STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs,

Court of Appeals No. 334663

v

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

Defendants.
_______________________________________/

SUPPLEMENTAL BRIEF OF DEFENDANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This matter is on remand from the Michigan Supreme Court and concerns allegations regarding violations of the Headlee Amendment, Const 1963, art 9, §§ 25–34. Such claims are properly brought in this Court, which has original jurisdiction pursuant to Const 1963, art 9, § 32 and MCL 600.308a(1). This includes Plaintiffs' instant claims under Const 1963, art 9, § 30.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Public school academies (PSAs, or charter schools) are statutorily designated public schools, school districts, and government agencies that deliver local education services in the same manner, and with the same funding, as traditional public schools. The PSAs at issue are authorized by school districts, intermediate school districts, and community colleges. These authorizers must operate within the geographic boundaries of their authorizers; exercise similar political powers as traditional public schools; and are subject to direct and indirect control of local electorates. Thus, PSAs are "authorities created by other units of local government." Must state funding to these PSAs be included in the calculation of total state spending paid to all units of local government required by Article 9, § 30?

   Plaintiffs' answer: No.

   State Defendants' answer: Yes.

2. The Michigan Supreme Court remanded this matter to this Court "to specify which defendant is failing to perform which clear legal duty and should analyze whether granting the extraordinary writ of mandamus is warranted." Have Plaintiffs sufficiently pled a claim for mandamus here given that the Governor is not subject to such an order and given that Plaintiffs failed to articulate the exact duty that a department head or officer should be compelled to perform?

   Plaintiffs' answer: Yes.

   State Defendants' answer: No.

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INTRODUCTION

This matter is now pending on remand from the Michigan Supreme Court with instructions to address two questions: (1) whether funding for PSAs that are authorized by school districts, intermediate school districts, and community colleges is properly counted under the Headlee § 30 percentage; and (2) whether and how a writ of mandamus should be granted, and what specific state defendants and duties are subject to it.

As to the first question, funding for the PSAs at issue must count as § 30 spending because they are authorities that are created by other units of local government. These PSAs are themselves authorities, which are in turn authorized by school districts, intermediate school districts, and community colleges, all of which operate in limited geographic boundaries. Further, the authorizers exercise political powers equivalent to—and greater than—traditional public schools and are subject to the direct and indirect control of local electorates. Finally, PSAs provide local education services, and expenditures by PSA authorizers—which are political subdivisions of the state—are properly counted as § 30 spending. Accordingly, the PSAs at issue—both statutorily and in operation—are units of local government for purposes of § 30, and state spending from state tax revenue to support these PSAs is § 30 numerator spending.

As to the second question, the Supreme Court's instruction was clear: consider whether a writ of mandamus is appropriate, and if so, identify the specific state departments that are subject to the writ and also the duties that they must

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perform. Plaintiffs' briefing does not provide that specificity and now seeks mandamus against the Governor, relief which this Court cannot grant.

For these reasons, Defendants request that this Court dismiss Plaintiffs' claims concerning PSAs under MCR 7.206(E)(3)(b) and MCR 2.116(C)(10), and limit the extent to which mandamus is appropriate in this matter.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Charter schools, also known as public school academies (PSAs), have been available to Michigan students for more than two decades. PSAs are created by certain authorizers, including school districts, intermediate school districts (ISDs), and community colleges, which all share many of the same characteristics as traditional public schools and other governmental entities that existed at the time of Headlee's ratification. Specifically, they exercise equivalent political power; are geographically restricted; and are subject to direct and indirect control of their local electorates.

Charter schools are authorities that exercise political powers and operate in the same manner as traditional public schools.

"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). PSAs are public schools and school districts. MCL 380.501(1). They cannot charge students tuition. MCL 380.504(2). They operate under the same per-pupil funding formula used to fund all public schools in Michigan—i.e., funding from the State School Aid Fund. MCL 388.1606(4); MCL 388.1620(6). Further, they exercise political powers equivalent to traditional public schools after Proposal A and are subject to direct and indirect local electorate control.

The Revised School Code (RSC) 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);

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Council of Organizations & Others for Educ About Parochiaid v Governor, 455 Mich 557, 568 (1997). And charter schools are accountable to the public based on their funding, i.e., per-pupil funding. In other words, if students (or their taxpaying parents) 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, PSA 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). And charter schools have access to the same state and federal grants as local school districts. MCL 380.504a(f).

