STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs,

Case No. 334663

vs.

THE STATE OF MICHIGAN, THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET OF THE STATE OF MICHIGAN; and the MICHIGAN OFFICE OF THE AUDITOR GENERAL.

Defendants.

_____/

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF SUMMARY DISPOSITION ON THE ISSUES PRESENTED ON REMAND

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STATEMENT OF QUESTIONS INVOLVED

1. WHETHER STATE FUNDING TO PUBLIC SCHOOL ACADEMIES, WHICH THEMSELVES HAVE BEEN HELD NOT TO BE LOCAL GOVERNMENTS BY THE MICHIGAN SUPREME COURT, BUT THAT ARE AUTHORIZED BY A SCHOOL DISTRICT, AN INTERMEDIATE SCHOOL DISTRICT, OR A COMMUNITY COLLEGE SHOULD BE COUNTED AS STATE SPENDING TO A UNIT OF LOCAL GOVERNMENT FOR PURPOSES OF § 30 OF THE HEADLEE AMENDMENT?

   Plaintiffs' Answer: No.

2. DID THIS COURT PROPERLY GRANT MANDAMUS DIRECTING THE DEFENDANTS TO COMPLY WITH THE REPORTING REQUIREMENTS OF THE HEADLEE AMENDMENT'S IMPLEMENTING LEGISLATION?

   Plaintiffs' Answer: Yes.

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I. SUMMARY OF ARGUMENT

Article 9, § 25 and § 30 of the Michigan Constitution prohibit the state from reducing the proportion of state spending in the form of aid that is paid to local governments, as a group, below the proportion existing at the time the Headlee Amendment was adopted.[1] Defendants have repeatedly violated art 9, § 25 and § 30 by improperly including expenditures on public school academies (PSAs) as state spending in the form of aid that is paid to local governments.[2]

Payments to public school academies (PSAs) are improper because they clearly do not meet the definition of local government in art 9, § 33 of the Headlee Amendment. For PSAs to qualify as local governments, they must be political subdivisions of the state, *as that term was commonly understood at the time the Headlee Amendment was adopted*. Const 1963, art 9, § 33.

The Michigan Supreme Court, in this case, held that "Headlee voters would not consider PSAs equivalent to "school districts" as the term was understood at the time the amendment was ratified." *Taxpayers for Mich Constitutional Gov't v State*, Nos. 160658, 160660, ___ Mich ___; 2021 Mich LEXIS 1311, *17-18 (July 28, 2021) (p 15 of the filed opinion). The Supreme Court further held that "while PSAs deliver traditional governmental services, their "distinctive marks" are not those of a "political subdivision of the state" as the voters who ratified the Headlee Amendment in 1978 would have understood the term." *Id.* at *21 (p 19 of the filed opinion).

The Court however reserved opinion and remanded for further consideration by this court whether funds payable to PSAs authorized by community colleges, intermediate school districts and local school districts should be counted as payments to local government under art 9, § 30.

[1] The proportion of total state spending in the form of aid that is required to be paid to local governments is 48.97%.

[2] The resulting shortfall exerts extreme pressures on local governments to reduce essential services — police, fire, EMS, waste removal, teachers, and other activities of local governments — or to increase taxes, assessments, and fees on local taxpayers.

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Article 9, § 33 defines local governments as political subdivisions of the state. The Court's remand thereby asks whether the authorizer's status can cloak PSAs with attributes of the authorizer such that PSAs may be considered political subdivisions of the state.

As detailed in this brief, PSAs authorized by school districts, intermediate school districts, and community colleges are not political subdivisions of the state. No principle of recognized law permits the authorizer's attributes to cloak PSAs, such that PSAs thereby ascend to the status of the authorizer. Regardless of the authorizer, the character of PSAs remains the same and they do not possess the distinctive marks of a political subdivision of the state. Moreover, the authorizer is the designated agent of the PSA, who is the principal, for purposes of receiving state payments and the largest community college authorizer is a federal tribal college that, as a matter of law, is not a political subdivision of this state.

The Court also remanded the issue of whether mandamus relief was properly entered and for this court to clarify or reconsider its decision as this court deems appropriate. For reasons as stated further in this brief, mandamus relief directing the state and its officials to comply with the reporting requirements of MCL 21.235 and MCL 21.241 was correctly entered and any technical deficiencies in the Complaint can be properly remedied pursuant to MCR 2.118(C).

II. STATEMENT OF FACTS

A. Authorizers of PSAs.

Michigan law permits state universities,[3] community colleges (including federal tribally

[3] In this case, the Michigan Supreme Court held that PSAs authorized by state universities are not political subdivisions of the state. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *23 (p 21 of the filed opinion). As a result, state universities as authorizing bodies is not addressed in this brief. State universities are however the largest authorizers of PSAs in the state, authorizing approximately 73% of all PSAs. See Michigan Department of Education, *Maps and Lists of Public School Academies* <https://www.michigan.gov/mde/0,4615,7-140-81351_81352_40088-515372--,00.html> (accessed October 12, 2021) (Spreadsheet attached as Exhibit A, 320 total PSAs. 236 authorized by state universities and 47 authorized by community colleges).

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controlled community colleges), intermediate school districts, and local school districts to "act as an authorizing body **to issue a contract to organize and operate**" a PSA. MCL 380.502(2) (emphasis added).

1. PSAs Authorized By Community Colleges

Community colleges are the second largest group of authorizers of PSAs in the state. Forty-seven (47) PSAs are authorized through contracts with community colleges.[4] Of this number, Bay Mills Community College (BMCC) issued contracts for nearly all PSAs authorized by a community college. The school is the authorizing body for forty-five (45) of the PSAs that are authorized by a community college.[5] Bay Mills Community College however is not a political subdivision of the State of Michigan.

