State of Michigan

Michigan Supreme Court

Taxpayers for Michigan Constitutional Government, Steve Duchane, Randall Blum, and Sara Kandel,

Plaintiffs-Appellees,

SC: 160658
COA: 334663

v.

State of Michigan, Department of Technology, Management and Budget and Office of Auditor General,

Defendants-Appellants.

_____/

**Taxpayers United Michigan Foundation's Brief *Amicus Curiae***

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## INTEREST OF AMICUS CURIAE[1]

Amicus Taxpayers United Michigan Foundation ("**Amicus Taxpayers United**"), is a Michigan non-profit corporation located in Oakland County and it is qualified as a §501(c)(3) organization under the Internal Revenue Code of 1986, as amended. It acts as a nonpartisan statewide educational foundation helping educate grassroots taxpayers how to defend and control their constitutional rights, particularly with respect to their taxpayers' rights as established by the 1978 Initiative amendments to the Michigan Constitution of 1963 with the addition to Article IX, of Section 6 and Sections 25 through 34, commonly known as the 'Headlee Tax Limitation Amendments'.

Amicus Taxpayers United's current State Chairman, William McMaster, and Richard H. Headlee (deceased 2004), together, formed Amicus Taxpayers United in 1976 to help successfully campaign to obtain sufficient statewide petition signatures and win statewide voter approval of the 1978 Headlee Tax Limitation Amendments to the Michigan Constitution. McMaster participated in the Initiative as the campaign director. Headlee was the 1978 Initiative campaign chairman. McMaster also was an author and final editor of the language of the Initiative as presented to the Secretary of State (the state's chief election officer) for placement on the ballot. He served on the Drafting Committee and was the editor for the compilation of the Drafters' Notes to the initiative and he has maintained all these historical records for Amicus Taxpayers United. He has continued as Amicus Taxpayers United's volunteer State Chairman. He frequently speaks to civic groups on behalf of Amicus Taxpayers United and he handles

[1] In accordance with MCR 7.312(H)(4) Amicus represents that no counsel for a party authored this brief in whole or in part and no such counsel or a party made any monetary contribution intended to fund the preparation or submission of this brief

Amicus Taxpayers United's media relations for topical matters affected by the Headlee Amendments.

Amicus Taxpayers United, under McMaster's direction, has also continued to monitor legislative workings and it has provided testimony on bills and legislation as affected by the Headlee Amendments. McMaster participates in educational seminars promoting the rights granted citizens through the Headlee Amendments, and, he also defends those rights through commencing and participating in, litigation when these rights, under the Headlee Amendments and the Michigan Constitution generally, are threatened.

## BASIS OF JURISDICTION

This lawsuit arises from the violations of the Headlee Amendments, Art. IX, § 25, § 29 and § 30, to the Constitution of the State of Michigan of 1963, as so amended, after the enactment of Proposition A in 1994. Proposal A is now contained in Art. IX, §8, specifically, the second sentence: *"Beginning May 1, 1994, the sales tax shall be imposed on retailers at an additional rate of 2% of their gross taxable sales of tangible personal property not exempt by law and the use tax at an additional rate of 2%. The proceeds of the sales and use taxes imposed at the additional rate of 2% shall be deposited in the state school aid fund established in section 11 of this article."*("**Proposal A**") Jurisdiction in this Court arises directly from the appeal of the decision in the Court of Appeals which had jurisdiction from the Mich. Const. Art IX, § 32 and from MCL § 600.308a (1).

## STATEMENT OF QUESTIONS INVOLVED

Amicus Taxpayers United accepts the issues the Court requested in its July 1, 2020 Order and addresses 1 through 3 and the Questions Presented for Review as set forth in the Plaintiffs-Appellants' Application for Leave to Appeal.

## STATEMENT OF FACTS

Amicus Taxpayers United accepts the Concise Statement of the Case and the Statements of Proceedings and of the Facts contained in the Plaintiffs-Appellants' Application for Leave to Appeal.