Finally, a member of a PSA board of directors is a public officer and, before entering upon the duties of the office, must take the constitutional oath of office for public officers under the Michigan Constitution. MCL 380.503(11); Const 1963, art 11, § 1. Similarly, 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, both personally and professionally, for an act or omission in authorizing a charter school if the authorizing body or the person acted or reasonably believed he or she acted within

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the authorizing body's or the person's scope of authority. *Council of Organizations*, 455 Mich at 567.

Charter schools are authorized by, among other entities, ISDs and community colleges, which operate in limited geographic regions.

The RSC provides for charter schools to be formed by contracts with certain authorizers. MCL 380.502. These entities operate in statutorily defined and limited geographic boundaries. Specifically, ISDs operate within district boundaries for each constituent district in accordance with maps published under Michigan law. MCL 380.626(1). Similarly, community colleges operate within districts comprised of counties, MCL 389.15; school districts, MCL 389.31(1); and ISDs, MCL 389.51.

Further, PSAs cannot operate outside of the authorizer's district boundaries. MCL 380.502(2). PSAs must also accept students who reside within the geographic boundaries of the PSA authorizer. MCL 380.504(3).

ISDs and community colleges are authorities that wield political powers similar to—in some ways greater than—traditional public schools.

An ISD is a body corporate governed by an intermediate school board. MCL 380.604. The RSC, MCL 380.601a provides, among other things, that ISDs have the powers of educating pupils, MCL 380.601a(1)(a); receiving taxes collected by a city or township treasurer, MCL 380.625; hiring employees and independent contractors to carry out ISD powers, MCL 380.601a(1)(d); borrowing and pledging

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funds, MCL 380.601a(1)(e); and entering into contracts for performance of ISD functions, MCL 380.601a(2).

Similarly, the Community College Act provides that community colleges are bodies corporate. MCL 389.103(1). A community college board of trustees may also borrow money, issue notes to secure funding for operations, and pledge state appropriations. MCL 389.127(1)–(2). The board may also borrow money and issue district bonds of the for certain community college operations or to purchase building sites or improvements. MCL 389.122(a)–(b).

ISDs and community colleges are accountable to local electorates.

ISDs are governed by intermediate school boards, which are comprised of school electors from a constituent district. MCL 380.612(1). School board candidates are nominated by petitions signed by school electors from combined constituent ISD districts in accordance with the district population. MCL 380.614(5)(a)–(b). Board members are elected biennially. MCL 380.614(1); MCL 380.615.

Community colleges are also governed by popularly elected boards of trustees from the district territory. MCL 389.14 ("a community college is directed and governed by a board of trustees, consisting of 7 members elected at large"); MCL 380.411a (requiring four members of the board of a first-class school district to be elected at large). See also MCL 389.34(1); MCL 389.54(1).

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Michigan Supreme Court proceedings and remand.

The Michigan Supreme Court affirmed this Court's dismissal of Plaintiffs' claims concerning Proposal A spending and funded mandates. *Taxpayers for Mich Constitutional Gov't v Michgian*, ___ Mich ___, ___ (2021), 2021 WL 3179659, (opinion of the court), *17. The Court then remanded this matter to this Court to decide whether funding for certain charter schools authorized by a school district, ISD, or community college should be counted as § 30 local spending. *Id.* at *12–13. Further, the Supreme Court vacated this Court's grant of mandamus and remanded to clarify which state defendant is failing to perform which clear legal duty, and also to consider whether mandamus is appropriate in the first instance. *Id.* at *17.

STANDARD OF REVIEW

On remand, Defendants seek dismissal of the remaining claims under MCR 2.116(C)(10) because there are no genuine issues of material fact and Defendants are entitled to judgment in their favor as a matter of law. In considering a motion under (C)(10), this Court considers "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120 (1999). But the opposing party cannot offer a "mere pledge to establish an issue of fact at trial" to "survive summary disposition." *Id.* at 121.

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ARGUMENT

I. PSAs are "authorities" within the meaning of § 30 of the Headlee Amendment.

PSAs are "authorities" as would be commonly understood by Headlee voters. Specifically, PSAs wield similar political power to traditional public schools insofar as they perform a state function previously carried out by other units of local government.

The relationship between local and state government as it relates to public education is clearly delineated in Const 1963, art 8, § 2, which provides:

> The legislature shall maintain and support a system of free elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin.

