STATE OF MICHIGAN
IN THE SUPREME COURT

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. 160660

Court of Appeals No. 334663
Original Action

REPLY BRIEF OF APPELLANTS STATE OF MICHIGAN, DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET, AND OFFICE OF AUDITOR GENERAL

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Dated: December 7, 2020

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INTRODUCTION

Plaintiffs want a guaranteed level of statewide taxpayer dollars for local discretionary use. That is the entire case boiled down to a sentence. They get there by creating a false premise: certain state spending paid to locals must no longer count under § 30, leaving the state short of satisfying the minimum proportion and requiring the state to back fill with additional statewide taxpayer dollars—none of which can be tied to a state mandate, and, thus, all of which would be discretionary or for "local programs of choice." If that guarantee is to be found in the Constitution, it is elsewhere. The Headlee Amendment provides no such guarantee.

And while the Headlee Amendment's sections work together in symphony, they remain separate instruments. Section 25 introduces the implementing provisions, being §§ 26–34. Each implementing section serves a different purpose in support of a common set of goals: restraining tax increases and increasing taxpayer control. Section 30 sets the minimum percentage of annual spending the State must share with local governments. The Headlee Amendment's goals are also furthered by two responsibility provisions: §§ 29 and 31.

The State is responsible for funding things it mandates. That is the purpose of § 29, and it requires only that the state fund the mandates it imposes on local units of government. The State cannot, by definition, impose something that is a local discretionary choice. Section 29 does not require local discretionary funding.

The second responsibility provision, § 31, applies to local governments. If a local government wants to provide a voluntary local service, i.e., spend public money, it must do so from an existing budget or get approval from local voters.

Section 30 is unconcerned with types of funding. It merely splits the entire pie into two pieces: that used by the state and that used by local governments. The base-year ratio under § 30, from 1979, is the comparison point against which each year's actual ratio of state to local spending must be weighed. That base-year calculation included everything when setting the initial ratio, i.e., education spending, mandate spending, and every other type of state spending paid as aid to local governments. And to be a valid measure of annual compliance, thereafter, so too must each annual calculation include everything, without exclusion.

Headlee has, in accordance with its design, limited statewide tax revenue and as a result statutory revenue sharing. But that does not justify an end run around the People and their Constitution. Plaintiffs' request does not raise a legal dispute under § 30. This has always been a political question for the voters.

ARGUMENT

I. Section 25 must be interpreted in accordance with the plain language of Headlee's implementing sections, not in a manner that conflicts with the ordinary words of § 30.

State Defendants have always applied the plain language of each Headlee provision as it reads—all of the spending at issue is state spending from state sources sent to locals units of government for local purposes, and, therefore, counts as § 30 spending. Plaintiffs assert that the State ignores or seeks to write article 9, § 25 out of the Constitution; to the contrary, State Defendants read § 25 as this Court has and consistent with the plain language of Headlee's implementing sections, mainly §§ 29 and 30. It is Plaintiffs, rather, that attempt to ascribe

meaning to § 25 which does not exist, and then animate it through an implementing section that is equally devoid of supporting language.

Courts have read § 25 for what it purports to be by its own language, i.e., an introduction or preamble. Section 25 lays out an overall framework while the remaining sections provide the mechanics and contours of each limitation. Section 25 tells the Court as much in clear terms as it provides "implementation of this section is specified in Sections 26 through 34, inclusive, of this article." In the context of a holiday dinner, § 25 is the place setting while §§ 26–30 are the meal. Here, whatever meaning Plaintiffs ascribe to § 25 lacks support within that provision and likewise finds no mention or mechanism for implementation in § 30. The attempt to give § 30 a secondary and incongruous purpose contradicts § 30's clear language and undermines its simplicity.

Plaintiffs ask this Court to ignore established precedent and give § 25 the same interpretation as a substantive enforcement section for one simple reason: their theory of Headlee's framework prohibits any condition that causes local governments to have to cut programs or raise taxes, and can only make some sense if the phrase "tax shift"[1] is given a meaning outside of Headlee's overall context.

[1] Plaintiffs' reference to a "tax shift" is not a tax shift at all, but appears to fall in line with art 9, § 26's reference to a "transfer[ ]" ("If responsibility for funding a program or programs is transferred from one level of government to another, as a consequence of constitutional amendment, the state revenue and spending limits may be adjusted to accommodate such change, provided that the total revenue authorized for collection by both state and local governments does not exceed that amount which would have been authorized without such change."). The permissive provision applies to the State's "revenue and spending" limit provisions, §§ 26–28.

To properly consider § 30, the Court need only analyze its plain language and, if needed, interpret that language according to the intent of the ratifying voters. No interpretation is needed here. But even if it were, the Headlee voters could not have intended § 30 to exclude certain types or categories of state spending because there are no such words in § 30 itself that do that. Plaintiffs appear to acknowledge as much when they oppose the "absolutist" approach, see Pls' Resp, p 30, or complain of the "literal interpretation" of § 30, *id.* at 46. These are just other words for plain meaning.

