STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Borrello, P.J., and Meter and Shapiro, JJ.

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

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, and OFFICE OF AUDITOR GENERAL,

Defendants-Appellants.
_____/

Supreme Court No. 160658, 160660

Court of Appeals No. 334663
Original Action

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

COMBINED BRIEF ON APPEAL OF APPELLANTS/APPELLEES, STATE OF MICHIGAN, DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, AND OFFICE OF AUDITOR GENERAL

ORAL ARGUMENT REQUESTED

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Matthew B. Hodges (P72193)
David W. Thompson (P75356)
Michael S. Hill (P73084)
Assistant Attorneys General
Attorneys for Defendants-Appellants
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

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TABLE OF CONTENTS

Page

Index of Authorities iv

Statement of Jurisdiction viii

Statement of Questions Presented ix

Constitutional Provisions and Statutes Involved xi

Introduction 1

Statement of Facts and Proceedings 4

Standard of Review 7

Summary of Argument 7

Argument 9

I. The Court of Appeals properly determined that Proposal A payments constitute Article 9, § 30 spending and do not shift a tax burden onto local governments. 9

A. Proposal A expenditures are state spending from state sources paid to local units of government, and, therefore, count as § 30 spending. 10

1. Proposal A revenue paid to school districts through the School Aid Fund is state spending to local governments. 10

2. Excluding Proposal A revenue from the § 30 numerator contradicts its clear language. 12

B. Including Proposal A state funding in the § 30 calculation does not shift a tax burden on local governments because Proposal A did not impose an unfunded mandate under § 29. 14

C. The exclusion of Proposal A revenue from Article 9, § 30 runs contrary to Headlee's established framework. 16

II. The Court of Appeals properly determined that funding for public school academies is included in the Article 9, § 30 computation. 19

A. The School Code defines charter schools as public schools for purposes of the Michigan Constitution, school districts for purposes of the School Aid Fund, and governmental agencies that perform state functions, i.e., provide education services. 20

B. Charter schools are local units of government. 22

1. Charter schools are created by state and local units of government. 22

2. Charter schools perform a function previously carried out by units of local government. 25

C. While PSAs did not exist at the time of the Headlee Amendment's ratification, they have characteristics of local units of government and would have been understood accordingly. 26

1. This Court has determined that the common understanding of public schools at the time Headlee was ratified would include charter schools. 26

2. Charter schools must comply with Michigan law. 29

3. Charter schools operate in the same manner as other public schools. 30

D. The Court of Appeals' determination that PSA funding is included in the § 30 calculation must be affirmed. 31

III. Mandate spending under § 29 is state spending from state sources sent to locals, and, thus, § 30 spending. 34

A. The plain language of § 30 includes all state spending in "total state spending" with no exceptions. State spending to fund local mandated activities and services under § 29 is included. 36

B. The Court of Appeals erred by excluding entire categories of state payments to local governments and creating new language in § 30 in conflict with its clear requirements. 38

1. The Court of Appeals read exclusionary language into § 30 for entire categories of state payments to locals. 38

2. The Court of Appeals erred in creating a guarantee for local discretionary funding in § 30. 40

3. The Court of Appeals' decision conflicts with the voters' intent of greater control over taxation and spending. 42

C. The Court of Appeals' dissenting opinion properly determined that § 30 does not guarantee discretionary funding. 45

IV. The Auditor General should not be subject to mandamus but instead dropped from this action. 46

A. There has not been a final determination that the funding at issue is not properly counted as § 30 spending, making any mandamus claim against the Auditor General premature. 46

B. The Auditor General's function is more than ministerial. 48

Conclusion and Relief Requested 50

INDEX OF AUTHORITIES

Cases

Am Fed'n of State, Co & Muni Emp v City of Detroit,
468 Mich 388 (2003) 37

Coalition for a Safer Detroit v Detroit City Clerk,
295 Mich App 362 (2012) 48

Council of Organizations & Others for Ed About Parochiaid, Inc v Governor,
455 Mich 557 (1997) ..... passim

Durant v Michigan,
456 Mich 175 (1997) (*1997 Durant*) 14, 47

Durant v State Bd of Ed,
424 Mich 364 (1985) (*1985 Durant*) ..... passim

Durant v State Dep't of Ed,
238 Mich App 185 (1999) (*1999 Durant*) 11

Ford Motor Co v Dep't of Treasury,
496 Mich 382 (2014) 7

House Speaker v Governor,
443 Mich 560 (1993) 21

In re Proposal C,
384 Mich 390 (1971) 27

In re Sanders,
495 Mich 394 (2014) 7

Int'l Union, UAW, UAW Local 6000 v Green,
302 Mich App 246 (2013) 32

Kramer v City of Dearborn Heights,
197 Mich App 723 (1992) 41

Livingston Co v Dep't of Mgt & Budget,
430 Mich 635 (1988) ..... passim

Oakland Co v Michigan,
456 Mich 144 (1997) 6, 41

Omne Fin, Inc v Shacks, Inc
460 Mich 305 (1999) 37

Paquin v City of St Ignace,
504 Mich 124 (2019) 33

Pillon v Attorney General,
345 Mich 536 (1956) 21

Rohde v Ann Arbor Pub Sch,
479 Mich 336 (2007) 21

Schmidt v Dep't of Ed,
441 Mich 236 (1992) 11, 42, 43

Silver Creek Drain Dist v Extrusion Div Inc,
468 Mich 367 (2003) 36

Stand Up For Democracy v Sec'y of State,
492 Mich 588 (2012) 48

Taxpayers for Mich Constitutional Gov't v Dep't of Tech, Mgmt, & Budget,
___ Mich App ___ (2019), 2019 WL 5588741 ..... passim

Ter Beek v City of Wyoming,
495 Mich 1 (2014) 21

Statutes

1966 PA 331 23

MCL 15.231 *et seq.* 29

MCL 15.261 *et seq.* 29

MCL 18.301 *et seq.* 4

MCL 18.1304(3) 11

MCL 18.1305 6

MCL 18.1350 25

MCL 18.1350(1) 25

MCL 21.231 *et seq.* 4

MCL 21.233(5) 20
MCL 21.235 4
MCL 21.241 4
MCL 380.11 23
MCL 360.11a(3)–(4) 23, 28
MCL 360.11a(7) 23, 28
MCL 380.501 31
MCL 380.501(1) 20, 31, 32
MCL 380.501(2) 22
MCL 380.503(11) 30
MCL 380.503(6) 29
MCL 380.503(7) 29
MCL 380.503(8) 30
MCL 380.504(2) 30
MCL 380.504a(f) 30
MCL 380.505(1)–(2) 30
MCL 380.601a 23
MCL 380.1278 30
MCL 388.1603(7) 22
MCL 388.1606(4) 30
MCL 388.1620(6) 30
MCL, Chapter 390 23
MCL 423.201 *et seq.* 29
MCL 691.1407 30

Other Authorities

2018 SB 848 17

Rules

MCR 7.303(B)(1) viii

Constitutional Provisions

Const 1963, art 8, § 2 ..... 20, 25, 32

Const 1963, art 9, § 11 ..... passim

Const 1963, art 9, § 26 5

Const 1963, art 9, § 29 ..... 1, 5

Const 1963, art 9, § 30 ..... ix, 1, 5, 35

Const 1963, art 9, § 31 14

Const 1963, art 9, § 33 ..... 5, 19

Const 1963, art 11, § 1 30

STATEMENT OF JURISDICTION

This Court has jurisdiction over Appellants' application for leave to appeal under MCR 7.303(B)(1), as well as this Court's July 1, 2020 order granting Appellants' application for leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

1. Article 9, § 30 of Michigan's 1963 Constitution provides that "[t]he proportion of total state spending" paid to local governments "shall not be reduced below" the levels from 1978–1979. Following voter approval of Proposal A of 1994, public education funding comes primarily from state revenue sources instead of primarily local revenue sources. Must state funding for public schools pursuant to Proposal A be included in the calculation of total state spending paid to units of local government under Article 9, § 30?

   State Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals' answer: Yes.

2. Charter schools are statutorily designated public schools, school districts, and government agencies under the Constitution (art 9, § 11) and state law. Must state funding to public school academies—public school districts created by political subdivisions of the state to provide local education—be included in the calculation of total state spending paid to units of local government under Article 9, § 30?

   State Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals' answer: Yes.

3. Under § 30, state payments to local governments to fund mandates under Headlee § 29 are not constitutionally or statutorily excluded from the § 30 calculation. Is state spending to local governments from state sources of revenue to fund new or increased activities (i.e., new mandates) properly included under Article 9, § 30?

   State Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals' answer: No.

4. The Office of the Auditor General is responsible for reviewing the State Budget Official Statement of the Proportion of Total State Spending from State Sources Paid to Units of Local Government and ensuring proper accounting for all such expenditures in accordance with certain accounting standards. Is the Office of the Auditor General a proper party to this Headlee appeal, which seeks mandamus as to a non-ministerial act?

State Appellants' answer:	No.
Appellees' answer:	Yes.
Court of Appeals' answer:	Did not answer.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 9, § 25:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through 34, inclusive, of this Article.

Const 1963, art 9, § 29:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Const 1963, art 9, § 30:

> 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.

Const 1963, art 9, § 33:

> Definitions. The definitions of this section shall apply to Section 25 through 32 of Article IX, inclusive.
>
> "Total State Revenues" includes all general and special revenues, excluding federal aid, as defined in the budget message of the governor for fiscal year 1978-1979. Total State Revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities. "Personal Income of Michigan" is the total income received by persons in Michigan from all

sources, as defined and officially reported by the United States Department of Commerce or its successor agency. "Local Government" means 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. "General Price Level" means the Consumer Price Index for the United States as defined and officially reported by the United States Department of Labor or its successor agency.

