IN THE SUPREME COURT
Appeal from the Court of Appeals
Hon. Michael J. Talbot, Hon. Henry William Saad, and Hon. Karen M. Fort Hood

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

Plaintiffs-Appellees,

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.

Supreme Court No. 147794
Court of Appeals No. 302142
Lower Court Case No. 11-119092-PZ

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BRIEF ON APPEAL-APPELLEES

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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Statement of Jurisdiction

Plaintiff Appellees concur that the Court has jurisdiction over this appeal pursuant to MCR 7.301(2). The reference in Defendant Appellants' Brief on Appeal to MCR 7.302(H)(2) as conferring jurisdiction is inaccurate because this is not an appeal before a decision by the Court of Appeals

Standard of Review

Plaintiff Appellees concur that the standard of review is *de novo*.

Counter Statement of Questions Presented

1. Whether the plaintiff taxpayers' have the burden of proving the amount or extent of underfunding of a legislative mandate in a challenge under Const 1963, art 9, §29?

   Appellants answer the question: yes
   Appellees answer the question: no
   Court of Appeals answered the question: no

2 Are the elements of proof that must be established to prove either full funding or underfunding for purposes of a POUM claim under §29 of the Headlee Amendment the costs incurred by the state if it were to provide the activities and services that are mandated by state law?

   Appellants answer the question: no
   Appellees answer the question: yes
   Court of Appeals answered the question: yes

3 Whether acceptance of a general appropriation from the Legislature which is specifically conditioned on compliance with reporting requirements pursuant to MCL 388.1622b(4)(c) waives any challenge to the funding level of those requirements under Const 1963, art 9, §29?

   Appellants answer the question: yes
   Appellees answer the question: no
   Court of Appeals answered the question: no

Counter Statement of Facts

The Defendants State's (state or state's) "Introduction", p.1, is in part an argumentative recitation of what it believes this suit is all about. The state characterizes this suit as: "[t]he Districts seek to grind vague orders and, of course, attorney fees from the litigation mill of artful and prolonged proceedings." This is inappropriate in what should be an objective recitation of what occurred in the proceedings below.

It must to be observed that much of the state's initial assertions in its statement of facts about the earlier *Adair* suit are argumentative and irrelevant to the identified issues for which this Court granted leave to appeal in the present case. As such, they need not be responded to.

However, it is initially asserted in the state's brief that this suit is a continuation of the earlier *Adair* case, finally decided by this Court on July 14, 2010 (Adair 1)[1]. Indeed, the parties and the subjects of *Adair* 1 are the same in many respects to the present suit, such as both involve the state's funding obligation for the costs of activities and services required to be provided by Michigan public schools pursuant to a state law, MCL 388.1752, a program referred to as the Center for Performance and Information (CEPI). A very detailed description of CEPI requirements imposed on Michigan schools, which are the subject of the present case, is contained in the report of Plaintiffs' expert witness, David Cotton, 67-117b. The focus of both suits is the question of whether the state has met its funding obligation for those costs under §29 of the Headlee Amendment. However, in the present suit the funding was provided through categorical appropriations made for the 2010-2011 and 2011-2012 school years in response to the Court's decision in that earlier suit, MCL 388.1752a(1). The named parties are essentially the same in the two suits and the remedy sought in both cases is declaratory judgment.

1 *Adair v Michigan*, 486 Mich 468; 785 NW2d 119 (2010).

In *Adair* 1 the state wholly avoided paying for any of the costs of these very costly services, groundlessly claiming that CEPI services were not new or did not represent increased mandates on schools. These claim was rejected as meritless at each way point in that suit, starting with the trial proceedings before the appointed special master, retired Judge Pamela Harwood. Notwithstanding, the state persisted in this assertion for over the 10 year duration of that suit. In the present suit, that claim was necessarily discarded in favor of the present claim that the state has now funded CEPI services to the full extent required by §29. That is a different assertion distinguishing the two suits.

The state also represented in their statement of facts, at p. 11, that Plaintiffs' Counsel indicated in opening statement that Plaintiffs had no intention of putting forward any evidence of the extent of the underfunding for CEPI services during trial. This is entirely inaccurate. The majority of the Plaintiffs' opening statement concerned the evidence that they would introduce to establish at trial that the underfunding by the state was extensive because the appropriation was based on incomplete and deficient assumptions as to the extent of the required CEPI services. 223-253,b. In the state's effort to forge its way through the vacuum in meeting its evidentiary responsibility, it has chosen to make this gross misrepresentation of Plaintiffs' extensive offer of evidence to meet its burden of proof, as will be set forth in greater detail below.

One other, not so subtle, representation of note interwoven throughout the state's statement of facts, and later argument, is the reference to this suit being between state government and school districts. Presumably, given the persistence in making this representation, the state believes that this plays well with the implied assertion that Plaintiffs are greedy local school bureaucrats trying to game or "grind away" at the state treasury. In fact, in every case there is a named taxpayer in this suit serving as a party plaintiff for each school district,

consistent with the provisions of §32 of the Amendment.[2] The taxpayers' school districts are also named plaintiffs since the suit seek to secure the requirements of §29 for their benefit. However, that does not detract from the fact that §32 suits are expressly designed to be "taxpayer" suits, not suits by local units of government to remedy underfunding. It should also be respected that the plaintiff taxpayers' purpose in this suit is to preserve the financial viability of the school programs offered through their school districts, independent of the costs of the state mandate.

This repeated reference to "School Districts" as being the Plaintiffs is a transparent attempt to negate that this suit is brought by taxpayers of local units of government as the people of Michigan envisioned through §32 when the Amendment was adopted. It should not need to be argued that since the subject of §29 is funding for the costs of mandated services, a taxpayer suit seeking to enforce that section for the benefit of his/her local unit of government is not about greed. Rather, it is about enforcing the expressed will of the people fixing financial accountability on state government for costs it involuntarily visits on local governments to the detriment of locally valued educational programs.

Defendant State represents in its statement of facts, p.10, that the special master considered and decided its February 17, 2012 pre-trial motion on the burden of proof question, arguing that the Plaintiffs had the burden to prove the exact amount of the underfunding that school districts were incurring statewide but, as discovery disclosed, were not prepared to so prove. They moved for summary disposition on that premise. However, while the state implies in its statement that the special master accepted their argument- and concededly did so hold on September 25, 2012-, the state neglects to point out that in the same decision, July 10, 2012, the special master sustained Plaintiffs' argument, 145-147a. The special master concluded that "The

2 Const 1963, art 9, §32.

Expert report...[when] viewed most favorably to the Plaintiffs, it rebuts the Defendants' argument that the Plaintiffs have 'refused to satisfy their burden of proof that the appropriation is insufficient to pay their necessary increase[d] costs." 88a. Plaintiffs acknowledged that they did not intend to quantify the dollar amount of the underfunding schools were experiencing in order to provide CEPI services based on the argument that the relevant costs are those that would be incurred by the state and not schools and the burden to establish those costs and the resulting sufficiency of funding appropriated falls on state government by operation of MCL 21.233(6) as interpreted by this Court in the 2010 *Adair I* decision 149-150a. However, the special master, entirely inconsistently, held in the very same July 10, 2012 decision that Plaintiffs' higher burden of proof "requires them to produce evidence of specific dollar amount increases in the costs incurred in order to comply with CEPI requirements." 87a. The special master declined to explain or clarify these inconsistent holdings in an order denying Plaintiffs' motion for clarification on the eve of trial, September 5, 2012, 218-219b.

The state has also attempted to twist in its statement of facts what the Plaintiffs were requesting by way of relief through the evidence they intended to elicit at trial before the special master. Reference is made in this regard in the state's present brief, at p.11, that the Plaintiffs were not intending to put forward evidence of the "extent" of the underfunding or the "specific amount of underfunding" that was occurring through the CEPI appropriations and didn't even want the special master to make such a determination. The inference is that Plaintiffs were seeking a declaratory judgment for underfunding but without even proving that underfunding is occurring. This is inaccurate.

To be clear, Plaintiffs' counsel made it known through an exchange with the special master during the September 18, 2012 trial proceedings that Plaintiffs were seeking a declaratory

judgment, not a dollar judgment, 145-157a. As further explained, the judgment sought would declare, based on the evidence at trial, that the Legislature's appropriation, based on the CEPI cost study on which it relied, was substantially underfunding the §25 and §29 standard of funding the full costs of those services.[3] That was because the study did not take into account the vast majority of the mandated CEPI services and therefore resulted in material underfunding. Plaintiffs' counsel maintained that their evidence, offered both through their expert witness and numerous school district CEPI compliance specialists and the admissions of CEPI staff who performed the cost study, served to meet the "higher burden in order to show a POUM violation" referred to in this Court's decision in the July 14, 2010 opinion of this Court in the *Adair 1* decision[4], Trial Transcript, 235-253b. This representation spoke to the Plaintiffs' acknowledgment that they had a higher burden of proof than applied in the earlier *Adair 1* case. That higher burden, Plaintiffs' counsel maintained, consisted of establishing through evidence that the process used to quantify the CEPI funding appropriation materially underfunded the subject services, leaving to the state the burden of proving that the CEPI categorical appropriations, MCL 388.1752a(1), served to meet the state's §29 funding responsibility applying the costs to the state if it were to provide the CEPI services pursuant to MCL 21.233(6), 149-150a.

An additional exchange occurred immediately following the conclusion of the trial on September 18, 2012 which is not referred to in the state's statement of facts. Undersigned counsel corresponded with the special master on September 21, 2012 indicating that his clients continued to maintain their position on the sufficiency of the evidence they intended to offer to

3 Const 1963, art 9, §25 and §29.

4 *Adair*, 486 Mich at 480 n 29.

meet their burden of proof, as expressed during opening statement, but that they were nonetheless prepared to offer evidence *in the alternative* through their expert witness at trial of the estimated minimum costs that would be required for the state to provide the required CEPI services on a statewide basis. It was requested in that correspondence that counsel be permitted to present this offer to the special master before he ruled on the state's pending motion to dismiss, 293-294b. The special master did not respond to that offer but later the same day, September 21, 2012, issued a form order granting the state's motion for directed verdict and/or involuntary dismissal, dismissing Plaintiff Appellees' suit with an opinion to follow, 158a.

On September 25, 2012 the special master issued an opinion and order granting the state's motion for involuntary dismissal and/or directed verdict, 159a. The special master made no reference in this opinion and order to undersigned counsel's offer in his correspondence of September 21, 2012. On September 26, 2012, Plaintiff Appellees filed a motion to amend their complaint and opening statement and to request the special master to reconsider his September 21 and September 26, 2012 orders dismissing their suit, 295-309b. Again, Plaintiff Appellees continued to maintain the sufficiency of the proofs earlier offered through their counsel's opening statement.

