

STATE OF MICHIGAN
IN THE SUPREME COURT

DETROIT ALLIANCE AGAINST THE RAIN
TAX, a voluntary unincorporated association, and
DETROIT IRON AND METAL CO., AMERICAN
IRON & METAL CO., MCNICHOLS SCRAP IRON
& METAL CO., MONIER KHALIL LIVING
TRUST, and BAGLEY PROPERTIES, LLC,
individually, and on behalf of similarly situated
persons,

Plaintiffs-Appellants,

v.

CITY OF DETROIT, a municipal corporation,
the DETROIT WATER AND SEWERAGE
DEPARTMENT, and the DETROIT BOARD OF
WATER COMMISSIONERS,

Defendants-Appellees.

Supreme Court
Case No. _____

Court of Appeals Case
No. 339176

**DAART PLAINTIFFS'
APPLICATION FOR
LEAVE TO APPEAL**

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SUSAN MCDONALD, GOAT YARD, LLC,
Individually, and on behalf of all others similarly
situated, and END OF THE ROAD MINISTRIES,
INC., a Michigan Nonprofit Corporation, Individually
and on behalf of all others similarly situated,
Plaintiffs,

-v-

CITY OF DETROIT, a municipal corporation, by
itself and through its WATER AND SEWERAGE
DEPARTMENT, its agent, the DETROIT BOARD
OF WATER COMMISSIONERS and GREAT
LAKES WATER AUTHORITY,
Defendants.

Court of Appeals
Case No. 337609

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS COMMITTED CLEAR AND SERIOUS ANALYTICAL ERRORS PRESENTING QUESTIONS OF SUBSTANTIAL PUBLIC INTEREST AND IMPORTANCE TO THE STATE'S JURISPRUDENCE THAT WILL RESULTING IN MANIFEST INJUSTICE TO MICHIGAN TAXPAYERS BY IMPAIRING THE VOTER APPROVAL REQUIREMENT OF MICH CONST 1963, ART 9, § 31, WHEN IT:

- A. Specifically relied on reasoning in a pre-*Bolt* federal decision that was repudiated after this Court's Decision in *Bolt* to uphold the 2016 Rain Tax's exemption for City-owned streets.**
- B. Misapplied the regulatory purpose prong of the *Bolt* test when it incorrectly distinguished *Bolt* and *Jackson* on the ground that this case involved "a significant regulatory component ... absent" in those cases.**
- C. Incorrectly found that the 2016 Rain Tax was not disproportionate to the benefit conferred or the cost of the service to those who are subject to it, and was not adopted to supplement diminished revenues.**
- D. Ignored strong evidence that serial circuit court class action settlements are being used to circumvent and nullify § 31.**
- E. Incorrectly applied utility rate-making principles to uphold the City's ad hoc "phase-in" adjustments of the Rain Tax, which demonstrated that the rates charged are not proportional to the cost of rendering (or the benefit conferred by) the service.**

**The Court of Appeals denied all relief, and presumably would say, "No."
Defendants-Appellees City of Detroit, et al., presumably say, "No."
Plaintiff-Appellant DAART says, "Yes."**

STATEMENT IDENTIFYING THE JUDGMENT AND ORDER APPEALED

Plaintiffs-Appellants are the Detroit Alliance Against the Rain Tax, Detroit Iron and Metal Co., American Iron & Metal Co., McNichols Scrap Iron & Metal Co., the Monier Khalil Living Trust, and Bagley Properties, LLC (collectively, “DAART”).¹

Defendants-Appellees are the City of Detroit, the Detroit Water and Sewerage Department (“DWSD”), and the Detroit Board of Water Commissioners (“the Board”) (collectively, “the City”).

DAART timely² seeks leave to appeal from the unpublished November 6, 2018, Opinion per curiam (“Op.”), Ex 1, and Order of the same date, Ex 2, that the Court of Appeals entered in the original action DAART brought on July 11, 2017, in the Court of Appeals pursuant to the Headlee Amendment,³ Court of Appeals Case No. 339176. DAART challenged the

¹ DAART and the City stipulated to substitute these named plaintiffs for those originally named, and to add an additional named plaintiff, Belmont Shopping Center, LLC, because the original named plaintiffs were included in the class definition in the *Michigan Warehousing* settlement, as discussed within. See Ex 1, Court of Appeals Opinion of November 6, 2018, at p 2 n2; Exs 32, 33, and 34.

