charter school concept. The charter school/PSA is dreamt up by a person or persons who then form the private company—which they operate by a board of their choosing. The local school district undertakes no real governance. It gets no money out of the deal. The private company gets that. Who knows, maybe the local school district doesn't even care if the state decides that its payments to the private company count as payments to the school district. "No skin off their back," as they say.

So who is harmed? All of the other real local units of government, whose state aid is correspondingly reduced by the payment to the private company. And, in the end, the Headlee voters, who didn't actually vote for that to happen to their "other" local governments, are the most harmed.

This Court on remand should find that payments to a charter school/PSA—even if authorized by a traditional school district or a community college and overseen by them for a fee—are not state spending paid to a local unit of government for purposes of Headlee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the Court's e-filing system which will send notification of such filing to all attorneys of record.

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