STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(O'Connell, P.J. and Talbot and Owens, JJ)

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS, and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, *et al*

Plaintiffs-Appellees

Supreme Court No. 147794

Court of Appeals No. 302142

OCCC Case No. 2011-119092-PZ

v

STATE OF MICHIGAN DEPARTMENT OF EDUCATION; JOHN NIXON, STATE BUDGET DIRECTOR; ANDY DILLON, TREASURER OF THE STATE OF MICHIGAN; and MICHAEL P. FLANAGAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellants /

BRIEF ON APPEAL – APPELLANTS
ORAL ARGUMENT REQUESTED

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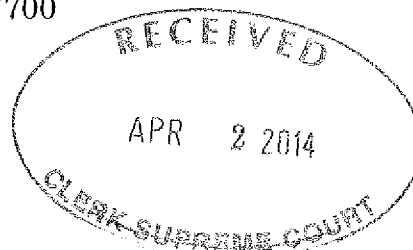

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STATEMENT OF JURISDICTION

Defendants-Appellants Michigan Department of Education, Budget Director for the State of Michigan, Treasurer for the State of Michigan, and Superintendent of Public Instruction (State Defendants or State) filed an application for leave to appeal the August 22, 2013 judgment of the Court of Appeals. This Court granted the State Defendants' application for leave to appeal on February 5, 2014. This Court has jurisdiction pursuant to MCR 7.301(A)(2) & MCR 7.302(H)(2).

STATEMENT OF QUESTIONS PRESENTED

1. The Legislature appropriated more than $3 billion annually to districts, while conditioning the funds on the districts furnishing data and other information required by law to the State. Plaintiffs here conceded that they would not demonstrate that their specific necessary increased costs, realized or anticipated, would exceed the amount of appropriated funding. In a case alleging underfunding of a legislative mandate under article 9, § 29 of Michigan's 1963 Constitution, have Plaintiffs met their burden of proof?

   Appellants' answer: No

   Appellees' answer: Yes

   Court of Appeals' answer: The Court of Appeals did not directly address this question.

2. The Court of Appeals imposed a standard of proof that focuses on Legislative methodology rather than on whether the amount of additional funding is reasonable and necessary. Does this approach violate constitutional separation of powers?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals' answer: Presumably, No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art 9, § 29:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the [level] of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

Const 1963, art 3, § 2:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 4, § 11:

> Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house.

Const 1963, art 9, § 34:

> The Legislature shall implement the provisions of Sections 25 through 33, inclusive, of this Article.

2011 PA 62, § 22b:

> Sec. 22b. (1) From the state funds appropriated in section 11, there is allocated for 2010-2011 an amount not to exceed $3,558,424,700.00 and there is allocated for 2011-2012 an amount not to exceed

$3,032,300,000.00 for discretionary nonmandated payments to districts under this section. Funds allocated under this section that are not expended in the state fiscal year for which they were allocated, as determined by the department, may be used to supplement the allocations under sections 22a and 51c in order to fully fund those calculated allocations for the same fiscal year.

(2) In addition to the funds allocated in subsection (1), there is allocated an amount estimated at $184,256,600.00 for 2010-2011 from the federal funds awarded to this state under title XIV of the American recovery and reinvestment act of 2009, Public Law 111-5. These funds shall be distributed in a form and manner determined by the department based on an equal dollar amount per the number of membership pupils used to calculate the final state aid payment of the immediately preceding fiscal year and shall be expended in a manner prescribed by federal law.

(3) Subject to subsection (4) and section 11, the allocation to a district under this section shall be an amount equal to the sum of the amounts calculated under sections 20, 51a(2), 51a(3), and 51a(12), minus the sum of the allocations to the district under sections 22a and 51c.

(4) In order to receive an allocation under subsection (1), each district shall do all of the following:

(a) Administer in each grade level that it operates in grades 1 to 5 a standardized assessment approved by the department of grade-appropriate basic educational skills. A district may use the Michigan literacy progress profile to satisfy this requirement for grades 1 to 3. Also, if the revised school code is amended to require annual assessments at additional grade levels, in order to receive an allocation under this section each district shall comply with that requirement.

(b) Comply with sections 1278a and 1278b of the revised school code, MCL 380.1278a and 380.1278b.

(c) Furnish data and other information required by state and federal law to the center and the department in the form and manner specified by the center or the department, as applicable.

(d) Comply with section 1230g of the revised school code, MCL 380.1230g.

(5) Districts are encouraged to use funds allocated under this section for the purchase and support of payroll, human resources, and other business function software that is compatible with that of the

intermediate district in which the district is located and with other districts located within that intermediate district.

* * *

INTRODUCTION

Through this litigation, the Districts seek to grind vague orders, and, of course, attorney fees from the Headlee litigation mill of artful pleading and prolonged proceedings. But basic legal and evidentiary principles require them to prove the amount that would be sufficient to fund the Center for Educational Performance and Information (CEPI) reporting activity—because, in their view, the billions of dollars already provided by the Legislature are insufficient. They did not do that in this case.

In this Headlee Amendment underfunding case, the Court of Appeals determined that

> "the higher burden borne by plaintiffs is the burden to present *sufficient evidence* to allow the trier of fact to conclude that *the methodology employed by the Legislature* to determine the amount of the appropriation *was so flawed* that it failed to reflect the 'actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . .' MCL 21.233(6)."
>
> [*Adair v State*, 302 Mich App 305, 316-317; 839 NW2d 680 (2013) (emphasis added)].

Stripped of ambiguous phrases like "sufficient evidence" and "so flawed," this burden of proof allows a fact finder to second-guess the validity of any legislative appropriation for a local mandate. The new standard violates separation-of-powers principles by suggesting that the "method employed by the Legislature" to determine the sufficiency of a legislative appropriation may be repeatedly overruled by a "trier of fact," presumably until the judiciary is satisfied that the Legislature has appropriated so much money that the "method" is no longer "flawed."

This Court should adopt the following standard that appreciates the deference due to the Legislature and sets out a burden of proof that will resolve, with finality, any question of legislative underfunding:

> A Headlee plaintiff alleging underfunding must prove, by clear and convincing evidence, the particular type and extent of harm by demonstrating that specific necessary increased costs to local government, realized or anticipated, exceed the amount of appropriated funding.

In other words, a plaintiff must prove the amount of underfunding. Otherwise, the parties will be in a state of perpetual litigation as the State annually attempts to estimate the theoretical cost and the local government units merely attempt to poke holes in the Legislature's chosen funding structure and ignore their actual costs of providing the activity or service.

Moreover, in addition to the $34 million appropriated in §152a of the State School Aid Act, MCL 388.1752a, in § 22b the Legislature specifically appropriated over $3 billion to school districts conditioned on performing certain activities, including reporting information to CEPI. Thus, in addition to § 152a, "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in art 9, § 29. And by accepting the conditional appropriation in § 22b, the Districts also accepted the responsibility attached to those funds and waived any Headlee challenge to the level of funding provided. This Court should reverse the Court of Appeals on these issues and dismiss this case.

STATEMENT OF FACTS

A. Background of *Adair*.

The Districts filed this case as an original action in the Court of Appeals on January 19, 2011, but much of the case is a continuation of the first *Adair* litigation. Originally filed in the year 2000, the first *Adair* litigation raised Headlee challenges to several different sections of the Revised School Code, the State School Aid Act, the Pupil Transportation Act, several special education administrative rules, and Executive Order 2000-9. The first *Adair* litigation culminated in this Court's July 14, 2010 decision affirming a declaratory judgment in the Districts' favor. This Court ultimately found that only one claim, the one based on changes in the recordkeeping and reporting requirements found in MCL 388.1752 and EO 2000-9, represented an actionable, and unfunded, increase in activities or services in violation of Headlee. See *Adair v Michigan*, 486 Mich 468, 480-481; 785 NW2d 119 (2010).

This claim involved requirements for reporting information to the Center for Educational Performance and Information (CEPI). *Adair v Michigan*, 470 Mich 105, 129-131; 680 NW2d 386 (2004). This Court first noted that school districts have long been under a general obligation to report any and all information that the State requires. *Adair*, 470 Mich at 129. But this Court held that the Court of Appeals erred in dismissing the case because the Districts' allegation was arguably based on more than just reporting information. *Adair*, 470 Mich at 129-130. Following a second dismissal by the Court of Appeals on remand, this Court

directed the Court of Appeals to determine whether the State unconstitutionally off-loaded its responsibilities by failing to provide any funding for CEPI-related reporting requirements. *Adair v Michigan,* 474 Mich 1073; 712 NW2d 702 (2006).

The Court of Appeals appointed the Honorable Pamela Harwood to serve as special master to determine "whether the record-keeping obligations imposed on plaintiff school districts as a result of MCL 388.1752 and Executive Order No. 2000-9 constituted either a new activity or service or an increase in the level of state-mandated activity or service within the meaning of the Headlee Amendment's prohibition of unfunded mandates." *Adair v Michigan,* 279 Mich App 507, 510; 760 NW2d 544 (2008) .

