STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs,

Case No. 334663

v.

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

Defendants.
_____/

PLAINTIFFS' BRIEF IN REPLY TO THE DEFENDANTS' ANSWER TO PLAINTIFFS' SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In this case, the Michigan Supreme Court held that public school academies (PSAs)[1] are not political subdivisions of the state and are not local governments.[2] *Taxpayers for Mich Constitutional Gov't v State*, ___NW3d___; 2021 Mich. LEXIS 1311, **21, 24 (July 28, 2021). The Court also held that spending paid to PSAs authorized by state universities definitively cannot be included within spending counted for purposes of § 30. *Id*. at *23. Under such circumstances, neither the authorizer nor the PSAs are local governments, and as a result, the state's spending cannot be considered a payment to a local government.

The Court however remanded for consideration of whether "state funding to PSAs authorized by a school district, an intermediate school district, or a community college" might be considered spending paid to a local government for purposes of § 30, *"[i]f, for example, a traditional school district—a "local government" under § 33 of the Headlee Amendment—experiments with the charter-school model to provide educational services to local children*." *Id*. at *24 (emphasis added).

Given the Court's holding that PSAs are not themselves a political subdivision of the state, the Court's remand asks for analysis: a) whether the state's spending paid to PSA's fiscal agent might be considered to be spending paid to a local government; and b) whether such payment used by the fiscal agent to pay a PSA to perform part of a fiscal agent's educational programming qualifies the payment as spending on a local government. Under existing legal and constitutional principles, neither the spending that occurs nor the nature of the services performed by PSAs

[1] Also known as "charter schools."

[2] Under the Headlee Amendment, the Michigan constitution defines local governments as "political subdivisions of the state." Const 1963, art 9, § 33. If an entity is not a political subdivision of the state, by definition, it cannot be a local government.

permit counting the spending as payments to local government for purposes of art 9, § 30.

The Court further remanded for clarification on the issue of mandamus, asking for specificity regarding which defendant is failing to comply and on the appropriateness of mandamus. *Id*. at *36-37. Defendants are clearly in violation of the reporting requirements of MCL 21.235 and MCL 21.241 and mandamus is warranted and necessary to achieve compliance.

II. DISCUSSION

A. The Common Understanding of Voters in 1978 Remains the Benchmark for Considering the Remand Issues

The Michigan Supreme Court's opinion recognized that to answer whether PSAs are local governments within the meaning of § 33, the Court "must determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Taxpayers for Mich Constitutional Gov't v State*, ___NW3d___; 2021 Mich. LEXIS 1311, at *38. To do so, the Court wrote that:

> [W]e must seek the "common understanding" of the constitutional provisions to ascertain and give effect to "the sense of the words used that would **have been most obvious** to those who voted to adopt the constitution. [*Id*. at 39 (emphasis added)].

Applying the rule, the Michigan Supreme Court has reasoned that when an entity "defies easy categorization," voters are unlikely to have understood the entity to be a local government at the time of ratification. *Paquin v City of St Ignace*, 504 Mich 124, 136; 934 NW2d 650 (2019). Such entities are simply not within the "common understanding" of the people who ratified the text. The Court writes:

> That **the [entity] 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*. (emphasis added)].

B. There is No Dispute that PSAs Authorized by Tribal Community Colleges Are Not Local Governments

For the same reason that spending paid to PSAs authorized by a state university is not a payment to local government, monies paid to PSAs authorized by tribal community colleges cannot be included as spending paid to a local government for purposes of § 30.

As shown in Plaintiffs' supplemental brief, Bay Mills Community College (BMCC) issued contracts for nearly all PSAs authorized by a community college and BMCC is definitively not a political subdivision of the state. Instead, BMCC is a federal tribal college, authorized under federal statutes and established by tribal law of the Bay Mills Indian Community. The Michigan Supreme Court holds that federal tribes are not political subdivisions of the State of Michigan and are not local governments. *Id*. (emphasis added)].

PSAs authorized by BMCC are not themselves local governments and neither are their authorizers. As a result, spending paid to those PSAs must be excluded from the state's calculation of spending paid to local governments for purposes of meeting the requirements of § 30.