MCL 18.1303:

* * *

(5) "Proportion" means the proportion of total state spending from state sources paid to all units of local government in a fiscal year, and shall be calculated by dividing a fiscal year's state spending from state sources paid to units of local government by total state spending from state sources for the same fiscal period.

MCL 18.1304:

* * *

(3) "State spending paid to units of local government" means the sum of total state spending from state sources paid to a unit of local government. State spending paid to a unit of local government does not include a payment made pursuant to a contract or agreement entered into or made for the provision of a service for the state or to state property, and loans made by the state to a unit of local government.

MCL 18.1305:

(1) "Total state spending" means the sum of state operating fund expenditures, not including transfers between funds.

(2) "Total state spending from state sources" means the sum of state operating fund expenditures not including transfers between funds, federal aid, and restricted local and private sources of financing.

INTRODUCTION

The Headlee Amendment was designed to place control over local policy and taxation in the hands of those most affected by both—voter-taxpayers at the local levels of government. The Amendment reflected the "taxpayer revolt" and has limited the size of state and local government, placing control over taxation and spending in the hands of the impacted voter-taxpayers.

The Amendment envisages that the size and scope of government (however large or small) reflect voters' preferences for what services they want and how much they are willing to pay for them. Under §§ 29 and 30, it provides simply that the State: (1) may not reduce funding for local mandates (art 9, § 29, s 1); (2) may not create a new local mandate without commensurate funding (art 9, § 29, s 2); and (3) may not reduce the percentage of the state's total annual spending comprised of payments to local governments (art 9, § 30). As to the last, Headlee provides that, but for a few exceptions not at issue in this case, state spending from state sources paid to locals *is* state aid paid to locals. There are no exceptions for public education or mandate spending. And that is the extent of Headlee's prescriptions and proscriptions at issue here.

The State has applied the plain language of § 30 as written for decades; and the language requires no interpretation. The portion of the State's annual budget that represents payments to local governments carrying out local activities—whether local governments use that funding to cover state mandated activities, local public education, or any other local activity—get counted under Headlee § 30.

There are no qualifiers or categories under § 30, nor is there any language guaranteeing state funding for local discretionary use.

The magnitude of the change urged here cannot be overstated. Taking the argument on Proposal A alone, nearly $13 billion each year in state funding to local units of government (public schools and community colleges) would be called into question—it would still be paid to public schools from state funds but it somehow would not be counted under Headlee. Within that is $1.273 billion in payments to Public School Academies. If Proposal A spending for public schools was suddenly excluded from the § 30 calculation, the shortfall could eclipse the entire annual general fund for the state budget (just over $10 billion in fiscal year 2019), a claim that could have been raised for any prior fiscal year. And the idea that § 29 mandate payments are not included under § 30 is without support—the State has counted mandate spending as local aid for § 30 purposes since Headlee was passed in 1978. This also may implicate hundreds of millions of dollars each year, although the exact amount is unclear as Plaintiffs have not identified which payments they challenge and because payments for state mandated activities were included in the baseline calculation in 1978. Plaintiffs seek nothing short of the fundamental restructuring of government. It is telling that no one has raised these claims in the more than 40 years since Headlee's passage, and it underscores the lack of textual anchor for the novel claims about "state spending" under § 30.

In short, this lawsuit turns the Headlee Amendment on its head and places questions of local priorities and taxation, properly reserved for local taxpayers to

answer, as far away from the local voters as they can possibly be, i.e., at the State's door. Frustrated by the downsizing of local government budgets due to Headlee's limits on taxation at the local level, Plaintiffs argue that instead of going to local voters for more funding (i.e., higher local taxes) to pay for discretionary local services, local governments can bypass the voters and sue the State, i.e., statewide taxpayers. The mechanism Plaintiffs employ is a fabricated concept deemed "local aid," which is the local units' way of requiring statewide taxpayers to provide local governments with restriction-free funds to be spent however those local governments please. But restriction-free "local aid" has never existed as a legal obligation of the State. In order for Plaintiffs' mechanism to work, this Court would have to rewrite Article 9, § 30 of the Michigan Constitution.

Thus, this Court should affirm the Court of Appeals' determinations that Proposal A funding is properly included in the Headlee Amendment, § 30 calculation, as is public charter school funding; and reverse the Court of Appeals' determination that § 29 mandate funding is not part of the § 30 calculation, and hold that the Auditor General is not subject to mandamus here.

STATEMENT OF FACTS AND PROCEEDINGS

This case involves the Headlee Amendment to the Michigan Constitution, and implementing legislation, MCL 18.301 *et seq*. and MCL 21.231 *et seq*. Specifically, Plaintiffs challenged the State's computations of state spending from state sources paid to local units of government under § 30 of the Headlee Amendment that included Proposal A spending, payments to public school academies (charter schools), and state payments made in compliance with § 29. Plaintiffs also sought mandamus concerning the reporting requirements of MCL 21.235 and MCL 21.241, which the State did not dispute in substance. But Plaintiffs mandamus claims extended to the Office of the Auditor General, which the State Defendants maintain is premature, and, therefore, inappropriate.

The Headlee Amendment was born from Michigan's "taxpayer revolt"

In 1978, Michigan voters ratified a series of constitutional provisions commonly known as the Headlee Amendment. That vote was "part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on locals government" by "put[ting] a freeze on what [voters] perceived was excessive government spending" and at the same time "lower[ing] their taxes both at the local and state level." *Durant v State Bd of Ed*, 424 Mich 364, 378 (1985) (*1985 Durant*).

The Headlee Amendment created a series of tax-limiting provisions, codified in Const 1963, art 9, §§ 25–34, which required voter approval for tax increases for

local units of government. The goal was to keep the size of government, and its ability to raise taxes, under direct taxpayer control. *Id*. at 383.

To that end, § 26 keeps the size of state government in check by limiting the State's total revenue raised in relation to personal income (total income received by persons in Michigan from all sources as provided in Const 1963, art 9, § 33). If state revenues and other financing sources exceed the annual limit, the State must issue pro rata refunds. Const 1963, art 9, § 26. Correlatively, local governments are constrained by § 31, which requires voter approval for new taxes or tax increases.

Headlee anticipated the possibility of the State shifting funding responsibility (i.e., burden to raise taxes) for state obligations to local governments. *1985 Durant*, 424 Mich at 379. Section 29 prevents this by requiring the State to fund newly created mandates and any increases in the scope of existing mandated services, programs, and activities. Const 1963, art 9, § 29. Section 30 sets the minimum amount of state spending that must be in the form of payments to local governments, in aggregate. Const 1963, art 9, § 30. Since 1993, that baseline minimum for current state spending to match state spending from 1978–1979 has been 48.97%.

State Funded Mandates for Provision of Local Services

When calculating the § 30 proportion, because § 30 makes no such distinction, the State does not differentiate between payments to cover local expenses for fulfilling State-imposed mandates and funding that is for local discretionary use.

That is not to say every category of state spending is included in the proportion. The parties agree that state spending to local governments to discharge the State's *own* obligations,[1] as well as other statutory carve-outs,[2] cannot be included as § 30 spending paid to local governments.

Court of Appeals proceedings

In its October 29, 2019 opinion on reconsideration, the Court of Appeals held that Proposal A and charter school funding are properly counted in the § 30 calculation but determined that § 29 mandate payments are not. It did not rule on the claims against the Auditor General for mandamus. On reconsideration, Judge Stephen L. Borrello penned a dissenting opinion on § 29 mandate funding:

> Simply stated, there is nothing in the language of either § 29 or § 30 that prohibits the state from eliminating a state mandate and then shifting funds formally allocated to the eliminated mandate to satisfy the state's obligation under the Headlee Amendment to fund a new mandate or an increase in the level of a mandated activity or service from the 1978 base year so long as the total proportion of state spending paid under § 30 is not reduced by the shifting of funds. [*Taxpayers for Mich Constitutional Gov't v Dep't of Tech, Mgmt, & Budget*, ___ Mich App ___ (2019), 2019 WL 5588741, *11 (BORRELLO, P.J., concurring in part and dissenting in part).]

This dissent recognized "[s]ection 30 contains no language guaranteeing the exact composition of the funding, i.e., that the base level of funding guaranteed by § 30

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[1] See, e.g., *Oakland Co v Michigan,* 456 Mich 144 (1997), holding that State spending to a county to discharge what was, under state law, the State's responsibility was not local spending for Headlee § 30.

[2] By law, federal funding is not included in either the numerator or denominator; § 30 calculates only state revenue sources, exclusive of certain "transfers between funds, federal aid, and restricted local and private sources" and considers how those resources are allocated between state and local spending. MCL 18.1305.

must contain the same ratio of discretionary funding to restricted funding as existed in the 1978-79 fiscal year." *Id.*

STANDARD OF REVIEW

Statutory interpretation and application of Michigan's Constitution are questions of law that this Court reviews de novo. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389 (2014); *In re Sanders*, 495 Mich 394, 404 (2014).

SUMMARY OF ARGUMENT

In thirty words, Article 9, § 30 sets a minimum amount of the state's annual spending that must be comprised of payments to local units of government. Simply: funds raised from state revenue sources and sent to local units of government are payments to local units of government for purposes of § 30. All the state expenditures at issue in this litigation fall into this category. Headlee does not guarantee anything but an aggregate minimum percentage of the overall state budget. It never mentions specific types of funding or end use by the receiving local government. It is a fraction—the top (numerator) is the aggregate part of the State's annual budget that goes to local governments and the bottom (denominator) is the State's total spending from state revenue sources.