The special master did not respond or even acknowledge this motion to amend the complaint and opening statement. On October 3, 2012 the special master issued his report to the Court of Appeals recommending, *inter alia*, that Plaintiff Appellees' suit be dismissed for the same reason contained in his opinion and order of September 25, 2012, 167a. The special master again ignored in his report to the Court of Appeals Plaintiff Appellees' letter and motion to amend.

Argument

1. WHICH PARTY HAS THE BURDEN OF PROVING UNDERFUNDING OF A LEGISLATIVE MANDATE IN A CHALLENGE UNDER CONST 1963, ART §29?

Summary of Argument: The burden of proof argument begins with the statutory implementing legislation for §29 of Headlee which defines the costs which must be paid by the state by reference to the costs the state would incur if it provided the mandated services rather than the costs local governments will incur. This definition of costs was purposeful and must control the question of whose costs need to be quantified for purposes of determining whether the amount appropriated is fully funding local governments' costs for compliance with a state mandate. That Headlee implementing statute necessarily controls which party has the burden of proof because the state alone can decide how it would achieve compliance and what that would cost the state. While the predecessor 2010 *Adair* decision did not decide the respective parties' burden of proof where the state provides some of the required funding in a POUM case, it establishes binding precedent as to most of the relevant considerations on the burden of proof question in that circumstance and is only distinguishable insofar as requiring a "higher" burden of proof for plaintiffs where some funding is provided but not requiring a "different" burden of proof than was decided in the 2010 *Adair I* decision. Plaintiffs offered to meet that higher burden of proof at trial through opening statement by introducing evidence establishing that the cost study supporting the amount appropriated by the Legislature is materially deficient because a) the state's costs of compliance with the mandate were not even considered or quantified in the study, b) the appropriation was derived from a cost study which ignored the vast bulk of the mandated services provided by schools to comply with the subject state mandate and c) was flawed in its methods of cost analyses resulting in substantial underfunding for schools. At that point, the burden of proof falls on the state to establish that sufficient monies to fully fund those costs based on the costs the state would incur were appropriated. The Court of Appeals properly ruled that the evidence offered by Plaintiffs was sufficient to meet Plaintiffs' initial burden of proof, leaving the burden to prove otherwise to the state. This is so because, the state's costs are the costs relevant to determining underfunding by operation of MCL 21.233(6) and, foremost among other reasons, those costs were not even considered or quantified in determining the subject appropriation.

Burden of Proof

It is particularly important at the outset of this argument to clarify the remedy that Plaintiff Appellees are seeking in this suit as contrasted to what they are not seeking. This is important because Defendant State has conveniently confused in its present Brief the nature of the remedy sought and the related offer of proofs through opposing argument. Plaintiffs are not

asserting that the declaratory judgment they seek should direct the Legislature to appropriate a specific dollar amount to remedy the underfunding which they are prepared to demonstrate to be occurring at trial. The evidence to establish that underfunding is discussed below. Plaintiffs accept and are prepared to show through their evidence that they have a duty to establish the existence of underfunding as a part of their burden of proof. Indeed, Plaintiffs readily concede that the duty to appropriate funding expressly required by §29 of the Headlee Amendment for the costs of the state's mandates, Const 1963, art 9, §29, is exclusively the Legislature's prerogative under the Constitution, Const 1963, art 4, §31.

Rather, Plaintiffs seek a declaratory judgment ruling that the appropriations made by the Legislature in this case materially underfunds the mandated CEPI services, based on the evidence to be presented, and thereby violates the funding requirements of §25 and §29 of the Headlee Amendment. This is because the Court of Appeals' responsibility under §32 of the Amendment is "to enforce" §29 of the Amendment and the subject of §29 is provide (i.e. appropriate and disburse) monies for local units of government to pay for the costs of state imposed requirements or mandates. At that point, the responsibility to quantify the required appropriation falls on the Legislature in accord with the Court of Appeal's issuance of such a declaratory judgment, applying the prescription for quantifying the costs set forth in MCL 21.233(6). The Legislature's duty is to then fully fund state mandated CEPI costs as expressly required in both §25 and §29 of the Headlee Amendment. The Legislature could, alternatively, choose to not follow the Constitution as declared by the Court and deal with the political fall out.

This argument must begin with a recognition that the question of what 'necessary costs' must be funded under §29 of the Headlee Amendment, has already been answered by the 1979

Headlee-implementing legislation[5]. The provisions of the Amendment do not expressly define how those costs must be measured or quantified in order to qualify for reimbursement under the Prohibition on Unfunded Mandates ("POUM") sentence of §29. Rather, they simply refer to those costs entailed with paying local units of government "for any necessary increased costs" which result from local units complying with either a new state law (i.e. legislation) or administrative requirement (i.e. state agency regulation/rule) or an increase in the level of a required activity or service imposed on local units above that which existed when the Amendment was adopted in 1978. While this language surely entails the notion that the voters intended local units be made whole for such costs, it does not prescribe how to put a dollar amount on the costs incurred.

Similarly, §29 of the Amendment does not set a dollar threshold that must be minimally incurred by local units in order to qualify for reimbursement of those costs.

These open questions, among others, were left to be defined by the Legislature. The Amendment provides in §34[6] that "The Legislature shall implement the provisions of Sections 25 through 33 inclusive of this Article." In the several months immediately following the voters' ratifying the Amendment in November of 1978, the Legislature took up the question of implementing §29 in 1979 PA 101.[7] Relative to the question of defining "necessary costs," the legislation defined them as "net costs of an activity or service provided by a local unit of government. The net costs *shall be the actual costs to the state if it provided the activity or service mandated as a state requirement*...." MCL 21.233(6) (Emphasis added). Regarding the threshold for costs which must be incurred in order to qualify for reimbursement, the legislation

5 1979 PA 101; MCL 21.231 et seq.

6 Const 1963, art 9, § 34.

7 MCL 21.231 *et seq.*

provided that "[n]ecessary costs" *does not* "include the costs of a state requirement if ...: (a) [t]he state requirement cost does not exceed a *de minimus* cost." MCL 21.233(6). The statute defines "*de minimus* costs" as "a net cost to a local unit of government resulting from a state requirement which does not exceed $300 per claim." MCL 21.232(4).

Neither party to this litigation has raised any challenge to the constitutional appropriateness of these statutory implementing provisions. To be noted from these provisions relative to proving the costs to be established at trial, the costs are *not* those of the local unit required to comply with the mandate but rather the costs to the state if it were to provide the service. This point is made abundantly clear through the mandatory words "shall be." In the context of a suit under the second sentence of §29 – the POUM sentence,[8] -the choice of using "state costs" rather than those of local units of government stems from the requirement of §29 that the Legislature's appropriation responsibility is operative when the requirement or mandate is *initially* imposed on local units. That follows from the part of the POUM sentence where it is expressed that a requirement shall not be imposed on local units "unless a state appropriation is made and disbursed to pay the unit for *any* necessary increased costs." (Emphasis added.) "The word 'any' means just what it says. It includes 'each' and 'every'... It comprehends 'the slightest.'" *Sifers v Horen*, 385 Mich 195, n 2; 188 NW2d 623 (1971). The word "any" certainly precludes the notion that the Legislature can postpone until a later time adopting an appropriation and disbursement process, at the point in time a new or expanded mandate is originally created or takes effect. Plaintiffs submit that it is intended by the voters, through the use of the word "any", that the Legislature should adopt contemporaneous legislative enactments of a mandate

8 *Adair v State*, 470 Mich 105, 111; 680 NW2d 386 (2004), citing *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999).

and the supporting appropriation/disbursement process, lest *some* (e.g. "the slightest") increased costs would be incurred by local government.[9]

This voters' intention in this regard should not be obscured by the fact that most litigation under the POUM sentence has involved taxpayer challenges under §32[10] where the Legislature ignored adopting *any* supporting appropriation when the mandate was first adopted or became effective. Indeed, in the preceding *Adair* suit the interval was over eight (8) years. During that time period, Michigan public school districts most certainly incurred "some" unreimbursed costs (i.e. extensive unreimbursed costs) as this Court acknowledged through its 2010 *Adair 1* opinion.[11] That cannot be squared with the voters' manifest intent through the words used in the POUM sentence.

Accordingly, when the Legislature is considering legislation which is about to be imposed that requires local units of government to provide costly new or expanded activities or services, there are no costs being incurred by local units as a result of the impending mandate. So the amount to be appropriated and disbursed is necessarily an estimate of future costs. Given that such an estimate is inherently a cost projection (as is equally true when new or expanded state departmental agency provided programs are enacted and contemporaneously funded), the obvious legislative intent through quantifying the reimbursable costs based on the costs that the state would incur if it were to provide the required activity or service, *via* MCL 21.233(6), is to base the amount of the appropriation and disbursements on a standardized set of cost estimates to

9 This concept of the Legislature being required to appropriate funding when the mandate is imposed, or prior to it becoming effective, was also recognized by the Legislature in 1979 when the §29 implementing statute was considered, 1979 PA 101. This is expressed in MCL 21.235(2)(a) where it provides that an annual appropriation shall be made sufficient to fund each local unit of government for any necessary costs of each state requirement with "An initial disbursement will be made at least 30 days prior to the effective date of the state requirement...." (Emphasis added.)

10 Const 1963, art 9, §32.

11 *Adair*, 486 Mich at 491.

apply statewide. This would also allow the state to take advantage of the economies of scale that would follow from using estimates of the costs the state would incur. In the case of local and intermediate schools, there are over 800 such public school systems (including public school academies) in Michigan extending from Marquette to Monroe and New Buffalo and all points in between. They would also range in terms of enrollment from the very small school systems to the very large. The necessary costs of complying with a state mandate by local and intermediate schools would range substantially from all of these points in Michigan due to the inherently vast range of cost environments in which those schools operate.

In other words, the requirement of MCL 21.233(6) that the costs to be considered for §29 funding purposes "shall be" those that the state would incur is not some idiosyncratic or curious legislative anomaly but, rather, is quite purposeful and logical[12]. The only other assumption is that the Legislature made a mistake through this verbiage in MCL 21.233(6); a mistake which needs to be judicially corrected. That would, of course, be an abhorrent interpretive perspective, contrary to all accepted rules of legislative interpretation. Rather, the cardinal rule of statutory construction is that words used in a statute must be applied as written.[13]

12 The House Legislative Analysis Section created two analyses of the bill leading to adoption of 1979 PA 101 when the bill was under consideration by the Legislature in the summer of 1979. Those analyses recognize that this means of quantifying the necessary costs by reference to the costs the state would incur were required in the bill, but provide no comments as to the purpose of using such a measure of costs.