Accordingly, the Constitution requires the Legislature to maintain and support a system of free public elementary and secondary schools, but local school districts are responsible to provide the education of its pupils. This is true of PSAs, which receive school aid per-pupil funding and provide education to pupils where they live. MCL 388.1606(4); MCL 388.1620(6).

PSAs may exercise any number of powers that are typically exercised by traditional public schools. For example, a PSA can acquire, hold, own, and sell real and personal property in its own name. MCL 380.504a(b). They can also receive, disburse, and pledge funds; enter into certain types of agreements (e.g., management agreements); incur debt; solicit and accept grants or gifts; and borrow money and issue bonds on their own full faith and credit. MCL 380.504a(c)–(g).

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Further, the political powers PSAs wield are not unlike traditional public schools after the passage of Proposal A. Under Proposal A, school districts are no longer allowed to levy taxes without restriction. Specifically, Public Act 145 of 1993 eliminated the authority of school districts to levy local millages on property for school district operating expenses. *Durant v State Dep't of Ed*, 238 Mich App 185, 196 (1999). But the school district or ISD to which a PSA belongs can levy certain taxes, which may be used to support the operations/facilities of the PSA the school district or ISD operates. MCL 380.503a.

Also, prior to the RSC, school districts were broken into various classes, which were consolidated by statute in 1996. Specifically, the RSC provides that "[b]eginning on July 1, 1996, each school district formerly organized as a primary school district or as a school district of the fourth class, third class, or second class shall be a general powers school district under this act." MCL 380.11a(1). Thus, the RSC eliminated primary school districts, MCL 380.71–380.87; districts of the fourth class, MCL 380.101–380.155; joint high school districts, MCL 380.171–380.187; districts of the third class, MCL 380.201–380.260; districts of the second class, MCL 380.301–380.362; and consolidation of school districts, MCL 380.862a. These district classes were replaced by general powers school districts, which exist today.

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In the course of this reorganization, the RSC also eliminated several powers previously held by public schools. [1] For example, the RSC repealed provisions requiring school boards to ensure that decisions at a school building level are made via site-based decision-making, MCL 380.1202a; requiring a school board and ISD board to publish financial reports, MCL 380.1203; and requiring a school board to issue an annual report to the State Board, MCL 380.1204, among other changes. (See generally, Ex A, Senate Fiscal Analysis.) The takeaway is two-fold: public schools at the time Headlee was ratified varied in their political authority; but now, they do not, which means that all public schools, including PSAs, wield the same general authority.

It was also not uncommon before Headlee's ratification for certain authorities to be created as matters of contract, and for those entities to exercise powers similar to those of PSAs. For example, under the Urban Cooperation Act of 1967, an interlocal agreement can create a separate legal entity to administer or execute certain agreements, MCL 124.507(1), which entity possessed certain powers similar to those held by PSAs. The Act provides that the separate legal entity "shall be a public body, corporate or politic for the purposes of this act." *Id*. These entities cannot levy taxes or issue bonds, but, like PSAs, can otherwise enter into contracts, acquire and operate buildings, hold or dispose of property, incur debts and

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[1] While the RSC eliminated some of these public school characteristics, some requirements were revised or moved to other statutes. See, e.g., MCL 388.1619, a provision of the State School Aid Act addressing financial reporting.

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obligations, etc. MCL 124.507(2). See also MCL 124.284(1)–(2) (allowing for incorporation of a sewage authority as a public body corporate that could, among other things, acquire and dispose of real and personal property.)[2] These authorities created by other local units of government are not directly controlled by any one local government's voters and may span across traditional political boundaries.

In short, PSAs exercise equivalent political powers to traditional public schools. And whether creatures of public law exclusively, or by contract in conjunction with public law, public entities similar to PSAs that were in existence at the time of Headlee's ratification exercised similar political powers as those wielded by PSAs.

II. PSAs organized by school districts, ISDs, and community colleges are "authorities created by other units of local government," for which reason they are local units of government for purposes of Headlee, § 30.

In its opinion, the Michigan Supreme Court examined whether PSAs are political subdivisions of the state by considering what Headlee voters would have understood them to be. Specifically, the Court noted that those voters would have understood a political subdivision of the state "to mean a geographically limited unit of government formed to exercise political power and that is beholden to a local electorate." *Taxpayers*, ___ Mich at ___, 2021 WL 3179659, at *11. School districts are "political subdivisions of the state," per § 33 of the Headlee Amendment.