Concerning Proposal A, the school aid money paid to local governments is included in § 30 regardless of whether it comes from revenue generated from Proposal A or another state source. Including this revenue in § 30's numerator merely applies the plain language of § 30 ("total state spending paid to . . . [l]ocal [g]overnment") and, contrary to Plaintiffs' assertion, it is not an impermissible "tax

shift," because that is a legal term of art referring to an unfunded mandate under § 29. There is no unfunded mandate claim here under § 29; Plaintiffs have admitted as much. Plaintiffs' theory excluding state spending that is derived from Proposal A revenue reads language into the Constitution that is not there, and it misapplies a Headlee term of art. And ultimately it undermines Headlee's aim of limiting the growth of state and local governments and greater taxpayer control over new or increased taxes. Proposal A funds are § 30 spending.

The same is true for public school academy funding. Charter schools are school districts for purposes of constitutional School Aid funding and are political subdivisions of the State carrying out local governmental functions—and, therefore, are local units of government for purposes of § 33. Charter school funding is properly counted as aid to local governments under § 30.

Concerning the question of funded mandates, the local funding calculation is comprised of: (1) state spending to cover state mandates under § 29; and (2) discretionary state spending to cover local programs and services of choice. Section 30 does not distinguish between mandates and discretionary funding. Nor does it require a minimum level of local discretionary funding, only an aggregate percentage of local funding (which includes both mandates and discretionary funding) at the same proportion of state funding from 1978–1979. Thus, under § 30, if the State increases its mandate funding and decreases its discretionary funding to the locals but maintains the overall percentage, § 30 is not violated.

In this way, local programs of choice are left to local voters to fund if the State replaces its funding with mandates. This is what the plain language requires. And it reflects the intent and purpose of the "taxpayer revolt" at the foundation of the Headlee amendments: lower taxation and spending at all levels of government and greater taxpayer control over future tax increases and government spending. All state funding paid to local units of government and used for local activities—whether mandated by the state or local programs of choice—count toward the aggregate calculation § 30 requires. All of it has been counted, to date, because that is what the Constitution's plain language requires.

Finally, Plaintiffs' mandamus claim against the Office of Auditor General (OAG) is premature because neither the Auditor General nor any of the State Defendants have demonstrated "recalcitrance" by refusing to abide by a final determination that any of the spending at issue cannot be counted for § 30 purposes, for which reason it should be dropped from this action.

ARGUMENT

I. The Court of Appeals properly determined that Proposal A payments constitute Article 9, § 30 spending and do not shift a tax burden onto local governments.

Proposal A funding is state spending from state sources spent to fund local public education. Section 30 provides no exceptions or disallowances for education funding or funding from revenue generated by Proposal A. It measures state funding paid to local units of government, which includes school districts. Thus, Proposal A funding is properly counted as § 30 spending; it is as simple as that.

A. Proposal A expenditures are state spending from state sources paid to local units of government, and, therefore, count as § 30 spending.

Section 30's plain language requires the inclusion of the additional revenue that Proposal A generated as "total state spending to local governments." Proposal A's guaranteed minimum funding in Article 9, § 11 is a component of "total state spending," and is also paid to "aid" local units of government. To claim otherwise is contrary to the plain language of § 11 and § 30, as well as to the intent of the voters who passed both the Headlee Amendment and Proposal A.

1. Proposal A revenue paid to school districts through the School Aid Fund is state spending to local governments.

Local school districts that receive guaranteed payments required by Proposal A are units of local government. They fall explicitly within the definition provided in Article 9, § 33, which defines "local government" to include "political subdivision of the state," as well as "school districts" and other "authorities created by other units of local government." Because the voter-approved Proposal A increased state taxes to fund public schools and guaranteed that each local school district receives minimum funding based on 1994–95 operating revenues, overall state revenues and payments to local governments naturally increased. Voters created state-level revenue dedicated to local public education, as § 11 provides:

> There shall be established a state school aid fund which shall be used exclusively *for aid to school districts*, higher education, and school employees' retirement systems, as provided by law. Sixty percent of all taxes imposed at a rate of 4% on retailers on taxable sales at retail of tangible personal property, 100% of the proceeds of the sales and use taxes imposed at the additional rate of 2% provided for in section 8 of

> this article, and other tax revenues provided by law, shall be dedicated to this fund. [Const 1963, art 9, § 11 (emphasis added.)]

Proposal A was a statewide voter directed public-school funding formula change. This voter-approved change increased the total amount of money the State pays to local schools, but it did not change the formula for calculating § 30's proportion. Neither did it change who was responsible for providing educational services; local schools remained responsible for delivery of public education, as evidenced by the People's choice to describe Proposal A money as "aid to school districts." The additional revenue paid to public schools is included in the State's § 30 calculation and has been since Proposal A went into effect.

And that is what Headlee voters intended under § 30. In order to properly interpret § 30, the Court must ascertain the intent of the voters who passed the Headlee Amendment. See *1985 Durant*, 424 Mich at 378. That intent is confirmed by first looking at the language of the Constitution. *Id*. The Court may also look at how the Legislature implemented the amendatory language. *Durant v State Dep't of Ed*, 238 Mich App 185, 212 (1999) (*1999 Durant*). Construction of a constitutional provision enacted by voter initiative requires a special emphasis on the duty of judicial restraint. *Schmidt v Dep't of Ed*, 441 Mich 236, 241–242 (1992).

Section 30 is broad and encompasses all categories of state spending of state sourced revenues. Here, the phrase "state spending paid to local units of government" is broad and does not categorize or differentiate between different sources of revenue paid to local governments. The same broad, non-categorical definition appears in the Management and Budget Act. MCL 18.1304(3) provides:

> "State spending paid to local units of government" means the sum of total state spending from state sources paid to a local unit of government. State spending paid to a local government does not include a payment made pursuant to a contract or agreement entered into for the provision of a service for the state or to state property, and loans by the state to a local unit of local government.

This statutory definition was in effect at the time Proposal A was adopted in March 1994. Because Proposal A did not amend § 30 to change the formula for determining its proportion, the definition expresses the voters' intention that Proposal A revenue be counted as "state spending paid to local units of government" in the § 30 numerator.

2. Excluding Proposal A revenue from the § 30 numerator contradicts its clear language.

Prior to Proposal A, the State included aid paid to school districts in its § 30 calculation. After Proposal A, the State continued to pay school aid to districts, but paid more through increased foundation allowances required by Proposal A. Despite increasing the amount of aid the State pays to school districts, the voters could have amended § 30 to exclude Proposal A revenue, adjusted the § 30 percentage, or specified that education is now a state service, but they did not. Thus, the voters intended that all school aid funds paid to local school districts continue to be included as § 30 spending. There is no indication whatsoever that voters intended for the State to exclude Proposal A school "aid" funding in calculating the § 30 percentage of money paid to locals.

Excluding certain categories of spending paid to local governments from § 30, simply because the revenue was generated by a voter-ratified constitutional

amendment that increased state funding to one particular category of local government, creates a non-existent exception to § 30's plain language that is absent from the text of Proposal A.

Plaintiffs' theory requires the Court to engraft contradictory language onto § 30. The Court of Appeals declined to do so here, as this Court has in the past. For example, in *1985 Durant*, the plaintiffs attempted to read additional language into § 29, arguing that the term "state law" included constitutional requirements. 424 Mich at 377. In holding that "state law" only includes state statutes and administrative rules and not constitutional requirements for purposes of Headlee "mandates," this Court looked at § 29 and compared the sentences "state law" and "required by the Legislature or state agency." *Id*. at 380. This Court declined to read the word "constitutional" into the plain language absent a definite pronouncement that constitutional requirements were to be included in § 29. *Id*.

In this case, there is no definite pronouncement in §§ 25–34 that the additional school aid payments required by Proposal A or payments required under § 29 should be excluded from "spending paid to all units of Local Government" when determining compliance with § 30. Likewise, nothing in Proposal A requires payments to schools be excluded from § 30's percentage. Thus, it is proper (indeed required) for the State to include all school aid funding paid to local schools in its § 30 calculations. The fact that the additional state spending for local schools caused overall allocations of total state spending to increase has no bearing on the calculation of the proportion paid to all units of local government as a group. This

Court applies the plain language of § 30 and Proposal A in order to give effect to the voters' intent.

In other words, Article 9, §§ 25–34 do not guarantee any units of local government a certain dollar amount of unrestricted aid from the State, which retained discretion to allocate dollars among all local governments. *1985 Durant*, 424 Mich at 393. Nothing in § 30—or elsewhere in Headlee—requires it.

B. Including Proposal A state funding in the § 30 calculation does not shift a tax burden on local governments because Proposal A did not impose an unfunded mandate under § 29.

Because any new or increased local taxes require local voter approval, see Const 1963, art 9, § 31, it is clear that § 29 operates as a check to make sure the State does not "shift" its responsibilities to local governments without an accompanying funding source for that new mandate. Section 30 ensures a minimum percentage of local aid—48.97% (as stipulated in the 1990s)—regardless of which local activities are mandated and which are not.

Plaintiffs argue that adding new mandates without increasing overall funding amounts to a "tax shift." It does not. First, spending paid to local units of government constitutes local aid, regardless of whether a condition is attached. Second, the phrase "tax shift" does not appear in Headlee. Only the words "shifting the tax burden" appear in Article 9, § 25, which Plaintiffs treat as an independent cause of action despite precedent interpreting it as an introductory paragraph with §§ 26–30 providing the substantive implementation. See *Durant v Michigan*, 456 Mich 175, 182 (1997) (*1997 Durant*) (noting that the requirements of § 25 "are

implemented in §§ 29 and 30."). Even if § 25 provided Headlee's substantive implementation, the phrase "shifting the tax burden" has been interpreted to mean a shift in responsibility (e.g., an obligation imposed on local governments) without appropriate funding, i.e., a § 29 violation. This makes sense. If the State mandates a local activity or service but does not provide the necessary funds, the local government must take revenue from other sources or raise taxes to comply with the State's requirement. As this Court stated in *1985 Durant* regarding § 29:

> Both sentences clearly reflect an effort on the part of the voters to forestall any attempt by the Legislature to shift responsibility for services to the local government, once its revenues were limited by the Headlee Amendment, in order to save the money it would have had to use to provide the services itself. [424 Mich at 668.]