C. Defendants' Arguments Do Not Address the Supreme Court's Questions

In this case, the Michigan Supreme Court held that, *regardless of their authorizer*, PSAs are not political subdivisions of the state under § 33. The Court wrote:

> **In sum, 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**. [*Taxpayers for Mich Constitutional Gov't*, 2021 Mich. LEXIS 1311, at *21].
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> Accordingly, although **we hold that a PSA is not a political subdivision of the state**, we remand this case to the Court of Appeals to consider … [*Id*. at 24].

The Court's holding shapes the contours of its question on remand. While finding PSAs themselves are not political subdivisions of the state, the Court remanded for further consideration

of "whether state funding to PSAs authorized by a school district, an intermediate school district, or a community college" can be counted as state spending to local government for purposes of § 30. *Id*. The remand does not seek additional briefing to revisit the Court's central holding – that PSAs are not political subdivisions of the state and not local governments.

Instead, the remand asks whether, *despite a PSA not being a political subdivision of the state*, there are circumstances where either the status of the authorizer as a local government or the nature of the services for a local government authorizer might permit payments to a PSA to be counted as state spending paid to local government for purposes of § 30. While the Court's specific questions are somewhat unclear, in the context of the Court's holding only two areas of consideration present themselves under existing legal doctrine.

First, the Court must consider whether the state's payments to local government authorizers, *as fiscal agents for the PSA*, is singularly sufficient to constitute state spending paid to local government for purposes of § 30. This question is suggested by the Court's recognition of the authorizer as fiscal agent for the PSA. See *Id.* at **23-24 n 32. As discussed further below, it does not.

Second, the Court must consider whether, depending on the circumstances of the local government authorizer and the nature and extent of services provided, spending paid to a PSA *as a private entity* might be considered to be state spending paid to a local government for purposes of § 30. This question is suggested by the Court's cited example of a local school district expressly experimenting with a charter-school model to provide education to local students. *Id*. at *24. As discussed further below, it again should not.

1. *Spending Paid to the Fiscal Agent of a PSA Is Not Spending Paid to a Local Government for Purposes of § 30*

The authorizer is the fiscal agent for the receipt of state spending paid to a PSA. See MCL

380.507(3). The plain language of the statute thus establishes a principal/agent relationship between the authorizing body and the PSA for purposes of receiving state funds. The PSA is the principal to whom the sums are due and owing and the authorizer is the designated agent for the sole purpose of receiving state payments and paying them to the PSA.

Under the statutory scheme, the authorizer has no discretion regarding the use of the funds or its allocation among PSAs. Instead, the authorizer "shall then forward the payment to the public school academy" after receiving the state's payment. MCL 380. 507(3). By law, the authorizer is required to deliver the state's payments directly to the PSA. Thus, while payments are nominally made to the authorizer as fiscal agent, the PSA is the intended beneficiary of the state's spending. Under these circumstances, the state's spending cannot fairly be described as payment to the authorizer for purposes of § 30.

The nature and character of the PSA as an independent private nonprofit corporation remains the same, regardless of whether the authorizer is a school district, intermediate school district, community college or even a state entity. The statutorily established principal and agent relationship is in no way impacted by the status of the authorizer. Under agency law, the agent acts as the representative of and is subordinate to the principal. In a sense, the agent becomes an arm of the principal. See generally, *St Clair Intermediate School Dist v Intermediate Ed Ass'n / Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 N.W.2d 707 (1998). A finding that the PSA, as principal, takes on the identity of its agent, the authorizer, when the agent is a local government turns this fundamental principle on its head and is without support in established law.

2. Existing Law Does Not Support Cloaking a PSA with their Authorizer's Status

To illustrate the issues on remand, the Michigan Supreme Court cited as an example where a "traditional school district … experiments with the charter-school model to provide educational

services to local children" and asked whether the authorizer's status as a local government might permit payments to the PSA to be counted under § 30. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich LEXIS 1311, *24. The authorizer's status as a local government however should not impact the outcome.

No evidence has been introduced in this case and the state has not even attempted to argue that any traditional school district experiments with the PSA model in the manner described by the Court. Moreover, such a scenario is highly unlikely. Authorizers just do not have the kind of relationship with a PSA where the authorizer "experiments" with K-12 education through the PSA. Throughout the process of organizing a PSA, the authorizer is a separate entity from the PSA, who is statutorily assigned the role of as the school's organizer, incorporator, applicant, etc. As widely recognized, the purpose of PSAs is *to compete*, rather than collaborate, with traditional school districts in the marketplace for education. Beyond traditional school districts, neither community colleges or intermediate school districts directly educate local students served by PSAs and thus, would not experiment in this manner.