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[2] Note, however, that this kind of authority could also issue bonds for "any of its corporate purposes." MCL 124.284(2)(f).

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Further, ISDs and community colleges bear the distinctive marks of "political subdivisions of the state." Accordingly, PSAs authorized by these entities are "authorities created by other units of local government," and thus local government units within the meaning of the Headlee Amendment, § 33.

A. PSAs authorized by school districts are local units of government because school districts are "political subdivisions of the state," and PSAs are authorities created by school districts.

Section 33 of the Headlee amendment provides that:

> "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 governmen*t. [Const 1963, art 9, § 33 (emphasis added).]

Thus, the Headlee Amendment defines school districts as political subdivisions of the state. Further, school districts in turn serve as authorizers for certain PSAs, which themselves are authorities for Headlee purposes. Accordingly, PSAs authorized by school districts are "authorities created by other units of local government."

It is that simple: § 33 itself resolves the question of whether PSAs authorized by school districts are local units of government, for which reason State spending for PSAs authorized by school districts is properly counted in the § 30 percentage.

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B. PSAs authorized by ISDs and community colleges are also local units of government because these authorizers bear the distinctive characteristics of political subdivisions of the state.

ISDs and community colleges operate within a limited geographic region, exercise equivalent political powers to traditional public schools and similar authorities, and are both directly and indirectly subject to local electoral accountability. Accordingly, PSAs authorized by these entities are "authorities created by other units of local government," and thus are themselves local units of government under Headlee, § 33.

1. ISDs and community colleges must operate within a limited geographic region.

ISDs and community colleges are limited geographically by district lines, county lines, and otherwise. As it concerns ISDs, these entities are required under Michigan law to publish a map showing the district boundaries for each constituent district:

> Except as provided in subsection (2), by July 1 of each odd-numbered year the intermediate school board shall prepare and publish a map of the intermediate school district showing by district lines the boundaries of each constituent district and shall submit a copy of the map to the clerk of each township and city located in the intermediate school district, to the secretary of each constituent district, and to the secretary of state. In the period intervening between publication dates, the intermediate school board shall report each boundary change to the principal officers of the affected municipalities and townships and the secretary of state. [MCL 380.626(1).]

These district lines/boundaries are the limited geographic regions in which ISDs operate—they cannot operate statewide.

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Similarly, community colleges operate in districts comprised of—and territories designated by—counties,[3] MCL 389.15 ("1 or more counties may join to form a community college district by a majority vote of the electors residing in the proposed district"); school districts, MCL 389.31(1) ("A school district or 2 or more school districts that operate grades kindergarten through 12 may form a community college district"); and ISDs, MCL 389.51 ("The board of an intermediate school district or the boards of 2 or more intermediate school districts acting as a single board may form a community college district under this chapter."). Accordingly, the geographic limitations built into these predicate entities/regions constitute the boundaries for community colleges as well.

Additionally, the RSC provides that a PSA itself cannot operate outside of the authorizing body's geographic boundaries:

> Subject to subsection (9), any of the following may act as an authorizing body to issue a contract to organize and operate 1 or more public school academies under this part:
>
> (a) The board of a school district. However, the board of a school district shall not issue a contract for a public school academy to operate outside the school district's boundaries, and a public school academy authorized by the board of a school district shall not operate outside that school district's boundaries.
>
> (b) An intermediate school board. However, the board of an intermediate school district shall not issue a contract for a public school academy to operate outside the intermediate school district's boundaries, and a public school academy

[3] Counties and their boundaries were established under the Revised Statutes of 1846, MCL 45.1.

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> authorized by the board of an intermediate school district shall not operate outside that intermediate school district's boundaries.
>
> (c) . . . the board of a community college shall not issue a contract for a public school academy to operate outside the boundaries of the community college district . . . . [MCL 380.502(2).]

This geographic limitation based on the authorizing/incorporating body (or the predicate entity, in the case of community colleges) is not unique to PSAs or their authorizers, and was a characteristic of similar authorities that existed prior to Headlee's passage. For example, under the Municipal Sewage and Water Supply Systems Act 233 of 1955, municipalities could incorporate an authority for purposes of sewage disposal. Under the Act, the authority "shall be comprised of the territory lying within the incorporating municipalities." MCL 124.282(2).