Special Master Harwood ruled that the relevant point in time for determining whether the Districts' claim was barred by *res judicata* was July 31, 1997, the date of the Supreme Court's decision in *Durant.* Special Master Harwood stated:

> In light of the foregoing, the first question to be decided is whether the record keeping requirements imposed by MCL 388.1752 and EO 2000-9 present a new activity or service beyond that required prior to the ratification of Headlee and if so, whether the new activity or service began after the conclusion of *Durant I.* [Appellants' Appendix p. 105a.]

This determination was consistent with this Court's 2004 decision. It sets the base, or starting point, for determining which of the recordkeeping and reporting activities the Districts were already performing, and which were increases in activity that require funding under the Headlee Amendment. Special Master Harwood specifically found that State-mandated educational record collection, maintenance, and reporting existed before 1997 and before 1978. (Appellants' Appendix pp. 121a-122a)

On January 27, 2008, the Special Master issued an opinion, concluding that (1) the recordkeeping requirements imposed by MCL 388.1752 and EO 2000-9 violated the Prohibition of Unfunded Mandates (POUM) clause of the Headlee Amendment because they increased an activity beyond the level required before 1997; (2) despite not showing actual costs of the alleged mandates, the Districts met their burden of proof with respect to demonstrating "necessary increased costs;" and (3) the increased recordkeeping requirements resulted in additional necessary costs to school districts that were not funded by the State. Further, the Special Master recognized that school districts were already collecting much of the data the State required, including data related to at-risk students, free lunch programs, Title I services, and special education students. (Appellants' Appendix pp. 106a, 111a, 120a.)

On July 3, 2008, the Court of Appeals adopted Special Master Harwood's findings of fact and conclusions of law, with some exceptions, and granted a declaratory judgment in the Districts' favor. *Adair*, 279 Mich App at 510-511.

On July 14, 2010, this Court affirmed the issuance of a declaratory judgment in the plaintiffs' favor. *Adair,* 486 Mich 468. But in its discussion of the increased level of activity, this Court did not focus on the level of State-mandated reporting back to 1978. Rather, the Court focused on the increase in activity after implementation of CEPI. *Adair*, 486 Mich at 481-482 ("Therefore, the pertinent testimony on this issue involved the changes in the volume and specificity of information that the state required to be reported after implementation of the CEPI

requirements.") This Court affirmed because it found that the new, electronic reporting "required an increase in the level of activities or services by plaintiff school districts over what was previously required." *Adair*, 486 Mich at 484. The Court then remanded the case to the Court of Appeals for the limited purpose of determining costs and attorney fees. *Adair*, 486 Mich at 484.

B. Funding the *Adair* Headlee obligation.

In accordance with this Court's July 14, 2010 decision, the Legislature appropriated funds for the increased record keeping activity at issue.

1. 2010 – 2011 funding.

In 2010 PA 217, the Legislature funded the *Adair* Headlee Amendment obligation by providing roughly $25.6 million to school districts in § 152a of the 2010-11 School Aid Act (Appellants' Appendix p. 49a.) See MCL 388.1752a for current year appropriations. The Legislature added § 152a to the 2010-2011 School Aid Act, MCL 388.1752a, for the express purpose of funding the *Adair* Headlee Amendment obligation.

In 2010 PA 204, the Legislature amended § 94a of the State School Aid Act, MCL 388.1694a, to also provide funds to school districts for their participation in CEPI's newly-created state longitudinal data system (Appellants' Appendix p. 67a.) For the 2010-2011 fiscal year, § 94a(9) of 2010 PA 204 allocated an amount not to exceed $8,440,000 to fund the efforts of districts to link individual teacher and student records. (Appellants' Appendix p. 74a.)

2. 2011 – 2012 funding.

On June 21, 2011, the Legislature amended the School Aid Act by enacting 2011 PA 62 and appropriating more than $11 billion from the School Aid Fund and General Fund for the 2011-2012 school year. From this amount, § 22a allocated funding for the Proposal A guaranteed obligation. And §§ 31d, 51c, and 152a continued to fund the *Durant* and *Adair* Headlee Amendment obligations. Incorporating new CEPI-related issues, 2011 PA 62 included the previous year's $8,440,000 appropriation for CEPI's Teacher Student Data Link (TSDL) into its *Adair* Headlee appropriation in § 152a—raising the total § 152a funding level to $34,064,500.00. (Appellants' Appendix p. 55a.) According to a representative from the State Budget Office, these funds were recommended as an allocation for the sole purpose of paying the Districts' necessary costs related to the state-mandated collection, maintenance, and reporting of data to the State. (Appellants' Appendix pp. 78a-82a.)

C. Additional appropriation to districts reporting data to the State.

In addition to the amount allocated in § 152a for the school districts' *Adair* recordkeeping obligations, the Legislature allocated over $3 billion for nonmandated payments to districts in § 22b of 2011 PA 62. But the allocation in § 22b was conditioned on each district "[f]urnish[ing] data and other information required by state and federal law to the center and the department in the form and manner

specified by the center or the department, as applicable." (Appellants' Appendix p 53a.) See also MCL 388.1622b(3)(c) for current year appropriations.

PROCEEDINGS BELOW

On January 19, 2011, the Districts filed this original action in the Court of Appeals. Similar to the challenge to 2000 PA 297 in *Durant III*, the Districts alleged that both the funding amount and the funding method in 2010 PA 217 violated the Headlee Amendment and Proposal A. In addition, the Districts alleged that the State violated Constitution 1963, article 9, § 29 by enacting teacher and administrator evaluation requirements without an appropriation to fund them. On April 21, 2011, the Court of Appeals appointed Oakland County Circuit Court Judge Michael Warren to act as special master because it determined that the allegations in the Complaint necessitated factual findings and a special master's report. (Appellants' Appendix p. 19a.)

On July 18, 2011, the Districts filed a First Amended Complaint to add claims that the 2011-2012 *Adair* funding provided in 2011 PA 62 was insufficient and that the funding mechanisms in 2010 PA 217 and 2011 PA 62 were unconstitutional because they provided no additional revenue to the Districts.

But the Districts did not quantify the amount of underfunding in their pleadings. And in their responses to interrogatories related to their *Adair* funding claim, the Districts stated that they did not calculate the amount of underfunding. (Appellants' Appendix pp. 56a-66a.) The Districts only anticipated presenting testimony of adequacy of cost estimates that CEPI produced for the State Budget

Office's recommendation to the Governor and, ultimately, the Legislature. (Appellants' Appendix p 56a-66a.)

On September 16, 2011, Plaintiff Districts filed a motion for partial summary disposition on their claim challenging the funding mechanism, and the State Defendants requested summary disposition under MCR 2.116(I)(2), arguing the funding mechanism was valid based on *Durant III.* The Special Master issued an Opinion and Order recommending that the Court of Appeals grant partial summary disposition in favor of the State Defendants on this claim.

Prior to a decision on Plaintiff Districts' first motion for partial summary disposition, they filed a second amended complaint on October 19, 2011. (Appellants' Appendix pp. 20a-40a.) The second amended complaint was basically identical to the first amended complaint, but added one additional claim that the State had imposed unfunded mandates related to the Teacher Student Data Link required in MCL 388.1694a.

Plaintiff Districts then filed a second motion for partial summary disposition on December 30, 2011, alleging that they were entitled to judgment as a matter of law on the defense that Plaintiff Districts had waived their right to funding and that the educator evaluation claims were barred by *res judicata*. The Special Master denied Plaintiff Districts' second motion regarding the waiver defenses, but granted their motion regarding the *res judicata*/collateral estoppel defense relating to the educator evaluator claims.

On February 17, 2012, the State Defendants filed a motion for summary disposition requesting dismissal of Plaintiff Districts' remaining claims pursuant to MCR 2.116(C)(10). The State argued 1) that the Districts' underfunding claims relating to the CEPI requirements for the 2010-2011 and 2011-2012 fiscal years must be dismissed because Plaintiff Districts could not demonstrate that the appropriations in the School Aid Act for the 2009-2010 and 2010-2011 fiscal years were insufficient - they could not produce any evidence of the amount of necessary increased costs; 2) that the challenged Tenure Reform provisions provided benefits and protections for school district employees and were not activities or services under the Headlee Amendment; and 3) the unfunded mandate claim relating to the Teacher Student Data Link (TSDL) must be dismissed because the Legislature funded the TSDL activity.

The Special Master issued an Opinion and Order finding that summary disposition with regard to the Tenure Reforms was warranted because the Tenure Reforms involve benefits for employees and do not involve state-mandated services or activities that require payment under the Headlee Amendment. (Appellants' Appendix pp. 85a, 89a-94a.) The Order denied the State's request to dismiss the remaining underfunding claims, including the claim that adequate funding was provided in § 22b. (Appellants' Appendix pp. 84a-85a, 87a-88a.) But the Special Master concluded that "the Plaintiffs have a 'higher burden' which requires them to produce evidence of the specific dollar amount increase in the essential costs incurred in order to comply with the CEPI requirements." (Appellants' Appendix p

87a.) The Districts filed a motion for reconsideration or clarification with the Special Master seeking to "clarify" that they did not actually have to produce any evidence of the amount of unfunded costs. On the same date, Plaintiff Districts filed a motion for leave to file a 3rd amended complaint in the Court of Appeals, which was denied on August 30, 2012. On September 5, 2012, the Special Master denied reconsideration.