Bay Mills Community College is a federal tribally controlled community college. The community college is authorized under the tribal colleges and universities provisions of the federal Higher Education Act of 1965, 25 USC 1801, *et seq*. The Bay Mills Indian Community is a federally recognized Tribe. By ordinance, the Tribal Council of the Bay Mills Indian Community chartered the Bay Mills Community College on June 25, 1984.[6] The school is governed by a Board of Regents, a majority of whom are appointed by the Bay Mills Indian Community's Executive Council with remaining members appointed by other tribal representatives and the

[4] See Exhibit A. See also, Citizens Research Council, *Improving Oversight of Michigan Charter Schools and Their Authorizers*, Report 409, at p 31 (February, 2020) <https://crcmich.org/publications/improving-oversight-of-michigan-charter-schools-and-their-authorizers> (accessed October 12, 2021) (Report attached as Exhibit B).

[5] *Id*.

[6] BMCC, *Charter of the Bay Mills Community College*, <https://www.bmcc.edu/about-bmcc/about-bmcc/bmcc-charter> (accessed October 12, 2021) (Ordinance & Charter attached as Exhibit C).

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student body president.[7] The BMCC and its offices are in Brimley, Michigan on the Bay Mills Indian Community's reservation and thus, are outside the State of Michigan's legal jurisdiction. Because of these facts and prior holdings of the Michigan Supreme Court, the BMCC is not a political subdivision of the state.

Only two other community colleges that are political subdivisions of the State of Michigan authorize a PSA — Jackson College and Washtenaw Community College.[8] Each is organized under Michigan's Community College Act of 1966, MCL 389.1, *et seq*, and each authorizes a single PSA.

2. PSAs Authorized By Intermediate School Districts, and Local School Districts.

Intermediate school districts and local school districts are the authorizing bodies for just 11% of the state's PSAs.[9] Of the state's 320 PSAs, fifteen (15) are authorized by contracts with intermediate school districts and twenty-two (22) are authorized by contracts with local school districts.[10]

Of the thirty-seven (37) PSAs authorized by contracts with intermediate school districts and local school districts, ten (10) are organized as cyber schools and four (4) are organized as strict discipline academies.[11] Cyber schools are PSAs where learning occurs online through remote instruction and attendance. See MCL 380.551(2)(e). Strict discipline academies are PSAs where students with difficult disciplinary histories have been placed by order of a court, the Department of Health and Human Services, a juvenile agency, or other means. *Id*., at 1311g(3). Both cyber

[7] *Id*.

[8] See Exhibit A.

[9] *Id*.

[10] *Id*.

[11] *Id*.

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schools and strict discipline academies are typically open to all students without regard to their residency within the state. Beyond cyber schools and strict disciplinary academies, all PSAs authorized by intermediate school districts and local school districts may admit students outside the authorizer's jurisdiction. *Id*., at 504(3).

3. The Relationship Between PSAs and Their Authorizers

The relationship between a PSA and its authorizer is essentially contractual. The Public School Academies Act, MCL 380.501 *et seq*, provides that state universities, community colleges, intermediate school districts, and local school districts may "**act as an authorizing body to issue a contract** to organize and operate 1 or more public school academies." *Id*., at 502(2) (emphasis added). The entity thus acts as an authorizer *by issuing a contract* with the nonprofit corporation[12] seeking to organize and operate a PSA.

While the Public School Academies Act requires the nonprofit seeking to organize and

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[12] The plain language of the Public School Academies Act requires charter schools to be organized as nonprofit corporations. The Act reads as follows:

> A public school academy **shall be organized and administered under the direction of a board of directors** in accordance with this part **and with bylaws adopted by the board of directors**. A public school academy corporation **shall be organized under the nonprofit corporation act**, 1982 PA 162, MCL 450.2101 to 450.3192. [MCL 380.502(1)].

A nonprofit corporation that organizes the PSA is an entity separate and distinct from its authorizers. Under state law, nonprofit corporations are established by private incorporators. MCL 450.2201. The incorporators write the articles of incorporation and select the initial board of directors. *Id.* at 2223. The incorporators are private individuals and/or private corporations – foreign or domestic. *Id*. at 2201 and 2108(3). The initial board of directors are also private individuals, who then adopt the corporation's bylaws. *Id*. at 2223. The board of directors may further delegate management of the PSA to private educational management organizations ("EMO"). MCL 380.503c. Educational management organizations may be organized as partnerships, for-profit, nonprofit companies, or other entities, all of which are private corporations. See MCL 380.503c(2).

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operate a PSA to submit the names of its proposed board of directors and governance structure along with its articles of incorporation and bylaws in its application to the authorizer, the Act gives no power to an authorizer beyond its ability to refuse to enter into a contract or to revoke a contract with the nonprofit organizing/operating the PSA. See *Id*., at 503(1); 507(1); & 507(4). The authorizer has no independent power under state law to reconfigure of the board, alter the governance structure, change the corporation's articles or bylaws, or to take any other action beyond enforcing the terms of its contract, amending the contract, or revoking the contract with the PSA. See *Id*., at 503(1).

After the contract is entered, the authorizer has two roles. First, the authorizing body that issued the contract is to act as the "fiscal agent" for the receipt of state school aid payments, which are due to be paid by the state to the PSA, as the principal for the receipt of those funds. *Id*., at 507(3). And second, to oversee compliance with the terms of the contract.[13] *Id*., at 502(4).