Further, MCL 380.504(3) provides that for PSAs authorized by school districts, ISDs, or community colleges, enrollment *may* be extended to all Michigan residents, but "*shall*" be open to all residents within the authorizing body's geographic boundaries who meet the admission policy. This is not unlike the "schools of choice" options that allow a student to attend a public school district other than the one where that student lives geographically. See MCL 388.1705; MCL 388.1705c.

In short, PSA authorizers are geographically limited by certain district/territorial lines. These lines also serve as geographic boundaries for PSA service areas.

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2. ISDs and community colleges have political powers similar to—in some ways greater than—traditional schools.

The RSC governs the power of ISDs, which are similar to traditional public schools. An ISD is a body corporate governed by an intermediate school board that may sue or be sued in its own name. MCL 380.604. The RSC, MCL 380.601a provides, among other things, that ISDs have the powers of:

- Educating pupils, MCL 380.601a(1)(a);
- Receive taxes collected by a city or township treasurer, MCL 380.625;
- Acquiring and disposing of ISD property, MCL 380.601a(1)(b);
- Hiring employees and independent contractors to carry out ISD powers, MCL 380.601a(1)(d);
- Borrowing and pledging funds, MCL 380.601a(1)(e);
- Entering into contracts for performance of ISD functions, MCL 380.601a(2).

Similarly, community colleges also exercise certain political powers equivalent to traditional school districts and ISDs. Specifically, the Community College Act provides that community colleges are bodies corporate that may hold, use, and sell real estate. MCL 389.103(1). A community college board of trustees may also borrow money, issue notes to secure funding for operations, and pledge state appropriations. MCL 389.127(1)–(2). The board may also borrow money and issue district bonds for certain community college operations or to purchase building sites or improvements. MCL 389.122(a)–(b).

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3. ISDs and community colleges are accountable to local electorates.

Among other traits, local units of government as typically understood by Headlee voters exhibited accountability to local electorates. Here, ISDs and community colleges are directly accountable to their local voters.

ISDs are governed by intermediate school boards, which comprise school electors from a constituent district. MCL 380.612(1). School board candidates are nominated by petitions signed by school electors from combined constituent ISD districts in accordance with the district population:

> (a) If the population of the intermediate school district is less than 10,000 according to the most recent federal census, a minimum of 6 and a maximum of 20.
>
> (b) If the population of the intermediate school district is 10,000 or more according to the most recent federal census, a minimum of 40 and a maximum of 100. [MCL 380.614(5)(a)–(b).]

Board members are then elected biennially. MCL 380.614(1); MCL 380.615.

Similarly, community colleges are governed by boards of directors.[4] The board is made up of qualified electors who reside in the community college district (or proposed district). MCL 389.151. Candidates are nominated and subject to elections under Michigan election law. MCL 389.152. For community college districts made up of counties, school districts, and ISDs, the board of trustees is "elected at large in the territory of the district or proposed district on a nonpartisan

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[4] Community college districts may also be established by the state board of education on petition of "not less than 25 school electors of the county, school district or intermediate school district." MCL 389.71.

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basis." MCL 389.14(1); MCL 389.34(1); MCL 389.54(1). In other words, election of board members is based on the territory of the county, school district, or ISD.

Nominations and elections by local populations are flagship indicia of local electoral accountability. PSAs, in turn, are subject to these local accountability mechanisms of their authorizers.

4. ISDs and community colleges are also subject to indirect accountability, which is a trait they share with authorities that existed at the time of Headlee's ratification.

Indirect accountability is an overarching characteristic of public authorities. That same system of accountability exists in PSAs through its authorizing bodies, i.e., ISDs and community colleges.

Here, the superintendent of public instruction, a state officer who is appointed by the state board of education (MCL 18.445(J); Const 1963, art 8, § 3), may suspend the power of an authorizing body to issue new contracts for PSAs if they fail in their oversight duties. MCL 380.502(5). This mode of indirect control—i.e., appointments of authorities by municipalities or state officers—would not be unfamiliar to voters at the time of Headlee's ratification because similar governmental entities, i.e., local units of government, existed at that time. For example, commissioners for water authorities were appointed by city legislative bodies. *Taxpayers*, ___ Mich at ___, 2021 WL 3179659, at *21 (VIVIANO, J., dissenting); MCL 121.6. Similarly, the Mackinac Bridge Authority board members were appointed by the governor, as were the boards of various transportation and

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building authorities. *Taxpayers*, ___ Mich at ___, 2021 WL 3179659, at *21; MCL 124.410(1)(d); MCL 124.355; MCL 123.302; MCL 123.955.