Section 25's prohibition on the "shifting of the tax burden" is implemented by § 29, which prohibits the state from requiring local governments to implement a program or perform a service without statewide tax dollars to pay for it. It does not, however, require the state to make a local government whole for any revenue shortfall or guarantee funding for local programs and services not mandated by the State. Section 30 merely provides the floor and guarantees local governments a fixed share of total state spending from state sources, i.e., 48.97%.

That local share includes both funding for mandates and any discretionary state funding that local governments can put toward whatever services they choose. But if the State provides such discretionary funding, Headlee does not set that funding level in stone. There is no provision or language within Headlee that sets a "base year" discretionary funding minimum. The State, through the Legislature, retains discretion to share as much of its revenue with local governments as it deems appropriate, so long as it meets the § 30 minimum, in aggregate, each year.

State Defendants did not overstate the impact that Plaintiffs' Headlee theory would have on the State budget. (Pls' Resp, p 12.[2]) The apparent disagreement in numbers between the parties demonstrates the problem with Plaintiffs' creation of categories of state spending that they argue must be excluded from § 30. Plaintiffs only now begin to provide details of how they believe the State should treat Proposal A funding under § 30. But even in attempting to provide details, they propose completely different ways of treating the funding. Plaintiffs admit "[w]hile §§ 25 and 30 clearly prohibit tax shifts that increase the tax burden on local governments, the provisions do not state a specific method for excluding such monies from the § 30 calculation." (*Id.* at 13.) The reason § 30 does not state a specific method for excluding funding from § 30 is because *there is no such requirement*. This is the problem with using semantics to engraft an unfounded limitation from a phrase in Headlee's preamble, and then attempting to implement it through a provision, § 30, that has no such language.

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[2] State Defendants substantiated the fact that not counting Proposal A funding as local aid would decimate the State general fund, as the State paid $13 billion to local schools in 2019, and Proposal A comprises much of it. (See State Defs' 09/09/2020 Br, pp 2, 17–18.) The Proposal A claims alone would reshape government. See n 3 below. But even accepting Plaintiffs' various figures at face value, whether just excluding Proposal A state funding, $3.61 billion, or Proposal A combined with PSA funding, $4.88 billion, (see Pls' Resp, p 12), that would comprise from a third to almost half of the current state general fund.

Under Plaintiffs' preferred accounting the effect would be catastrophic, requiring nothing less than the restructuring of state government, with either the largest State tax increase in history or the largest reduction in state spending on state-level services in history to meet these novel interpretations of Headlee. Under Plaintiffs' own figures, the numbers surpass the *entire general fund budget for the Department of Corrections* by more than $1 billion annually.

II. Charter school funding is properly counted as § 30 spending.

Plaintiffs claim that the Court of Appeals erred in framing the issue as whether charter schools "can receive funding under art 9, § 11 of the state Constitution." (Pls' Resp, p 32.) But that is not the question presented in this matter, nor is it the question the Court of Appeals answered. Instead, the Court of Appeals properly recognized that this matter involves whether charter school funding is counted under § 30 of the Headlee Amendment. Further, the Court of Appeals' majority properly determined that this funding is § 30 spending, in accordance with the Michigan Constitution and the Revised School Code (RSC).

Plaintiffs assert that whether charter school funding is properly counted under § 30 depends on whether they are "political subdivisions of the state." (*Id.*) The RSC makes clear (and as the Court of Appeals determined) that charter schools are school districts for purposes of constitutional school funding, and, therefore, are political subdivisions of the state. And contrary to Plaintiffs' statement that State Defendants "ignore the requirement that under the Headlee Amendment, an entity must be a political subdivision of the state and ignore the rule of common understanding" (*id.* at 35), State Defendants apply the Michigan Constitution and RSC according to their plain language. Neither do State Defendants argue any "functional equivalency analysis" (*id.*), which are words that appear nowhere in any of State Defendants' many briefs in this case. Merely recharacterizing State Defendants' arguments into strawmen does not answer the questions presented.

Further, as the Court of Appeals' majority recognized with respect to charter schools (*Taxpayers for Mich Constitutional Gov't v Michigan*, 330 Mich App 295,

312–313 (2019)), the "rule of common understanding" does no analytical work as applied to contemporary public schools generally, or charter schools in particular. Indeed, 1978 voters did not address charter or other public schools in their current form, because they have transformed so dramatically since 1978.

In any event, the Court need not rely on background rules to parse the term "local government" because the Constitution itself helpfully defines it. Specifically, " '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*." Const 1963, art 9, § 33 (emphasis added). Plainly, the Constitution does not require that a "local government" have a direct electorate or a particular form (like charter schools, authorities frequently take a corporate form).