Each of these roles is limited and discrete. As fiscal agent, the authorizing body receives the PSA's state school aid payments state and "shall then forward the payment to the public school academy." *Id.*, at 507(3). The authorizing body is thus, statutorily, the PSA's agent for the receipt of the state's payment. The authorizer is, by law, required to pay the sums to the PSA, who is the principal in this relationship and the intended beneficiary of the state's payment.[14]

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[13] MCL 380.507 provides that the authorizing body enforces the contract and applicable state law. However, as it is in most public and private contracts, the parties' compliance with applicable state law is a required term of the contract. See MCL 380.503(6)(b).

[14] Authorizing bodies may charge PSAs fees and require reimbursement with state school aid monies for processing a school's application, issuance of the contract, and oversight. MCL 380.502(6). Such fees, however, may not exceed "a combined total of 3% of the total state school aid" received by the PSA each year. *Id*. Upon information and belief, the amounts charged are required to be listed first as income to the PSA and then as an expense to them on financial reporting forms required by the state.

Notably, an authorizing body also "may provide other services" to a [PSA] and charge a fee for those services but **cannot require** a PSA to enter such an arrangement. *Id*. See also, Michigan

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With respect to contract oversight, it is entirely within the discretion of individual authorizers "to determine the nature and rigor" of their oversite of the contract's terms.[15] While the authorizing body is charged with oversight of the PSA's compliance, the authorizing body is limited to revoking the contact or amending the contract with the PSA to include provisions that identify corrective measures to avoid revocation. See MCL 380.507(4) & (8). Revocation is permitted only if one of four conditions occur. The conditions are:

1) Failure to demonstrate "improved pupil academic achievement for all groups of pupils" or to meet the contract's educational goals;
2) Failure to comply with applicable law;
3) Failure to meet accepted accounting principles and sound fiscal stewardship; and
4) "The existence of 1 or more other grounds for revocation as specified in the contract." [*Id*., at 507(4)(a)-(d)].

As discussed further below, an authorizer's role as fiscal agent and in providing contractual oversight does not transform PSAs into an instrumentality of their authorizing body, such that voters in 1978 would have found PSAs to be political subdivisions of the state.

B. Reporting Requirements of MCL 21.235 and MCL 21.241.

The parties, in fact, litigated the issues of the Defendants' compliance with MCL 21.235 and MCL 21.241 and this court properly entered mandamus relief directing the Defendants, their officials, and employees to comply with the requirements of these statutes.

Plaintiffs' Complaint included clearly stated the reporting requirements of MCL 21.235 and 21.241 and alleging the Defendants' noncompliance with each provision.[16] In Count VI of

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See Department of Education, *Michigan Public School Accounting Manual, Frequently Asked Questions*, pp 7-8 (updated December 2019), <https://www.michigan.gov/documents/mde/FAQ1022_212920_7.pdf> (accessed October 11, 2021) (Attached as Exhibit D).

[15] See Exhibit B.

[16] See Plaintiffs' *Complaint*, Doc 1, at p 15, ¶¶ 86-90.

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the Complaint, Plaintiffs again allege Defendants' failure to meet the reporting requirements and in their request for relief, expressly requested "an order …ordering Defendants to fully comply with the reporting requirements of MCL 21.235 and 21.241."[17] The Complaint's Prayer for Relief section further expressly requests this court to enter judgment against the Defendants granting: "[m]andamus relief directing the State of Michigan to fully comply with the reporting requirements of MCL 21.235 and 21.241."[18]

Defendants answered the complaint claiming that the reporting requirements of MCL 21.235 "are met through § 201 of the Omnibus Budget Bill"[19] and admitting that "the reporting requirements in MCL 21.241 have not been completed."[20] Defendants did not move for dismissal or to otherwise strike for any deficiencies in the pleading.

Plaintiffs' motion for summary disposition again expressly alleged Defendants' failure to comply with the reporting requirements.[21] The motion attached the reports submitted as part of the budget process pertained to the state's compliance with the Headlee Amendment as Exhibits 2 and 3. Neither of the exhibits are the reports required by MCL 21.235 and MCL 21.241. No other reports were prepared or made public during the budget process that would satisfy the reporting

[17] *Id*. at p 22, ¶ ¶ 121 & "Wherefore" paragraph.

[18] *Id*. at 23.

[19] On its face § 201 of the Omnibus Budget Bill does not address the reporting requirements of MCL 21.235. It simply lists the total amount of state spending from state sources to be paid to units of local government for a single Department — the Department of Agriculture and Rural Development. It does not identify state spending paid through any other Department, such as the Departments of Education, Transportation, Health and Human Services, and all the other divisions of state government that make payments to units of local government pursuant to art 9, § 29 and are counted within art 9, § 30 calculations. See attached Exhibit F, Section 201 of Omnibus Budget Bills from 2016 to present (available online at: <https://www.legislature.mi.gov/(S(sl4jtslvgmf5ba0n05c2amde))/mileg.aspx?page=AppropriationBillsPassed>).

[20] Defs' *Answer and Affirmative Defenses*, Doc 5, at p 13, ¶ 90.

[21] Pls' *Motion for Summary Disposition*, Doc. 72, at p 13, and fn 18.