Trial began on September 18, 2012. During opening statements, the Districts again expressed that they would not present any proof as to the actual amount of underfunding. (Appellants' Appendix pp. 142a-144a.) While the Districts conceded that they had a "higher burden" to produce a specific dollar-amount increase in activity as announced by the Supreme Court and reiterated by the Special Master, they stated that they had no intention of putting forth any evidence of the extent of underfunding, and they indicated that they did not even want the Special Master to determine the specific amount of underfunding. (Appellants' Appendix pp. 145a-157a.) On the basis of this concession, the Special Master dismissed the case. (Appellants' Appendix pp. 158a, 159a-166a.)

In a written opinion issued September 25, 2012, the Special Master stated that allowing the case to go forward without evidence of an amount of actual underfunding "could subject the taxpayers, courts, and parties to a cycle of never-ending lawsuits, in which the Plaintiffs only seek to prove that appropriations do not amount to full funding, while depriving the courts [of] the ability to declare what a full level of funding would be" (Appellants' Appendix p 165a.) On October 2,

2012, the Special Master issued a report and recommendation consistent with his decision to grant a directed verdict. (Appellants' Appendix p. 167a-213a.)

On August 22, 2013, the Court of Appeals erroneously reversed the directed verdict portion of the Special Master's decision, stating that the correct burden of proof was whether "the method employed by the Legislature to determine the amount of the appropriation was so flawed that it failed to reflect the 'actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . .' MCL 21.233(6)." *Adair*, 302 Mich App at pp 316-317.

The Court of Appeals also rejected the State's argument that the $3 billion appropriation in § 22b of the State School Aid Act satisfied the State's Headlee funding obligations related to the entire *Adair* litigation. *Id* at p 326. This was a continuation of the Court of Appeal's error in its 2008 decision—an error that has perpetuated this litigation for another five years at taxpayer expense. The State also raised this issue in the *Adair I* litigation, but this Court declined to address it in its 2010 decision. *Adair,* 486 Mich at 491, note 42.

STANDARD OF REVIEW

This appeal involves interpretation of Constitution 1963, article 9, § 29. Constitutional questions are issues of law that this Court reviews *de novo*. *Wayne Co v Hathcock,* 471 Mich 445, 455; 684 NW2d 765 (2004).

ARGUMENT

I. The Districts failed to meet their burden of proof because they conceded that they would not demonstrate that their specific necessary increased costs, realized or anticipated, would exceed the amount of appropriated funding.

In a suit alleging underfunding of a legislative mandate under article 9, § 29 of the Michigan Constitution, a plaintiff has the burden of proof and must establish by clear and convincing evidence a quantifiable shortfall between its realized or anticipated necessary increased costs and the appropriated funding – the amount of underfunding. It is well established that one challenging the constitutionality of a statute assumes the burden of overcoming the presumption of constitutionality. *Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 127; 247 NW2d 764 (1976) (opinion by Coleman, J., citations omitted). And in litigation to compel funding from the Legislature, the plaintiff "must prove by clear and convincing evidence that the requested funding is both 'reasonable and necessary.'" *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141, 149; 719 NW2d 553 (2006). The Special Master's recommendation for dismissal was proper because the Districts conceded that they would not present any evidence of a quantifiable shortfall between the amount of appropriated funding and their specific costs, realized or anticipated.

And the State met its funding responsibility. Section 22b funding is an appropriation that is made and disbursed to pay local school districts for any necessary increased costs associated with collecting, maintaining, and reporting data to the State. Thus, in addition to § 152a, "a state appropriation [was] made

and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in article 9, § 29. And by accepting the conditional appropriation in § 22b, the Districts also accepted the responsibility attached to those funds and waived any Headlee challenge to the level of funding provided.

A. Plaintiff Districts bear the burden of proof.

The fact that Plaintiff Districts bear the burden in this case is an obvious statement of law that they have essentially conceded in their earlier arguments (see "Plaintiff Districts' Acknowledgment of Their Higher Burden" section of Plaintiffs' Brief in Support of Objections to Recommendations in Special Master's Report, Appellants' Appendix p. 215a.) The placement of the burden of proof on the plaintiff in a POUM Headlee case is apparent. In the first *Adair* litigation this Court held that, to establish a Headlee claim under Const 1963, art 9, § 29:

> [P]laintiffs must allege the type and *extent* of the harm so that the court may determine if a § 29 violation occurred for purposes of making a declaratory judgment. In that way, the state will be aware of the financial adjustment necessary to allow for future compliance. [*Adair,* 470 Mich at 119-120, emphasis added, quoting from *Oakland County v Michigan,* 456 Mich 144, 166; 566 NW2d 616 (1997).][1]

And this Court's precedent on other constitutional challenges places the burden of proof on the person challenging the constitutional validity of a statute:

> "We long have held that a statute comes clothed in a presumption of constitutionality and that the Legislature does not intentionally pass an unconstitutional act. Therefore, one challenging the constitutionality of a statute assumes the burden of overcoming the

[1] As noted in the decision, while *Oakland County* dealt with a Maintenance of Support (MOS) claim, the burden of proof in regard to a POUM claim is "similar." *Adair,* 470 Mich at 120, n 13.

> presumption." [*Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 127; 247 NW2d 764 (1976) (opinion by Coleman, J., citations omitted)(constitutional challenge to workers compensation provision reducing benefits after worker attains age of 65).]

The placement of the burden of proof on the plaintiff is constant through all of the Headlee cases. See *Durant v Dep't of Ed (After Remand, On Third Remand)*, 213 Mich App 500, 503; 541 NW2d 278 (1995), aff'd in part sub nom *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997); *Oakland County*, 456 Mich at 166; *Adair*, 470 Mich at 119-120. In this particular case, there is no difference between a Headlee POUM plaintiff challenging the Legislature's failure to sufficiently fund any new or increased activity and a Maintenance Of Support (MOS) plaintiff challenging the Legislature's failure to provide sufficient funding of the State's proportionate share of the cost of a required activity—both burdens fall to the plaintiff to establish a claimed shortfall.

But it should be clarified that there is no basis to conclude that burden shifting, in the real sense of the phrase, should apply to a Headlee case challenging the sufficiency of an appropriation to fund state-mandated activities and services. Contrary to the Court of Appeals implications, this case is clearly distinguishable from the 2010 *Adair* decision, in which this Court applied a burden-shifting scheme when *no appropriation* was made to fund a new mandate. See *Adair*, 486 Mich at 487. The distinction was clearly outlined in *Adair*, 486 Mich at 488, where this Court stated, "We conclude that, *when no legislative appropriation was made*, a plaintiff does not have the burden to make such a showing [of specific dollar-amount

increases in costs incurred] to establish entitlement to a declaratory judgment under the POUM provision." (Emphasis added.)

In that case, a completely unfunded mandate tended toward a State-centered analysis under the implementing legislation, which the Court used to justify shifting the burden to the State to demonstrate that there were no necessary increased costs with the implementation of its new legislation.[2] *Adair*, 486 Mich at 486-487. In fact, much of this Court's analysis of this issue stemmed from the definitional "cost to the state" language in MCL 21.233(6), which does not apply when, as here, the Legislature has determined the amount of costs and properly funded the activity. Further, the implementing legislation clearly establishes the difference between a mandate left totally unfunded and one in which the Legislature determined an appropriate level of funding at the time it established the mandate. According to MCL 21.233(6), "net cost" is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, *unless otherwise determined by the legislature when making a state requirement.*" (Emphasis added.) See MCL 21.233(6).

[2] It should further be noted that longstanding Headlee jurisprudence provides that the "state's cost" is a ceiling to limit a local government's claim of necessary costs, not a floor on which to stack sacks of unmerited tax revenue. *Durant v Dep't of Education*, 129 Mich App 517, 530-531; 342 NW2d 591 (1983), rev'd, in part, on other grounds, 424 Mich 364 (1985). The State is not required to pay for local inefficiencies in implementing the mandated activities, and it is not required to provide efficient local governments with a funding windfall on the basis of fictional additional costs that the State would face in mobilizing localized activity statewide. See *Durant*, 129 Mich App at 530-531.

Neither the Legislature nor this Court ever expressed any intention that the burden of proof should shift to the State when, as in this case, the Legislature has appropriated funds for an activity. This Court should therefore reject the Court of Appeals' reasoning that the burden-shifting found in *Adair,* 486 Mich at 486-487, applies to dilute or distort the Districts' burden in this case. Any shift in the burden of proof does an injustice to the intent and purposes of the Headlee Amendment and denigrates the usual deference afforded the Legislature in carrying out its constitutional duties. See *46th Circuit Trial Court*, 476 Mich at 141-142, 149.