Rather than guarding against tax shifts, Plaintiffs wish to treat state aid tied to mandates as no aid at all. This assertion lacks textual or case law support.

Proposal A was not a state mandate—it was a public-school funding formula change enacted directly by the people. Instead of funding public schools primarily through local property taxes, the voters decided to primarily fund schools through state-collected taxes. While it is true that local millages were reduced, local governments' burden to fund their school districts was also reduced. The State did not "shift" a tax burden onto local governments. Quite the opposite: as the Court of Appeals correctly recognized (*Taxpayers*, 2019 WL 5588741, at *5 (opinion of the court)), the *people* approved Proposal A, which removed from local governments much of the burden of school funding, providing them substantial savings. Further, it preserved Legislation discretion:

> [T]he voters intended, as revealed in the plain language of § 30, that the State be free from time to time to rebalance how § 30 revenue sharing is distributed among "all units of Local Government, taken as a group" so long as the overall proportion of funding remains at the constitutionally-mandated level. [*Id.*]

Nothing in § 30 requires the State to allocate a certain dollar amount, or a certain category of aid, to a particular local unit of government. Headlee's check on the State from shifting any tax burden to local government is set in § 29, which does not guarantee local governments money for general operations or local services. Section 29 merely protects local units from the State mandating that they provide programs or services without paying for them. Thus, "[o]ur Supreme Court expressly rejected, as a 'strained interpretation of an unambiguous statement of intent by the voters,' the proposition that § 30 mandated that each individual unit of government must receive in perpetuity the same proportion of the allotment for local government as it received in 1978." *Id.*, citing *1985 Durant*, 424 Mich at 393.

C. The exclusion of Proposal A revenue from Article 9, § 30 runs contrary to Headlee's established framework.

Headlee capped government growth by giving the people greater control over new or increased taxation (at both the state and local levels); Proposal A increased statewide funding of school districts, reduced the funding burden on local governments, and capped the rate by which ad valorem property taxes may increase as a function of a property's true cash value. This is how Headlee and Proposal A were intended to work together.

Plaintiffs' theory that all of the state spending paid to local governments pursuant to Proposal A be ignored under § 30 would turn the voter's intent on its

head and upend 25 years of State budgeting and accounting. The numbers are staggering:

- Total state spending from state sources of revenue was approximately $34 billion in fiscal year 2019. Of that, $18.9 billion was state spending paid to local units of government.[3] That included nearly $13 billion paid to local school districts, including charter schools and community colleges, with a significant portion generated by the voters through Proposal A of 1994.[4]

- The remaining $21 billion of state spending from state revenue sources in fiscal year 2019 included approximately $6 billion in payments to local units of government other than public education providers.[5]

This leaves $15 billion state spending for state purposes, of which nearly $13 billion funds core state public safety services, health and human services programs, postsecondary education, and state infrastructure.[6] Under Plaintiffs' theory, in order to meet the 48.97% minimum, the Legislature must somehow raise billions of dollars, through dramatic increases in state taxes, and send all of the newly created

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[3] See State Budget Office, *Statement of the Proportion of Total State Spending from State Sources Paid to Units of Local Government* (June 25, 2020), available at <https://audgen.michigan.gov/wp-content/uploads/2020/06/r071003120.pdf> (accessed September 4, 2020).

[4] See App p 583a; See also House Fiscal Agency, *The Michigan Tax System and Budget*, available at <https://www.house.mi.gov/hfa/PDF/Alpha/Budget_Poster_FY19.pdf> (accessed September 4, 2020).

[5] See 2018 SB 848, available at < http://www.legislature.mi.gov/documents/2017-2018/publicact/pdf/2018-PA-0207.pdf > (accessed September 4, 2020), Michigan's 2019 Budget including Section 201 appropriations by Department, e.g., pp 5, 15, 37, 54, 76, 77, 134, 203, 214, 225, 244, 252, 266–67, 287.

[6] See House Fiscal Agency, *The Michigan Tax System and Budget*, available at <https://www.house.mi.gov/hfa/PDF/Alpha/Budget_Poster_FY19.pdf> (accessed September 4, 2020).

revenue directly to local units of government for discretionary use, at no benefit to statewide taxpayers. This would merely create more state spending in § 30 to replace all of the purportedly excludable Proposal A revenue, all of which would be for local discretionary purposes. Or the State must drastically cut statewide programs and services in order to rededicate the associated spending to local discretionary use. Given the magnitude of Proposal A spending, it would likely require some combination of both.

Either option to accommodate Plaintiffs' theory would effect a fundamental restructuring of government, burdening statewide taxpayers with increased taxes, and cuts to programs/services at the state level to enable local governments to avoid asking their constituents to fund local programs and services. The fact that no one has argued this point in the past is telling.

Headlee was never intended to turn government upside down and burden statewide taxpayers with the needs of local government to fund discretionary programs or general operations. The level of government deciding to provide a service must look to its taxpayers for funding, as this Court stated in *Livingston County v Department of Management and Budget*, 430 Mich 635 (1988):

> Moreover, if we were to accept amicus curiae's argument that the Headlee Amendment applied to increases in the level of even optional activities or services, any unit of local government that had undertaken an optional activity in the past could pass along to taxpayers statewide the cost of improvements. Units of local government, such as plaintiff county, could look to all state taxpayers for the cost of upgrading a voluntarily assumed, quasi-governmental function, such as a sanitary landfill, whereas taxpayers in an adjoining county that used a private landfill would presumably find charges for using their landfill increased because the private landfill owner could

> not be reimbursed for upgrading his landfill. That unit of government would in turn have to pass off that increased cost to its own tax base, rather than to that of the entire state. [*Id.* at 645–646.]

Under Plaintiffs' theory, local governments can bypass their constituents and seek money from the State burdening statewide taxpayers for programs and services that will only benefit a small subset of state taxpayers. This further shows why this Court should decline to adopt Plaintiffs' novel theory, which takes control over taxation away from the people in contravention of Headlee's framework.

II. The Court of Appeals properly determined that funding for public school academies is included in the Article 9, § 30 computation.

Article 9, § 33 defines "Local Government" as "any political subdivision of the state, including, but not restricted to, school districts, . . . authorities created by the state, and authorities created by other units of local government." Here, it is undisputed that charter school are authorities created by units of local government, e.g., universities and intermediate school boards. Similarly, the Revised School Code (School Code) defines charter schools as both public schools *and* school districts for purposes of the Michigan Constitution, including its provision for the School Aid Fund. Finally, the School Code provides that charter schools are governmental agencies created by state or local units of government, carry out public/local purposes (i.e., provide education services), and must operate in full compliance with Michigan law. Therefore, the Court of Appeals' decision as to charter schools (or PSAs) funding should be affirmed.

A. The School Code defines charter schools as public schools for purposes of the Michigan Constitution, school districts for purposes of the School Aid Fund, and governmental agencies that perform state functions, i.e., provide education services.

The School Code governs Michigan schools and school district formation/organization, including for charter schools. Specifically, MCL 380.501(1), provides that charter schools are:

- *Public schools charged with providing free public education*, in accordance with the Michigan Constitution, Article 8, § 2;
- *School districts supported by the School Aid Fund*, in accordance with the Michigan Constitution, Article 9, § 11;
- Governmental agencies that perform public purposes and governmental functions of the state. Specifically, charter schools perform the *public/local service of providing education*.

Accordingly, the Legislature has made clear that for purposes of school funding, charter schools are school districts, and moneys issued to charter schools constitute "aid to school districts."

Plaintiffs point to language in the Headlee implementing legislation concerning limited geographic regions that traditional public schools serve. But this "geographic limitation" language is a legislative modification to the Headlee Amendment. Further, the School Code provision defining charter schools as "school districts" is more specific, and, therefore, controls this matter.

It is true that the State Disbursements to Local Units of Government Act, MCL 21.233(5) ("implementing legislation"), defines political subdivisions of the state to include "school districts . . . if the political subdivision has as its primary purpose the providing of local governmental services for residents in a

geographically limited area of this state and has the power to act primarily on behalf of that area." But the "geographically limited" restriction is a legislative addition to the Headlee Amendment, § 33, definition of "Local Government," which contains no mention of this restriction. "Neither the legislature, nor this Court, has any right to amend or change a provision in the Constitution." *House Speaker v Governor*, 443 Mich 560, 592 (1993), overruled in part on other grounds by *Rohde v Ann Arbor Pub Sch*, 479 Mich 336 (2007); see also *Pillon v Attorney General*, 345 Mich 536, 547 (1956).

Further, the School Code provision is more specific than the implementing legislation, and, therefore, controls. While the implementing legislation introduces a new restriction to the definition of "Local Government," it does not identify what purpose the definition serves. By contrast, the School Code explicitly identifies the constitutional purpose for which charter schools are defined as "school districts"—i.e., for purposes of school aid funding under Const 1963, art 9, § 11. "It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision." *Ter Beek v City of Wyoming*, 495 Mich 1, 22 (2014).

School aid funding and its characterization for Headlee Amendment purposes is precisely what is at issue in this case. And while Plaintiffs identify certain Attorney General opinions stating that "the legislature did not intend to equate [charter schools] with school districts as a general proposition" (Pls' Appl, p 18), the School Code does not make any such "general" equation either. Instead, as the

opinions note, the Code specifically defines charter schools as "school districts" for purposes of constitutional state school aid funding only. This is confirmed by the State School Aid Act, MCL 388.1603(7), which defines school districts to include PSAs, with certain exceptions. In other words, as relating to the *very item at issue in this case*—state aid expenditures for school funding—the Legislature and the Constitution make clear that charter schools are "school districts."