13 "In reviewing questions of statutory construction, [a court's] purpose is to discern and give effect to the Legislature's intent." *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *Id.* "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent." *Id.* Courts may not "rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Courts have "no authority to add words or conditions to [a] statute." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214 n 10; 731 NW2d 41 (2007). Or, as stated by this Court in another Headlee Amendment case, "[i]n our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts.... If the orders are clear, the judges must obey them." *Schmidt v Department of Educ*, 441 Mich. 236, 242 n 1; 490 NW2d 584 (1992).

The legislative intent relative to the $300 per claim minimum threshold of costs incurred by local units in order to qualify for state reimbursement is plainly obvious. As with the first point, this second point would also need to be established by the Legislature at the time it considers the adoption of new mandates. Given the extremely low threshold of only $300 per claim, the Legislature could easily make this determination with only minimal effort. The state is nonetheless required to do this at the time it considers any new or expanded mandate through the combined reading of the POUM sentence of §29 and MCL 21.233(6)(a) and MCL 21.232(4).

Thus, at the time the state considers the adoption of a new or expanded mandate, it must *first* determine whether compliance will implicate more than a $300 cost to each of the affected local units of government, MCL 21.233(6)(a), and .232(4). If the mandate will result in an increased cost to local units of more than $300, the Legislature must determine how state government would logistically comply with the mandate and then determine or estimate the total necessary costs needed to be expended to achieve compliance using the state's own resources, MCL 21.233(6). It will then be required, pursuant to the express provisions of the POUM sentence of §29, to appropriate sufficient funds to fully cover those estimated costs. Again, from a concurrent reading of the POUM provision, as implemented by MCL 21.233(6), this must all be done at the time the mandate is passed or becomes effective in order to avoid local units of government incurring "any necessary increased costs." While that sequence didn't happen here, it is nonetheless instructive on the burden of proof question,

Therefore, the question of which party has the burden of proof needs to be addressed in these combined Constitutional and statutory contexts. This brings to the fore the *stare decisis* determinations of this Court in the immediately preceding 2010 *Adair I* opinion.[14] Plaintiff

14 *Adair*, 486 Mich at 468.

Appellees have consistently maintained throughout this case, and do so presently, that the 2010 *Adair I* decision of this Court is not dispositive on the question of what evidence must be established by plaintiff taxpayers and their local units to carry their burden of proof where some funding has been appropriated and disbursed but where it is asserted by a challenging taxpayer that the amounts appropriated and disbursed are less than *full funding*. The requirement of full funding is expressed in §25 of the Amendment and applied in the verbiage of §29.[15] At the same time, there are several points of law decided in that case which bear directly on these questions.

This requirement of full funding is first expressed in §25 as follows "The state is prohibited from requiring any new or expanded activities by local governments without *full state financing*..." (Emphasis added.) There can be no reasonable dispute about the voters' intent through this language. Similarly, where it is expressed in §29 of the Amendment that the state is prohibited from requiring new or expanded activities or services to be provided by local governments "unless a state appropriation is made and disbursed to pay the unit of Local Government for *any necessary increased costs*" (Emphasis added), there can be no reasonable dispute that the voters intended to prohibit partial funding for the costs of mandated services.

When these two provisions are combined, the voters' intent is crystal clear: if the State, acting either through the Legislature or a state agency, imposes a new or expanded mandate on a local unit of government, the costs of complying must be fully paid for by state government.

The first point of *stare decisis* to be derived from this Court's 2010 opinion in *Adair* I, 486 Mich 468 (2010), is the holding that in a POUM case, where it is alleged that no funding is provided by the state, the burden of proof is initially met when the plaintiffs establish (1) that the State has imposed mandates on local units of government, (2) the costs of which mandates have

15 Const 1963, art 9, §25 and §29.

caused more that *de minimus* necessary costs to be incurred, and (3) that those costs have not been paid for by the state through adoption of an appropriation. The state then has the burden of proof to establish what costs it would incur if it were to provide the mandated services, following the requirements of MCL 21.233(6), and show that these costs are fully funded. This would consist of establishing whether, either (1) no state funding is required because the requirement did not increase costs to local government or that the increased costs were not necessary, or (2) the Legislature has appropriated and disbursed the required funding to pay for those costs to the affected local units. This is stated in the Court's opinion as follows:

> We conclude that to establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local government, the plaintiff need not show the amount of increased costs. It is then the state's burden to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary. *Adair,* 486 Mich at 480.

Relative to the question of which party has burden of proof to establish whether the increased costs are necessary within the meaning of the POUM sentence of §29, the Court held as follows:

> Neither Const. 1963, art. 9, §29 nor MCL 21.233 suggests that plaintiffs bear the burden of proving precisely how much the school districts' costs increased as a result of the mandate. In fact, the language of MCL 21.233 implies the opposite. That section defines "necessary cost" as the "net cost of an activity or service provided by a local unit of government." The "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.
>
> Nothing in the POUM provision expressly requires a plaintiff to establish that the increase in activities or services resulted in increased costs. Rather, a plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it. The burden then shifts to the state to show (1) that it is not required to pay for it because the new or increased level of activity did not result in increased costs or (2) that those costs were not "necessary" under MCL 21.233(6)." *Adair,* 486 Mich at 486-487.

Relative to the burden of proof to establish a specific or exact amount of increased costs- as the state's counsel presently asserts- the Court held as follows:

> We conclude that, when no legislative appropriation was made, a plaintiff does not have the burden to make such a showing to establish entitlement to a declaratory judgment under the POUM provision. This conclusion is axiomatic from the language of Const. 1963, art. 9, §29, previous case law involving the Headlee Amendment, and the underlying purpose for seeking a declaratory judgment. *Adair*, 486 Mich at 488.

The Court explained that this conclusion is compelled by the fact that:

> The terms "net cost" and "actual cost" suggest a quantifiable dollar amount. However, nothing in MCL 21.233 suggests that it was intended to change the burden of proof in Const 1963, art 9, §29. The specific costs that would be incurred are defined by reference to what costs the state would incur if it had to pay for the increased costs itself. Thus, it is the Legislature's burden to demonstrate that those costs were not 'necessary' under one or more of the exceptions in MCL 21.233(6)(a) to (d). Otherwise, the Legislature must determine what dollar amount is necessary, then appropriate that amount to the school districts.
>
> This is so because MCL 21.233(6) defines "net cost" as "the actual cost to the state" if the state were to provide the activity or service required. Clearly, the Legislature is in a position far superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased recordkeeping and reporting duties. Proofs on this point are easily accessible to the state because it could ascertain the costs it would incur if it provided the new activity. *The dispositive issue is the cost to the state if it were to provide the new or increased activity or service, not the cost incurred by the local governmental unit.* (Emphasis added) *Adair*, 486 Mich at 488-489.

The Court also explained as follows relative to the evidence required to establish underfunding by Plaintiffs:

> Defendants claim that a finding of necessary increased costs cannot be established without a comparison between the specific net costs before and after the required change in activities. For the reasons stated previously, we reject this argument. Had this action proceeded to a prompt resolution, plaintiffs could not have demonstrated such a side-by-side comparison of the "before and after" costs incurred to meet the recordkeeping requirements. It would be nonsensical to impose this additional evidentiary requirement on plaintiffs here when, in another case, it would be impossible for the plaintiffs to make such a showing. *Adair,* 486 Mich at 490-491.

Finally, relative to the question of the burden of proof given the fact that the suit was brought for the remedy of declaratory judgment the Court held as follows:

> Requiring plaintiffs to demonstrate specific costs is contrary to the purposes of an action for declaratory judgment under the POUM provision in Const. 1963, art. 9, §29 and the language authorizing it. *Adair,* 486 Mich at 491.

Each of these points of law is *stare decisis* on the issue decided. As such, these are settled points of law interpreting the POUM provisions of §29 of the Headlee Amendment to our Constitution and the related burden of proof of taxpayers seeking to enforce the Amendment where no funding for the mandate is provided by the state. While it is true that this Court is not necessarily bound by existing decisions issued by this Court which constitute *stare decisis*, pursuing a course of rejecting its earlier decisions which constitute *stare decisis* is a very destabilizing course of action, particularly as relates to interpreting the State Constitution.

This was illustrated in *McCormick v Carrier*, 487 Mich 180, 264-266; 795 NW2d 517 (2010), where Justice Markman wrote a lengthy dissent (in which Justice Young concurred), assailing the majority's lack of regard for *stare decisis.* In that dissent, Justice Markman specifically criticized what he perceived as his fellow Justices taking advantage of changes in the composition of the Court in order to overrule precedent they did not like. Justice Markman wrote "to remind the majority that there are larger issues at stake in this case: the rule of law, respect for precedent, the integrity of this Court, and judicial restraint. Accordingly, larger institutional issues are implicated in this case." *Id.* at 264 (Markman, J., dissenting).

Justice Markman further noted that "[p]rinciples of *stare decisis* in matters of statutory interpretation, particularly where the Legislature has not responded to a prior interpretation, weigh against overruling precedent absent sound and specific justification." *Id.* at 266 n 35 (Markman, J., dissenting). And he criticized the then-majority for their "new favored practice …

to flag decisions of the past decade and invite challenges to those decisions. It is difficult to reconcile this practice with the majority's previous claims of fidelity to *stare decisis*." *Id.* at 270 (Markman, J., dissenting), quoting Justice Young's partial dissent in *Potter v McLeary*, 484 Mich 397, 450; 774 NW2d 1 (2009).

> [I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence *dangerously unstable*.... Under the doctrine of *stare decisis*, it is necessary to follow earlier judicial decisions when the same points arise again in litigation.... [P]rinciples of law deliberately examined and decided by a court of competent jurisdiction become precedent and should not be lightly departed. Absent the rarest circumstances, we should remain faithful to established precedent. (Emphasis added)

McCormick, *supra* at 270 (Markman, J., dissenting), quoting Justice Young's partial dissent in *Potter* at 450. Justice Young echoed these sentiments in his dissent in *Regents of University of Michigan v Titan Ins Co*, 487 Mich 289, 329-330; 791 NW2d 897 (2010) and, with Justice Markman's concurrence, in his dissent in *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 482-484; 795 NW2d 797 (2010).