**ARGUMENT**

The Constitution of the State of Michigan of 1963, as amended by Initiative in 1978 by Article IX, § 25, § 29 and § 30 (the "**Headlee Amendments**") prohibits the State of Michigan from reducing the proportion of state spending, in the form of aid to local units of government, from that percentage amount of state revenue that had then been established when the Headlee Amendments were enacted in 1978 (the "**Headlee Percentage**"). (This undisputed Headlee Percentage amount is statutorily implemented by Act 101 of 1979 (State Disbursements to Local Units of Government Act, MCL §21.231 *et seq*[2]) and is presently determined at 48.97%.) With and since the enactment in 1994 of Proposal A, the state has repeatedly, annually, violated the Headlee Amendments' constitutional prohibition against reducing the state's spending aiding local units of government below the Headlee Percentage. The state has done this by the action of the Department of Technology, Management and Budget ("**DTMB** ") failing and refusing to correctly identify the "state financed proportion" of aid to local units of government and thereby failing to "recommend a supplemental appropriation to the legislature" which "[t]he legislature shall then appropriate [in] the amount required" in order to comply with the Headlee Amendments by delivering the Headlee Percentage to local units of government. The state has done this by failing

[2] MCL §21.234 (3) State financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law" means the percentage of necessary costs specifically provided for an activity or service required of local units of government by existing law and financed by the state on December 23, 1978.
And
MCL § 21.235(4) If the amount appropriated by the legislature for a state requirement is insufficient to fully fund disbursements for the necessary cost of a state requirement as required by this act….The director shall recommend a supplemental appropriation to the legislature sufficient to fully fund the disbursements for the necessary costs of each state requirement in which the initial appropriation was insufficient ….The legislature shall then appropriate the amount required in an appropriation bill introduced as a result of the request.

and refusing to comply with the Management and Budget Act MCL §18.1101 *et seq* and in particular MCL § 18.1349[3]. The state has also done this by the Auditor General failing and refusing to so recognize and report such unconstitutional noncompliance with the Headlee Percentage in the audit report required of him by Section 53 of Article IV of the Michigan Constitution of 1963[4] and statutorily implemented by the Audits and Examinations Act, being Act 1 of 2003, MCL §13.101 *et seq*. and its predecessor acts.

The state has so violated the Headlee Amendments through the DTMB, and the Office of Auditor, actively and continuously refusing to identify the failure to comply with, and to implement, the statutorily required cure to, the unconstitutional Headlee Percentage state aid amount deficiency to local units of government. The state accomplishes its unconstitutional action by including in the numerator, as part of its required aid contribution of the Headlee Percentage, the new additional 2% sales tax revenue (which is a deposit into *the state* school aid fund). The state's clever accounting position is enabled by Proposal A's major change to Michigan's historical method of schools financing. Public schools financing had largely and substantially been through local taxation. Proposal A materially altered this historical local financing method. Proposal A substituted a statewide 2% increase to the state sales tax. Indeed, one of the proffered arguments to the electorate for Proposal A was that the statewide sales tax would reach out of state visitors to help support Michigan schools financing. Proposal A's success then placed that additional tax

[3] MCL § 18.1349 In accordance with the provision of section 30 of article IX of the state constitution of 1963 , the proportion of total state spending from state sources paid to all units of local government shall not be less than the proportion in effect in fiscal year 1978-1979. The executive budget submitted to the legislature and the budget enacted by the legislature shall be in compliance with section 30 of article IX of the state constitution of 1963.

[4] Article IV § 53 Auditor general; appointment, qualifications, term, removal, post audits.
Sec. 53. …. The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof. …. He shall report annually to the legislature and to the governor and at such other times as he deems necessary or as required by the legislature.

revenue into *the state's* school aid fund. Well and good. But next, the state misleadingly accounts for this state sale tax increase to what had previously been *local* taxes revenue – that were not a part of the state's Headlee Percentage contribution but that the state now claims as [part of its numerator contribution. Thus this Proposal A state sales tax increase, replacing a local tax and now dedicated to the state's existing enacted school aid fund package, is taken by the state as part of its Headlee Percentage aid to all local units of government. The plain result of this deft position is that the state has thereby actually materially reduced its aid to all local units of government well below the Headlee Percentage. The state's false accounting for Proposal A revenue and its directed deposit into the state's school aid fund, as a part of its required Headlee Percentage aid, indisputably enhances the state's revenue while *shifting* aid revenue away from all local units of government (perhaps and arguably not, local school districts) and thereby severely burdening all local units of government in their delivery of their services to their local constituent populations. Such self-interested accounting is a "shift" that directly violates the Headlee Percentage required by the constitution in the Headlee Amendments.