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requirements of either statute. The motion's request for relief expressly sought mandamus ordering the Defendants to comply with the reporting requirements of MCL 21.235 but inadvertently omitted reference to MCL 21.241.[22]

Defendants answered Plaintiffs' motion for summary disposition recognizing Plaintiffs' claim for mandamus relief ordering compliance with the reporting requirements of MCL 21.235 and 21.241 and argued in opposition.[23] Defendants' arguments did not include their alleged compliance with the reporting requirements either MCL 21.235 and 21.241 and Defendants did not introduce any evidence of their compliance with either statutory provision.[24] At oral argument, Defendants again acknowledged that they have not prepared the "list" and other reports required by state law.[25]

In ruling on the parties' cross-motions for summary disposition, this court properly granted mandamus relief directing the state and its officers and departments to comply with the annual disclosure and reporting requirements set forth in MCL 21.235(3) and MCL 21.241. The court recognized that each provision is part of the implementing legislation of the Headlee Amendment and the state's failure to comply "undermines the right and role of taxpayer oversight and enforcement conferred by Const 1963, art 9, § 32." *Taxpayers for Mich Constitutional Gov't v State*, 330 Mich App 295, 319; 948 NW2d 91 (2019). The court further found that the acts at issue are "clearly ministerial." *Id.* The plain language of each statute clearly imposes the reporting duties on state officials and on employees of the Department of Technology, Management and Budget (DTMB) and there is no alternative avenue of relief to achieve the Defendants' compliance.

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[22] *Id* at p 50.

[23] Defs' *Answer to Pl Motion for Summary Disposition*, Doc 87, pp 7 & 23-25.

[24] See *id*.

[25] See attached Exhibit G, Excerpt of Hearing Transcript.

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As a result, mandamus relief was properly entered by this court.

As noted by the Supreme Court in its opinion, Defendants did not seek leave to appeal that portion of this court's order granting mandamus and directing the Defendants, state officials, and their employees to comply with the reporting requirements of MCL 21.235 and 21.241. Instead, Defendants sought leave to the extent that mandamus relating to the unfunded mandates portion of the decision applied to the state auditor general. The Court however remanded to this court to clarify the scope of mandamus relief granted.

To the extent there were any technical deficiencies in Plaintiffs' pleading and their failure to name the governor individually, such deficiency can be remedied by amendment of the Complaint. Contemporaneous with this brief, Plaintiffs have filed such motion pursuant to MCR 2.118(C).

III. DISCUSSION

In this case, the Michigan Supreme Court held that PSAs, themselves, do not possess the characteristics of either school districts or political subdivisions of the state. The Court first considered whether Headlee voters might have considered PSAs to be school districts and found that they would not. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *17-18 (p 15 of the filed opinion).

In reaching this conclusion, the Supreme Court found that PSAs:

- Are **nonprofit corporations organized by private persons** or entities while school districts are legislative creations; *Id.*
- Are **not limited to a defined local geographic area** like school districts; *Id.*
- Are **governed by privately selected boards of directors** while school districts are governed by school boards whose members are selected by local electors; *Id.*
- May **enter into private contracts with an education-management corporations to manage and operate the PSA** while the school boards of school districts cannot; *Id.*

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- Are **funded entirely by state payments** while local school districts may also levy taxes. *Id.*

After determining that voters would not have considered PSAs to be school districts, the Supreme Court considered whether PSAs are "political subdivisions of the state" and again held that they are not. *Id*. at *21 (p 19 of the filed opinion). In addition to the factors distinguishing PSAs from school districts, the Court found that PSAs:

- **Are private entities** and not governmental bodies; *Id*. at *20-21 (pp 18-19 of the filed opinion).
- Have **no independent political power**; *Id*.
- Have **no limited or local geographic boundaries**; *Id*.
- Have **a governing body that is not selected by and does not answer to local electors**; *Id*. and
- While PSAs answer to their authorizing bodies that "**control is much less direct, or even merely symbolic**." *Id*. See also Exhibit A.

As a result, the Court held that PSAs are not political subdivisions of the state "as the voters who ratified the Headlee Amendment in 1978 would have understood the term." *Id*.

Finally, the Supreme Court considered the dissent's arguments that PSAs are analogous to authorities which may be considered political subdivisions of the state. The Court expressed skepticism writing even if "the authorities listed in the dissent are political subdivisions of the state, it does not follow that PSAs must also be political subdivisions of the state." *Id.* *22 (p 20 of the filed opinion).

The Supreme Court readily concluded that PSAs authorized by state universities are not political subdivisions of the state, recognizing that state universities do not serve geographically limited areas of the state and are responsive to electors state-wide and not local electors of a geographically limited area. *Id.* *23 (p 21 of the filed opinion).

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The Court however reserved opinion on whether PSAs authorized by community colleges, intermediate school districts, and local school districts might be considered political subdivisions of the state and remanded the issue to this court for further briefing and consideration.

Given the Supreme Court's recognition that PSAs themselves are neither school districts nor political subdivisions of the state, the Court's remand asks whether the authorizer's status can cloak PSAs with attributes of the authorizer such that PSAs may be considered political subdivisions of the state as understood by voters in 1978.

A. Standard For Determining Status of PSAs Authorized by Community Colleges, Intermediate School Districts, and Local School Districts.

Michigan courts have long recognized that the primary rule of constitutional construction is the rule of common understanding. *Traverse City Sch Dist v Att'y Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971). Citing Justice THOMAS COOLEY, the Court describes the rule and its primacy within our constitutional system:

> A constitution is made for the people and by the people. **The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it** 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it**, the intent to be arrived at is that of the people**, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, **but rather that they have accepted them in the sense most obvious to the common understanding,** and ratified the instrument in the belief that that was the sense designed to be conveyed.' Citing (Cooley's Const Lim 81)." (Cooley's Const Lim 81). [*Traverse City Sch Dist v AG*, 384 Mich at 405 (emphasis added). See also *Council of Orgs And Others For Educ About Parochiaid*, 455 Mich 557, 569, 576, 583; 566 NW2d 208 (1997)].