Other states, namely Missouri and New Hampshire, have considered the wisdom of presuming necessary increased costs when a new mandate is *unaccompanied* by an appropriation, and those states have decided that no increased costs should be presumed, leaving the burden on the plaintiff throughout to demonstrate an actual violation of the constitution. See *Concord v State*, 164 NH 130, 140; 53 A3d 576 (2012); *Brooks v State*, 128 SW3d 844, 849 (Mo, 2004).

Moreover, costs, especially net costs, are best left to the plaintiff to establish, as the plaintiff is in the best position to quantify the necessary expenses. See *Mount Ida School for Girls v Rood*, 253 Mich 482, 489-490; 235 NW 227 (1931). As is evident in this case, distorting and rearranging traditional legal burdens only leads to vague and ambiguous evidentiary presentations, yielding, at best, vague and ambiguous results. As Justice Markman correctly predicted:

> "The dismantlement of the quantification requirement, the erosion of the 'necessary' and 'de minimis' conditions for a Headlee claim, the

> distortion of burden-of-proof obligations, and the general sense of uncertainty caused by the elimination of traditional obligations of POUM plaintiffs to prove their claims will all lead inevitably to increased litigation between the state and local units of government." [*Adair,* 486 Mich at 512 (Markman, J., dissenting).]

The present case stands as a monument to the inefficiencies fostered by adjusting the basic principles underlying our adversarial system of justice.

B. To sustain a claim alleging underfunding of a legislative mandate under article 9, § 29, a plaintiff must prove a quantifiable shortfall between specific costs to local government, realized or anticipated, and the amount of funding appropriated.

A POUM plaintiff must prove, by clear and convincing evidence, that its specific necessary increased costs, realized or anticipated, exceed the amount of appropriated funding. These elements of a POUM claim alleging underfunding of a legislative mandate are not a novel idea — they are a restatement of legal principles prominent in existing law.

To start, the Constitution provides that the Legislature shall not require of local government a new activity or service "unless a state appropriation is made and article 9, § 29. From this straightforward language, this Court restated, "Under the POUM clause, [a plaintiff] must show that the state-mandated local activity was originated without sufficient state funding . . . ." *Adair*, 470 Mich at 111. This Court later pointed to relevant elements gleaned from MOS cases, like *Oakland County* and *Durant*, stating that "the requirements of POUM claims are, in this respect, similar to MOS claims." *Adair*, 470 Mich at 120, n 13. Included in the statement of elements was the fact that "plaintiffs must allege the type and extent

of the harm so that the court may determine if a § 29 violation occurred for purposes of making a declaratory judgment." *Adair*, 470 Mich at 119-120, quoting *Oakland County*, 456 Mich at 166 (opinion by Kelly, J.). This requirement carried sufficient weight with the Court that it promulgated MCR 2.112(M), which included the requirement that "the plaintiff shall state with particularity the type and extent of the harm . . . ." Therefore, even in a case seeking declaratory judgment, a Headlee plaintiff must demonstrate the extent of the harm to justify a judicial declaration that the amount provided by the Legislature fell short. *Adair*, 470 Mich at 119-120.

The element requiring the plaintiffs to demonstrate *their* necessary costs derives, in part, from the portion of the enabling statute that defines "necessary cost" as "the *net* cost of an activity or service *provided by a local unit of government*." MCL 21.233(6). Again, the "actual cost to the state" is only implicated if the State has shifted the cost to the local unit of government without providing any appropriation for it. MCL 21.233(6). This makes sense, because the State would, in that circumstance, be in a position to determine what it had been paying to support the activity or service. Otherwise, the "net cost" plainly refers to the local unit's activity and should reflect local government's necessary increased expenses. Thus, to establish underfunding of a legislative mandate, a plaintiff must prove the amount of the shortfall between the amount appropriated and the local government's net cost of the activity it is mandated to provide.

The clear and convincing standard and the element requiring specificity or particularity derive, in part, from the nature of the action as a constitutional

challenge to a presumably valid funding statute. As stated in *46th Circuit Trial Court*, to use the Constitution as a tool to disgorge money from the Legislature, the plaintiff "must prove by clear and convincing evidence that the requested funding is both 'reasonable and necessary.'" *46th Circuit Trial Court*, 476 Mich at 149. Similarly, a challenge under the POUM clause alleging underfunding of a legislative mandate seeks to compel additional funding. In a POUM underfunding case, demonstrating a "net" cost (that there exist "necessary increased costs") is a required element of proof to establish any right to additional funding under the constitution. MCL 21.233(6); article 9, § 29. Therefore, there must be a greater degree of clarity and specificity of proofs, because any range of estimation that falls short of establishing the amount of underfunding would fall short of establishing any legal right at all.

It is important to note here that the element of particularity is reinforced, rather than diluted, by the declaratory nature of this action. Perhaps this Court's previous *Adair* opinion, 486 Mich at 490, placed undue reliance on *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978), and *Merkel v Long*, 368 Mich 1, 11-14; 117 NW2d 130 (1962), for the proposition that declaratory actions do not require evidence of realized damages — so, in a suit to enforce article 9, § 29, they do not require affirmative evidence of the amount of realized or anticipated necessary increased costs either. However, *Shavers* states that, "before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and *proves each fact alleged*, i.e.,

a plaintiff must allege and prove an actual justiciable controversy." *Shavers,* 402 Mich at 589 (emphasis added). As noted above, a POUM plaintiff must allege "with particularity the type and extent of harm." MCR 2.112(M)

Similarly, *Merkel,* 368 Mich at 11, quotes extensively from *City of Flint v Consumers Power Co*, 290 Mich 305, 309; 287 NW 475 (1939), for the proposition that "the rights to be determined by declaratory judgment or decree may be and perhaps usually are rights not *in praesenti* . . . ." But *City of Flint* goes on to deny declaratory relief, in part on the grounds that the plaintiff failed to establish any "threat to change the status of either party in a manner that would affect the rights of either or that would subject plaintiff to any *actual or threatened loss or damage* . . . ." *City of Flint,* 290 Mich at 310 (emphasis added). Therefore, a present lack of suffering does not alleviate the plaintiff's responsibility to prove the type and extent of loss that will result without the Court's preemptive, declaratory ruling.

This path leads invariably to questions related to the degree of proof required in a Headlee case asserting underfunding of a legislative mandate. It is well established that, if a plaintiff's claim is susceptible to detailed proofs, then the plaintiff is required to present them and may not rely on speculation or conjecture for an award. *Meyers v McQueen*, 85 Mich 156, 161; 48 NW 553 (1891). The Headlee Amendment is essentially aimed at preventing shifting activities and services onto local government without providing funding for the necessary increased costs of those activities or services – losses from shortfalls in funding. So

cases addressing proof of loss from an unlaunched or stalled business venture are instructive.

In *Richards v F C Matthews & Co*, 256 Mich 159; 239 NW 381 (1931), this Court considered a case with peculiar similarities to the present action. In *Richards*, 256 Mich at 161-162, the plaintiff alleged that his refrigerator supplier promised to hold him harmless from any losses he sustained in selling the appliances. Although the complaint asserted a particular amount of damages, the claim failed from lack of sufficient evidence that the plaintiff actually suffered a loss. *Richards*, 256 Mich at 163-164. "It was incumbent upon the plaintiff to give sufficient data, facts, and circumstances from which the jury might find the actual loss, if there was one." *Richards*, 256 Mich at 164.

The *Richards* decision relies on *Dolomite Limestone Products Co v Kennedy-Van Saun Manfg & Eng Corp*, 241 Mich 279; 217 NW 26 (1928), and *Mount Ida School for Girls v Rood*, 253 Mich 482; 235 NW 227 (1931). In *Dolomite*, the issue turned on the lost-bargain value of an under-performing lime mill, but the plaintiff's proofs failed to put forth evidence of the difference in the mill's value based on its production capacity as promised and the actual capacity, notwithstanding the ability to put forth particularized evidence of the mill's value. *Dolomite*, 241 Mich at 281-282. This Court reversed the jury verdict, ruling that "in all cases where the damage is susceptible of definite proof or of estimation by those having knowledge, it is the duty of the plaintiff to submit such proof to the jury to aid them in arriving

at a verdict which must not be based on pure speculation." *Dolomite*, 241 Mich at 282.