In sum, because charter schools are created by state or local units of government, they are also local units of government for purposes of Headlee § 33.

B. Charter schools are local units of government.

Charter schools are created by state and local units of government, and perform functions previously carried out by local units of government, i.e., traditional public schools. Therefore, charter schools are local units of government.

1. Charter schools are created by state and local units of government.

The School Code also provides that a charter school shall be organized by the governing board of a public body, or an "authorizing body." The School Code identifies four types of authorizing bodies: (1) the board of a school district; (2) the intermediate school board; (3) the board of a community college; and (4) the governing board of a state public university. MCL 380.501(2).

All authorizing bodies are public institutions under the control of the State. *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 573 (1997). And each of the four types of authorizing bodies are either state or local units of government that are themselves authorities created by the

State or by other local units of government. A school district is organized as a body corporate with general (and implicit) powers necessary to providing education—including contracting with other public and private entities—and elects a governing board in accordance with the School Code. MCL 380.11; MCL 360.11a(3)–(4), (7). Similarly, an intermediate school district (ISD) is a creature of the State formed under MCL 380.601a, and it is granted all implicit and necessary powers to provide education, including operating as a fiscal agent for various school and job training programs. Further, community colleges are formed by counties, school districts, ISDs, or by petition, under the Community College Act, and are governed by a popularly elected board per 1966 PA 331. Finally, public state universities are creatures of statute, created by the Legislature with governing boards of regents, trustees, etc. (See generally Michigan Compiled Laws, Chapter 390.)

This Court has construed the School Code according to its plain language, finding that charter schools are public schools. In *Council of Organizations*, the plaintiffs challenged the creation of public school academies by 1993 PA 362 (then known as the "Charter Schools Act"), by attempting to enjoin the distribution of public funds on the basis that the act was unconstitutional. 455 Mich at 560. The plaintiffs argued that charter schools are not public schools because they are not under the immediate or exclusive control of the State, and the board of directors were not publicly elected or appointed by a public body. *Id*. at 571.

This Court initially observed that "[s]ubsection 501(1) states that '[a] public school academy is a public school under section 2 of Article VII of the state

constitution of 1963, and is considered to be a school district for the purposes of section 11 of Article IX of the state constitution of 1963.'" *Id.* at 567 (citation omitted). This Court ultimately held that the Constitution did not require exclusive state control, but instead only requires the Legislature to maintain a system of public schools. *Id.* at 572–573. This Court also determined that charter schools met the control requirement because "they are under the ultimate and immediate control of the state and its agents" (*id.* at 573), and reasoned that a charter can be revoked by the authorizing body for the school's failure to comply with the contract or applicable law. *Id.* Also, all charter school authorizing bodies are public institutions over which the State exercises control. *Id.* And the State controls the school's funding, for which the school must meet certain qualifications. *Id.* at 573–574.

Further, the Court observed that:

- A charter school is administered under the direction of a board of directors and the nonprofit corporation bylaws contained in the school's contract. *Id.* at 565.
- A person or entity that wishes to organize a charter school must submit an application containing the statutorily required information to an authorizing body. *Id.*
- The application is an agreement that the charter school will comply with state and federal law applicable to public bodies or school districts. *Id.* at 566.
- A charter school can be authorized by a school district, and the charter school agrees to be covered by the collective bargaining agreements that would apply to other employees of that school district. *Id.*

Finally, this Court rejected the plaintiffs' argument that the board of directors of a charter school is private, reasoning that the authorizing bodies are public bodies, through which the public maintains control of the school. *Id*. at 576–577.

In short, because charter schools are public schools and school districts, they are political subdivisions of the state and local units of government under § 33. Further, the authorizing bodies are themselves state or local units of government.

2. Charter schools perform a function previously carried out by units of local government.

The Management and Budget Act, MCL 18.1350, requires that funding for charter schools be included in the § 30 calculation because education was understood to be a local function when the Headlee Amendment was passed. Const 1963, art 8, § 2. Specifically, MCL 18.1350(1) provides that:

> If state government assumes the financing and administration of a function, after December 22, 1978, which was previously performed by a unit of local government, the state payments for the function shall be counted as state spending paid to units of local government.

Here, charter schools must be counted toward the 48.97% minimum 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 (which for the forgoing reasons, also constitute units of local government for purposes of § 33) with state funding.

C. While PSAs did not exist at the time of the Headlee Amendment's ratification, they have characteristics of local units of government and would have been understood accordingly.

The Court of Appeals properly noted that Headlee voters could not have had any intention as to PSAs because they did not exist at the time. *Taxpayers*, 2019 WL 5588741, at *7 (opinion of the court). Yet the Headlee Amendment does not "limit [the] ongoing authority of the state to define and fund school districts." *Id.* Therefore, it is unremarkable and appropriate that a future legislature would pass a law that defines PSAs as "school districts" for purposes of school aid funding under Michigan's Constitution. In short, PSA funding presents no conflict with Headlee or its voters' intentions.

And this legal definition accords with common sense as charter schools fall within the category of local units of government based on their similar characteristics to public schools of that time. Specifically, they perform a local service (i.e., delivery of education services) and receive state per-pupil funding. This comports with this Court's determination that voters would have understood charter schools to be public schools. *Council of Organizations*, 455 Mich at 576.

1. This Court has determined that the common understanding of public schools at the time Headlee was ratified would include charter schools.

While Plaintiffs argue that charter schools do not fit within § 33's broad definition of "local government" as the public would have understood it in 1978, in *Council of Organizations* this Court went back to 1970 in determining the voters' intent that charter schools are public schools:

> [I]f we examine the common understanding of what a "public school" is, as adopted by the 1961 Constitutional Convention, for the first paragraph of § 2, and if we inquire into the common understanding of "private, denominational or other nonpublic" school, as adopted by the voters in 1970 for the second paragraph of § 2, *we find that public school academies are "public schools."* [*Id.* (emphasis added).]

And the "board members are public officials and are subject to all applicable law pertaining to public officials." *Id.* at 585.

Plaintiffs also quote *Traverse City School District v Attorney General* (*In re Proposal C*), 384 Mich 390, 405 (1971) for the proposition that "it is not to be supposed that they [the people] have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding . . . ." (Pls' Appl, pp 37–38.) But Plaintiffs ignore the School Code's pronouncement that charter schools are school districts created by other units of local government. Further, § 33's definition of "local government" must be plainly interpreted insofar as the § 30 proportion requires the inclusion of all state spending "paid to all units of Local Government." An overly narrow interpretation of what constitutes a local unit of government would mean that entities that perform local functions for the benefit of residents (such as education) would not be included in the § 30 calculation. Such a result does not represent the intent of the voters based on an obvious or common understanding of the Headlee Amendment.

Plaintiffs further argue that charter schools are different than schools that were typical when voters ratified the Headlee Amendment because charter schools purportedly have less accountability than traditional schools. But this Court

rejected this argument in *Council of Organizations*, explaining that "because authorizing bodies are public institutions, the state exercises control over public school academies through the application-approval process." 455 Mich at 573.

Finally, Plaintiffs argue that private entities may handle portions of charter school operations. That is true. Charter schools, like other public-school districts (and other public bodies generally), have the authority to contract for the provision of certain support services. See MCL 360.11a(3)–(4), (7). There is no requirement, for example, that lawn service or snow removal must be performed by school employees or that a school district cannot contract these services to private entities. Charter schools, like any other public schools, must comply with the School Code. Further, charter school board members are public officials subject to all applicable laws pertaining to public officials. *Council of Organizations,* 455 Mich at 585. Thus, the mere fact that a charter school can contract with a third-party for certain services does not distinguish charter schools from other public schools in Michigan.

In short, a plain, obvious, and common understanding of the Headlee Amendment, as well as the role of charter schools in delivering local education services, makes clear that charter schools (which are public schools) fit within the definition of local units of government in 1978. Using pre-Headlee considerations, specifically relying on common understanding from 1970, this Court has already addressed these arguments. *Id.* at 576. Plaintiffs raise old arguments in a novel context, but that does not mean the voters' intent is any less resolved now than it was when this Court considered these arguments. *Id.*

2. Charter schools must comply with Michigan law.

Charter school contracts implement the same statutory requirements applicable to all Michigan public schools, and charter schools must comply. With respect to a charter school contract, the School Code prescribes that all charter contracts must contain certain provisions, including in pertinent part:

> (a) The educational goals the public school academy is to achieve and the methods by which it will be held accountable. The educational goals shall include demonstrated improved pupil academic achievement for all groups of pupils . . . .
>
> (b) A description of the method to be used to monitor the public school academy's compliance with applicable law and its performance in meeting its targeted educational objectives.
>
> * * *
>
> (e) Procedures for revoking the contract and grounds for revoking the contract, including at least the grounds listed in [MCL 380.507].
>
> * * *
>
> (i) A certification, signed by an authorized member of the board of directors of the public school academy, that the public school academy will comply with the contract and all applicable law.
>
> (j) A requirement that the board of directors of the public school academy shall ensure compliance with the requirements of 1968 PA 317, MCL 15.321 to 15.330 [contracts of public servants with public entities].
>
> * * *
>
> (*l*) A requirement that the board of directors of the public school academy shall make information concerning its operation and management available to the public and to the authorizing body in the same manner as is required by state law for school districts. [MCL 380.503(6).]

Similarly, charter schools must also comply with all applicable law, including the Open Meetings Act (MCL 15.261 *et seq.*), the Freedom of Information Act (MCL 15.231 *et seq.*), and the Public Employment Relations Act (MCL 423.201 *et seq.*). MCL 380.503(7).