The Constitution's Article Nine, Section 25, prohibits the state "**from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government**". The language prohibiting a "shift" was added by Amicus Taxpayers United at the drafting stage of what became the Headlee Amendments. It was added at the suggestion of the eminent economist, Milton Freidman, the 1976 Nobel Prize winner in Economic Sciences, who spoke repeatedly on behalf of Amicus Taxpayers United and its campaign in Michigan to enact the Headlee Amendments. Although Dr. Freidman died in 2006, it was clear that he unquestionably understood politicians' proclivity for revenue to fund their favored legislation and the need to publicly avoid the appearance of raising taxes to do so. Hence

his suggestion. And indeed, the state's actions taken after Proposal A reducing its Headlee Percentage of aid contribution for distribution to local units of government unavoidably increased the need of local units of government for revenue. This need in turn has been met by unfortunate reduction in services and increased local taxes. The state on the other hand has received the benefit from violating the Headlee Percentage prohibition by the materially reduced amount of its required aid below the Headlee Percentage to be distributed to local units of government. Its spending for itself was thereby been allowed to increase *without the public appearance of a tax increase*. Precisely the result which Dr. Milton Friedman's suggested language against allowing "shifting" prohibits in Section 25.

The prohibition on not reducing local governmental aid set in the Headlee Percentage is well and easily understood. The artful and false accounting for Proposal A revenues and spending - changing a historical local tax and "running it" through state accounts - obscures the state's actual *shift of the tax burden* by forcing local units of government to increase taxes(and necessarily reduce services). The state's false accounting is prohibited by Section 30. The Proposal A possibility, of the reduction in aid by shift, was well understood by the drafters of the Headlee Amendment. In the Drafters' Notes to Section 25 it was stated:

> "The primary intent of this section was to prevent a shift in tax burden, *either directly or indirectly* from state to local responsibility. Any action by the state which would result, *directly or indirectly*.in increased local taxation through a shift in funding responsibility is clearly prohibited by this Section." (Exhibit 1, p2-3 Drafters' Notes-Tax Limitation Amendment Michigan Constitution of 1963. *Emphasis added.*)

The direct and indirect shifts of tax burdens and state imposed mandated local spending set forth in the Headlee Amendments has been repeatedly addressed by this Court.[5] The issues continue to arise. This case presents a broader issue than that of particular programs, but the same issues.

Sec. 25 was viewed by the Drafters as critical to the effectiveness of the Headlee Amendments as a whole. One does not need to be a Nobel economist to understand that the prohibition on direct or indirect shifting of the tax burden is *essential* to make effective the limitations imposed on the state. The language of Section 25, to be given its full intended critical meaning, must not be disregarded. The Headlee Amendments prohibition on direct or indirect shifting of burden between the state and local units of government cannot be viewed as a static statement of purpose designed to address only a known and established problem in 1978. Rather that language clearly anticipates the tension between state and local interests. The language of the Headlee Amendments generally provides a strict discipline to both state and local governments to seek approval of the people first, for any tax increase. The incumbent governments' prospect of avoiding the voters' decisions, by merely shifting the tax burden among units of government, was what was foreclosed by Section 25. Section 25's prohibition on shifting. It is critical to understanding the use to which the state has put Proposal A. The Headlee Amendments generally, and Section 25, in particular, were precisely designed to protect local units of governments from the very reduction crafted by the state's accounting for revenue from Proposal A.: "action by the state which would **result, directly *or indirectly*, in increased local taxation through a shift in**

[5] See *Durant v State Bd of Ed*, 424 Mich 364, 378-379 (1986) ("The first sentence . . . is aimed at existing services or activities already required of local government. The second sentence addresses future services or activities."); *Schmidt v Dep't of Education*, 441 Mich 236, 254 (1992). *Judicial Attorneys Ass'n v. State* 460 Mich. 590 (1999)

**funding responsibility".** Which would result in increased local taxation. The Drafters' Notes again emphasized, through repetition, this prohibition in their discussion of Section 30. They said: "The primary intent of this section was to prevent a shift in the burden, either directly or indirectly from state to local responsibility"(Exhibit 1, p10 Drafters' Notes-Tax Limitation Amendment Michigan Constitution of 1963.)

The State of Michigan and its Department of Technology, Management and Budget have caused the prohibited shift through the accounting for Proposal A revenue. Proposal A substituted new state received revenue, for the local taxation that had been supporting local schools, the latter local tax was then restricted by Proposal A. This was the "bargain" that the voters approved in Proposal A. The prohibited shift has happened because DTMB then attributed the new state revenue, which was utilized to fund the local schools, as a part of *state revenues distributed* to all local units of government. As a consequence the DTMB has allowed the state to now **capture new revenue that had been previously been a local tax that principally funded local school districts and to redistribute it back to local school districts and claim that it counts toward its obligation to fund all local units of government** at the Headlee Percentage. This accounting maneuver severely reduces the amounts that would be otherwise constitutionally required to be distributed to local units of government, albeit not local school districts. This accounting by DTMB results in a direct reduction in the amount of local government aid, and it produces a corresponding increase in retention, by the state, of that amount -a classic shift prohibited by the Headlee Amendments. The Auditor General has failed to so identify this unconstitutional shift in the tax burden that has "resulted" in forced increased local taxation (and reduction of services).