In *Mount Ida School*, the issue was the cost savings to the boarding school for the child's failure to attend. *Mount Ida School,* 253 Mich at 488. This Court ruled that the plaintiff's failure to prove damages, including net damages, was fatal to its damages claim. *Mount Ida School,* 253 Mich at 489. Regarding the plaintiff's argument that the burden shifted to the defendant parents to demonstrate any savings as an offset to damages, this Court stated, "We can conceive of no good reason why the burden of proof in such a case should be shifted to the defendant. Producing this proof may be difficult for a plaintiff, but clearly it would be much more difficult for a defendant." *Mount Ida School,* 253 Mich at 489-490. "The burden is upon plaintiff not only to establish a right to recover but likewise to establish the extent of recovery." *Mount Ida School,* 253 Mich at 489. See also *Detroit Fire Proofing Tile Co v Vinton Co*, 190 Mich 275; 157 NW 8 (1916) ("[T]he plaintiff failed to introduce testimony from which the jury could intelligently and with reasonable accuracy determine the actual loss of profits (damages) suffered by the plaintiff . . . .") Therefore, specific proof of actual or anticipated harm has always been a fundamental element to establishing the extent of a contract-related financial loss.

In the matter of *Kolton v Nassar*, 358 Mich 154, 156-157; 99 NW2d 362 (1959), this Court discussed the plaintiffs obligation to prove the extent of harm in the context of a cancelled building contract. "Plaintiff's measure of damage, if any

was suffered, was the *net* difference in his favor between the unpaid balance of the contract price and the amount it would cost plaintiff to finish performance had he been permitted to do so." *Kolton,* 358 Mich at 156 (emphasis added). This Court affirmed the directed verdict for the defendant, saying, "Plaintiff did not choose to prove such difference, *despite urging by the trial judge.* He sought to prove loss of profits arising from defendants' breach by means of opinion evidence, unsupported by testimonially established facts." *Kolton,* 358 Mich at 156-157 (emphasis added). The parallels to the Special Master's urgings in this case are obvious.

And the requirement to demonstrate specific proof of the actual or anticipated funding shortfall is firmly rooted in this State's Headlee Amendment jurisprudence. See *Durant v Dep't of Ed,* 203 Mich App 507, 514-515; 513 NW2d 195 (1994) ("In keeping with the voters' intent in the ratification of the Headlee Amendment, once a school district establishes its actual costs, the state may show that, in light of alternate means it might have used to provide the mandated educational program or service, another figure more accurately represents necessary costs.").

From the same body of law from which this Court drew the elements of "type and extent of harm," the Court of Appeals derived, and this Court implicitly adopted, the following element for MOS cases: "plaintiffs must establish a prima facie case by showing the actual costs to all the school districts for each of the mandated services." *Durant (After Remand, On Third Remand),* 213 Mich App at 503. Likewise, in *Oakland County,* this Court stated that Const 1963, art 9, § 29

directs the State to reimburse only the necessary costs of a state requirement and discussed necessary costs in terms of examining the counties' actual cost of providing foster care services, not the cost to the State if it provided the services. *Oakland Co v Michigan*, 456 Mich 144, 164-165; 566 NW2d 616 (1997). And in *Schmidt v Dep't of Ed*, 441 Mich 236, 250; 490 NW2d 584 (1992), this Court concluded that determining the sufficiency of the State's proportionate funding of necessary costs of a state-mandated activity or service requires calculation of the necessary cost to each local unit in the funding year at issue. As the Court of Appeals observed, an MOS calculation "by its very nature ... involves the quantifying of the necessary costs incurred by the school districts in specific dollar amounts." *Adair v Michigan*, 279 Mich App 507, 513; 760 NW2d 544 (2008).

Therefore, the principle requiring a Headlee plaintiff to demonstrate actual, specific, quantifiable costs to local government to sustain a suit alleging underfunding of a legislative mandate is not novel. It has consistently been applied in MOS cases, and a suit challenging the sufficiency of state funding under the POUM clause is substantially similar. See *Adair*, 470 Mich at 120, n 13 ("[T]he requirements of POUM claims are, in this respect, similar to MOS claims."). Both allege underfunding for a state-mandated activity or service. The only difference is that in a suit under the MOS clause, the State must pay a proportion of the necessary costs of state-mandated activities or services, and under the POUM clause the State must pay all of the cost for new or increased activities or services. In either case, the Headlee plaintiff must establish the local government costs to

prove that the given funding is insufficient to pay either the proportionate share of the necessary cost (MOS) or the entire necessary increased cost (POUM). Under the plain language of article 9, §29, the local government costs of performing the activity are at issue, not the cost to the State if it were to perform the activity.

The MOS and POUM clauses both address the voters' intent in ratifying the Headlee Amendment – to limit the Legislature's ability to shift funding obligations for state-mandated services from the State to local government. *Durant v State*, 456 Mich at 207. And there is no reason to depart from the requirement that a Headlee plaintiff demonstrate actual, specific, quantifiable costs to local government in suits challenging the funding level under the POUM clause. Both suits challenge the sufficiency of funding required by article 9, § 29.

In fact, other states with similar constitutional limitations on unfunded mandates also require a plaintiff challenging a mandate to prove increased expenses. In New Hampshire, the list of elements requires a plaintiff to show that the legislative mandate "necessitates additional expenditures by the local subdivision," *Concord v State*, 164 NH 130, 140; 53 A3d 576 (2012), and Missouri requires a plaintiff to demonstrate an increased cost with specificity. See *Brooks v State*, 128 SW3d 844, 849 (Mo, 2004) ("[A] case is not ripe without specific proof of new or increased duties and increased expenses, and these elements cannot be established by mere 'common sense,' or 'speculation and conjecture.' *Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986).")

Therefore, existing law fully supports the requirement that a POUM plaintiff must demonstrate by clear and convincing evidence that its specific necessary increased costs, realized or anticipated, exceed the amount of appropriated funding – a quantifiable shortfall in funding.

The Court of Appeals' analysis distorted the burden of proof and the elements of proof in this case. The Districts and the Court of Appeals relied exclusively on Justice Kelly's analysis in *Adair,* 486 Mich at 486-487, for their reasoning that the Districts do not bear any burden of demonstrating that they incurred any "net" costs, or costs that would actually exceed the amount of the appropriation (See Plaintiffs' Brief in Support of Objections, pp 42-45). See *Adair II*, 302 Mich App at 314-315. But as the Special Master found and the Court of Appeals partially accepted, the decision in *Adair*, 486 Mich 468 is distinguishable. In the first *Adair* litigation, the Legislature had not appropriated any funding, but here, it has. See *Adair*, 486 Mich at 480, n 29.

This Court clearly stated that, "to establish a violation of the POUM provision, a plaintiff must show that 'the state-mandated local activity was originated without sufficient state funding . . . .'" *Adair*, 486 Mich at 479, quoting *Adair,* 470 Mich at 111. In a footnote, this Court further stated: "If the state did appropriate funds for the new or increased activity or service, the plaintiff would likely have a higher burden in order to show a POUM violation." *Adair*, 486 Mich at 480, n 29. Thus, this Court distinguished per se violations where there is no funding, and cases asserting *under*funding of a legislative mandate.

The higher burden is in keeping with this Court's historical respect for the Legislature's inherent role in fulfilling the State's Headlee requirements through the legislative appropriations process. This respect is evident in Justice Brickley's exchange with the majority Justices regarding the propriety of granting the Districts a monetary award in the *Durant* litigation. See *Durant I,* 456 Mich at 205-206, 221, 229-230. This respect has also manifested itself in the requirement, found in *Adair,* 470 Mich at 119-120, that a Headlee plaintiff must claim and present actual evidence of underfunding before the Court will intervene to mend an alleged Headlee shortfall.

The Legislature appropriated funds in this case, and the Districts conceded that they would not put forth any evidence to demonstrate that the appropriation fell short of their actual or anticipated costs. Therefore, the Districts concededly failed to offer any evidence of the "type and extent of the harm," *Adair,* 470 Mich at 119-120, and the Special Master correctly recommended dismissal of the Districts' CEPI-related claims.

C. The State provides a $3 billion appropriation to pay for the necessary increased costs of the Districts' *Adair* activity, and the Districts' acceptance of the funds waived any challenge to the funding level.

The Legislature's appropriations in §22b provide the Districts with significantly more funds than it was constitutionally required to provide under the Headlee Amendment. Section 22b funding is not, however, unrestricted aid. The appropriation is specifically conditioned on districts furnishing to CEPI data and

other information required by state and federal law. This is a permissible condition placed on an appropriation of state funds. More importantly, by accepting the conditional appropriation in § 22b, the Districts waived any Headlee challenge to the level of funding provided.

The Legislature makes annual appropriations to aid in the support of public schools, intermediate school districts, community colleges, and public universities in the School Aid Act. Section 22b funding is an appropriation that is made and disbursed to pay local school districts for costs associated with collecting, maintaining, and reporting data to the State. Thus, in addition to § 152a, "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in Constitution 1963, article 9, § 29. And by accepting the conditional appropriation in § 22b, the Districts waived any Headlee challenge to the level of funding provided.

a. The Legislature's appropriation of more than $3 billion in funds to school districts that perform certain activities—including data reporting requirements—satisfied the State's obligations under the Headlee Amendment.