² See MCR 7.305(C)(2)(a) (“the application must be filed ... within 42 days in other civil cases ... after: (a) the Court of Appeals order or opinion resolving an ... original action...”). This application is filed within 42 days after the Court of Appeals issued its November 6, 2018 Opinion and Order.

³ Mich Const 1963, art 9, § 32, confers original jurisdiction on the Court of Appeals over claims based on the Headlee Amendment:

Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

See also MCL 600.308a(1) and (2):

constitutionality of the storm water charge the City first imposed on the 22,000 Detroit parcels subject to it on October 1, 2016 (the “2016 Rain Tax”).

INTRODUCTION

Five serious departures by the Court below from the analysis prescribed by settled decisions to distinguish a fee from a tax are likely to have serious consequences in pending and future cases seeking to enforce the Headlee Amendment’s requirement that voters approve any new or increased tax. Though the decision below is unpublished, as a practical matter, it will have precedential effect in several pending and all future cases that challenge storm water fees,

(1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.

(2) The jurisdiction of the court of appeals shall be invoked by filing an action by a taxpayer as plaintiff according to the court rules governing procedure in the court of appeals, MCR 2.112(M) and MCR 7.206(E).

Mich Const 1963, art 9, § 31 pertinently provides:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. ...

The limitations of this section shall not apply to *taxes* imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. (Emphasis added).

particularly in cities that, like Detroit, have combined sewer systems. As discussed within, such claims are being brought and settled in the circuit courts without ever receiving appellate scrutiny. In the process § 31 of the Headlee Amendment is being rendered a dead letter by opportunistic settlements providing little relief to the class supposedly benefited, but barring them forever from challenging storm water fees under the Headlee Amendment.

This case is one of the increasingly rare original actions in the Court of Appeals authorized under the Headlee Amendment, so the decision below has undergone no automatic appellate review for the correction of error, which is the underpinning of the usual rule that it is not this Court's function to correct error. When, as here, an important constitutional right is involved, the errors below are so obvious and numerous, and the immediate and future consequences of those errors are so foreseeable and consequential, DAART submits that this Court should temper its usual reluctance to review Court of Appeals decisions, because in this case that Court did not perform its usual function of correcting error; rather, it committed error in the exercise of its original jurisdiction. To the writer's knowledge, no Court of Appeals decision in an original Headlee action has gone unreviewed by this Court. This should not be the first, particularly when, as the arguments within suggest, the decision below reflects an alarmingly uncritical and startlingly incorrect interpretation of the selected portions of the record on which it is based.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

DAART'S CLAIM

This is a class action under the Headlee Amendment ("Headlee"), Mich Const 1963, art 9 § 31 ("§ 31"), in which DAART alleged that the City's 2016 Rain Tax is unconstitutional under § 31 and the test announced in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998) ("*Bolt*"). As the *Bolt* Court observed, 459 Mich at 161, determining whether a storm water charge is properly

characterized as a fee or a tax “requires consideration of several factors,” no single one of which is determinative. *Id.*, 459 Mich at 167 n16 (“the criteria we have articulated are not to be considered in isolation.”).⁴ Generally, a “fee” is a payment “exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.” A “tax,” on the other hand, is an exaction imposed primarily for public rather than private purposes. Revenue from taxes inures to the benefit of all, while exactions from a few for benefits that inure only to the persons or group assessed are fees. *Id.* Based on these general principles, drawn from its past decisions, *Bolt* articulated a 3-part test providing criteria for distinguishing a fee from a tax:

A Fee Must Have a Regulatory Purpose: The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Id.*

The Amount of a Fee Must Be Proportional to the Cost of the Regulatory Activity or Service It Funds: A second, but closely interrelated, criterion is that a fee must be proportionate to the necessary costs of rendering the regulatory service. To be sustained as a regulatory fee, the exaction must fund the cost of the regulatory service to those subject to the fee, rather than generating revenue to fund activities for the common good. A charge that is proportionate to the cost of regulating the activity to which it applies will be upheld as a fee: “Generally, a ‘fee’ is “exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.” *Id.*

⁴ “[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee.” *Graham v Kochville Twp.*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

A Fee Has an Element of Volition: The third criterion, “voluntariness,” requires that one who does not wish to incur the charge must be able to avoid it by refraining from the activity regulated, or by not availing oneself of the service. Just as water rates “are nothing more than the price paid for water as a commodity,” and “no one can be compelled to take water unless he chooses, ... the same reasoning ... should be applied to sewage drainage charges.” *Bolt*, 459 Mich at 162, quoting *Ripperger v Grand Rapids*, 338 Mich. 682, 686 (1954) (“The distinguishing factor ... was that the property owners were able to refuse or limit their use of the commodity or service.”).