Plaintiff Appellees readily acknowledges that the majority decision in the 2010 *Adair 1* decision also commented relative to the burden of proof question, in a footnote, as follows:

> However, 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. Under those circumstances, the state would not have violated the POUM provision per se by failing to provide funding. Because those circumstances are not presented in the instant case, we need not address this issue. *Adair,* 486 Mich at 480 n 29.

This case involves that circumstance. Specifically, Plaintiffs allege that the Legislature has appropriated categorical funding for compliance with the mandates imposed by the state's

Center for Educational Performance and Information (CEPI), MCL 388.1752a(1)[16]. Plaintiffs further allege in their Second Amended Complaint that the necessary costs being incurred by each plaintiff school district for CEPI compliance was substantially more than *de minimus.* i.e. $300 per claim, (para 19) 24a. Moreover, Plaintiffs' expert witness was prepared to support that allegation through his testimony at trial before the special master.[17] Further, Plaintiffs' proofs would have demonstrated, but for the dismissal of their claim by the special master, that the funding level provided through MCL 388.1752a(1) was substantially less than necessary to pay Michigan school districts for the *full* amount of the necessary costs of the activities and services required of them by CEPI for the applicable school years.[18] This was to substantiate Plaintiff-Appellees' allegation that the funding provided was violative of the requirement of the POUM sentence of Const 1963, art 9, §29.[19]

In so alleging and offering to prove during opening statement, Plaintiff Appellees were fully prepared to meet a higher burden of proof than was required in the 2010 *Adair I* case, which involved the State's total failure to fund the same required CEPI services. As also made clear in the opening statement, Plaintiff Appellees' evidence would consist of testimony of school district personnel from school districts located throughout the State, responsible for providing the activities and services necessary for achieving CEPI compliance. They would testify about the requirements imposed in order for school districts statewide to comply with the requirements of CEPI, 249-250b. This testimony was offered to prove that most of the tasks

16 CEPI is created within the Department of Technology, Management, and Budget at MCL 388.1694a. The source of the mandate on schools for whatever data may be required by CEPI is MCL 388.1752. The funding appropriated in December of 2010 to conform to this Court's July 14, 2014 decision is MCL 388.1752a(1).

17 Cotton Report, pp. 4, 7, 48 and Exhibits C-6 and C-7, Appendix 64b, 67b, 108b, 181-185b, and 186-190b.

18 Transcript of Plaintiffs' opening statement, 234-235b; the applicable school years are 2010-11 and 2011-12.

19 Transcript of opening statement, 235-253b.

required for CEPI compliance were not even considered by the state in its cost study and thus the Legislature's appropriation determination.

Plaintiffs' counsel also indicated in his opening statement that the testimony of an exceptionally well qualified expert witness, David Cotton, a CPA having extensive national expertise in both Federal and State cost accounting, would testify to his opinion based on his study of CEPI program requirements, 250-251b. Mr. Cotton's testimony would include, as his March 30, 2012 report expressed, his opinions and conclusions, based on his supporting rationale, that 1) the state's time studies are flawed and 2) the state's appropriations are materially under-stated because the costs determinations are inadequate and incomplete, 71-117b. As indicated in Mr. Cotton's report, 107b, the term "materiality" is defined by the Federal Accounting Standards Board (FASB) as "'the magnitude of an omission or misstatement of accounting information that, in the light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement.' That discussion recognizes that materiality judgments are made in light of surrounding circumstances and necessarily involve both quantitative and qualitative considerations.", footnote 37, 107b.

As reflected in Mr. Cotton's report, his review and analysis involved meetings with local and intermediate school district personnel responsible for CEPI reporting throughout the State, 61b. These involved meetings with staff employed by school districts of different student and staff densities and after hands on review of the myriad physical activities required by CEPI, 77-117b. Based on this review and analysis, Mr. Cotton concluded in his report, and was prepared to testify, that the state's time studies were structurally flawed and the funding appropriated by the

state through MCL 388.1752a(1) was materially less than necessary to constitute full funding of the costs being incurred by those schools, 71b.

It was also concluded by Mr. Cotton 'in my opinion, the state's appropriations are understated far in excess of this de minimis amount." footnote 38, 108b. This report was provided to the special master and opposing counsel on that date. It was also the subject of subsequent deposition testimony of Mr. Cotton taken by counsel for the State prior to trial.[20]

As also indicated in Plaintiffs' opening statement, evidence would be introduced from a well qualified school district administrator to establish the very limited extent of data and associated time expended that was required to be provided by Michigan public school districts in 1978 when the Headlee Amendment was adopted, as compared to the vastly greater extent and complexity of data presently required by CEPI commencing in 2002.[21] This testimony would be offered to establish the element in §29 that "an increase in the level of an activity or service *beyond that required by state law* [in 1978] shall not be required by the legislature or any state agency," without full state funding of "any necessary increased costs" of same. As indicated in the opening statement, the person who was going to testify to this was a person employed as an intermediate school district auditor of such reporting responsibilities by local school districts to state authorities commencing in 1974 and continuously managed under her direction through the present time.[22] Her testimony was being offered to demonstrate the dramatic transition in the extent of data required to be reported to the state and the associated increase in costs being incurred by school districts from 1978 through the present time, most prominently through the

20 Notice of Taking Deposition of David Cotton, 216-217b.

21 Plaintiffs' opening statement, 242-246b.

22 Plaintiff' opening statement, 241-249b.

imposition of CEPI requirements commencing with the 2002-2003 school year. CEPI reporting requirements first became operative during that school year.[23]

Plaintiffs' intended to include in their case in chief testimony from the expert's review of the cost study[24] which was relied upon to support the Legislature's appropriations for the 2010-11 and 2011-12 school years presently in issue.[25] Specifically, his testimony would include, *inter alia*, his analysis of its deficiencies based on deposition testimony of the CEPI staff persons who conducted the state's cost study and their supervisors and his own separate review and analysis of those deficiencies. It was acknowledged in these depositions that this cost study was directed and performed by CEPI staff members over the course of 2-3 weeks in October of 2010 in order to provide the Legislature with supporting information for the state to be compliant with this Court's 2010 *Adair* decision.[26] Indeed, the amount appropriated for the two school years is exactly the amount of money determined through this October 2010 CEPI cost study.[27]

Most importantly, it is also clear from discovery that the state's attempt through the CEPI cost study never even gave consideration to the estimated costs to the state of the logistics and data collection/creation, maintenance, error checking and reporting activities, the same services provided by school districts the costs for which the State would incur if it was to provide these

23 2002 PA 191.

24 Mr. Cotton testified that there were 5 cost studies prepared by the CEPI staff, each dealing with different component CEPI databases. They are herein referred to, collectively, as "the cost study."

25 The CEPI Director testified at p. 24 of his deposition that the CEPI cost study provided the basis for the Legislative appropriation in MCL 388.1752a, 76b. This was also confirmed by the testimony of Mr. Howell's supervisor Roberta Jameson during her deposition at 51b.

26 Appendix 5-6b.

27 MCL 388.1752a(1); 2010 PA 217; 2011 PA 62. The amount appropriated in section 152a(1) of the 2010 act, 2010 PA 217, was $25,624,500 million for CEPI services. This is the same amount produced through the CEPI cost study. Separately, $8.4 million for estimated costs of an associated CEPI requirement was also appropriated in the 2010 act but in a different section of that act totaling an appropriation of $34,064,500 for CEPI services for the 2010-11 school year. As the evidence elicited through discovery showed, the 2011 appropriation simply combined these formerly separate appropriations into section 152a(1) of the 2011-12 school year appropriation, 2011 PA 62, producing an appropriation of $34.064,500. As such, there was in actuality no increase appropriated for the 2011-12 school year over the amount appropriated for the 2010-11 school year.

compliance tasks. Rather, the only costs considered- limited to the data upload function though they were- were those estimated to be incurred by school districts. Thus, the evidence at trial will establish-and is not disputed in the arguments presently before this Court- that the requirements for the relevant cost determinations required by MCL 21.233(6) were not even estimated or attempted to be quantified by the state in arriving at the Legislature's POUM appropriations for the costs of CEPI services.[28]

While Plaintiffs were prepared to offer this testimony through their witnesses, undersigned counsel also indicated to the special master that they were not proposing to quantify the exact dollar amount of the underfunding that was being incurred by school districts statewide for CEPI compliance based on the above identified settled points of law from the 2010 *Adair 1* opinion.[29] This response was after having fully considered footnote 29 from the 2010 Adair *1* Opinion that a taxpayer "would likely have a higher burden of proof" in a circumstance such as this where some funding was provided, in this case through MCL 388.1752a(1). Plaintiffs' position in interpreting that footnote is that the Court did not express that a plaintiff taxpayer enforcing §29 would likely have a "different" burden of proof but rather, as stated, a "higher" burden of proof. This would be in the form of providing evidence that substantially more than *de minimis* underfunding was in fact occurring. Specifically, Plaintiffs proposed that this higher burden would be to elicit evidence that those additional costs are materially greater than the funding provided by the Legislature and thus failed to meet the Headlee standard of full funding.

The reason for that interpretation is two fold. First, as established in the 2010 *Adair* opinion of this Court, the exclusive costs relevant to establishing "necessary costs" by operation

28 See particularly March 30, 2012 Report of Plaintiff Appellees' Expert Witness, 108-110b, and the excerpt of deposition testimony of CEPI Director Thomas Howell, 10-11b.

29 Transcript of opening statement, 280-281b.

of MCL 21.233(6) "shall be the actual costs to the state if it were to provide the activities and services mandated as a state requirement...." Beyond Plaintiff Appellees establishing through evidence that the necessary costs incurred by the Plaintiff Schools are greater than the funding appropriated to pay for those costs, i.e. materially greater, and that the costs being incurred are more than *de minimus*, the burden of producing evidence of whether full funding, using state resources, was appropriated and disbursed would fall on the Defendant State. Since it is undisputed that neither state government nor any state agency has ever provided CEPI services from the inception of those requirements, the proofs necessary to quantify what those costs would be would require entirely speculative evidence on Plaintiff Appellees' part.

As this Court established in the 2010 *Adair 1* decision:

> Clearly, the Legislature is in a position far superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased recordkeeping and reporting duties. Proofs on this point are easily accessible to the state because it could ascertain the costs it would incur if it provided the new activity. The dispositive issue is the cost to the state if it were to provide the new or increased activity or service, not the cost incurred by the local governmental unit. *Adair, supra* at 489.