The organization and operation of schools for K-12 education is traditionally not a function of either community colleges or intermediate school districts (ISDs). Community colleges provide postsecondary school education. See MCL 389.101 *et seq.* Within regions of the state, intermediate school districts provide support services to one or more school districts, PSAs, and other private schools operating within their region. See MCL 380.620(1)(a)(iv). Within Michigan's public education system, neither community colleges or ISDs directly provide K-12 education.

Notably, the PSAs authorized by community colleges, ISDs, and traditional school districts are not geographically restricted to a local service area. While each is generally permitted (with numerous exceptions) to authorize PSAs within their service area, students can be drawn from

anywhere in the state if the PSA, in its sole discretion, chooses. Thus, the geographic restriction is not on the population of students served. Instead, the geographic restriction is on the physical location of the school. In this way, the PSA operates more akin to traditional private schools within the authorizer's service area and less like traditional public schools.

The example provided by the Michigan Supreme Court essentially asks when does a private entity assume the functions of a traditional school district such that they can be said to have stepped into the shoes of the school district. Existing principles of law establish when a private corporate entity assumes, for limited purposes, the status of the government that contracts with them. This occurs when the private entity is found to be an instrumentality of the state or to be a state actor for purposes of compliance with the state constitution. See generally *Jackson v New Ctr Community Mental Health Servs*, 158 Mich App 25; 404 NW2d 688 (1987) (instrumentality of the state); and *Moore v Detroit Entertainment*, LLC, 279 Mich App 195; 755 NW2d 686 (2008) (private entity as state actor). As shown in Plaintiffs' initial submission, a PSA cannot fairly be found to be an instrumentality of the state or a state actor under the Court's example, and as a consequence, spending paid to the PSA should be excluded from § 30 calculations.

3. Whether PSAs are Analogous to Municipal Authorities is Irrelevant to the Questions on Remand

Defendants' brief argues that state spending paid to PSAs can be counted as payments to local government because PSAs should be considered to be municipal authorities create by local governments. The Court's opinion expressly rejects this argument. The Court found:

> We cannot say for certain that the authorities mentioned by the dissent would each qualify as political subdivisions of the state as contemplated by § 33; **that is not the question we are faced with today**. However, **assuming that 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**. *Taxpayers for Mich Constitutional Gov't*, 2021 Mich. LEXIS 1311,

**23-24 n 32 (emphasis added).

***

> [A]gain **assuming that the authorities identified in the dissent are all political subdivisions of the state, <u>we do not find PSAs sufficiently analogous to them to conclude that, if those authorities are political subdivisions of the state, PSAs must also be political subdivisions of the state</u>**. *Id.* at *23 (emphasis added).

For purposes of its decision, the Court first assumed each of the dissent's authorities to be a political subdivision of the state. *Id*. However, the Court *expressly rejected* the dissent's argument that PSAs are political subdivisions of the state because PSAs are, in the dissent's view, authorities "created by" a political subdivision of the state. *Id*. The Court found that PSAs are not sufficiently analogous to authorities created by local governments to find that PSAs are therefore also a political subdivision of the state when their authorizer is a local government. The Court then expressly held that PSAs are not political subdivisions of the state, irrespective of their authorizer.

Nonetheless, the Defendants' brief, in effect, asks this Court to reject the higher Courts' findings and holding.[3] The Defendants do so by arguing that PSAs are analogous to authorities created by local governments, and then that because they are authorized by a local government, PSAs are therefore also political subdivisions of the state. See Defs' Suppl Br, pp. 8-22. As noted in Plaintiffs' initial supplemental brief, and as recognized by the higher Court, PSAs simply are not municipal authorities created by local government. Defendants' argument to the contrary is the very sort of strained analogy rejected by the Court in *Paquin*. Moreover, as recognized by the Court in this case, it does not follow that *even if* PSAs are analogous to municipal authorities, they are therefore political subdivisions of the state. The Court has held that they are not, and the decision of the higher Court must be followed on this remand.