Under the rule of common understanding, certain principles are clear. First, "a provision must be given the interpretation that the great mass of people would give it. The intent to be arrived at is that of the people." *Traverse City Sch Dist*, 384 Mich at 405. Next, courts "must construe [constitutional provisions] as the people did in their adoption." *Lockwood v Comm'r of*

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Rev, 357 Mich 517, 555 (1959). And, finally, "the circumstances surrounding the adoption of the constitutional provision … may be considered" to clarify a term's meaning. *Traverse City Sch Dist*, at 405.

The Michigan Supreme Court confirmed that the rule of common understanding provides the standard for understanding whether PSAs are political subdivisions of the state, and thus local governments, under the Headlee Amendment. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *38-39 (p 2 of the filed opinion).

B. PSAs Are Not Instrumentalities of Their Authorizers Such that They Would Be Understood by Voters to Be Political Subdivisions of the State.

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.

In *Jackson v New Ctr Community Mental Health Servs*, 158 Mich App 25; 404 NW2d 688 (1987), the Court of Appeals considered substantially similar issues. In that case, a publicly funded nonprofit corporation that was performing a government function sought to be considered a government agency and thereby afforded the protections of the state's governmental immunity statute. The statute defines governmental agencies as "the state or a political subdivision." See MCL 691.14019(a).

The court found that the defendant "confuses the issues of governmental agency status and governmental function" and held that "[a] private entity's performance of a governmental function does not confer governmental agency status on that entity." *Id*, at 34-35. The court reasoned further:

> Notwithstanding its performance of a "governmental function" and its reliance on public funding, New Center **retains its identity as a nongovernmental entity. Its employees are not county employees. It retains its separate corporate identity and is**

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> **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**. While it may have been created in response to the recognition of mental health needs in Detroit, New Center's creation was not mandated by law.
>
> **We are persuaded of no reason to treat a private entity as a governmental agency merely because that entity contracts with a governmental agency to provide services which the agency is authorized or mandated to provide**. We hold that New Center is not a governmental agency. [*Id*, at 35. See also, *Rambus v Wayne Co Gen Hosp*, 193 Mich App 268; 483 NW2d 455 (1992); *O'Neill v Emma L Bixby Hosp*, 182 Mich App 252; 451 NW2d 594 (1990); *Roberts v Pontiac*, 176 Mich App 572; 440 NW2d 55 (1989); and *Johnson v Williams*, ___F Supp 3d___; 2017 U.S. Dist. LEXIS 156149 (ED Mich, Sep. 25, 2017) (attached as Exhibit E) and *Fareed v G4S Secure Solutions (USA) Inc*, 942 F Supp 2d 738 (ED Mich, 2013)].

This court's decision in *Jackson* is conclusive regarding the issues on remand. Merely because a private entity enters a contract to perform services that are commonly, though not exclusively, performed by a government agency does not transform the separate and independent private entity into a political subdivision of the state. While some PSAs are issued a contract by authorizing bodies such as community colleges, intermediate school districts, and local school districts that may be political subdivisions of the state and PSAs perform educational functions commonly though exclusively performed by government, neither fact transforms PSAs into political subdivisions of the state. Importantly, no voter in 1978 would have understood otherwise. Instead, voters in 1978 (and today) would understand PSAs to be private entities, separate and independent from government, that provide educational services under contract with their authorizers.

Under the law of 28 USC 1983 and related constitutional principles, courts will only recognize private entities as a state actor when the private party acts under color of law. See *Moore v Detroit Entertainment, LLC*, 279 Mich App 195; 755 NW2d 686 (2008). A private entity acts

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under color of law when its conduct is 'fairly attributable to the state.'" *Id.* (citing *Lindsey v Detroit Entertainment, LLC*, 484 F3d 824, 827-828 (6th Cir, 2007)). Courts use three tests to determine when conduct is fairly attributable to the state: 1) the public function test; 2) the state compulsion test; and 3) the symbiotic relationship/nexus test. *Id*.

Public school academies cannot meet any of these three tests to be found as acting on behalf of their authorizer. The public function test requires that the private entity be performing an activity *traditionally exclusively reserved* to the state. *Id*. Education is not an activity that is, by tradition, exclusively reserved to state actors. From the earliest history of this state, education has been performed by religious and private institutions, alongside state actors.

The state compulsion test requires that the private party has been compelled by the state to engage in the activity at issue, such that the private party had no effective choice but to act. *Wolotsky v Huhn*, 960 F2d 1331, 1335 (6th Cir, 1992). Public school academies voluntarily submit applications and are free to enter contracts with their authorizers or to quit their contracts at any time. There is no element of compulsion in the relationship between PSAs and their authorizing bodies.

Similarly, the symbiotic relationship test is not satisfied. The symbiotic relationship test requires a close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id*. "[I]t must be demonstrated that the state is **intimately involved** in the challenged private conduct in order for that conduct to be attributed to the state." *Id*. Simply because a business is regulated by the state, even extensively so, "does not by itself convert its action into state action." *Id*. See also, *Bier v Fleming*, 717 F2d 308, 311 (6th Cir, 1983). Rather, courts find that:

> The required nexus may be established by showing that the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be

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> deemed to be that of the State." *Blum, supra*, 457 U.S. at 1004, 102 S. Ct. at 2786. [*Lindsey v Jansante*, 806 F Supp 651, 655 (ED Mich, 1992)].