Second, the process of quantifying the state's costs would be totally inimical to the remedy Plaintiff Appellees seek in this case. Indeed, declaratory judgment is the remedy that this Court indicated to be *the* appropriate remedy available for violations of §29 of Headlee by state government.[30] To impose a burden of proving the exact dollar damages incurred by schools is nothing less than imposing the burden on Plaintiff Appellees to establish sufficient evidence in order to recover the remedy of dollar damages for an injury to one's person or property, but to do so in a suit seeking the inapposite remedy of a declaratory judgment, declaring the rights of the parties in equity. As this Court settled in the 2010 *Adair 1* opinion:

30 *Durant v State*, 456 Mich 175, 205-06; 566 NW2d 272 (1997).

> Requiring plaintiffs to demonstrate specific costs is contrary to the purposes of an action for declaratory judgment under the POUM provision in Const. 1963, art. 9, § 29 and the language authorizing it. *Adair, supra* at 491.

Again, these are *stare decisis* determinations of this Court, interpreting the Headlee Amendment to the Constitution, in the 2010 *Adair 1* decision. Plaintiff Appellees do not quarrel with the words in footnote 29 of the 2010 *Adair 1* decision about the phrase "would likely require a higher burden." Rather, Plaintiff Appellees accept that they do have a higher burden and are prepared to meet it with evidence of the material underfunding that is occurring based on their witnesses' above reviewed testimony as to what considerations were taken into account by the Legislature, via the CEPI staff cost study. Again, it is undisputed that this cost study was the sole support used in arriving at the amounts categorically appropriated for purposes of funding CEPI costs for the two school years in question, MCL 388.1752a(1).[31]

Those deficiencies are very specifically documented in the Plaintiff Appellees' expert witnesses' report, 71-117b, and will be the subject of his testimony at trial. As documented in his report, they include the fact that the costs identified in the appropriations for the two school years in question, 2010-11 and 2011-12, were derived by a very simplistic attempt at measuring the least costly activity or service involved in schools achieving CEPI compliance. Those costs were determined from the time involved in uploading data to the CEPI servers, while ignoring or failing to take into account the far more costly activities and service necessary to be done by schools on a virtually daily basis in order to comply with CEPI requirements. This would have been established by Plaintiff Appellees' expert witnesses' testimony, as amply and extensively documented in his March 30, 2012 report, as well as the testimony of the sources for his opinions from school district employees who actually do the work associated with documenting

31 Deposition testimony of the Director Of CEPI, Thomas Howell, 8-11b.

compliance with CEPI activities and services. As the testimony will show, these employees were consulted by Plaintiff Appellees' expert witness during the course of arriving at his opinion. In addition, there were subpoenaed to testify nine (9) CEPI staff members who are expected to acknowledge facts that support the expert witnesses' conclusion about the substantial shortcomings of the state's cost study and necessity for considering the costs of additional activities and services than were considered in the CEPI staff study. These witnesses were subpoenaed to testify as for cross examination during Plaintiff Appellees' case in chief.[32]

Following Plaintiff Appellees' counsel's opening statement, Defendant State's counsel moved for directed verdict and/or involuntary dismissal.[33] The state's argument was that Plaintiff Appellees were required to establish the exact amount of the underfunding for which state government is responsible to appropriate and disburse under the POUM sentence of §29, but based on the necessary costs that school districts statewide- not the state- are incurring in order to provide CEPI services.[34] The special master initially took the motion under advisement [35] and then subsequently granted the motion, concurring in the state's burden of proof assertion.[36] The special master so reported to the Court of Appeals on October 2, 2012 and recommended that Plaintiff Appellees' suit be dismissed with prejudice on that basis.[37]

The Court of Appeals rejected that recommendation in an opinion issued on August 22, 2013 and remanded the suit back to the special master for trial, 216 a. The Court of Appeals ruled that the Plaintiff Appellees had a higher burden of proof than applied in the 2010 *Adair*

32 Plaintiffs' Witness List, 38-41b.

33 Trial Transcript, 270b.

34 *Id.*

35 Trial Transcript, 289b.

36 October 2, 2012 Report of Special Master, 167-213a.

37 October 2, 2012 Report of Special Master to Court of Appeals, 167-213a.

opinion of this Court but that burden was less than to establish the costs incurred by school districts statewide for providing CEPI services as asserted by the Defendant State. That burden was to prove that the methodology used by the Legislature was flawed insofar as failing to quantify the actual costs to the state if it were to provide the CEPI services in accordance with MCL 21.233(6). The court concluded that Plaintiff Appellees' expert witnesses' report, if supported through testimony, would be sufficient to undermine the legitimacy of the Legislature's determination of the adequacy of the costs incurred under the POUM requirement and thereby shifted the burden of proof to the state to establish that the amount appropriated was sufficient to fully fund the necessary costs of the CEPI mandates based on the costs the state would incur if it provided the CEPI services. In summary, the Court of Appeals subscribed to Plaintiff Appellees' reading of footnote 29 in this Court's 2010 *Adair I* opinion on the burden of proof issue. The remand was stayed in light of the present appeal to this Court.

Plaintiffs' Offer of Alternative Proofs

A further point relating to the evidentiary proceeding, such as it was, before the special master, which commenced and ended on September 18, 2012, needs to be considered in connection with the rulings below on the burden of proof issue. The evidentiary proceeding consisted of Plaintiff Appellees' counsel making an opening statement, described above, and Defendant Appellants' counsel making his opening statement and then moving to dismiss.[38] As above noted, at that point the special master took the argument under advisement after engaging in a brief exchange with counsel about the issue raised in the Defendant Appellants' motion. The exchange was to clarify Plaintiff Appellee's position on the burden of proof question.[39]

38 Trial Transcript, 253-270b.

39 Trial Transcript, 270-291b.

Since it was apparent to undersigned Plaintiffs' counsel from this exchange that the special master appeared to be receptive to dismissing Plaintiff Appellees' suit on this basis, undersigned counsel corresponded with the special master on September 21, 2012 indicating that his clients continued to maintain their position on the sufficiency of the evidence they intended to offer to meet their burden of proof, as expressed during opening statement, but that they were nonetheless prepared to offer evidence *in the alternative* through their expert witness at trial of the estimated minimum costs that would be required for the state to provide the required CEPI activities and services on a statewide basis. It was requested in that correspondence that counsel be permitted to present this offer to the special master before he ruled on the state's then pending motion, 293-294b. As above noted in the Counter Statement of Facts, the special master did not respond to that offer but later the same day, September 21, 2012, issued a form order granting the state's motion for directed verdict and/or involuntary dismissal, dismissing Plaintiff Appellees' suit with an opinion to follow, 158 a.

On September 25, 2012 the special master issued an opinion and order granting the state's motion for involuntary dismissal and/or directed verdict, 159a. The special master made no reference in this opinion and order to undersigned counsel's offer in his correspondence of September 21, 2012.

On September 26, 2012, Plaintiff Appellees filed a motion to amend their complaint and opening statement and to request the special master to reconsider his September 21 and September 26, 2012 orders dismissing their suit, 295-309b Again, Plaintiff Appellees continued to maintain the sufficiency of the proofs earlier offered through their counsel's opening statement, but moved as follows:

> Plaintiffs herby move to amend their complaint and opening statement to plead in the alternative that while it is not possible to prove the specific costs to the State

> using the standard of necessary costs defined in MCL 21.233(6), because the State has never provided the subject CEPI services using its own resources and, resultantly, would necessarily be speculative, the Plaintiffs are nonetheless prepared to prove through testimony of their expert witness an estimate of the minimum necessary costs that the State would incur to provide those services on a statewide basis using its own resources rather than those of the Plaintiff School Districts, as required by MCL 21.233(6). 296b

The special master did not respond or even acknowledge this obviously timely motion to amend the complaint and opening statement. On October 2, 2012 the special master issued his report to the Court of Appeals recommending, *inter alia*, that Plaintiff Appellees' suit be dismissed for the same reason contained in his opinion and order of September 25, 2012, 167a. The special master again ignored in his report Plaintiff Appellees' letter and motion to amend.

The Court of Appeals in its opinion of August 22, 2013 reviewing the recommendations in the special master's report declined to accept his recommendation on this point, 216a. The Court of Appeals held that the determinative costs for purposes of enforcing the POUM sentence of §29 are the "actual costs" that the state would incur if it provided the required CEPI services as specified in MCL 21.233(6). Thus the court found that the resulting burden of proof to establish whether the monies appropriated and being disbursed to fund those costs is sufficient to fully fund them falls on the state because of its superior knowledge of how it would provide these services and what costs it would incur in doing so, 219-222a.

Regardless, if this Court were inclined to accept the state's argument that the burden of proving the costs which are required to be paid to local units of government under the POUM sentence falls on Plaintiffs, this Court should be aware that Plaintiffs made the offer before the special master, in the alternative, to provide evidence to establish an estimate of the costs that the state would minimally incur if it provided these services in order to meet its burden of proof. Proof of such an estimate is the only evidence that could be produced by Plaintiff Appellees

given the undisputed fact that the state, acting through its various departments or agencies, has never provided such services since the inception of CEPI. Accordingly, such proofs would necessarily be based on estimates, taking into account the myriad tasks required to comply with CEPI requirements imposed on schools and the costs the state would incur in doing so. This is the only alternative manner of proving these costs available to Plaintiff Appellees which respects the costing standard expressly specified in MCL 21.233(6). This statute is the manifestation of the Legislature carrying out its responsibility delegated by the people of Michigan in §34 of the Headlee Amendment.[40] There, the Legislature was directed that it "*shall implement*" the provisions of the Headlee Amendment. They did so in MCL 21.233(6).

Finally, it must be noted that Plaintiffs sought discovery to determine whether any consideration was made by the state of the costs that it would have incurred if it were to use state resources, staff, supplies, etc., in order to achieve compliance with CEPI requirements as required by MCL 21.233(6). This effort to learn the Legislature's prescription for determining the relevant costs was prevented by the state's counsel's motions, objecting to permitting discovery of knowledgeable state employees on those issues. In the early stages of discovery the state was informed that the Plaintiff Appellees sought to take the depositions of the Defendant State Superintendent of Public Instruction and representatives of the House and Senate fiscal agencies that had prepared the analyses of the appropriation legislation to learn, inter alia, whether any attempt was made during the course of quantifying the appropriation legislation, MCL 388.1752a(1), to quantify the "necessary costs' that the state would incur if it provided the CEPI services, 44-49b However, the state asserted executive privilege relative to the testimony of the State Superintendant, MCR 2.302C, and legislative privilege relative to the testimony of

40 Const 1963, art 9, § 34.

Fiscal Agencies' representatives, Const 1963, art 4, §11, as precluding those depositions. The special master agreed, quashing those deposition subpoenas, 52-53b

Thus, the CEPI representatives who prepared the cost study, relied upon by the Legislature in making the appropriations –the only state representatives available to Plaintiffs for discovery purposes-, testified that they did not attempt to consider the costs that the State would incur if it were to provide CEPI services.[41] However, the special master precluded testimony from the State Superintendant (who would presumably have some knowledge of whether such a cost estimate was attempted) and the representatives of the Fiscal Agencies (who prepared fiscal analyses for these appropriations by the Legislature). The preclusion of testimony from these witnesses' means Plaintiffs were left with the information learned from the deposition of the CEPI staff which confirmed that no attempt was ever made to analyze and apply the costs the state would incur in achieving CEPI compliance in arriving at the amount of the appropriations.