3. Charter schools operate in the same manner as other public schools.

The School Code prohibits any charter school from charging tuition, and if there are more applicants than space, then the charter school must use a random selection process for the enrollment of students. MCL 380.504(2); *Council of Organizations*, 455 Mich at 568. And charter schools are accountable to the public based on their funding, i.e., per-pupil funding. In other words, if students are not satisfied with their education, they can simply choose to go elsewhere, and the funding follows the student. Const 1963, art 9, § 11.

Additionally, charter teachers must be certified in accordance with the State Board of Education rules, or otherwise be tenured at a state public university or have at least five years of experience at a community college. MCL 380.505(1)–(2). And charter schools must adopt a core curriculum following Michigan's core content standards. MCL 380.1278. Further, charter schools are funded through the State School Aid Act and receive per-pupil base foundation funding. MCL 388.1606(4); MCL 388.1620(6). Charter schools may also obtain state and federal grants in the same way as local school districts. MCL 380.504a(f).

Finally, the board of directors of a PSA are public officers and must take the constitutional oath of office for public officers under the Michigan Constitution. MCL 380.503(11); Const 1963, art 11, § 1. A charter school and its incorporators, board members, officers, employees, and volunteers have governmental immunity as provided in MCL 691.1407 and MCL 380.503(8). An authorizing body and its board members, officers, and employees are immune from civil liability for an act or

omission in authorizing a charter school if the authorizing body or person acted or reasonably believed he or she acted within the authorizing body's or the person's authority. *Council of Organizations*, 455 Mich at 567.

In short, charter schools operate like traditional public schools and are formed under (and must comply with) Michigan law by both statute and contract.

D. The Court of Appeals' determination that PSA funding is included in the § 30 calculation must be affirmed.

The Court of Appeals examined the question of whether state funding for PSAs counts under § 30 by looking to the School Code in relation to the Michigan Constitution. The Court determined that PSA funding is properly counted because according to the School Code, "[a] public school academy . . . is a school district for purposes of section 11 of article IX of the state constitution of 1963 . . . ." *Taxpayers*, 2019 WL 5588741, at *6 (opinion of the court), citing MCL 380.501(1). In other words, PSAs are school districts for purposes of *the very issue* in this case.

The Court of Appeals correctly decided this issue because the School Code speaks directly to this question and points to constitutional authority of equal weight to the Headlee Amendment. Specifically, MCL 380.501 provides, in pertinent part:

> A public school academy is a public school under section 2 of article VIII of the state constitution of 1963, is a school district for the purposes of section 11 of article IX of the state constitution of 1963 and for the purposes of section 1225 and section 1351a, and is subject to the leadership and general supervision of the state board over all public education under section 3 of article VIII of the state constitution of 1963. A public school academy is a body corporate and is a governmental agency. The powers granted to a public school academy

> under this part constitute the performance of essential public purposes and governmental functions of this state. [MCL 380.501(1).]

Accordingly, the School Code makes clear that charter schools are:

- Public schools charged with providing free public education, in accordance with the Michigan Constitution, Article 8, § 2;
- School districts supported by the School Aid Fund, in accordance with the Michigan Constitution, Article 9, § 11;
- Governmental agencies that perform public purposes and governmental functions of the state. Specifically, charter schools perform the public/local service of providing education.

Plaintiffs point to various distinctions between characteristics of school districts at the time of Headlee's passage and contemporary PSAs. (Pls' Appl, pp 36–37.) Yet, as the Court of Appeals recognized, Headlee voters could have had no intention as to PSA funding because PSAs did not yet exist. "PSAs are school districts for the purpose at issue in this case, i.e., the receipt of state school aid." *Taxpayers*, 2019 WL 5588741, at *6 (opinion of the court).

Plaintiffs also assert that the School Code effectively changes the meaning of the Michigan Constitution. (Pls' Appl, p 47.) But this is not true. First, the School Code does not change the meaning of the Constitution, but instead makes clear that certain funding falls into a certain bucket of the Constitution. Second, the Legislature is the voice of Michigan citizens. "A legislature in a representative constitutional republic speaks for the people on matters of significant public concern." *Int'l Union, UAW, UAW Local 6000 v Green*, 302 Mich App 246, 284 (2013). Accordingly, so long as a legislative act is constitutional (Plaintiffs have

made no assertions that the School Code is not), it is a valid act that expresses the intent of the people of Michigan.

Plaintiffs' citation to *Paquin v City of St Ignace,* 504 Mich 124 (2019) (Pls' Appl, p 43) is also unavailing. *Paquin* addressed whether a person convicted of a crime while holding a position with a tribal government was precluded from later running for city council; it decided that a tribal government was not a local government under Article 11, § 8. But a federally recognized Indian tribe is not a creature of state law, while a PSA is. Further, an Indian tribe is an independent sovereign, and tribal government is therefore not properly considered "local." *Paquin* is therefore not relevant to the question whether PSAs (which are state law creations, not independent sovereigns) perform state governmental functions.

Neither did *Paquin* grapple with the "functional" analysis Plaintiffs assert because the *Paquin* Court reviewed a different set of facts and law. While the Court of Appeals did not rule on this issue, *Taxpayers*, 2019 WL 5588741, at *7 n 9, the question here is whether entities created and operating under state law are local units of government as defined by the Headlee Amendment and implementing statutes. PSAs are local governments under state law. As a result, it is not surprising that they look and function like traditional public schools—but contrary to Plaintiffs' entreaties, mere functional similarity is an unremarkable result, and not a cause, of PSAs' legal designation as local units of government under Headlee.

In short, the Court of Appeals' decision is not a departure from the law or common sense. "Put simply, we decline to hold that PSAs are school districts for

purposes of receiving state aid, but not school districts for purposes of determining how much state aid was received by school districts." *Id.* at *7.

III. Mandate spending under § 29 is state spending from state sources sent to locals, and, thus, § 30 spending.

State funding under § 29 is state spending from state sources that is sent to locals for various mandates the State imposes. Because there are no § 30 exceptions for mandate funding, this funding is properly counted as § 30 spending. The language of the Michigan Constitution is clear in § 30—it includes no carveouts—and must be applied as written.

Simply put: there is nothing in the Headlee Amendment that says state spending is analyzed under § 29 *or* under § 30. They are separate provisions with separate purposes (otherwise they would not both need to exist) and *both* must be applied. So, under § 29, the state must pay for mandates it creates. Then when determining the aggregate amount of state spending each year that is in the form of payments to local governments under § 30, all state aid for local use (for mandates and discretionary revenue sharing) counts. There is no dividing wall, disqualifier, or conflicting language in §§ 29 and 30; they can both be applied, harmoniously, and have been for decades.

Stated differently, mandate spending is § 30 spending; any other conclusion relies on a false premise of guaranteed discretionary funding. But Headlee never guaranteed state funding for local programs of choice, and § 29 mandate funding falls within the plain language of, and is properly counted under, § 30.

Yet, in addressing State Defendants' motion for reconsideration, the lower court majority held that "pursuant to § 29, funding for new or increased *state mandates* may not be counted for purposes of § 30." *Taxpayers*, 2019 WL 5588741, at *1 (opinion of the court) (emphasis added). The Court's majority reasoned that:

> If state spending to fund new state-mandates under § 29 may be included in the State's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30, then *§ 29 state funding for new mandates would supplant* ***state spending intended for local use*** and, thereby, allow funding for new mandates to serve two conflicting purposes, i.e., to fund new state mandates as well as to the 1978–1979 level of state funding to local governments. [*Id*. at *8 (emphasis added).]

This conclusion creates a new category of spending—"state spending for local use"—disregarding the plain language of Const 1963, art 9, § 30.

Specifically, the decision relies on an alleged shortfall in "state spending intended for local use," see *id.,* a concept that is not part of the Headlee amendment, not found in the enabling statutes, and foreign to the caselaw. Its meaning is unclear because state funding to local governments to pay for state mandates *is* "intended for local use." The fact that the state places conditions on aid does not deprive the aid of its local character. Nevertheless, it appears to be a new phrase for a now familiar argument: state funding *for local programs of choice*.

This Court has already rejected that argument. The lower court erred when it failed to apply controlling precedent, instead modifying this Court's holding in *1985 Durant*, 424 Mich at 379, and holding that Headlee § 29 is "aimed at existing services or activities already required of [, or otherwise performed by,] local government" in 1978. *Taxpayers*, 2019 WL 5588741, at *7 (alteration in original).

The Court of Appeals' added bracketed phrase—"[or otherwise performed by]"—is not only absent from *1985 Durant*, it conflicts with this Court's precedent. In *Livingston County*, this Court held that Headlee "clearly does not prohibit the reduction of the 'state financed proportion . . . of any existing activity or service [*not*] required . . . by state law.' " *Livingston Co*, 430 Mich at 644 (1988) (alteration in original).

A. The plain language of § 30 includes all state spending in "total state spending" with no exceptions. State spending to fund local mandated activities and services under § 29 is included.

Section 30 does not exclude any category of state spending paid to local governments from the "total." It is a simple provision with a single fraction. State spending paid to local governments to fund state mandates falls within the plain language of § 30 and not only should, but *must*, be accounted for as such. State funding paid to local governments without any associated mandate—i.e., discretionary funding—must also be counted under § 30; "total" means total.