Community colleges, intermediate school districts, and local schools districts do not exercise significant coercive power and do not provide significant encouragement such that the PSA's decision to engage in education services can be found to be deemed to be that of the state itself. Beyond ensuring that the PSA conforms to their contract, no government authorizer is so intimately involved with the school's educational activities to be found in a symbiotic relationship with a PSA. Instead, PSAs are specifically formed and issued a contract to distance governmental bodies from the school's operation and to provide an alternative to government operated schools.

Notably, if PSAs are found to be instrumentalities of their authorizers such that they are thereby political subdivisions of the state, they must comply with the U.S. Constitution, Michigan Constitution, and each of the other myriad requirements, and myriad potential liabilities, that apply to all other government entities. This is a pandora's box that courts should be circumspect in opening.

C. The Community Colleges Of Federal Recognized Tribes Are Not Political Subdivisions Of The State Of Michigan.

As noted above, there are forty-seven (47) PSAs authorized by contracts issued from community colleges. Bay Mills Community College is the authorizing body for forty-five (45) of these PSAs. Bay Mills Community College is a federally recognized tribal community college that was established by and is owned and operated by a federally recognized tribal community. As a matter of law, BMCC is not a political subdivision of the State of Michigan.

In *Paquin v City of St Ignace*, 504 Mich 124; 934 NW2d 650 (2019), the Michigan Supreme Court held that tribal governments are not local subunits of the state. The Court wrote:

> [The] unique relationship between the United States federal government and tribal governments highlights the difference

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> between tribal governments and local subunits of state government … It is thus irrelevant to note all of the functions that the Tribe provides that are similar to that of, for example, the city of St. Ignace—that the two entities function similarly in some respects does not make them the same.
>
> * * *
>
> That the Tribe defies easy characterization lends further support to the finding that its inclusion under the term "local . . . government" would be to reach for a strained interpretation of that term. **Because the cornerstone of constitutional interpretation is to seek the common understanding of the people, we therefore find that the Tribe is not a "local . . . government" as that term is used in Const 1963, art 11, § 8**. [*Id*, at 135].

The Michigan Supreme Court holds that federal recognized tribes are not political subunits of state government and not local governments of the state. Bay Mills Community College is therefore not a political subdivision of the state and not a local government under the definitions established by Const 1963, art 9, § 33.

Consequently, PSAs issued a contract by BMCC are not aided by the status of their authorizer and the Michigan Supreme Court's reasoning relating to state university authorizers applies. In this case, the Michigan Supreme Court considered whether PSAs authorized by a state university might be considered a political subdivision of the state. After finding that PSAs are not themselves political subdivisions of the state, the Court reasoned that even if PSAs could be construed to be instrumentalities of their authorizers, state universities are "definitively not" political subdivisions of the state. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *23 (p 21 of the filed opinion). As a result, the Michigan Supreme Court held that PSAs issued a contract by state universities are not political subdivisions of the state and thus not local governments under the Headlee Amendment. *Id.*

Likewise, even if PSAs issued a contract by BMCC could conceivably be considered instrumentalities of their authorizer, they are not political subdivisions of the state and not local

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governments under Const 1963, art 9, § 33. Payments made to these PSAs therefore cannot be counted as payments to local government under art 9, § 30.

D. A Local School District's Experimentation With Differing Educational Models Is Not A Factor In Determining Whether PSAs Possess The Distinctive Marks Of A Political Subdivision Of The State As Understood By Voters In 1978.

Without expressing an opinion on the outcome, the Michigan Supreme Court posited whether a traditional school district that "experiments with the charter-school model to provide educational services to local children" might properly have state school aid funding that is paid to the PSA counted as state spending to a unit of local government under § 30. The short answer is that it would not be proper to count the state's payments to the PSA as payments to local government under § 30.

In the first instance and as noted above, the PSAs status remains as an independent private entity and the school district's experimentation by issuing contracts authorizing PSAs to undertake the education of local students does not convert the status of those PSAs to a political subdivision of the state. The school districts' experimentation is no different from that of other authorizers and it remains bound to the same relationship with the PSA that is established by state law — a contractual relationship where the authorizing body's role is to enforce the contractual terms. The experimentation is substantively similar to other privatization efforts extensively undertaken by local governments over the past three decades, with one critical difference — the PSA is the principal in the relationship with its authorizer regarding receipt of state funds.

The Public School Academies Act expressly designates each authorizing body as the "fiscal agent for the public school academy." MCL 380.507(3). The authorizing body is thus the agent acting for and on behalf of the principal – the PSA – with respect to the receipt of state school aid funding. The plain language of the statute establishes the principal/agent relationship between the authorizing body and the PSA and is the expressed intent of the legislature.

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Fundamental rules of statutory interpretation prevent any other interpretation. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 63; 718 NW2d 784 (2006) ("[W]e must assume that the thing the Legislature wants is best understood by reading what it said").

The statutorily established principal-agent relationship between the experimenting school and the PSA for the payment of state funds is what distinguishes the experimenting school from the local government that, in its discretion, privatizes a department. In this case, the principal for receipt of the state's funds is designated as the PSA, as a matter of law. It is not a discretionary payment to the local government, but rather a direct payment to the PSA, through its statutory agent, and that payment is required, by law, to be made by the agent to the PSA. As a result, the school aid funds are paid by the state to the PSA, a private entity. Voters in 1978 would not understand this payment to be otherwise.

E. PSAs Authorized By Community Colleges, Intermediate School Districts, and Local School Districts Are Not Analogous To Municipal Authorities That Are Political Subdivisions Of The State.