[3] Defendants' argument that PSAs are similar to authorities and school districts again infers an equivalency argument that is rejected by the Michigan courts. See *Paquin,* 504 Mich at 135.

Simply put, PSAs are schools formed and operated by private nonprofit corporations for the express purpose of competing with schools formed and operated by local school districts.

D. Defendants Clearly Fail to Meet the Reporting Requirements of MCL 21.235 and MCL 21.241

The Headlee Amendment's implementing legislation at MCL 21.235 requires the governor to prepare a report of amounts disbursed "to each local unit of government for the necessary cost of each state requirement for that fiscal year." MCL 21.235(3). While the statute requires the governor to include the report with the annual budget recommendation, it is the Defendant Department Of Technology, Management And Budget (DTMB) that prepares the report and administers the implementing legislation. MCL 21.235(5). The DTMB's role includes *planning, preparation, submitting and executing* the governor's budget recommendation. See MCL 18.1141; Ex. A–Excerpt from Governor's Budget recommendation; Ex. B–Excerpt from the 101st Legislature, *Michigan Manual 2021-2022*, at p 489; and State Budget Office website, <https://www.michigan.gov/budget> (accessed January 20, 2022).

The State has never prepared the report required by MCL 21.235 and mandamus is appropriately entered against the Defendants Governor, DTMB, and the Director of the DTMB.

At MCL 21.241, the Defendant DTMB is required to provide a report with highly detailed information. MCL 21.241. This report was to be prepared and published by the Department after the Headlee Amendment was adopted and *is required to be updated annually*. *Id*. No such report has ever been prepared by the state and mandamus is appropriate against the Defendants DTMB, and the Director of the DTMB for failing to meet the reporting requirements of MCL 21.241.

The reporting of both statutes requires disclosure of detailed information intended to inform the public whether the state is meeting the requirements of *§ 29* of the Headlee Amendment. Even the most deferential review of Defendants' exhibits reveals that there has been no compliance

with the reporting requirements. Instead, the exhibits are simply reports *summarizing all state spending paid to local units of government* for the purpose of meeting the *§ 30* proportion. The exhibits do not disclose any meaningful information that would allow the public to understand whether the state is meeting the requirements of § 29.

This Court previously considered and recognized that the statutory reporting requirements are ministerial and that "the failure of the State to undertake such acts 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) overturned on other grounds by, ___NW3d___; 2021 Mich. LEXIS 1311 (July 28, 2021). No information or argument has been made that contravenes the Court's prior findings and mandamus remains the appropriate remedy to achieve compliance.

III. CONCLUSION

Public school academies are not themselves political subdivisions of the state and neither the factual record nor any known existing legal principles support finding that PSAs should step into the shoes of their authorizers for purposes of §30. Moreover, under the Court's holding spending paid to PSAs authorized by a tribal college cannot, under any circumstances, be counted as payments to local governments.

Mandamus is appropriately entered by this court. Plaintiffs request that mandamus be entered against the Defendants Governor, DTMB, and the Director of the DTMB for violating the reporting requirements of MCL 21.235 and against the Defendants DTMB, and the Director of the DTMB for failing to meet the reporting requirements of MCL 21.241.

Respectfully Submitted,

By: /s/ John C. Philo_____
John C. Philo (P52721)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue, Second Floor
Detroit, Michigan 48201
(313) 993-4505/Fax: (313) 887-8470
Co-Counsel - Attorneys for Plaintiffs

John E. Mogk (P17866)
Wayne State University Law School
471 W Palmer Ave.
Detroit, MI 48202
(313) 577-3955
Co-Counsel - Attorneys for Plaintiffs

Tracy A. Peters (P76185)
Tracy A Peters PLLC
3494 Harvard Rd
Detroit, MI 48224-2340
(313) 693-5155
Co-Counsel - Attorneys for Plaintiffs

Date: January 21, 2022

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Defendants.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, I electronically filed the attached PLAINTIFFS' BRIEF IN REPLY TO THE DEFENDANTS' ANSWER TO PLAINTIFFS' SUPPLEMENTAL BRIEF 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,
By: /s/ Shannon Stuckey
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue, Second Floor
Detroit, Michigan 48201
(313) 993-4505/Fax: (313) 887-8470
Co-Counsel - Attorneys for Plaintiffs

Date: January 21, 2022