Section 30 provides that state spending to locals "shall not be reduced below that proportion in effect in fiscal year 1978-79." It uses the word "proportion" rather than a discrete dollar amount, a comparative ratio with state spending to locals over total state spending, period. "[I]n analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face." *Silver Creek Drain Dist v Extrusion Div Inc*, 468 Mich 367, 375 (2003). If the words have a clear and obvious meaning, "that plain meaning is the meaning given them." *Id*. If they instead turn on "a technical, legal term" then the words

are construed "in their technical, legal sense," based on "the meaning that those sophisticated in the law understood at the time of enactment . . . ." *Id.*

Here, the language is clear and merely "requires that the overall percentage allotment of the state budget for local units of government must remain at 1978 level." *1985 Durant*, 424 Mich at 393. It does not reference what the money is paid to the locals for, any exclusions from those state payments to locals, or any other guarantees beyond the aggregate calculation and minimum aggregate funding that must be satisfied each year. This Court should, as it previously has in addressing this very provision, "decline to accept a strained interpretation of an unambiguous statement of intent by the voters" that ratified the Headlee Amendment. *Id.*

The Court of Appeals improperly determined that counting state mandate spending (i.e., § 29 funding) under § 30 would "serve two conflicting purposes." *Taxpayers*, 2019 WL 5588741, at *8 (opinion of the court). The Court reasoned that if State aid payments are counted under both § 29 (because they are payments to fund state mandates) and § 30 (because they are state aid payments to locals), these state payments would serve "double-duty" as if the two provisions were inherently at odds rather than harmonious provisions with distinct purposes. *Id.*

If courts cannot "read into [a] statute what is not within the Legislature's intent as derived from the language of the statute," i.e., add words or requirements that simply do not appear, they cannot change the State's Constitution on that basis either. See *Am Fed'n of State, Co & Muni Emp v City of Detroit*, 468 Mich 388, 400 (2003), citing *Omne Fin, Inc v Shacks, Inc* 460 Mich 305, 311 (1999) (wherein this

Court "declined to read into the statute a provision" that did not exist in the plain language). The lower court's decision addressing state payments to local governments to satisfy § 29 and their treatment under § 30 is contrary to the plain language of Michigan's Constitution and should be reversed.

B. The Court of Appeals erred by excluding entire categories of state payments to local governments and creating new language in § 30 in conflict with its clear requirements.

The Court of Appeals' opinion engrafts new language into the constitution, creates a new guarantee for discretionary local funding, and undermines the voters' intent to exert greater control over taxation and spending.

1. The Court of Appeals read exclusionary language into § 30 for entire categories of state payments to locals.

The Court of Appeals cited this Court's decision in *1985 Durant*, then added language that is in direct conflict with this Court's prior decisions and that changes the meaning of *1985 Durant*. Specifically, the Court of Appeals held that:

> The first sentence of § 29 speaks only to "existing activities" and so "aimed at existing services or activities already required of *[, or otherwise performed by,]* local government" at the time the Headlee Amendment became effective. *Durant*, 424 Mich at 379; 381 NW2d 662. This sentence "prohibits reduction of the state proportion of necessary costs with respect to the *continuation* of state-mandated activities or services." [*Taxpayers*, 2019 WL 5588741, at *7 (opinion of the court) (emphasis added) (citations omitted).]

With one set of brackets, the court changed the purpose of (and the entire body of caselaw addressing) § 29. Specifically, the court defined a local government's "existing activities" entitled to state funding to include those

mandated by the state in 1978 "*[, or otherwise performed by,]* local government" at the time the Headlee Amendment became effective." *Id.* (emphasis added).

That bracketed language does not square with *1985 Durant*, or *Livingston County*, *Schmidt*, or *Oakland County*. It is also internally inconsistent as, two lines later, the lower court reinserted the language citing state funding for "*continuation* of state-mandated activities or services" in 1978. *Id.*

But most importantly, it does not square with § 29 itself; the Court of Appeals' language, engrafted into the actual language of the first sentence of § 29, would appear as follows:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service ~~required of units of~~ [provided by] Local Government[s] ~~by state law.~~

This cannot be reconciled with the plain language of the Constitution or controlling precedent. This error is the lynchpin in excluding certain chunks of state spending paid to local governments, this time for mandate payments under § 29 but opening the door to others in the future simply because local governments want more state revenue sharing, a question best left to the body who the Constitution says controls the purse strings, the Legislature. Neither § 29 nor § 30 requires a minimum level of funding of local government for discretionary activities. This Court must reverse the lower court's decision because it is contrary to controlling law, rewrites the Constitution, erodes § 29's guarantees, and changes the § 30 calculation.

2. The Court of Appeals erred in creating a guarantee for local discretionary funding in § 30.

As previously discussed, this Court's decision in *Livingston County* disposes of Plaintiffs' premise that the state must provide local governments, in perpetuity, with discretionary funding. Headlee only guarantees that statewide taxpayers fund state-created mandates, not discretionary local activities. In *Livingston County*, this Court discussed this same theory, holding:

> [The Amendment's] plan is quite obvious. Having placed a limit on state spending, it was necessary to keep the state from creating loopholes either by shifting more programs to units of local government without the funds to carry them out, or by reducing the state's proportion of spending for "required" programs in effect at the time the Headlee Amendment was ratified. *The plan clearly does not prohibit the reduction of the "state financed proportion . . . of any existing activity or service [not] required . . . by state law*. [*Livingston Co*, 430 Mich at 644 (emphasis added).]

This Court rejected the argument that "the Headlee Amendment applied to increases in the level of even optional activities or services" because local governments that took on these "optional activities . . . could look to all state taxpayers for the cost of upgrading a voluntarily assumed" activity. *Id*. at 645.

Had this Court accepted that argument, as the lower court did here, it would have been in direct conflict with the very intent of the Amendment:

> Rather than containing the cost and scope of state and local government as indicated by the Headlee Amendment, this result would encourage local units of government to undertake those services and activities previously provided by private enterprise since state taxpayers as a whole, as opposed to local consumers of the service, would pay for any necessary increased costs associated with the increase in the level of that service or activity. [*Id*. at 646.]

Courts have consistently distinguished between what is required of local governments by state mandate and what is optional, permissive, or voluntary local activity. See *Kramer v City of Dearborn Heights*, 197 Mich App 723, 726 (1992) (holding that "[b]y statute, a law that allows a local unit of government to perform an activity or service, but does not require it, is not a 'requirement of state law.' "). As a result, providing such a local service "is a permissive rather than a mandatory activity," and the associated costs of the program of choice is "not subject to the provision of the Headlee Amendment" requiring state funding. *Id.* To hold otherwise would require statewide taxpayers, through state revenue collections, to pay for local governments' services of choice.

That was not the intent, or the plain language, of the Amendment: "both the purpose behind and the circumstances surrounding adoption of the Headlee Amendment, as well as dicta from several Court of Appeals decisions, indicate that the language 'an increase in the level of any activity or service' in art. 9, § 29"—the legal challenge at issue in *Livingston County*—"refers only to required, not optional, services or activities." *Livingston Co*, 430 Mich at 648. Local discretionary activities and services are not entitled to state funding under § 29 or § 30.

Every known decision since *Livingston County* has reached the same conclusion. On the question of pre-Headlee state mandates, this Court noted that "§ 29 prevents the state from reducing its share of the funding of programs mandated by prior law." *Oakland Co*, 456 Mich at 149. Similarly:

- "The Headlee Amendment is implicated where an 'activity or service' is involuntary." *Id.* at 157.

- "The question is not whether the local [governments] will be forced to raise local taxes to support their programs of choice, it is whether the state may mandate programs for which it does not pay a proportionate share." *Schmidt*, 441 Mich at 260.

- "The Headlee Amendments do not insulate [local governments] from making difficult financial choices" with regard to its voluntary services, but what would be unconstitutional is "[o]bliging local units of government to increase taxes in response to a reduction of funding for state-mandated programs" which could not "properly be characterized as a 'tough financial decision' consistent with the spirit of the Headlee Amendments." *Id.* at 306–307.

- The state is only "required to maintain the level of funding of categorical aid for the necessary costs of programs *required* of school districts *by state statute or state agency regulation that existed at the time § 29 became effective*." *Id.* (emphasis added).

The lower court's decision is directly contrary to this Court's precedents and subsequent Michigan Court of Appeals' decisions relying on this Court, consistently differentiating between mandatory and non-mandatory local programs and who—statewide taxpayers or local taxpayers—is responsible for funding them.

3. The Court of Appeals' decision conflicts with the voters' intent of greater control over taxation and spending.

Headlee was intended to give voters greater control over taxing and government spending. Accordingly, decisions about local services (and the taxes to support them) are made by local taxpayers. Conversely, making statewide taxpayers fund local discretionary activities moves taxpayers further from, not closer to, control over government taxing and spending. Voters can control state spending by electing (or removing) state level representatives. And a subset of the same voters can control local discretionary spending directly by approving (or declining) local tax increases. "The Headlee Amendment sought 'to link funding,

taxes, and control,' balancing rights and obligations at both the state and local levels." *Schmidt*, 441 Mich at 258, quoting *1985 Durant*, 424 Mich at 368.

In other words, "unrestricted state aid [to local governments] is not funding for an 'existing activity or service required of units of Local Government by state law.' " *1985 Durant*, 424 Mich at 378. And nothing in § 30 guarantees *any* particular type of funding; it is an aggregate ratio of the "total" state funding sent to local governments, regardless of how local governments ultimately use those funds, over total state spending from state revenue sources. Arguing that *some money does not count*, in an effort to devise guaranteed unrestricted state funding at the 1978–1979 level, is contrary to the plain language and this Court's precedent. Simply put, state aid is state aid whether tied to mandatory or voluntary activities.

This Court has been careful "to protect all local taxpayers from the need to increase taxes to pay for programs over which they lack control." *Schmidt*, 441 Mich at 259. As to § 29, this Court "rejected an interpretation . . . that . . . 'would . . . force some taxpayers to supplement the [local governmental] budgets of others' when the 'supplementing taxpayers would have no control over how those funds would be spent . . . .' " *Id.* at 257–258, quoting *1985 Durant,* 424 Mich at 383.