The Michigan Constitution at art 9, § 33 defines local governments as political subdivisions of the state. As recognized by the Michigan Supreme Court, only those authorities that are also political subdivisions of the state are included within art 9, § 33's definition. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *23 (p 21 of the filed opinion). The inherent characteristics of authorities are what determine their status as political subdivisions and are also what distinguish them from PSAs authorized by community colleges, intermediate school districts, and local school districts.

The Court held that "Headlee 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." *Id*. *17 (p 18 of the filed opinion). For purposes of art 9, § 33 then, an entity must have three distinguishing attributes. First the entity must be formed to

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operate in a geographically limited area to serve citizens of the limited area. Second, the entity must exercise political power, and finally, the entity must be answerable to the local electorate.

The Court found that authorities existing in 1978, "are generally made up of territories comprising the local governmental units that agree to participate in the authority." *Id*. *22 (p 20 of the filed opinion). That court further found that "**PSAs do not have limited or local geographic boundaries**." *Id*. *20 (p 18 of the filed opinion). 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. Moreover, intermediate school districts and local school districts issue contracts authorizing most of the state's cyber schools and strict disciplinary academies.

Authorities are organized as public municipal corporations, created by legislation, while PSAs "are private entities and not governmental bodies." *Id*. While not all authorities exercise all the same political powers in the provision of the services that they undertake, each is invested with and in fact exercises political powers. See e.g., Garbage and Rubbish Authorities. MCL 123.309 (Power to issue revenue bonds.) and *Peninsula Sanitation v City of Manistique*, 208 Mich App 34, 39; 526 NW2d 607, 609 (1994) (Disposal of solid waste is an aspect of the police powers"); and Transportation Authorities. MCL 124.403 (Possess "all the powers of a public corporation") and MCL 124.407 (Possess the power to "fix rates, fares, tolls, rents and other charges for the use of" public transportation facilities); Charter Water Authorities. MCL 121.16 (Power to levy taxes); Building Authorities MCL 123.959 (Power of condemnation); and Huron-Clinton Metropolitan Authority. MCL 119.53 & 59 (Power to acquire land through eminent domain to develop public parks and highways).

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Regardless of their authorizer, PSAs do not exercise any political powers. They have no police powers, no taxing power, and do not exercise any other of the myriad forms of political or governmental power.

Similarly, authorities are answerable to the electorate. In each instance, the incorporating articles of the authority are formed by elected officials of local government and the governing board of the authority is composed of persons *directly appointed by elected officials* or as established by the articles of incorporation. Garbage, Rubbish, and Dog Pound Authorities. MCL 123.301 (Elected officials establish the articles of incorporation) and MCL 123.302 (Articles of incorporations establish the type and membership of governing board); Regional Transportation Authorities. MCL 123.410 (Governor appoints two-thirds of the members from candidates submitted by elected officials of participating local governments. Members must be residents of the nominating community); Charter Water Authorities. MCL 121.3 (Requiring vote of local electors to join) and MCL 121.6 (Legislative body of each local government selects board members); Building Authorities. MCL 123.954 (Elected officials establish the articles of incorporation) and MCL 123.955 (Articles of incorporations establish the type and membership of governing board); and Huron-Clinton Metropolitan Authority. MCL 119.60 (Requiring vote of local electors to join) and MCL 119.54 (County commissioners select each board member).

While authorities' accountability to local electors may be derivative, PSAs' accountability is far more so. In 1978 it was not uncommon for state legislation to require a vote of the local electorate before a community could join a regional authority. The form, nature, and powers of the governing boards of such authorities are commonly established by the decision of local elected officials, who are accountable to the local electorate. And, the membership of the governing board is in all, but a very few instances directly made by local elected chief executive officers or the local elected legislative body.

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In stark contrast and again regardless of their authorizer, PSAs are privately formed, and their governing boards are privately selected **with no substantive accountability to the local electorate**. The governing boards of directors of PSAs are composed of privately appointed members. See MCL 380.502(1) and MCL 450.2223. The PSAs' incorporators and board of directors establish the PSAs' bylaws and articles of incorporation. MCL 380.502(3)(b); MCL 450.2201; and MCL 450.2223. The Public School Academies Act only requires that the articles of incorporation, the proposed governance structure, and names of the proposed board be submitted with the PSAs' application for a contract with the authorizer. MCL 380.502(3)(b). The Act does not grant authorizers any power to establish the PSAs' governance structure, membership on the governing board, or the contents of the articles of incorporation beyond the authorizer's power to withhold or enter into a contract with the PSAs.[26] This power is thus not substantively different than the power that local governments have over any other private entity from whom they receive proposals in myriad other areas and certainly does not rise to the level of control such that PSAs could be found to be an instrumentality of the state. As noted by the Michigan Supreme Court in this case, "**this control is much less direct, or even merely symbolic.**" *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, at *20 (p 19 of the filed opinion) (emphasis added).

As a result, PSAs authorized by community colleges, intermediate school districts, and local school districts do not possess the distinguishing marks of a political subdivision of the state, as set forth by the Michigan Supreme Court in this case and as would have been contemplated by

[26] PSAs are required to provide their proposed governance structure, names of board members, and articles of incorporation with the application submitted to a proposed authorizer. MCL 380.502 (3). The Act however does not grant the authorizer power to independently amend, alter, replace, or substitute these items. It simply permits the authorizer to approve, disapprove, or to revoke a contract with the PSA.

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voters in 1978 and cannot fairly be found to be analogous to municipal authorities possessing the characteristics of a political subdivisions of the state.

C. The Court Properly Granted Mandamus Relief On The Reporting Requirements Of MCL 21.235 And MCL 21.241 And Any Technical Deficiencies In the Pleadings Can Be Remedied By Amendment Pursuant to MCR 2.118(C).