RELATED PROCEEDINGS BEFORE DAART FILED ITS COMPLAINT

Binns, et al. v City of Detroit, et al., CoA Case No. 337609, an original action challenging under § 31 the same Rain Tax that DAART organized to challenge, was filed on March 27, 2017. Ex 3, Docket Sheet, CoA Case No. 337609, Complaint, entry 1. Proceedings were delayed when plaintiffs in *Binns* moved, on May 3, 2017, to preliminarily enjoin the City from collecting the Rain Tax, *id.*, entry 10, but the Court denied the motion on June 20, 2017. *Id.*, entry 23.

Meanwhile, the City was simultaneously attempting to dispose indirectly of challenges to its storm water charges, including *Binns*, by seeking an *ex parte* modification of the Order requiring the City to remediate effluent discharges from its sewers entered in the 40-year-old litigation in *United States v City of Detroit*, Case No. 77-71100 (ED Mich) (Cox, J.). Ex 4, Order of Dec. 15, 2015. The City asked Judge Cox to amend the Order to exempt the City’s storm water charges and rates from the Headlee Amendment to fortify the meritless “federal preemption” defense it has asserted here, in *Binns*, and in other cases. After requiring the City to spell out in writing precisely what it wanted, Judge Cox denied the requested “relief,” stating that it did not

“appear appropriate or authorized,” and noting that the City sought it without notice to the parties to the class actions challenging the City’s drainage charges. Ex 5, pp 2-3.

PROCEEDINGS AND PROOFS BELOW

As in *Bolt*,⁵ the “proofs” in this case consist of the exhibits attached to the parties’ pleadings and briefs, which the Court below summarized at pages 2-6 of its Opinion. The exhibits pertinent to this application are submitted with it, and are discussed and cited above and within.

DAART filed its Complaint on July 11, 2017, as an original action in the Court of Appeals, pursuant to the Headlee Amendment.⁶ Ex 6, CoA Docket Sheet, Case No. 339176, entry 1.

⁵ As counsel for Alexander Bolt, the undersigned is familiar with the record in *Bolt*. With the exception of a few documents reflecting the charge levied against Mr. Bolt, this Court’s decision in *Bolt* was based entirely on public records and the City of Lansing’s own publications and descriptions of its storm water fee program. No discovery (other than FOIA production) occurred, and no testimony was taken or introduced. MCR 7.206(E)(3)(c) and (d) expressly contemplate that the Court may render a peremptory decision on the pleadings and exhibits if no factual question requires a remand to circuit court for discovery and other proceedings.

⁶ Mich Const 1963, art 9, § 32, confers original jurisdiction on the Court of Appeals over claims based on the Headlee Amendment:

Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

See also MCL 600.308a(1) and (2):

(1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.

(2) The jurisdiction of the court of appeals shall be invoked by filing an action by a taxpayer as plaintiff according to the court rules governing procedure in the court of appeals, MCR 2.112(M) and MCR 7.206(E).

Mich Const 1963, art 9, § 31 pertinently provides:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate

DAART's Complaint challenged the constitutionality of the 2016 Rain Tax the City imposed on 22,000 unmetered Detroit parcels that had never previously been charged for storm water services.⁷ When, despite the Rule 2.113(C)(2)(b) notice in the caption of DAART's complaint that a related action (*Binns*) was pending, the Court of Appeals did not *sua sponte* consolidate the two cases, three events prompted DAART to move for consolidation with *Binns*: (1) Counsel for the City requested, and counsel for DAART granted,⁸ a three-week extension for filing its answer. (2) During that three-week extension, the same counsel representing the City in both *Binns* and *DAART* negotiated a settlement in a pending *circuit court* class action, *Michigan Warehousing, et al. v City of Detroit, et al.*,⁹ which challenged the impervious acreage-based drainage charge that the City first imposed in July 2013 (the "2013 charge"), after it emerged from bankruptcy. *Michigan Warehousing* was brought on behalf of a class comprising only the owners of 12,000 acres of commercial property subject to the 2013 charge. (3) On August 23, 2017, the Court of Appeals issued an order in *Binns*, Ex 10, directing the parties to file supplemental briefs addressing

of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. ...