Yet, the Court of Appeals' decision handcuffs the Legislature. That decision, contrary to this Court's pronouncements as to Headlee voters' intent, would "severely limit the [Legislature's] ability to exercise discretion in the allocation of funds" as circumstances, needs, or even pure policy preferences, change. *Id.* at 261. Headlee voters did not intend "to freeze the status quo" or "freeze [Legislative]

funding" decisions "regardless of the changes . . . over time." *Id.* at 261–262. But excluding local aid dollars tied to state mandates from the § 30 proportion would radically constrain legislative discretion in ways unimagined by the Headlee voters.

If the Legislature's authority to control its *own* fisc is unfettered (i.e., if it may decide to reallocate funds from discretionary funding to a new mandate, or it may repeal a state law mandate altogether and reallocate those funds to another use), then the lower court's recognition of a novel requirement—state funding for local discretionary use—stands alone, a complete stranger to the fabric of the law. The Legislature would have no control over the local programs of choice, and thus, no ability to reallocate (or eliminate) the use of those statewide taxpayer funds.

Under the lower court's reading of §§ 29–30, however, the Legislature would be required to appropriate additional state taxes "to pay for programs over which they lack control" and will not benefit from. *Id.* at 259. The Headlee Amendment was part of a "nationwide 'taxpayer revolt.'" *Id.* at 285 (LEVIN, J., (dissenting), citing *1985 Durant*, 424 Mich at 378. But the lower court's decision recasts Headlee as if a product of a *local government* revolt; unable to convince their taxpayers to approve additional local funding, local governments end-run those taxpayers seeking increased funding from statewide taxpayers for purely local purposes. This formulation is the exact opposite of what Headlee's voters desired and is contrary to what this Court has held.

C. The Court of Appeals' dissenting opinion properly determined that § 30 does not guarantee discretionary funding.

On reconsideration, Judge Borrello, penned a separate dissent outlining the reasons why the majority's decision was contrary to law. Specifically, citing this Court's decision in *1985 Durant* without modification, the dissent noted that "[e]ach sentence in § 29 serves a separate but related function. The first sentence is 'aimed at existing services or activities already required of local government.' " *Taxpayers*, 2019 WL 5588741, at *10 (BORRELLO, P.J., concurring in part and dissenting in part) (citation omitted). By contrast, "[t]he second sentence 'addresses future services or activities.' " *Id.*

The dissent then applied § 30's plain language, finding that it "guarantees nothing more than the provision by the state of a certain base level of funding, i.e., an amount equivalent to the proportion of total state spending paid to all units of local government, taken as a group, in effect in fiscal year 1978-79." *Id.* at *11.

Further, "[s]ection 30 contains no language guaranteeing the exact composition of the funding, i.e., that the base level of funding guaranteed by § 30 must [forever] contain the same ratio of discretionary funding." *Id.* Again citing this Court's decision in *Livingston County*, the dissent found that:

> [T]he provisions of the Headlee Amendment do not prohibit the reduction by the state of its financed portion of any existing activity or service provided by a local unit of government not required by state law, i.e., a service or activity provided at the discretion or option of the unit of local government." [*Id.*, citing *Livingston Co*, 430 Mich at 644, 648.]

And because there is no such prohibition in the plain language, "and to the extent that general and unrestricted revenue sharing composed a portion of the

total state spending in fiscal year 1978-1979," the state may reallocate unrestricted or discretionary funding paid to local governments. *Id.* These monies may "fund the necessary costs incurred by local units of government in providing newly enacted state-mandated activity . . . or an increase in an existing mandated activity," and are counted under § 30 either way, "without violating the scheme of the Headlee Amendment." *Id.* That reading harmoniously applies the plain language of § 29 and § 30, and not as serving "two conflicting purposes," as if only one provision or the other may lay claim to state funding that clearly meets the definitions of both. *Id.* at *10. This Court should apply the same reasoning as the dissent because it is sound, consistent with the plain language of the provisions, it properly applies controlling precedent, and respects the voters' intent.

IV. The Auditor General should not be subject to mandamus but instead dropped from this action.

Plaintiffs seek mandamus to enforce a right that has not accrued; they seek enforcement of a final appellate judgment that has not been entered and subject to further modification on appeal. Thus, any action against the Auditor General is, at best, premature. Further, the Auditor General's function is more than ministerial, for which reason mandamus is not appropriate.

A. There has not been a final determination that the funding at issue is not properly counted as § 30 spending, making any mandamus claim against the Auditor General premature.

Even assuming Plaintiffs are correct as to any of the counts at issue, any remedy as applied to the Auditor General is premature. Section 32 of the Headlee Amendment evinces the People's intent that "a constitutional provision . . . be

effectively enforced." *1997 Durant*, 456 Mich at 206. But this enforcement only necessitates a remedy if the state fails to act in accordance with a court decision. "Declaratory relief coupled with an award of damages is appropriate . . . as a result of the prolonged 'recalcitrance' of the defendants . . . ." *Id.*

In *1997 Durant*, the Court of Appeals had previously determined that certain education programs fell within state-mandated activities/payments under § 29. *Id.* at 186. In proceedings to determine the calculation of amounts related to these programs, the state persisted in arguing that certain state programs should not be counted under § 29 because they were imposed by federal law. *Id.* at 189. This Court rejected the State's claims and considered the appropriate remedy. The Court noted that the case was "the first case of underfunding under art 9, § 29 to come to judgment." *Id.* at 204. "While we anticipate that monetary relief typically will not be necessary in future § 29 cases, defendants' prolonged recalcitrance in this case necessitates a substantial recovery aimed primarily at providing a remedy for the harm caused by underfunding." *Id.* The Court also determined that declaratory relief was appropriate owing to the state's "recalcitrance." *Id.* at 206.

Like *1985 Durant*, this is the first case of its kind to come to judgment under § 30 of the Headlee Amendment. This fact was not lost on the Court of Appeals, which noted that "the question posed by this suit is a novel one." *Taxpayers*, 2019 WL 5588741, at *5 (opinion of the court). Further, there is no indication of the State's, or the Auditor General's, recalcitrance because there has been no final judicial decision on the issues presented in this case. If the state is ordered to

remove the funding at issue from the § 30 calculation, State Defendants will comply with the ruling. In the meantime, an order of mandamus that the Auditor General audit state expenditures in accordance with a ruling that has not yet been made is sequentially impossible and premature.

If this Court adopts Plaintiffs' § 30 interpretation, then the OAG will implement the procedures and interpretations this Court orders. A mandamus action would be appropriate only if: (1) Plaintiffs prevail; and (2) the OAG does not comply with this Court's determination going forward. Neither of these have occurred, for which reason the OAG should be dropped from this action.

B. The Auditor General's function is more than ministerial.

"A writ of mandamus is an extraordinary remedy." *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366 (2012). A plaintiff must show that: (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled; (2) the defendant has a clear legal duty to perform the act; (3) the act is ministerial; and (4) no other remedy exists that might achieve the same result. *Id*. See also *Stand Up For Democracy v Sec'y of State*, 492 Mich 588, 618 (2012).

A mandamus action requires, among other things, that the act be ministerial. *Coalition for a Safer Detroit*, 295 Mich App at 366. In this *case*, the OAG is responsible for reviewing the State Budget Office's Statement of the Proportion of Total State Spending from State Sources Paid to Units of *Local* Government ("Statement"), and completing a limited scope review. (App p 128a.) In other words, the OAG reviews whether the Statement properly accounts for spending to

units of local government in accordance with law and established policies and procedures. The OAG then concludes whether or not material modifications to the Statement are necessary. This review "includes primarily applying analytical procedures to management's financial data and making inquiries of management." (*Id.*) The review is conducted "in accordance with *Statements on Standards for Accounting and Review Services* issued by the American Institute of Certified Public Accountants." (*Id.*) That duty is not found within or specific to any Headlee constitutional provisions. Rather, the OAG relies on testing performed in a separate financial audit that reviews whether state spending is properly recorded in the State's accounting records and those same records are then used by the State Budget Office to compile the § 30 report.

The OAG agrees that the act of reviewing state expenditures may be considered ministerial, as conducting the review itself is required. But the application of accounting principles and analyses during that review, and its conclusions, are not ministerial. To the contrary, the OAG review includes discretion and communication to verify any areas of concern—it requires auditing in accordance with well-established guidelines and procedures to new information (i.e., budgets, line-item accounting/expenditures) each year.

But discretion should not be confused with arbitrary application; the OAG has applied the same methods for its review and analysis for decades, including the interpretations included in the definitional sections for how certain funding is treated. Any purported error in its methods is neither established nor even

apparent. Furthermore, the OAG's review and analysis culminate in a statement of assurance, i.e., that the Budget Office's determination that the State has met its § 30 obligations requires no material modifications. It is not a forensic audit of every transaction, in every state department and agency, spanning an entire year.

CONCLUSION AND RELIEF REQUESTED

Appellants respectfully requests that this Court affirm the Court of Appeals as to Proposal A and charter school funding being counted as state spending paid to local units of government under Article 9, § 30. Appellants also ask that this Court reverse the Court of Appeals as to § 29 mandate spending and determine that it is also included as § 30 state spending to local units of government as a matter of law. Finally, the Auditor General asks that it be dismissed from these proceedings as the Office of Auditor General has never been a necessary party to this case.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ Matthew B. Hodges
Matthew B. Hodges (P72193)
David W. Thompson (P75356)
Michael S. Hill (P73084)
Assistant Attorneys General
Attorneys for Defendants-Appellants
Revenue and Tax Division
P.O. Box 30754
Lansing, MI 48909
(517) 335-7584

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