Mandamus relief is properly granted where (1) the plaintiff has a clear legal right to the performance of the act requested; (2) the defendant has a clear legal duty to perform the act; (3) the act is ministerial; and (4) no alternative remedy exists that might achieve the same result. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). In this case, each of these requirements were properly found by this court with respect to the reporting requirements of MCL 21.235 and MCL 21.241.

1. Reporting Under MCL 21.235

MCL 21.235 requires reporting as follows:

> The governor shall include in a *report which is to accompany the annual budget recommendation* to the legislature those amounts which the governor determines are required to make disbursements to each local unit of government for the necessary cost of each state requirement for that fiscal year and the total amount of state disbursements required for all local units of government. [MCL 21.235(3) (emphasis added)].

Annually — from 1978 through the present, the governor and DTMB (as part of planning and preparing the budget recommendation on behalf of the governor) has never prepared and the governor has never submitted a report with the required information.

On motions for summary judgement in this case, the Defendants did not argue that the reports had ever been prepared or submitted and did not submit any evidence that such a report has ever been made. Instead, Defendants solely relied on a legal argument that Plaintiffs did not have standing to bring a mandamus action on these statutes.

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The court recognized MCL 21.235 is part of the implementing legislation of the Headlee Amendment. The court found that the state's failure to comply "undermines the right and role of taxpayer oversight and enforcement conferred by Const 1963, art 9, § 32." *Taxpayers for Mich Constitutional Gov't*, 330 Mich App at 319. And, the court further found that the acts at issue are "clearly ministerial." *Id.* The plain language of each statute clearly imposes the reporting duties on state officials and on employees of the DTMB. There is no alternative avenue of relief to achieve the Defendants' compliance. As a result, mandamus relief was properly entered by this court.

Mandamus directed the "state through its officers and departments" to comply with the requirements of MCL 21.235. The governor is an officer of the state. Moreover, the Defendant DTMB is the department that prepares the governor's annual budget recommendation and accompanying reports that are submitted to the state legislature. See MCL 18.1141 (The department shall "[p]lan, prepare, and execute a comprehensive state budget"). See also MCL 21.235(6) (The department shall "administer this act").

To the extent there were any technical deficiencies in Plaintiffs' failure to name the governor individually, such deficiencies can be remedied by amendment of the Complaint. Plaintiffs have requested leave to amend pursuant to MCR 2.118(C), which permits amendment at any time — even after judgment — to conform the pleadings to the issues litigated by the parties.

2. Reporting Under MCL 21.241

Mandamus directing the DTMB to comply with MCL 21.241 was properly entered. MCL 21.241 requires further reporting:

> (1) Within 6 months after the effective date of this act the department shall collect and tabulate relative information as to the following:

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(a) The state financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law.
(b) The nature and scope of each state requirement which shall require a disbursement under section 5.
(c) The nature and scope of each action imposing a potential cost on a local unit of government which is not a state requirement and does not require a disbursement under this act.

(2) The information shall include:
(a) The identity or type of local unit and local unit agency or official to whom the state requirement or required existing activity or service is directed.
(b) The determination of whether or not an identifiable local direct cost is necessitated by state requirement or the required existing activity or service.
(c) The amount of state financial participation, meeting the identifiable local direct cost.
(d) The state agency charged with supervising the state requirement or the required existing activity or service.
(e) A brief description of the purpose of the state requirement or the required existing activity or service, and a citation of its origin in statute, rule, or court order.

(3) **The resulting information shall be published in a report submitted to the legislature not later than January 31, 1980**. A concurrent resolution shall be adopted by both houses of the legislature certifying the state financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law. **This report shall be annually updated** by adding new state requirements which require disbursements under section 5 and each action imposing a cost on a local unit of government which does not require a disbursement under this act. [MCL 21.241 (emphasis added)].

From 1978 through the present, the state and its departments have never prepared or updated the required report.

In its answer to Plaintiffs' Complaint and throughout this case, the Defendants admitted that the reports required by MCL 21.241 have never been prepared. On motions for summary judgement in this case, the Defendants again did not argue that state officials have complied with the statutory reporting requirements.

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The court properly recognized MCL 21.241 is part of the implementing legislation of the Headlee Amendment and that the state and DTMB's failure to comply with the reporting requirements undermines the unique role that taxpayers play in enforcing the Headlee Amendment. *Taxpayers for Mich Constitutional Gov't*, 330 Mich App at 319. The court properly found that the acts at issue are ministerial. *Id.* And again, the plain language of the statute clearly imposes the reporting duties on the DTMB and there is no alternative avenue of relief. As a result, mandamus relief was properly entered by this court.

IV. CONCLUSION

Public school academies are not instrumentalities of their authorizers. The relationships are essentially contractual and oversight is limited to overseeing, amending, or revoking the contract. Moreover, authorizers are the agent of the PSA, who remains the principal concerning the payment of state school aid funds and under Michigan Supreme Court precedent, federally authorized tribal community colleges are not political subdivisions of the State of Michigan. As a result, PSAs issued a contract by community college, intermediate school district, and local school district authorizers would not be understood by voters in 1978 to be political subdivisions of the state.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs,

Case No. 334663

vs.

THE STATE OF MICHIGAN, THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET OF THE STATE OF MICHIGAN; and the MICHIGAN OFFICE OF THE AUDITOR GENERAL.

Defendants.

_____/

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the attached *Plaintiffs' Supplemental Brief in Support of Summary Disposition On the Issues Presented On Remand* with the Clerk of the Court using the TrueFiling system, which will send notification of such filing to all electronic case filing participants.

Respectfully Submitted,

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