The Legislature's appropriation in § 22b of the State School Aid Act, MCL 388.1622b, satisfies the State's Headlee Amendment funding obligation. The relevant provision in article 9, § 29 provides:

> A new activity or service or an increase in the [level] of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Since 2005, the Legislature complied with this requirement by making state appropriations in excess of $3 billion annually to school districts that furnish data and other information required by state and federal law to CEPI. For the years at issue, in § 22b of the State School Aid Act, the Legislature specifically appropriated over $3,551,097,700 for 2010-2011 and $3,032,300,000 for 2011-2012 designated for districts that perform certain activities, including reporting information to CEPI. MCL 388.1622b(3)(c).[3]

Section 22b provides:

> (4) In order to receive an allocation under subsection (1), each district shall do all of the following:
>
> * * *
>
> (c) Furnish data and other information required by state and federal law to the center and the department in the form and manner specified by the center or the department, as applicable.

This section provides for the payment of State school aid to the Districts (a state appropriation to units of Local Government) for a school district furnishing data to CEPI (the activity or service). By allocating this money, the Legislature provides school districts with significantly more funds than is constitutionally required under Proposal A. Further, the Legislature provided this funding specifically for districts furnishing data and other information required by state and federal law to CEPI. Unmistakably, § 22b funding is an appropriation that is made

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[3] The School Aid Act is amended annually. This Court's Feb. 5, 2014, Order granting leave to appeal cites "MCL 388.1622b(1)(c)". For the fiscal years at issue, 2010-2011 and 2011-2012, and the current fiscal year, the conditional appropriation appears in §22b(3)(c), MCL 388.1622b(3)(c). For the years at issue, 2011-2012 and 2011-2012 this appropriation was contained in § 22b(3)(c) of 2011 PA 62.

and disbursed to pay local school districts for costs associated with collecting, maintaining, and reporting data to the State. Thus, in addition to § 152a, "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in Const 1963, art 9, § 29.

The Legislature made the funding conditional. MCL 388.1622b specifically makes the receipt of funds contingent upon the school district's agreement to comply with CEPI's data collection and reporting requirements. The State provided school districts with $3.5 billion more than it was required to provide. It is axiomatic that if a district accepts this money that the State provides on condition that school districts provide the data to CEPI, the school district must actually provide the data and may use those funds to cover any costs associated with CEPI reporting. The Headlee Amendment was intended, in part, to prevent the State from shifting costs and funding responsibilities to local units of government. It is clear that there has been no shifting of burdens under the present school funding system. Rather, in the school funding context, the burden has shifted away from local taxpayers to the State.

The Districts essentially argue that they can accept an unambiguous conditional appropriation, disregard the stated condition for receipt of that appropriation, and use the funding for their general operations because they allege that the Legislature's funding model for the recordkeeping requirements is flawed. This argument defies logic. And the Court of Appeals' conclusion that § 22b cannot be considered as part of the State's Headlee obligations because it improperly

restricts the Districts' "discretionary" spending is clearly erroneous under a plain reading of the constitution and §22b.

The Court of Appeals improperly concluded that funds appropriated in §22b were unrestricted funds that the districts could use for any purpose at their discretion. This was a continuation of the Court of Appeal's error in its 2008 decision—an error that has perpetuated this litigation for another five years at taxpayer expense. *Adair v Michigan (On Second Remand),* 279 Mich App 507, 519-525; 760 NW2d 544(2008); *Adair v Michigan,* 302 Mich App 305, 326; 839 NW2d 680 (2013). This reasoning is flawed because §22b is not a general appropriation granting the Districts complete discretion for the use of the funds. Rather, the plain language of § 22b provides that as a condition to receiving these funds, the Districts must provide the required recordkeeping information. The Legislature prescribed a distinct use for a portion of these funds. This appropriation does not conflict with the District's discretion because the Districts voluntarily and knowingly accepted their recordkeeping responsibilities by accepting the funds. The Legislature "made and disbursed" an appropriation containing a sufficient level of funding to pay "any necessary increased costs" of reporting and then permissibly conditioned the appropriation on the Districts' compliance with the reporting requirement. The Court of Appeals decision ignores the conditional language and renders the Districts' voluntary agreement to abide by the conditions stated in § 22b in return for the funding meaningless.

This Court's 1985 decision in *Durant* is also distinguishable. The 1985 *Durant* decision involved the question whether the State may reduce funding for the necessary costs of educational courses required by state law under the maintenance of support provision in art 9, § 29. *Durant*, 424 Mich 364 at 389-392. The 1985 decision predates the shift in school funding to the State that resulted from Proposal A and the conditional language at issue in § 22b. Significantly, the *Durant* case did not interpret whether a specific appropriation was proper. There the parties agreed that the State was using MCL 21.233(6)(d) to reduce "categorical aid" to school districts under the MOS clause, requiring them to use outside funding such as unrestricted aid to fund mandated programs.[4] *Durant* is not applicable here because the State has not reduced the state proportional funding for mandated activities, and § 22b funding is not unrestricted aid. It is specifically provided on condition that the Districts provide specific activities and services, including reporting data to CEPI. 2011 PA 62 § 22b(3)(c). Therefore, the funding in § 22b complies with the plain language of the Headlee Amendment that "a state appropriation is made and disbursed to pay the local unit of government for any necessary increased costs." article 9, § 29.

In addition to the $34 million appropriated in § 152a that is intended to fully fund the recordkeeping activity, the Districts also received and additional appropriation in § 22b that is also intended to cover their reporting costs. The

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[4] Although the term "categorical aid" does not appear in the Headlee Amendment or School Aid Act, this Court has used the term to describe State aid that is provided for specific activities or services required by school districts. *Durant*, 424 Mich at 389.

Districts accepted the money provided in § 22b, so they should not be heard now to complain that their CEPI reporting activities were underfunded by a separate $34 million appropriation for the same purpose. Article 9, § 29 does not dictate that the State make a precise appropriation in a single section of an appropriation bill. So long as the Legislature identifies the activity or service and appropriates sufficient funds to pay a local government for any necessary increased costs of the new or increased activity or service that the State requires, there is no Headlee violation. Through § 22b, the Legislature has done what the Headlee Amendment requires. Under the circumstances, the Legislature has provided a State appropriation for school districts that perform specific activities related to CEPI reporting requirements, and this Court should reverse the Court of Appeals' determination on this issue, and dismiss the Districts' complaint on the grounds that the § 22b clearly compensates the Districts for any mandated reporting activity.

b. The Legislature may appropriate state funds conditioned on the recipient reporting information.

It is well-established that the Legislature may place reasonable constitutional conditions on its appropriation of state funds. *Regents of University of Michigan v State*, 395 Mich 52, 65; 235 NW2d 1 (1975). See also *State Board of Agriculture v Auditor General*, 226 Mich 417, 428-429; 197 NW 160 (1924). By accepting appropriated state funds the receiving unit of government, even a constitutionally independent university, is bound to abide by permissible conditions placed on the use of those funds. *Regents*, 395 Mich at 65.

For example, in *Regents*, the plaintiffs challenged conditional appropriations in the Higher Education Appropriation Act of 1971, 1971 PA 122. Specifically, § 20 of the Appropriation Act required the plaintiffs to provide the Legislature with information about particular contracts entered into by the university. *Regents*, 395 Mich at 66-67. This Court held that reporting provision to be a permissible condition on the appropriation of state funds to the University. *Id.*, at 68. See also *William C Reichenbach C v State*, 94 Mich App 323, 335; 288 NW2d 622 (1980), overruled in part on other grounds 450 Mich 655; 545 NW2d 351 (1996) (So long as conditions placed on an appropriation do not interfere with trustees' control and direction of university, "such conditions are binding if the trustees accept the money[.]").

Legislative conditions placed on state-appropriated funds are similar to Congressional conditions placed on the receipt of federal funds under its Spending Clause authority. US Const, art I, § 8, cl 1. "Congress may attach conditions on the receipt of federal funds" in order "to further broad policy objectives" including objectives not attainable under its constitutional restrictions. *South Dakota v Dole*, 483 US 203, 206-07; 107 S Ct 2793 (1987) (citations omitted); see also *US v Miami Univ*, 294 F3d 797, 808 (CA 6, 2002) (citations omitted) ("Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states."). Conditional appropriations are analogous to a contractual relationship, *School Dist of City of Pontiac v Secretary of US Dep't of Educ*, 584 F.3d 253, 268 (CA6, 2009) (Cole, J.) (citing *Pennhurst State School and*

Hospital v Halderman, 451 US 1, 17; 101 S Ct 1531; 67 L Ed 2d 694 (1981)). If the condition is clearly stated, pertains to the general welfare, is not unduly coercive or contrary to *other* constitutional provisions providing an independent bar to the condition, then the condition is binding if the funds are accepted. *Champion v Secretary of State*, 281 Mich App 307, 325-28; 761 NW2d 747 (2008) (discussing *Dole, supra,* and limits on Spending Clause conditions).

While the POUM clause of article 9, § 29 precludes the Legislature from directly requiring a local government to perform a new or increases level of activity or service without funding any necessary increased costs, it does not preclude the Legislature from making a conditional appropriation to local government that includes a reporting requirement if the funds are accepted. The Constitution does not preclude the Legislature from the indirect achievement of objectives that it cannot directly achieve.