The limitations of this section shall not apply to *taxes* imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. (Emphasis added).

⁷ Ex 6, entry 1, DAART Complaint, ¶ 1.

⁸ DAART agreed not to file its Brief in Support of its Complaint until August 8, 2017, thereby extending until August 29, 2017, the date for the City to file its Answer. Ex 6, entries 7 and 8.

⁹ Ex 7, Docket Sheet, Wayne County Circuit Case No. 15-010165-CZ (John A. Murphy, J.). Ex 8 is the Stipulated Order Preliminarily Approving the Settlement. Ex 9 is the Settlement Agreement, which was executed on August 31, 2017.

two dispositive issues,¹⁰ which, if decided in the City's favor in DAART'S absence, would effectively dispose of DAART's claim, as well. Over the City's vigorous opposition, the Court of Appeals entered an Order on October 24, consolidating *DAART* with *Binns* and allowing DAART to participate in the supplemental briefing.¹¹

In addition to addressing the two questions posed in the supplemental briefing order, DAART's November 21, 2017, supplemental brief also informed the Court below that the City's August 31 settlement agreement in *Michigan Warehousing* would oust the Court's jurisdiction over the § 31 claims directed at the 2016 Rain Tax challenged in both *Binns* and *DAART*, because it defined the *Michigan Warehousing* class (which had challenged only the 2013 charge, not the 2016 Rain Tax) in the settlement agreement a manner that would preclude them from pursuing their claims.¹²

¹⁰ Whether (1) (as the City nonsensically claimed) the drainage charge (which the City claimed was a *fee*) was exempt from application of § 31 because it was within its exemption for *taxes* authorized by law or charter before Headlee was adopted; and (2) whether the Rain Tax was a tax or a fee. See **Ex 10**.

It was apparent, from the argument they advanced in response to the first question, that counsel for plaintiffs in *Binns* did not grasp a basic feature of § 31 – i.e., that if, as the City alleged, its drainage charge was a *fee*, the City's "affirmative defense" that it possessed "preexisting authority" to impose the 2016 Rain Tax because the City's drainage charge program predated the Headlee Amendment's adoption – was a legal *non sequitur*, because § 31's exemption applies only to pre-Headlee *taxes*.

Ultimately, the Court of Appeals deemed the City's "preexisting authority" defense so meritless that, despite extensive briefing on it from *Binns*, the City (twice), DAART, the GLWA, and amicus Trappers Alley, the Court did not discuss it in its Opinion.

¹¹ **Ex 6**, entries 12, 13 and 19; **Ex 11**, Order of October 24, 2017.

¹² Paragraph 2 of the settlement agreement, **Ex 9**, defines the class to include, "all owners and occupiers of non-residential parcel-based real property who or which were billed and/or paid the Per-Acre Drainage Charges between July 18, 2013, and June 30, 2017 ('the Class Period')." When the *Michigan Warehousing* Complaint was filed, the only "per-acre drainage charge" that existed was the \$852 per impermeable acre per month charge imposed on most, but not all, metered Detroit properties beginning in 2013. (cont'd following page)

By securing the settlement in *Michigan Warehousing* and its covenant not to sue precluding class members forever from challenging storm water charges under the Headlee Amendment, the City (hopes it) bought the right to impose the 2013 charge *and* the 2016 Rain Tax long after the one year of prospective rate relief in 2017 that the agreement supposedly provides, and apply those revenues to performing capital improvements required under its NPDES permit.¹³ That feature alone should put this Court on high alert.¹⁴

The *Michigan Warehousing* settlement agreement bars any class members who “were billed and/or paid the Per-Acre Drainage Charges between July 18, 2013, and June 30, 2017,” from pursuing a Headlee Amendment claim, however, and thus encompassed DAART members and class representatives who had been billed for or paid either the 2013 charge or the 2016 Rain Tax.

Many DAART members, all of the original individual named plaintiffs in *DAART*, and the *Binns* plaintiffs (who had been billed for and/or paid their 2016 Rain Tax charges) were included within that class definition, which extended beyond the allegations of the Complaint in *Michigan Warehousing* to include those who are subject to the new 2016 Rain Tax if: (1) they also owned property subject to the 2013 charge, and/or (2) had been billed for and/or paid *any* impervious acreage charge before June 30, 2017, 9 months after the October 1, 2016, effective date of the 2016 Rain Tax.