The Lack of Support for State's Burden of Proof Arguments

The state refers in its present Brief on Appeal to the Headlee cases of *Oakland County v State of Michigan*, 456 Mich 144, 164-165; 566 NW2d 616(1997) and *Schmidt Dep't. of Ed.*, 441 Mich 236, 250; 490 NW2d 584 (1992) as supporting its contention that this Court has "consistently" applied the burden of proof for which it presently argues in MOS cases under §29. This is inaccurate. In *Oakland County,* the Court did not discuss or consider the plaintiffs' burden of proof necessary to establish their claims of MOS underfunding. The issues in that case were reviewed in the context of the state's summary disposition motion below. While the Court refereed to the elements necessary to be established in a MOS case[42] and referred to the

41 Deposition testimony of the Director Of CEPI, Thomas Howell, 8-11b.

42 *Oakland County v State, supra* at 151.

provisions of MCL 21.233(6), it made no attempt to discuss the application of the latter to the former. The Court remanded the case to the trial court for an evidentiary hearing.[43] Thus, this decision does not support the proposition that this Court ruled that a local unit of government must meet the burden in a MOS case of proving the specific, quantifiable costs they incurred to provide the mandated services rather than the state proving the costs it would incur in providing those services in conformance to MCL 21.233(6).

Similarly, in the *Schmidt* case the Court considered the issues on appeal in the context of a summary disposition ruling below dismissing plaintiffs' MOS claims. The Court did not refer to the burden of proof question raised by MCL 21.233(6): in fact it is not even referenced in the Court's opinon. Rather, the decision deals with the proper method of analyzing the state's funding responsibility under the MOS sentence of §29. It is entirely disanalogous to the question presently before this Court. The state's reference to the case of *Adair v Michigan*, 279 Mich App 507, 513; 760 NW2d 544(2009) in making the argument that the *Oakland County* and *Schmidt* cases support its interpretation of the burden of proof requirements similarly provides no support for its contention. That reference to the Court of Appeals' 2009 *Adair* decision simply is to the need to "quantify" the costs that schools' incur in complying with a mandate in a MOS case. However, the court did so without any attempt to discuss which party has the burden of proving those costs and how those costs should be quantified given the requirements of MCL 21.233(6): the questions of law presently at issue.

The point is, straightforward, that this question of law has not been previously decided by this Court or the Court of Appeals under either the MOS or the POUM sentences of §29, until the 2010 *Adair I* decision. The state's assertions to the contrary are groundless.

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43 *Oakland County v State, supra* at 165.

What is particularly missing in the state's argument in its present brief is the fact that it takes no account of the provision of MCL 21.233(6) requiring the costs to the state "shall be" the costs which must be used to quantify the state's compliance with its funding responsibility under §29. It is as though this §29 implementing statute is to be disregarded by this Court out of hand. No basis for doing so is provided in the opposing argument. Indeed, even if prior cases supported the state's position, arguendo, Plaintiff Appellees contend that would supply no reason for sustaining those holdings in the face of this clear statutory language. Conversely, those purported MOS decisions do not involve an analysis of the burden of proof implications of MCL 21.233(6). As such, they provide no support whatsoever for ignoring this statutory directive enacted by the Legislature in 1979, less than one year after the voters ratified the Amendment and as recognized by this Court's analysis of this issue in the 2010 *Adair I* decision.

Similarly, the state makes no attempt in its present argument to explain whether the costs it contends are required to be proven by Plaintiffs are the costs that Michigan schools have incurred in complying with this state mandate or whether Plaintiffs must establish the costs the state would incur if it provided the mandated services. Indeed, if it is the latter, no explanation is provided as to how Plaintiffs would meet the degree of specificity necessary to achieve recovery where the state has never provided CEPI services and thus those proofs would, necessarily, be entirely speculative. In the proceedings before the special master the state contended that the relevant costs are the costs incurred by school districts' statewide. Given that this provides no deference to the prescription for the relevant cost set forth in MCL 21.233(6), the state builds its argument by amorphous references in its opposing brief of simply the Plaintiffs' need to carry the burden of establishing the "actual, specific, verifiable" costs of complying with CEPI mandates *without identifying which party's costs.* This is, transparently, to avoid the

inconvenient necessity of explaining to this Court how to rationalize the prescription of MCL 21.233(6) in the burden of proof context.

Lacking any support for placing responsibility on Plaintiffs in this case for establishing the exact amount of costs that have been underfunded, the state refers to a series of decisions of this Court which support the proposition that if a litigant claims to have been wrongfully under paid or suffered lost profits, that litigant bears the burden of proof to establish the specific amount of its claim or its claim fails, at pp 21-24. This argument is made without any attempt to discuss anything in those cases which is analogous to the specificity of MCL 21.233(6) applicable in the present case. Nor does the opposing argument explain why this burden of proof would apply in a declaratory judgment case where money damages are not in issue. These authorities simply do not support the state's argument.

2. WHAT ELEMENTS OF PROOF ARE NECESSARY TO SUSTAIN SUCH A CLAIM?

Plaintiffs' answer to this question, posed by the Court in granting leave, is directly intertwined with the analysis set forth above. Consistent with that analysis, Plaintiff Appellees submit that they have the initial burden of proving in a POUM case involving some state funding being provided that:

A. State government is requiring by state law, adopted after 1978, local units of government to provide new or expanded activities and services which entail necessary costs being incurred by those local units,

B. The Legislature has provided an appropriation to fund the necessary costs incurred by local government to provide those activities and services,

C. The necessary cost that local governments are incurring to provide these activities and services are in excess of the amount appropriated and being disbursed by the Legislature to pay the local units for the net costs they are incurring, and

D. The net costs which each local unit of government is incurring in order to provide the required activities and services are greater than $300.

At that point, it is submitted that state government would have the burden of proof to establish either that:

A. State government is not required to pay for the necessary costs for the required activities and services in issue because the new or increased level of the activity or service do not result in increased net costs to local units of government or that those net costs are less than $300 per claim, or

B. Any costs incurred by local units of government are not "necessary" within the meaning of MCL 21.233(6) because the actual costs to the state if it were to provide the activities and services mandated or required by state law are equal or less than the amount appropriated and being disbursed to pay the affected units of local government for the costs they are incurring to provide those required activities and services.

The foregoing relies directly on the provisions of the POUM sentence of §29, the implementing provisions of the POUM sentence found in MCL 21.233(6) and MCL 21.232(4), and, in pertinent part, this Court's interpretations of the respective parties' burden of proof derived from these combined Constitutional and statutory provisions in the 2010 *Adair* decision.

3. WHETHER ACCEPTANCE OF A GENERAL APPROPRIATION FROM THE LEGISLATURE WHICH IS SPECIFICALLY CONDITIONED ON COMPLIANCE WITH REPORTING REQUIREMENTS PURSUANT TO MCL 388.1622b(1)(C) WAIVES ANY CHALLENGE TO THE FUNDING LEVEL FOR THOSE REQUIREMENTS UNDER CONST 1963, ART 9, §29?

The most fundamental point of §29 is that the voters intended that local units of government should be made whole either proportionally (under the first or MOS sentence) or totally (under the second or POUM sentence) for any costs incurred in complying with post 1978 state mandates. In the case of mandates imposed, as here, after 1978 the funding required is *full state financing.*[44] Stated differently, the voters' intended that local units of government are to be

44 See Const 1963, art 9, §25: "The state is prohibited from requiring any new or expanded costs by local governments without full state financing ..."

made whole financially from the costs of state mandates under the POUM sentence. The voters' objective isn't any more complex than that.

The corollary intent of §29 is to make state government financially and politically responsible for the costs it imposes on local units of government if it decides that mandated services are necessary to be provided by those local units. The intent was to bring to a stop the voters' perceived propensity of state government to mandate services to be provided by local government without any accountability for the financial consequences visited on them. By *not* including §29 in the Headlee Amendment, state government would be limited by the other sections of the Amendment from raising taxes without a vote of the people but would continue to be able to force local government to either absorb the costs associated with new or increased state mandates, to the detriment of existing local public services, or to, inevitably, cause local government to seek local voters' approval of tax increases to make ends meet for the costs of state caused new or expanded services. This would obviously frustrate the Headlee voters' intent. Indeed, preventing this from occurring at the state/local level was the *raison d'être* for including §29 in this voter initiative. This Amendment was a tax limitation initiative. It was instigated by the proponents of the Amendment and solidly approved by Michigan voters. This initiative was, most certainly, not promoted by state officials in office at that time, nor, obviously, is it particularly favored today in its application as the record in this case vividly demonstrates.

What the state's present argument seeks to do is to entirely circumvent the basic concept referred to above by exploiting the vulnerability of school districts that is the result of the fact, long present in education funding in Michigan, that while K-12 educational services are provided locally, the vast majority of money necessary to operate public schools is, by design, provided by appropriations enacted by the Legislature. This inherent susceptibility of local schools to revenue

diversion by state government was explored by this Court in a §29 Headlee decision rendered in 1985. Before the voters' adoption of Proposal A in 1994, funding was provided to schools by a formula that provided school operating monies depending on the relative wealth of school districts as reflected in the revenues capable of being raised from their tax base; the so-called Bursley funding law.[45] Under that Act, the less well funded school districts received, via appropriations, what was referred to as "in formula" state aid. See *Schmidt, supra* at 44-45. These monies could be expended for any general operating purpose at the discretion of schools' boards of education. See *Id.* Additional funding was provided to schools for "categorical" services." See *Id.* at 34 n 5. Categorical funding was, and is today, restricted monies that can only be used by schools for a legislatively designated, or "categorical," purpose. *Id.* Funding for "out of formula" school districts consisted of categorical revenues and revenues raised from levying property taxes. See *Id.* at 44-45. These were the sources of funding available to schools from 1973 through 1993. See *Durant v State*, 238 Mich App 185, 195-196; 605 NW2d 66 (1999) (On Remand).