Plaintiffs are mistaken in arguing that recognizing charter schools as "local governments" changes the meaning of the Constitution, (Pls' Resp, pp 35–41), as § 33 itself takes an expansive view of what a local government is. Because the types of local government are expressly "not restricted to" the categories listed in § 33, they are merely illustrative. As a matter of law, the Constitution and the RSC provide that charter schools are "school districts," which are themselves "political subdivisions of the state." MCL 380.501(2); Const 1963, art 9, § 33. Further, § 33 makes clear that "authorities created by the state, and authorities created by other units of local government" are political subdivisions of the state. It is undisputed that units of local government, under state law, may authorize charter schools.

In short, the Michigan Constitution and the RSC independently make clear that charter schools are school districts (which are "local governments" under § 33), "authorities created by the state, and authorities created by other units of local government." Accordingly, charter schools are "political subdivisions of the state," for which reason spending for charter schools must be counted under § 30.

III. Section 29 funding has always counted under § 30. To exclude it now would fundamentally change decades of practice but would also leave the comparison to the baseline year without meaning.

The plain language of § 30 required that the 1978–79 calculation, as the baseline year, reflect two "totals": (1) total state spending from state revenue sources and, of that, (2) the total amount that was spending to locals. Everything, whether for mandates or discretionary use, counted when setting that base year ratio of "total state spending paid to all unit of local government" (numerator) to overall "total state spending" (denominator). Const 1963, art 9, § 30. It does not fix a specific *amount*, which would have required a discrete dollar figure. It does not reference any *type* of funding, which is the purview of § 29. Section 30 uses the words "total," and "proportion," and "taken as a group."

The request to exclude entire categories of state funding finds no support in Headlee's plain language. And to do so now would create a dissimilar and irrelevant comparison to the base year. While the minimum set in 1978–79 included all state aid to locals in setting the bar, in determining whether the State clears that bar each year many of those same categories would now be excluded. That makes no sense and would provide no comparison at all to the base year.

But worse, Plaintiffs assert that the challenged categories of state aid could remain in the denominator (total state spending) but be removed wholly from the numerator. ("Plaintiffs believe that the most appropriate method is to exclude spending generated by a prohibited tax shift from the numerator . . . ." (Pls' Resp, pp 13–14).) This argument fails for three reasons. First, this is not a "prohibited tax shift." Second, this would entirely distort the equation and effectively give local governments almost 65% of the state budget each year.[3] Third, it would mean the word "total" used in § 30 has a different meaning within the same constitutional provision: it truly means "total" when looking at the entire state budget, but apparently means something far less when tallying state payments to locals. This is a paragon of a "strained" interpretation of § 30, an exercise this Court has previously rejected and should again for this simple and clear provision. See *Durant v State Bd of Ed*, 424 Mich 364, 393 (1985). Neither is there any support in the plain language to remove it from both the top and bottom of the equation.

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[3] Plaintiffs' response focuses on public school funding. (Pls' Resp, pp 12–13.) In 2019, total state spending from state sources was $34 billion. (The local share was nearly $19 billion, or 55.41%) If $6 billion were removed from the numerator *only* it would appear that the local share was only 37.85%, requiring additional state spending to locals of $3.8 billion to return to $16.8 billion of $34 billion, all discretionary under Plaintiffs' theory. That would require a reduction of the same $3.8 billion from state spending for state services. That is if the "shortfall" is remedied with pure state level spending cuts. Alternatively, it would require nearly $8 billion in new state revenue (new taxes) to meet the 48.97% minimum. An $8 billion increase would make local spending $21 billion ($13 billion that still counts plus the $8 billion in new tax revenue) out of new total state spending of $42 billion. Locals would still get the $6 billion in school funding; in all $27 billion of $42 billion total state spending would go to locals, or 64%. (All figures except the hypothetical $6 billion exclusion are from the State Budget Office's statement, see State Defs' 09/09/2020 Br, p 17 n 3.)

Rather, *all* state spending paid as aid to locals, no matter the category or type as was understood in the base year calculation, must count when calculating the § 30 percentage each year. That is consistent with the plain language and purpose of § 30, a base-year calculation against which aggregate state spending in subsequent years is measured.

CONCLUSION AND RELIEF REQUESTED

The plain language of § 30 is unambiguous and finds no support for Plaintiffs' massive funding request and seismic shift after forty years of consistent application. And § 25 does not change that reality. State Defendants ask that this Court reverse as to § 29 state spending for mandates under Headlee § 30, and affirm that state spending to public schools—all of it and all of them (which includes charter schools)—also counts under the "total" in § 30, and confirm that the Auditor General is not subject to mandamus here.

Respectfully submitted,

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