Curiously, *Binns* neither mentioned nor opposed the *Michigan Warehousing* settlement in its Supplemental Brief.

¹³ To avoid repetition, the information in this footnote regarding the City’s use of impervious acreage fees to fund future unamortized capital improvements, which the Court below did not acknowledge, will be referred to in I (C), *infra*, on the issue of proportionality.

By 2019, the City is required to complete the capital improvements to its storm water system required under the Facility Improvement Program and Green Infrastructure program of its NPDES permit. It also may be required to perform an additional \$1 billion worth of capital improvements to its storm water retention system after its current NPDES permit expires, in 2022, if those capital improvements do not bring the City into compliance with its discharge requirements. See Ex 12, pp 12, 14, 16 (¶ 5); Ex 13, pp 15, 26-27 (Facilities Improvement Program), 36 (storage gate construction), 37 Hubbell Retention Basin), 38-39 (\$3 million in permit-mandated annual Green Infrastructure grants to citizens who apply for matching funds to perform capital improvements benefiting and reducing discharges only from their parcel), 39 (Outfalls 009, 011, and 012, affecting only the areas served by those outfalls, 41 (future capital investments at 17 Rouge River outfalls and 31 Detroit River outfalls), 64.

¹⁴ DAART members challenging the 2016 Rain Tax included in the settlement’s broadened class definition objected to the *Michigan Warehousing* settlement, urging that it represented a gross departure from established attorney fee rules under Headlee, achieved nothing of any real value to Detroit taxpayers, and nullified the rights of class members under § 31 forever.

Perhaps the single most useful summary of the underlying facts is Ex 20, a 15-page DWSD publication, which describes the genesis, rationale, and features of the 2016 Rain Tax. It describes the City's combined sewer system; the need for combined sewer overflow (CSO) facilities to combat contaminated discharges that occur when storm water overwhelms the capacity of the City's combined sewers to handle storm water discharged into it during weather events; the City's need for revenue to operate and maintain the CSO facilities in compliance with the City's NPDES

The settlement called for a total "payment" of \$29.5 million, of which class counsel would receive more than a quarter, a fee of \$7.5 million. Ex 9, ¶¶ 27-30. The settlement characterizes this fee as "approximately 10% of the aggregate value of the settlement fund" by adding in the purported value of a one-year reduction of the drainage charge, after which DWSD will be free to charge the full amount in perpetuity. DAART Ex 9, p. 15, ¶¶ 15-19. Because most of the "payment" consisted of 10% credits toward unpaid drainage fees that become a lien on the property assessed, and eventually result in foreclosure, however, the credits will be worthless to anyone who cannot pay the other 90% of their unpaid charges. Other than the attorney fee and the \$1 million plaintiff's counsel was paid to administer the settlement, class counsel's Proposed Distribution Report revealed that the actual cash payout to class members was less than \$5 million.

Moreover, the purported "reduction" of the 2013 charge (used to inflate the purported value of the settlement and characterize the attorney fee as a smaller percentage of the total value of the settlement) was limited to a mere *one year reduction of the 2013 drainage charge* to \$661 per impervious acre per month from August 31, 2017, to July 31, 2018. *Id.*, at p. 15.

This purported "reduction" is a chimera, because, four months before the settlement was agreed, the City had announced on March 31, 2017, and again on April 19, 2017, that the per impervious acre rate for those who had been paying \$852 per acre monthly charge would be reduced to \$598 in 2018. Thus, the one year "reduction" supposedly secured in the settlement was to a higher rate than the City already had announced it was reducing the 2013 charge. See Exs 15 to 19.