This Bursley statutory mechanism was changed by the voters' approval of Proposal A in 1994.[46] The concept significantly changed the funding concept such that, with a limited exception,[47] it required schools to entirely rely upon state provided funding in the form of aid "for discretionary nonmandated payments to districts." MCL 388.1622b(1). The source of the revenue for the state to make these state aid payments to schools is the 6 mill levy on all taxable

45 The legislation was formally known as the Gilbert E. Bursley School District Equalization Act, enacted in 1973. See *Board of Ed of Oakland Schools v Superintendent of Public Instruction*, 401 Mich 37, 39; 257 NW2d 73 (1977).

46 See http://senate.michigan.gov/sfa/Publications/JointRep/FINPROPA/95COMP.HTML (accessed March 27, 2014), for a more complete description.

47 A small number of public school districts, 42 out of 558, retained the right for a limited period of time to levy a limited amount of property taxes for general operating purpose under Proposal A. See footnote 46 id, *supra*.

property in the State and a portion of state sales tax receipts. See *Durant,* 238 Mich App at 196. Categorical aid continues in place.

The legal issue presently before the Court was a subject of argument in one of the early §29 Headlee decisions, *Durant v State Bd. of Educ.*, 424 Mich 364; 381 NW2d 662 (1985). A question considered by the Court in that case, *inter alia*, was whether state government can make use of funding provided to in formula schools for general operating purposes to make up for or apply to meet its responsibility to pay schools for the costs of mandates services required under §29 of the Headlee Amendment. The services in question were special education services required to be provided by the School Code of 1976, MCL 380.1751, *et seq*. This issue of law was decided in the context of the MOS' sentence of §29 rather than the POUM sentence, but it nonetheless concerned the voters' intent as to a permissible source of funding for state government to meet its payment responsibility under §29 of the Amendment. Plaintiff Appellees submit the Court's ruling has the same application under both sentences because each, while requiring different proofs due to differing triggering causes, involves the duty of state government to pay, either in part or full, for the costs of services it mandates. At issue in that appeal was the state's argument that external sources of revenue, then being provided to Michigan schools for other purposes than to meet its §29 funding obligation should apply to offset whatever amount may be due to schools from the state in order to meet the minimum proportion of costs (i.e. existing 1978 proportions of funding) for mandated special education services under the MOS sentence of §29. *Durant,* 424 Mich at 371.

There were two revenue sources to which the state referred in making this argument. The first source involved unrestricted state aid provided to in-formula school systems under the then applicable Bursley funding system. The state argued that it was entitled to have the unrestricted

revenues provided to in formula schools credited to its minimum funding obligation for the costs of mandated special education services under §29. *Durant,* 424 Mich at 378. At that time, the proportionate amount required to be funded by the state to pay for special education services at 1978 levels of funding had yet to be established.[48] The state's argument was that monies provided to in formula schools for general operating purposes should be available to meet the state's §29 Headlee responsibility to minimally maintain at 1978 levels funding for the proportionate costs of special education services. See *Durant*, 424 Mich at 383, 392.

The second source of revenue that the state argued should serve to offset its §29 funding obligation was federal monies provided to support special education services.[49] The state's argument was that federal dollars for special education services were fungible and, moreover, were provided specifically to fund special education services.

There was statutory support for these arguments. The state relied upon a provision in the 1979 Headlee implementing legislation at MCL 21.233. The provision the state relied upon expressly permitted the reduction of the state's funding obligation under §29 for required services by permitting the use of "federal or state categorical programs or other external financial aid", MCL 21.233(6)(d), to offset the state's required payments under §29. This subsection is referred to in the Court's opinion simply as "§3(6)(d)." *Durant*, 424 Mich at 391. The State argued that in formula funding was "other external financial aid" and the federal monies were provided pursuant to a "federal … categorical program." *Id.*

48 *Durant* was presented to this Court in the context of a motion for summary judgment brought by the Defendant State in lieu of an answer following the original filing of Plaintiffs' complaint. *Durant*, 424 Mich at 370-371.

49 Federal funding was provided in 1978 pursuant to an act then known as Education for All Hadicapped Children Act of 1974. PL 94-142. That Act was later amended by Congress and is now known as The Individual with Disabilities Education Act ("IDEA"), 20 USC §1400, *et seq.*

In a unanimous decision, this Court rejected the state's argument holding this provision of the §29 implementing statute to be unconstitutional as applied. The Court stated:

> Plaintiffs and defendants in *Durant* agree that the state is using this provision [§3(6)(d)] to reduce the amount of "categorical aid" to some school districts, requiring them to make up the difference through the use of other outside funding, such as unrestricted aid. Plaintiffs claim that this is a direct violation of art. 9, §29. Defendants again assert that this is proper under the legislative interpretation of the term "necessary costs."
>
> We agree with plaintiffs that, used in this manner, §3(6)(d) clearly violates the intent of the Headlee Amendment. The amendment unambiguously forbids state reduction of the proportion of state aid below the 1978-79 levels for specific requirements imposed by statute or state agency rule. Therefore, to the extent that it is used to reduce categorical aid below the proportion paid by the state in 1978-79, we find § 3(6)(d) unconstitutional as applied. The state may not avoid the clear requirements of art. 9, §29 either by specific statute or by implementation of definitions adverse to the mandate of the people. *Durant*, 424 Mich 391-92.

In other words, the *Durant* Court held that to satisfy the state's §29 funding obligation the Legislature must appropriate and disburse funding *dedicated to paying the costs of the mandated services*, and without resort to other available unrestricted funding available to those local units to defray their general operating expenses or federal funding. This intent is conveyed through the words used in the first sentence of §29 combined with the following words in the second sentence of §29, "unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs." *Durant,* 424 Mich at 377.

If the state can shift money around from existing operating or unrestricted resources of the impacted local government, it has the means to circumvent the voters' intended control. That control is to require the Legislature to assess, when proposed requirements on local government are being initially considered, whether state government has sufficient state resources to pay for those additional costs. If it does not, then the requirement should not be imposed within the intent of the voters' ratifying §29. If the Legislature determines that the state has available

revenues for this purpose then it may impose the requirement subject to appropriating and disbursing the money necessary to pay for those added costs. This fiscal discipline is one of the fundamental reforms of the Headlee Amendment. Through the 1985 *Durant* decision, this Court made it clear that it will "enforce" this fiscal discipline.

Most noteworthy, the Legislature in the present instance has in fact appropriated categorical funding for CEPI services in MCL 388.1752a(1). Categorical funding is how the required §29 reimbursements is supposed to be provided to school districts, wholly apart from appropriations for general operating costs of schools. The Court unmistakably decided this point of law in the 1985 decision in *Durant*.

Tacitly recognizing that the amount of the proposed supplemental appropriation considered in December of 2010[50] was, charitably, a slap dash cost number put together by CEPI in quick response to the 2010 *Adair I* decision, the Legislature – rather than developing a cost analysis taking full account of what costs the state would incur if it provided the activities and services– resorted to creating a financial backstop for §233(6) by referring in the School Aid Act to well over $3 billion in annual funding for schools' "discretionary non-mandated" operating purposes, MCL 388.1622b(1).[51] Through this scheme, the Legislature is attempting to treat those "discretionary non-mandated" appropriations as if they are available to be plugged into the required §29 CEPI appropriation, in order to make up for any underfunding that exists from the categorical appropriation expressly intended to fund CEPI costs, MCL 388.1752a(1). What was expressly appropriated for "*nonmandated*" purposes thereby becomes through this legislative

50 2010 PA 110.

51 $3,53,500,000 for the 2010-11 school year, 2010 PA 110; $3,032,300,000 for the 2011-12 school year. See 2011 PA 299.

mechanism a categorical resource under subsection 3(c) for *mandated* funding purposes.[52] This is the Legislature's sense of complying with §29 of Headlee. It is doing so in disregard of this Court's 1985 ruling in *Durant* against using creative, self serving legislation, i.e. legerdemain, to circumvent its funding responsibility under §29.

Moreover, using that abundant dollar resource intended for funding statewide general school operating expenses, appropriated under 388.1622b(1), it cannot be missed that the state would effectively circumvent ever paying anything for CEPI costs (or for that matter virtually any other costs for mandates imposed on schools), regardless of how those costs are calculated. Certainly, the billions of dollars in revenues appropriated to pay for the general operating costs of school systems statewide dwarfs the costs necessary to singularly pay for mandated CEPI costs.

It is critical to note that the central point of the state's argument – both in 1985 in *Durant* and now – is that there should be no cost implications to the state's budget relative to school funding as a result of §29 of the Headlee Amendment. This argument is made despite the fact that the source of the problem is the decision by state government to impose requirements without first appropriating and disbursing revenues to pay for the costs of the CEPI requirements when they were initially imposed. It is as though the people of Michigan, voting for this change in how their government should operate fiscally, using words unmistakable in conveying their purpose, did not intend what was stated in the words used in §29 of the Amendment.

For example, the state's argument would infer that the opening words in the first sentence of §29 "[t]he state is hereby prohibited from reducing the state financed proportion" and the

52 MCL 388.1622b(3)(c) provides that in order for a district to receive its allocated "discretionary nonmandated payments" as provided in subsection (1), "each district shall ... [f]urnish data and other information required by state and federal law to the center [CEPI] and the department in the form and manner specified by the center or the department, as applicable."

words used in the second sentence of §29 that new activities and services shall not be required of local units "unless a state appropriation is made and disbursed to pay the unit for any necessary increased costs" really did not intend to have the state *actually* pay for the necessary costs of mandated services. The state's argument invites the Court to hold that the voters' intent in §29 was to tolerate financially meaningless shifting of dollars at no cost to the state government's budget priorities. They posit that the added costs of state mandates may be borne by local units rather than the state at the Legislature's option exercised during the appropriation process.

The State's position is disingenuous on its face because it renders utterly meaningless the expressed intent of the Michigan voters who adopted this section of the Amendment.[53] In short, the State would require schools to bear the costs of this mandate from their general operating budgets in full disregard of the voters' manifest intent under §29.

4. THE STATE'S SEPARATION OF POWERS ARGUMENT

The State presents an argument that involves the separation of powers clause of the Constitution, Const 1963, art 3, §2. However, that argument was never presented for decision to the Court of Appeals or the special master during the proceedings below. Accordingly, the argument was not considered or decided below. As such, this argument was not preserved for appeal. This occurred despite ample opportunity for the state to raise this issue and secure a decision below. But, it did not do so.