Similarly, Public Act 73 of 1970 permits the formation of Airport Authorities between counties located within 10 miles of any state-owned airport and any city located within the boundaries of any such counties having a population over 10,000. MCL 259.801. Such authorities are governed by a board consisting of eight members; three of which are appointed by the mayors of each designated city (subject to advice and consent of the city council); three members from each county appointed by a majority of the board of commissioners; and two members from each other county comprising the authority appointed by their respective legislative bodies. MCL 259.802. The authority is a public body corporate with the power to sue or be sued and the duty of owning, maintaining, acquiring, and operating all publicly owned airports and facilities. MCL 259.807.

Also, Public Act 47 of 1945 permits the formation of Hospital Authorities among two or more cities, villages, townships, or combination thereof. MCL 331.1. Like Airport Authorities, the Hospital Authority is governed by a board consisting of members appointed by the legislative bodies of each participating city, village, or township. MCL 331.5(1). The board is also a body corporate with the power to sue, be sued, and exercise the powers necessary to acquire, construct, improve, own, maintain, and operate one or more community hospitals. MCL 331.2. Thus, while the Hospital Authority boards themselves are not directly accountable to the local populace, there is indirect accountability in that the members are appointed by the

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local government legislative bodies, who are directly accountable to the local electorate.

Similar to airport and hospital authorities, there are other authorities with similar board structures in existence in 1979 when Headlee was ratified. See MCL 121.6 regarding Charter Water Authorities controlled by a board of directors appointed by the legislative body of each participating city/village/township. See also MCL 123.673, allowing cities to establish market authorities with the power to develop and supervise a public market for the reception, handling, storage, and sale of wholesale farm and food products. The market authority board is established and governed by city ordinance and can issue bonds to carry out its functions. *Id.*

In short, this system of accountability is a main feature of a public authority going back to Headlee's ratification. Accordingly, ISDs and community colleges—and, therefore, their creations, i.e., PSAs—are "local units of government" for purposes of § 33.

C. ***Jackson*** is irrelevant to the question whether the subject PSAs are creations of political subdivisions of the state and/or they perform a service for the authorizing local units, the State's spending for which constitutes § 30 spending to locals.

Plaintiffs assert that PSAs are not "instrumentalities" of their authorizers:

> A private entity does not transform its character as an independent entity into becoming an instrumentality of its authorizing body and a political subdivision of the state by the simple acts of contracting with a governmental entity and performing a governmental function. [Pls' Suppl Br, p 13.]

Neither Defendants nor any court has relied on any similar or parallel proposition. Instead, the question is whether the subject PSAs are creations of political

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subdivisions of the state or whether PSAs perform services for the authorizing local units of government, the spending for which constitutes § 30 spending.

Plaintiffs' reliance on *Jackson v New Center Community Mental Health Services*, 158 Mich App 25 (1987) is misplaced because this case has nothing to do with governmental immunity. In *Jackson*, the plaintiff victims sought damages for injuries arising from a shooting at the defendant's mental health facility. The facility and related physician argued that they had governmental immunity because the facility was a nonprofit, publicly funded corporation that was part of a county agency charged with carrying out a governmental function. *Id*. at 27–28. This Court rejected those claims, reasoning that while mental health facilities carry out services that are required of government agencies, they are also "commonly provided by private facilities." *Id*. at 35. Accordingly, regardless of its provision of services that constituted a "governmental function" and public funding, it was nevertheless a nongovernmental entity that lacked governmental immunity:

> Its employees are not county employees. It retains its separate corporate identity and is governed by its own board of directors. Except as it has voluntarily obligated itself by contract, New Center is not required to provide services or to remain in existence. [*Id*.]

Far from "conclusive," (Pls' Suppl Br, p 14), *Jackson* has nothing to say about what constitutes a local unit of government under the Headlee Amendment.