The use of conditional appropriations has been upheld in the education context. Under its Spending Clause power, Congress permissibly conditioned states' receipt of federal educational funds on districts reporting information to the US Department of Education, despite claims of insufficient federal funding requiring the use of state and local funds. *City of Pontiac*, 584 F.3d at 283-84 (Sutton, J.).

Similar to the conditions placed on appropriations to universities and federal education funding, the appropriation in § 22b contains the reasonable and clearly stated condition that the Districts must report certain data to CEPI. This

condition, among others required in § 22b(3), is merely a reporting measure of data and information required by state and federal law. Section 22b provides for the receipt of State aid (an appropriation) for a school district furnishing data to CEPI (the activity or service). The Legislature placed a permissible condition on a school district's receipt of § 22b funds requiring reporting to CEPI. By accepting the funding provided under § 22b, the District must use those funds for the purpose set forth. *Regents,* 395 Mich at 65. Thus, in addition to the funds appropriated under § 152a, MCL 388.1752a, in § 22b "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" as required under Constitution 1963, article 9, § 29.

c. The Districts waived any challenge to funding by accepting the conditional appropriation in § 22b.

Longstanding policy and jurisprudence demonstrate that acceptance of a conditional appropriation binds the recipient to comply with the conditions placed on the funds. In other words, the recipient waives any other challenge to the validity of the conditions. "[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prods & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 374; 666 NW2d 251 (2003). "The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive." *Book Furniture Co v Chance,* 352 Mich 521, 526–527; 90 NW2d 651 (1958) (citations omitted). While generally mere acquiescence to the loss of a known right will not equate to

waiver, in some circumstances policy concerns and the particular facts support a finding of waiver by acquiescence. *In re Receivership of 11910 South Francis R (Price v Kosmalski)*, 492 Mich 208, 229 n 45; 821 NW2d 503 (2012). As stated by this Court over 125 years ago, fundamentally waiver is "an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon." *Warren v Crane*, 50 Mich 300, 301; 15 NW 465 (1883)

Waiver, whether express, implied, or acquiesced to, exists in a variety of settings. A party can waive contract provisions. *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 719; 179 NW2d 252 (1970) (defendant's statement that plaintiff did not have to accept home operated as waiver because the statement was a voluntary "election to forego strict enforcement of the contract which could have been insisted upon"). An accused can waive their constitutional right to testify through non-assertion or by acquiescing to counsel's decision. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). A state can expressly waive its sovereign immunity by accepting federal funds specifically conditioned upon that waiver. *Hurst v Texas Dep't of Assistive and Rehabilitative Services*, 482 F3d 809, 810-11 (CA5, 2007) (citations omitted). Courts have also held that one accepting benefits under a statute waives the ability to attack or challenge the validity of a statute. See, e.g., *Arnett v Kennedy*, 416 US 134, 153-54; 94 S Ct 1633; 40 L Ed 2d 15 (1974) ("appellee must take the bitter with the sweet" where statute precluded an employee's dismissal without cause but did not provide hearing on issue of

cause); *Convent of Sisters of St. Joseph of Chestnut Hill v City of Winston-Salem*, 243 NC 316, 324; 90 SE2d 879 (1956) (citations omitted) (noting that for property covenants the "rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens").

The Districts waived any challenge to the appropriation of funds. There is more than mere acquiescence in this case. The plain language in § 22b clearly conditions the receipt of the funds on the Districts providing information to CEPI. Longstanding policy and jurisprudence demonstrate that acceptance of a conditional appropriation binds the recipient to comply with the conditions placed on the funds and waives any other challenge to the Legislature's ability to directly impose the conditions. Section 22b(3)(c) unambiguously provides that "to receive an allocation" a school district "shall" provide required information to CEPI. 2011 PA 62, § 22b(3)(c). Similar to a Spending Clause contractual relationship, the Legislature clearly stated that to receive the additional non-mandated discretionary funds a school district is required to provide the information. *Pennhurst*, 451 US at 17; 23. A school district therefore accepts the funding provided in § 22b fully aware that its voluntary acceptance binds it to comply with the stated condition. In other words, the Legislature "spoke so clearly that [this Court] can fairly say that the [Districts] could make an informed choice." *Id.*, at 25.

And the affirmative act of accepting and spending the funds demonstrates the intentional relinquishment of any right to challenge the sufficiency of any

funding that might otherwise be required based on the prior decision in *Adair*. The Districts waived their right to challenge the sufficiency of the funding under Constitution 1963, article 9, § 29 with respect to the CEPI reporting by accepting (and using) the conditional appropriation that plainly required them to furnish CEPI with data and other information required by state and federal law. The condition is set forth in unambiguous terms in the plain language of § 22b. This condition is a clear statement that if a District accepts the appropriation then it must abide by the requirement to provide the information to CEPI. Thus, the Districts waived any challenge to the funding level for the reporting requirements in this Headlee action.

A contrary rule would allow recipients of valid conditional appropriations to ignore the reasonable conditions that the Legislature placed on the funds. Public policy, the circumstances surrounding the substantial conditional appropriation, and the Districts' voluntary knowing acceptance of the conditional funding all support the conclusion that the Districts waived any challenge to the sufficiency of the funding for the requirements under Constitution 1963, article 9, § 29. The Districts can't hold out their hands and accept over $3 billion in funding conditioned in part on reporting information to CEPI and then continue to complain that the allocation in another section of the School Aid Act is insufficient to fund that same activity.

In sum, the Districts waived any challenge to the level of funding for the activities and services related to reporting data to CEPI. The appropriation in § 22b

requires the Districts to provide the data to CEPI as a condition of receiving their portion of the over $3 billion in funding. The plain language in § 22b provides a clear statement of the condition and requirement from which the Districts voluntarily and knowingly accepted the conditions imposed on the funding. The Districts have waived any right they may have had to challenge the sufficiency of the appropriation in § 152a.

D. Special Master Warren applied the correct burden of proof, so this Court should dismiss this case.

Special Master Warren properly dismissed this case. Plaintiffs chose not to present proof of the amount of underfunding despite Special Master Warren's direction. This Court should adopt his reasoning and reverse the Court of Appeals. The Districts arrived at trial with no intention of demonstrating the amount that the Legislature's appropriation underfunded the Districts' necessary increased costs.

Here, the Districts made no effort to demonstrate, or even approximate, the disparity between their costs, real or anticipated, and the Legislature's appropriation. As in *Kolton,* 358 Mich at 156-157, the Special Master encouraged (insisted, in fact) that the Districts present some affirmative evidence that the money received from the Legislature's appropriation did not, or would not, cover the necessary increased costs of providing CEPI-related data.[5] Yet under the Court of

[5] It should be noted that the State stood prepared to demonstrate that the Budget Office's recommendation was actually extremely generous, especially in light of the slight changes in State-mandated reporting after this Court's *Durant* I decision on

Appeals standard a plaintiff must only show, by opinion evidence, alleged flaws in the State Budget Office's recommendation—a strategy that could never reveal, with any degree of certainty, any quantifiable shortfall in the actual appropriation. The Districts conceded they had no intention of putting forth any evidence of the extent of underfunding, and they indicated that they did not even want the Special Master to determine the specific amount of underfunding.

This was patently insufficient evidence to support their claims of underfunding. See *Kolton*, 358 Mich at 157. Therefore, the Special Master correctly applied the appropriate burden of proof and rightly determined that the Districts would not, by their own admission, meet it. See *Kolton*, 358 Mich at 157; *Mount Ida School,* 253 Mich at 489-490. Because the Special Master properly analyzed and evaluated this issue, this Court should reverse the Court of Appeals' decision regarding the burden of proof, adopt the Special Master's recommendation, and dismiss this case.

II. The Court of Appeals violated separation-of-powers principles by establishing a burden of proof that turned on a POUM plaintiff's ability to demonstrate a "flaw" in the Legislature's "method" for generating its appropriation.

The Court of Appeals invented and applied a burden of proof that focused on demonstrating flaws in the Legislature's methods for arriving at its amount of appropriation, rather than on the sufficiency of the appropriation to cover the

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July 31, 1997, (the only relevant time period), resulting from the creation of CEPI, advances in technology, voluntary grant-related reporting, and the Districts' extensive pre-existing data infrastructure.

mandate's costs. This approach violates essential separation-of-powers principles. The constitutional issues in this case are as straightforward as they are vital to the fundamental structure of government in this State.

"The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Constitution 1963, article 3, § 2.

For the judiciary, separation of powers means upholding the legally valid actions of its coequal branches and deferring to the authority placed, by constitution, into the other branches' spheres of responsibility. See *People v Gardner*, 143 Mich 104, 109; 106 NW 541 (1906); *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010).