Plaintiffs also would stress in the context of the separation of powers clause that they are *not* asserting that the declaratory judgment they are seeking should direct the Legislature to

53 "Under well-established principles, constitutional provisions are to be construed in the light of the purpose sought to be accomplished thereby, and in such manner as to reasonably accomplish such purpose.... Resort may be had to the same general principles that are applicable in the interpretation of statutes." *Board of Education of City of Detroit v Elliott*, 319 Mich 436, 447; 29 NW2d 902 (1947). Under those principles, "a reviewing court should not interpret a statute in such a manner as to render it nugatory." *Apsey v Memorial Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). "A statute [or constitutional provision] is rendered nugatory when an interpretation fails to give it meaning or effect." *Id.*

appropriate funding to remedy the underfunding which they are prepared to demonstrate to be occurring through their above discussed evidence. Indeed, as earlier noted, that is exclusively within the Legislature's purview under the Constitution. Rather, Plaintiffs seek a declaratory judgment ruling that the appropriation made by the Legislature materially underfunds the mandated CEPI services, based on the evidence to be presented, and thereby violates the funding requirements of §25 and §29 of the Headlee Amendment. This is because the Court of Appeals' responsibility under §32 of the Amendment is to "enforce" the provisions of the Amendment At that point, the responsibility to quantify and adopt the required appropriation falls on the Legislature, applying the prescriptions of MCL 21.233(6), so as to fully fund CEPI costs.

Finally, this argument is injected into this appeal gratuitously because it is not a subject for review identified in the Court's February 5, 2014 Order granting leave.

The State's Failure to Preserve the Separations of Powers Issue

The first point that applies to this argument is derived from the state's answer to Plaintiffs' complaint[54] In response to Plaintiffs' following allegation (paragraph 2) "[T]his Court [Court of Appeals] has original jurisdiction of this matter pursuant to Const 1963, art 9, §32." the State responded (paragraph 2), 021a. "Defendants admit that the Court of Appeals has original jurisdiction over claims made to enforce the terms of the Headlee Amendment under Const 1963, art 9, §32.", 13b. This admission is inconsistent with the state's new found argument that the judiciary has no jurisdiction to remedy the underfunding due to the separation of powers concept.

Further, reviewing the state's affirmative defenses discloses no assertion of a separation of powers claim providing the state with an affirmative defense to Plaintiffs' allegations in their

54 The state's answer was denominated "Defendants' Answer to Plaintiffs' Second Amended Complaint and Affirmative Defenses" dated November 10, 2011.

complaint. 34-37b. Indeed, there is no reference anywhere to be found in the state's answers and affirmative defenses to Article 3, §2 or, even more generally, to the separation of powers concept as a basis for a defense.

The state nonetheless asserted in its application for leave to this Court that it preserved this argument before the Court of Appeals prior to the court's August 22, 2013 decision which it is presently appealing. The state claimed to have done so by raising arguments before the special master and the Court of Appeals. Wholly apart from the absence of any basis in the pleadings for such an argument, these references in its application for leave do not support that assertion.

Most telling of the state's failure to preserve this argument, at no point in any of its briefs/arguments below was there any attempt to identify this argument as a discrete issue of law to be resolved by the special master or Court of Appeals. As a result, this supposed constitutional conflict is not even discussed or decided in the respective decisions. One will search in vain in the respective opinions of the special master and the Court of Appeals to find any recognition of the separation of powers clause as being in play in this case. In short, this is a wholly after the fact argument which apparently occurred to the state's counsel when they decided their client's arguments *actually made* to the Court of Appeals leading to its August 22, 2013 decision would be unavailing on appeal to this Court.

The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice." *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). See also *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007), where this Court noted that "[i]ssues raised for the first time on appeal are not ordinarily subject to review."

Issue preservation requirements are designed to prevent a party from "sandbagging." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In order to succeed on appeal, the appellant must address the basis of the trial court's decision. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). The reasons why such arguments *should not* be considered on appeal were explained in *Estate of Quirk v Commissioner*, 928 F2d 751, 758 (CA 6 1991):

> Propounding new arguments on appeal ... [that were] never considered by the trial court ... is not only somewhat devious, it undermines important judicial values. The rule disciplines and preserves the respective functions of the trial and appellate courts. If the rule were otherwise, we would be usurping the role of the first-level trial court with respect to the newly raised issue rather than reviewing the trial court's actions. By thus obliterating any application of a standard of review, which may be more stringent than a *de novo* consideration of the issue, the parties could affect their chances of victory merely by calculating at which level to better pursue their theory. Moreover, the opposing party would be effectively denied appellate review of the newly addressed issue.... In order to preserve the integrity of the appellate structure, we should not be considered a "second shot" forum, a forum where secondary, back-up theories may be mounted for the first time.

The State has manifestly not preserved this issue for appeal

The Lack of Merit to the Separation of Powers Argument

In response to this argument on the merits, Plaintiffs would again point to the fact that it is not requesting the Court of Appeals in this §32 suit to direct, whether through a declaratory judgment or otherwise, that an appropriation be made by the Legislature in order to comply with funding requirements of §29. Concededly, the power to appropriate is within the sole discretion of the Legislature under Const 1963, art 4, §31. Rather, Plaintiffs seek the remedy of declaratory judgment finding that the appropriations made through MCL 388.1752a(1) violate the state's duty under §25 and §29 of the Headlee Amendment to fully fund CEPI costs. In so declaring, the Court of Appeals will be enforcing the Amendment as expressly required under §32.

As should be plainly apparent from this description of the remedy sought, there can be no violation of the separation of powers clause by the court complying with its enforcement responsibility under §32. That clause requires in part that "[n]o person of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution." Thus, the Court of Appeals by following §32 is exercising its power/responsibility "to enforce" that express provisions of §29 of the Constitution, whereas the legislature reserves its power under the Constitution to appropriate (or not appropriate) the funding adjudicated to be required under §29. Simply put, there will be no infringement by the judicial branch of government over the power/responsibility of the Legislative branch that will occur if the remedy sought by the Plaintiffs in this suit is granted.

The state asserts error- a violation of the separation of powers clause- because this approach involves the judicial branch unconstitutionally delving into the methods used by the Legislature to meet its §29 "appropriate" and "pay" responsibilities. Interpreting the Michigan Constitution and statutes is precisely what the judicial branch is supposed to do. "The power of judicial review is one that belongs exclusively to the judicial branch of our government." *Grievance Adm'r v Fieger*, 476 Mich 231, 253; 719 NW2d 123 (2006), citing Const. 1963, art. 3, §2. In this instance, this is even more abundantly appropriate because §32 of the Constitution expressly imposes the responsibility on the Court of Appeals to enforce the provisions of the Headlee Amendment including the Legislature's "appropriate" and "pay" responsibility of §29.

The subject of that sentence is for the Legislature to "appropriate" and "pay" local units of government "for any necessary increased costs" attributable to state mandates. If the state is correct in its assertion that the Judiciary is overstepping its authority by delving into the Legislative methodology during the course of appropriating and paying for the mandated

services which in this case, without dispute, involves reviewing the bases relied upon by the Legislature which doesn't quantify the costs to the state to provide the subject services and, subject to dispute, has not taken into account the full range of services that schools must provide, then the voters' intent through the POUM sentence will be wholly circumvented. This would most surely elevate the separation of powers clause to a level where it serves as a tool to avoid the voters' intended Headlee reform. Taken to the extreme, what would prevent the state, if this argument were to prevail, from simply appropriating a token amount without any analysis of costing data, let alone engaging in an analysis of the costs to the state to provide the mandated services using its resources, as required by MCL 21.233(6)?

What the state is actually asserting through this argument is that it does not like the Court of Appeals' interpretation of §29 in this decision. Under the state's rationale, there is no coherent way of distinguishing between an interpretation that is incorrect, as opposed to one that exceeds the judicial branch's authority. In other words, the state's position would itself violate separate of powers by intruding upon the judiciary's constitutional authority to interpret the Constitution.

The Court of Appeals' August 22, 2013 findings, with respect to the burden of proof, are in accord with well settled principles of constitutional interpretation. When interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification. *Nat'l Pride At Work, Inc v Governor,* 481 Mich 56, 67; 748 NW2d 524 (2008). "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law." *Id.* To clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the

purpose sought to be achieved. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

CONCLUSION

One case stands out on the importance of adhering to the words/concepts appearing in the Constitution, even in the face of an otherwise undesirable result. That case is *The People on relation of Daniel S Twitchell v Amos Blodget*, 13 Mich 127 (1865). The subject of that case was a statute adopted during the Civil War (1864) which permitted soldiers on active duty in the field to vote in township elections wherever they were stationed. Three of the four sitting Justices concluded that the then Michigan Constitution required the physical presence of the elector within his township of residence in order for his vote to be counted. As events occurred, an election for the Washtenaw County prosecutor hinged on whether the soldiers' votes were lawfully casted. The obvious equities were with permitting the soldiers' votes to be counted when casted in the field in light of their sacrifices in serving during the war. Justice Campbell identified in the lead opinion the Court's responsibility where such a conflict is presented:

> [The Constitution] proceeds from the people in their original capacity, as the source of all power in the government. *Their will being the supreme law, and only to be found in the constitution which they ordain, must be fairly and cheerfully enforced according to its terms, and no attempt should be made to evade or defeat it.* The constitution... depends for its force entirely upon the popular vote. Being designed for the popular judgment, and owing its existence to the popular approval, *its language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice.* We are not to speculate how the people would have acted under other circumstances, or whether they would have bound themselves in the same way, had their minds anticipated the future. We must only determine how they saw fit to act with their sober judgment, taking upon themselves such consequences as their action might bring forth in the future. *The constitution is eminently a popular instrument, binding according to its terms, and requiring for their interpretation such rules as will not warp its sense from what its language shows it probably appeared to those who adopted it. Id.* at *8 (Emphasis added).

The majority of the Court accordingly ruled that the soldiers' votes could not be counted because the 1864 statute was unconstitutional.

The voters' intent through §29 of the Headlee Amendment, while arguably to some as being too restrictive on state government, is nonetheless unmistakable. They intended that local government should be made whole when state government mandates that they provide costly services. That is what Plaintiffs seek to achieve through this suit. Partial payments, such as what has been attempted in the present case, do not suffice in meeting the voters' manifest intent.

Respectfully submitted,

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