Even if *Jackson* had relevance to Headlee, it would be distinguishable because there are fundamental distinctions between the mental health facility at issue in *Jackson* and the PSAs at issue in this litigation or their authorizers. While the *Jackson* mental health facility employees were not public employees, PSA board

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members are public officers, who along with other PSA employees, do have governmental immunity. MCL 380.503(11); Const 1963, art 11, § 1; MCL 691.1407; MCL 380.503(8). Further, unlike the facility and services at issue in *Jackson*, the only service that PSAs provide is a governmental service (i.e., delivery of *free* education services), in the absence of which there would be no reason for PSAs to exist. Neither is there any discussion in *Jackson* concerning what political powers the mental health facility could exercise or the extent of its accountability to a local electorate. The facility was merely providing mental health services, which happened to also be a government function, along with the services it generally provided in its private capacity. PSAs, by contrast, are required to provide, and derive public (per-pupil) funding from providing, education services.

Plaintiffs also misrepresent the nature of the PSAs at issue. In reciting this Court's prior opinion, they note that "PSAs do not have limited or local geographic boundaries." (Pls' Suppl Br, p 20, citing *Taxpayers*, ___ Mich at ___; 2021 WL 3179659 at *11.) Further, they assert that "public school academies authorized by community colleges, Intermediate School districts, and local school districts are no different. They admit students on the same basis as PSAs authorized by state universities unless their contract provides otherwise." (*Id.*) These representations are false. First, the PSAs at issue are limited geographically by the boundaries of their authorizers. MCL 380.502(2). Second, the PSAs at issue have different admission standards than PSAs authorized by state universities. Specifically, as a matter of statute (not contract), these PSAs *must* admit students from "within the

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geographic boundaries of that authorizing body," and *may* otherwise admit other students from outside the same. MCL 380.504(3). This is akin to traditional public schools, which may admit students from the same ISD or a contiguous ISD. MCL 388.1705; MCL 388.1705c.

Finally, Plaintiffs attempt to address a PSA's local accountability by saying that it is "far more" derivative than other authorities in 1978. (Pls' Suppl Br, p 21.) But Plaintiffs do not confront the local accountability structure of PSA authorizers or of PSAs themselves discussed *supra*. Plaintiffs merely rely on generalized characterizations of authorities that existed in 1978 without grappling with specific enabling legislation that existed prior to or at the time of Headlee's ratification.

As discussed above, this Court and the Michigan Supreme Court look to those criteria discussed above (Arguments II.B.1–3), concerning the geographic operations, political powers, and local electorate accountability to determine whether an authority is a local unit of government. Based on those characteristics, these PSAs are local units of government. And even if they are not, these PSAs perform local unit services at the direction of the local unit of government, the spending for which constitutes § 30 spending.

III. PSAs deliver local education services, which is why spending to their authorizers is § 30 spending.

The Legislature has created a variety of different local service delivery mechanisms for political subdivisions, and political subdivisions can select among them without losing the characteristic of being a political subdivision. Education

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services is an example: while the Michigan Legislature has a constitutional duty to support and maintain (i.e., help fund) a system of education in Michigan, the responsibility to deliver education services has always belonged—and according to Michigan's 1963 Constitution continues to belong—to local schools and school districts. Const 1963, art 8, § 2; *Traverse City Sch Dist v Att'y Gen*, 384 Mich 390 (1971). And the mere fact that some local services are delivered via contract or commission does not mean that spending for those services is not § 30 spending. This is because provision of local services via a contracted entity or other commission would have been familiar to Headlee voters. And this Court should not overlook the fact that these particular PSAs are providing local education because of the decisions of other political subdivisions of the state—their authorizers; this is *how other local units of government have chosen to spend their local public education funds,* provided by the State, to deliver free local public education.

Here, PSAs are contractual entities authorized and governed by a board of directors that is subject to oversight by the authorizing body. MCL 380.502(1)–(2); MCL 380.507(1)(d). A similar scheme permeated the "separate legal entities" created under the Urban Cooperation Act of 1967. These entities could be made up of a commission, board, or council created under a contract. MCL 124.507(1). Further, "[t]he governing body of each public agency shall appoint a member of the commission, board, or council constituted pursuant to the agreement." *Id*. The Act, in turn, defined "public agency" to include among other things "a political subdivision of this state . . . , including, but not limited to, a state government; a

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county, city, village, township, charter township, school district, single or multipurpose special district, or single or multipurpose public authority . . . ." MCL 124.502(e). See also MCL 124.284d (municipal sewer authorities, which are incorporated by municipalities and subject to enforcement by the same.) Neither was it uncommon for political subdivisions to form a joint board or commission to supervise the execution of a contract. MCL 124.535. This has been allowed ever since the Intergovernmental Transfers of Functions and Responsibilities Act 8 of 1967.[5]

In short, at the time of Headlee's ratification, it was not uncommon for public agencies and political subdivisions to create and supervise—by contract or otherwise—other public agencies, political subdivisions, and separate contracted legal entities that carried out local public purposes. This form of service delivery—via contract and otherwise—was not a problem for these entities prior to voters' ratification of Headlee, and it should not be a problem for PSAs today.