The shift lets the state receive tax revenue previously local and use it to "hide" its reduced Headlee Percentage obligation to local units of government. The shift has materially reduced aid

from the state to local units of government and does not meet the state's obligation under the Headlee Percentage. While schools may (arguably only) be less affected by this state DTMB accounting, other local units of governments are severely adversely affected. The shift by DTMB is precisely the violation of the Headlee Amendments that the language and the Drafters of the amendments sought to prohibit.

The Drafters' Notes at page 10 allow the legislature to redistribute state aid differently to local units of government. But the action of DTMB, in effectively 'taking' local schools revenue and redistributing it back to the schools, and then claiming it as a part of its Headlee Amendments obligations for distribution to local units of government, **as a whole**, clearly shifts what had been local taxation for school districts and for all units of local government and uses it to the detriment of all local units of government. The concern that Proposal A could be so utilized by DTMB was expressed by Richard Headlee in his interview with Charlie Cain. Exhibit 2 Charlie Cain *Headlee Criticizes Proposal A As Tax Shift And Tax Increase*, The Detroit News, May 14, 1993, at 2B He recognized immediately the prohibited shift that the state would seek to utilize: the increased state sales tax revenues for supposedly reduced local property taxes became a claimed reduction in the states' required Headlee Percentage aid to all local units of government. Mr. Headlee's anticipation was precisely what DTMB did after the enactment of Proposal A. The support to the schools through the increased sales tax and its redistribution would be claimed and accounted for to the benefit of the state by its inclusion in the calculation of the proportion of total state spending required to be paid to local units of government. And Mr. Headlee also recognized the plain effect of such shift on local units of government and the effective shift of taxation revenue to the state. He stated:

> "The constitution guarantees local governments 41.6 percent of all state revenues for local programs. Without recalculation of the Section 30

> requirements, the state would count the $1.8 billion of sales tax revenue as spending for local governments, thereby gutting Section 30 and protection of local government revenue sharing." *Id.*

Mr. Headlee's observation is, of course, consistent with the Drafters' Notes and their intention that the prohibitions against shifting had to apply directly to Section 30 or else the language of prohibition on a shift loses meaning. This intention is so stated in the Drafters' Notes on Section 30 at p. 10. This Honorable Court has recognized its' obligation to so give effect to the prohibited shift language contained in the Headlee Amendments and to give Section 30 its well understood meaning recognizing such prohibition of the shift that has been made by the state's DTMB and ignored by the state's Auditor..

## CONCLUSION

State government defendants have massively violated Art. IX, § 25 and § 30 by including the new Proposal A revenue and directed spending within its calculations of the amount of state spending in aid paid to local units of government. What had been local revenue and spending not within the Headlee Percentage calculation was in effect appropriated by the state; was redirected to its school aid fund to the school districts it was appropriated from; it was then used to inflate the numerator in the calculation of the state's contribution to the Headlee Percentage. The use of the inflated calculation of the state's aid to local units of government has dramatically cut aid to local units of government. The state's receipt of previously local taxes and its use of its distribution of those previously local taxes to reduce its aid to local units of government, has placed upon those local units of government the need to increase their taxes and reduce their services – an undeniable shift of the tax burden away from the state and onto local units of government.

**RELIEF REQUESTED**

The actions of the Defendants violate Art. IX, § 25 and § 30 of the Michigan Constitution; MCL § 21.235 of the State Disbursements to Local Units of Government Act, P.A. 101 of 1979; MCL § 18.1349 of the Management and Budget Act, P.A. 431 of 1984; the duty imposed upon the Auditor General under Section 53 of Art. IV of the Michigan Constitution; and MCL13.101 of the Audits and Examinations Act 1 of 2003.

This Honorable Court's Declaration so should be GRANTED to the Plaintiffs/Appellants.

November 25, 2020

Respectfully Submitted,

*S/ Andrew A. Paterson*
Andrew A. Paterson P18690
Attorney for Amicus
2893 E. Eisenhower Pkwy
Ann Arbor, MI 48108
(248) 568-9712
aap43@outlook.com