In his adamant dissent against awarding any money damages in Headlee Amendment cases, Justice Brickley cogently recognized:

> The Court's place is to interpret the law, not to guide, control, or direct the activities of the other branches of government. We must presume that the other branches of government, once informed of their constitutional duties, will execute them to the letter and spirit of the law. In the unfortunate event that they choose to diverge from their explicit constitutional obligations, the remedy must be political, not judicial. [*Durant v Michigan,* 456 Mich at 229-230 (Brickley, J, concurring in part, dissenting in part), quoted with approval in *Durant v Michigan (On Remand),* 238 Mich App 185, 214-215; 605 NW2d 66 (1999).]

In this case, the Court of Appeals did not provide any deference to the legitimacy of the Legislature's determination of its appropriation, but instead

generated a judicial standard that essentially examines and directs the Legislature's deliberative process.

The Court of Appeals first determined that "a new or expanded activity or service can be said to be fully financed by the state for purposes of the POUM provision only when the state pays the 'necessary increased costs' resulting from compliance with the state's mandate." *Adair v State (Adair II)*, 302 Mich App 305, 316; 839 NW2d 680 (2013). It then stated that "the Legislature is in a position far superior to plaintiffs' to determine what the actual costs to itself would be if it performed the increased recordkeeping and reporting duties." *Id.*

Although the Court of Appeals recognized the Legislature's supremacy in determining the correct amount of "necessary increased costs," it did not leave any room for the Legislature's ability, and authority, to determine the amount of "necessary increased costs" without judicial intervention and assistance. See *Adair II*, 302 Mich App at 316. Instead, the Court of Appeals delegated to itself a form of super-veto authority over the Legislature's appropriation process by allowing a plaintiff "to present sufficient evidence to allow the *trier of fact* to conclude that the *method* employed by the Legislature to determine the amount of the appropriation was *so flawed* that it failed to reflect" an adequate amount of money. *Adair II*, 302 Mich App at 316 (emphasis added). In this way, the Court of Appeals crossed the line that prevents branches of government from interfering with activities constitutionally assigned to other branches. As stated by this Court more than fifteen years ago:

> We are acutely conscious of the limitations of judicial competence in developing workable standards to regulate government conduct. We acknowledge also that the Legislature, no less than this Court, interprets the document that binds both institutions and is obligated and entitled *to make its own good faith judgments* regarding the implications of the Headlee Amendment when enacting policy as the people's representatives. [*Durant I*, 456 Mich at 221 (emphasis added).]

Thus, the Court of Appeals' decision fails to recognize any independent constitutional authority for the Legislature to make an adequate, much less accurate, determination of its funding obligations.

The constitution has squarely placed three separate responsibilities within the realm of the Legislature, and all three arise in this case. First, it is the Legislature's role to pass laws to govern the State, and the judiciary's role to interpret and apply them. Second, it is the Legislature's designated role to apportion funds from the State's treasury. Third, the Michigan Constitution states, "The Legislature shall implement the provisions of Sections 25 through 33, inclusive, of this Article [collectively known as the Headlee Amendment]." article 9, § 34.

Taking these roles in order, it is clear that the Court of Appeals' standard transgresses all three. First, the standard applied by the Court of Appeals invites inappropriate second-guessing of the Legislature's "method" or motives for setting the amount of appropriation at issue. Judicial inquiry into the underlying motivation for enacting a law is improper.

In *People v Gibbs*, 186 Mich 127, 134-135; 152 NW 1053 (1915), this Court wisely stated, "Courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the results of their action." "Nothing

is better settled than the rule that the motives of a legislature or of the members cannot be inquired into, for the purpose of determining the validity of its laws." *Gardner*, 143 Mich at 106.

By basing its entire burden of proof on the propriety and accuracy of the "method" employed by the Legislature, the Court of Appeals clearly exceeded its constitutional bounds. "There is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony the constitutionality of a law." *Todd v Hull*, 288 Mich 521, 533; 285 NW 46 (1939).

Second, the "power of the purse" has long been recognized as an authority designated to the Legislature under Constitution 1963, article 4, § 1. See *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141, 144; 719 NW2d 553 (2006). "The whole subject of finance and taxation is placed by the Constitution of this State under the control of the Legislature." *C F Smith Co v Fitzgerald*, 270 Mich 659, 670; 259 NW 352 (1935). In accordance with this recognition of authority, this Court has developed and applied a highly burdensome standard to lower courts seeking to challenge the sufficiency of their appropriations. In *46th Circuit Trial Court*, this Court stated, "In litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is both 'reasonable and necessary.'" *46th Circuit Trial Court*, 476 Mich at 149. The Court of Appeals did not give any deference to legislative prerogative to the Legislature here, so its standard overreaches the judiciary's constitutional bounds.

Third, according to Constitution 1963, article 9, § 34, "The Legislature shall implement the provisions of [the Headlee Amendment]." The application and effect of this constitutional provision should be self-evident. The constitution designates the Legislature, with its political influences and restraints, as the body to decide how the Headlee Amendment should be implemented. The Court of Appeals usurps that role by placing itself in the position to gauge the sufficiency of an appropriation by determining the validity of the methods used to determine the appropriations at issue. Moreover, the Court of Appeals uses an "actual cost to the state" standard that, according to the implementing act, only applies when the *Legislature* has not already determined the amount of relevant costs. See *Adair II*, 302 Mich App at 316-317; MCL 21.233(6). According to MCL 21.233(6), "net cost" is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, *unless otherwise determined by the legislature when making a state requirement*." (Emphasis added.) Under the plain language of this implementing legislation, the Legislature "otherwise determined" the relevant "necessary" or "net cost" in this case when it appropriated more than $34 million to cover CEPI-related costs. See MCL 21.233(6).

In keeping with the clear import of the Legislature's designation as the body charged with implementing the Headlee Amendment's safeguards, the Court of Appeals should have applied the constitutional deference adopted in *46th Circuit Trial Court*, 476 Mich at 149. It did not. Because the Court of Appeals invented and applied a constitutionally infirm legal standard to this case, this Court should

reverse the Court of Appeals' ruling on the burden of proof and apply the appropriate, deferential burden of proof.

Further, the Court of Appeals' burden of proof is unworkable because of other, more indirect, constitutional limitations, like the "Speech and Deliberations" clause. See *Wilkins v Gagliardi,* 219 Mich App 260, 268-269; 556 NW2d 171 (1996). Constitution 1963, article 4, § 11 provides in part:

"[Legislators] shall not be questioned in any other place for any speech in either house."

This clause insulates the motivations or "method" of any legislator from judicial inquiry. Although article 4, § 11 is primarily concerned with speech and debate, its protections extend to "other matters" that constitute "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v United States*, 408 US 606, 625; 92 S Ct 2614; 33 L Ed 2d 583 (1972).

The clause means that Districts cannot constitutionally prove what "method" the legislators, individually or collectively, "employed" any more than a "trier of fact" can accept "evidence that, if determined credible by the trier of fact, would . . . undermine[] the validity of the method used by the Legislature to determine the amount of the appropriations . . . " under the standard that the Court of Appeals adopted in this case. See *Adair II*, 302 Mich App at 316-317. The judiciary has no

authority to delve into the inner machinations of the Legislature, either collectively or as a means to explore and examine the motives and methods of the individual members. *Wilkins*, 219 Mich App at 268-269. The Court of Appeals' development and application of such an intrusive standard was erroneous. This Court should reverse the portion of the Court of Appeals decision that invented the erroneous burden of proof, approve the burden correctly delineated later in this brief, adopt the Special Master's application of that legal standard, and dismiss this case.

CONCLUSION AND RELIEF REQUESTED

The Districts failed to meet their burden of proof. Plaintiff Districts have the burden of proof in a suit alleging underfunding of a legislative mandate under Constitution 1963, article 9, §29. To sustain a claim alleging underfunding of a legislative mandate under Constitution 1963, article 9, § 29, a plaintiff must prove a quantifiable shortfall between specific costs to local government, realized or anticipated, and the amount of funding appropriated. Here the Districts conceded that they would not present any evidence of a quantifiable shortfall between their specific costs, realized or anticipated, and the amount of funding appropriated. And the State met its funding responsibility. Section 22b funding is an appropriation that is made and disbursed to pay local school districts for costs associated with collecting, maintaining, and reporting data to the State. Thus, in addition to § 152a, "a state appropriation [was] made and disbursed to pay the unit of Local Government for any necessary increased costs" in § 22b as required in Const 1963, art 9, § 29. And by accepting the conditional appropriation in § 22b, the Districts

also accepted the responsibility attached to those funds and waived any Headlee challenge to the level of funding provided.

Thus, this Court should reverse the Court of Appeals decision on these issues, apply the appropriate burden of proof, and reinstate the Special Master's dismissal of the Districts' claims.

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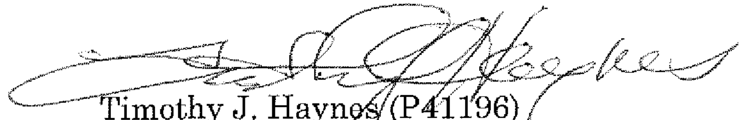

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