IV. Plaintiffs have not identified which state department is failing to perform which specific duties. Further, the Governor is not subject to mandamus. Finally, the State Budget Office has prepared reports for FY 2021 and FY 2022 that are responsive to the statutory reporting requirements.

The Michigan Supreme Court gave clear instructions on remand:

> In light of our disposition regarding Parts III(B) and (C) of the Court of Appeals opinion and because we are unable to discern the nature of the relief requested or granted, we vacate Part III(E) of the Court of

[5] These joint boards *may* be staffed by officers or employees of the state or a political subdivision thereof. MCL 124.535.

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> Appeals opinion. Although we do not express an opinion on the appropriateness of the remedy, we remand to the Court of Appeals for clarification. *On remand, the panel should specify which defendant is failing to perform which clear legal duty and should analyze whether granting the extraordinary writ of mandamus is warranted.* [*Taxpayers*, ___ Mich at ___; 2021 WL 3179659 at *17 (emphasis added).]

The Supreme Court gave specific instructions to this Court to determine whether mandamus relief was appropriate in the first place, and if so, which Defendant failed to perform which duty. On November 23, 2021, this Court granted Plaintiffs' motion to file an amended complaint naming the Governor and Department of Technology, Management and Budget (DTMB) Director as Defendants. But this mode of relief suffers two flaws.

First, Plaintiffs have not identified the specific defendant—i.e., state officers or departments—that must perform which clear legal duty, as required by the Michigan Supreme Court's Opinion in *Taxpayers for Mich Constitutional Gov't v Michigan*, ___ Mich ___ (2021), 2021 WL 3179659. Instead, Plaintiffs merely added the Governor and DTMB Director without delineating which specific duties these parties—and the other party Defendants—were failing to perform which specific duty. Finally, the State Budget Office published its FY 2021 Total Estimated Payments to Locals from State Sources report (Ex B); and its FY 2022 Executive Budget Funding for Legislation Affecting Local Government Operations (Ex C). These reports contain information concerning state disbursements to locals for state requirements, as required by MCL 21.235 and 21.241.

Second, the Governor is not subject to mandamus, for which reason naming the Governor after more than five years of litigation does not advance Plaintiffs'

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claims or this case. "[M]andamus will not lie to compel the Governor to act, regardless of whether the actions sought to be compelled are discretionary or ministerial." *Musselman v Governor*, 200 Mich App 656, 662–663 (1993), citing *Sutherland v Governor*, 29 Mich 320 (1874); *Germaine v Governor*, 176 Mich 585 (1913); *Born v Dillman*, 264 Mich 440 (1933).) (See discussion in Defendants' 12/21/2021 Motion for Partial Summary Disposition, pp 5–7.)

Plaintiffs' filings on remand offer no new legal support, specific allegations, or evidence on this question, which has otherwise been fully litigated and briefed. Defendants also ask that this Court consider the State Budget Office's recent reports responsive to MCL 21.235 and 21.241.

CONCLUSION AND RELIEF REQUESTED

On remand, this Court is tasked with addressing (1) whether funding for certain PSAs may be counted in the § 30 percentage based on the nature of their authorizers, and (2) whether a writ of mandamus is appropriate, and if so, what state defendants must perform which legal duties.

As to the first question, it is clear based on their characteristics that the PSA authorizers at issue are political subdivisions of the state, and their creations (i.e., PSAs) are local units of government, for which reason state funding for these entities is properly counted in the § 30 percentage. As concerns the second question, Plaintiffs provide no new legal support or evidence for their allegations, and still do not specifically delineate the state departments and duties to be performed. Further, the Governor is not subject to mandamus, which relief

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Michigan courts have consistently rejected. Finally, this Court should consider the State Budget Office's recent reports.

For these reasons, Defendants respectfully request that this Honorable Court find in their favor as to funding for PSAs, limit any mandamus relief in accordance with the order of the Michigan Supreme Court, and dismiss the Governor as a party to this action.

Respectfully submitted,

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