When it was negotiated, the parties knew that the settlement secured little or nothing of value for the class, because under the one year of prospective relief it provides, beginning in September 2017, the class will pay at a higher (\$661) rate than the previously announced reduction to \$598 that began on January 1, 2018. Thus it provided only 4 months of the purported one-year "reduction" in the 2013 drainage charge, in September through December of 2017, after which the temporarily reduced \$661 rate prescribed by the settlement, was actually higher than the reduced \$598 rate City unilaterally announced four months before the settlement in response to the outcry against the new charge. Compare Ex 9, ¶ 15 with Exs 15 and 18. Oddly, class counsel negotiated an increase in the previously announce reduction, but valued it as if the reduction had not already occurred.

permit and the orders of the Court in *US v Detroit*; and the creation of the Great Lakes Water Authority (“GLWA”) during the City’s bankruptcy. In exchange for a 40-year annual lease payment from GLWA of \$50,000,000, which is earmarked for maintenance of the City’s sewer and water system, the City relinquished to GLWA the revenues from, and control of the operation of, the City’s enormous multi-county water, sewage, and storm water treatment infrastructure, except for the portion lying within the City limits and serving City residents.

As Ex 20 explains, and the Affidavits of DWSD Director Gary Brown and Deputy Director Mobley amplify, see Exs 21, 22, and 24, after the bankruptcy and the creation of GLWA, the City continued to be obligated, under the order in *US v Detroit*, for 83 % of the indebtedness for the \$1 billion worth of CSO facilities the City constructed in the 40 years since that litigation began. In 2017, the City required \$151 million in drainage revenue, including \$125 million to treat over 10 billion gallons of drainage at its WTP, Ex 20, pp 6-7; Ex 22, ¶¶ 17-26, which is the largest single site municipal treatment plant in the world. Its enormous size is a product of the City’s 3000-mile plus combined sewer system, which is too large to separate, and must be sized and specially equipped with temporary retention facilities to accommodate peak storm water flows and prevent CSOs. Ex 20, pp 1, 6.

The City has had some form of drainage charge since 1975, but when it emerged from bankruptcy, in July 2013, it began to implement a completely new system for generating the revenue necessary to pay for its drainage program, to replace its former meter-size-based storm water charge (used as a proxy for parcel size). Ex 20, p 2. The 2013 charge was \$852 per month per acre of impervious area. Exs 15, 17, 18. In 2015, using City assessor and flyover views, the City identified 22,000 additional unmetered parcels that were not included on the DWSD’s billing database, and, in 2016, announced that, effective October 1, 2016, these parcels would be subject

to a different impervious acreage charge, \$750. With the addition of these 22,000 parcels to the over 200,000 existing DWSD customer accounts (for over 380,000 parcels), the City planned to complete its conversion to this impervious acreage-based drainage charge system by 2018. Ex 20, pp 2, 3; Ex 22, ¶¶ 17-26.

The new impervious area-based system ascribes all storm water discharge in the entire City to the impervious acreage for which the charge is imposed; by 2018 the City planned to derive all of its storm water treatment system revenue solely from parcels containing impervious area. Ex 20, p 2.¹⁵ The City, the Land Bank, and other government-owned parcels (except County and State roads subject to the settlement in *Detroit v Michigan*, 803 F2d 1411 (CA 6 1986), discussed *infra*, I (A.)) are subject to the impervious acreage charge, Ex 20, p 6, but the City exempts the 23,000 impervious acres of City-owned streets by classifying them as “conveyance infrastructure.”¹⁶

¹⁵ The system exempts parcels that drain directly to the Detroit and Rouge Rivers, and includes an appeal system for challenging the amount of impervious area the City ascribes to a parcel and a program for securing a reduction of the charge by performing certain “green” improvements to reduce discharge. Ex 20, *passim*.

¹⁶ Calculated at the \$852 per acre per month rate of the 2013 charge, the 23,000 impervious acres of City-owned streets represents foregone revenue of \$235,152,000. At the \$750 rate of the 2016 Rain Tax, the revenue foregone is \$207,000,000.

Of course, if the City’s streets were included in the impervious acreage drainage charge system, the per-acre charge would be nowhere near \$852 or \$750, because the total area subject to the charge would be increased, reducing the amount per acre needed to cover the drainage program’s cost.

Thus, those who pay the 2013 charge of \$852 per acre or the 2016 Rain Tax charge of \$750 per acre, are covering the cost of treating not only the storm water the City presumes to be discharged from their property’s impervious acreage (the charge is imposed regardless of the topography and actual discharge from an individual parcel – there is no actual measurement of the discharge), but also the cost of treating the storm water generated by and discharged from the impervious area of the City-owned streets and storm water discharge from saturated pervious surfaces, as discussed within.

The Court below failed to discuss in its Opinion that, just after suit was filed in *Binns* to challenge the 2016 Rain Tax, in March and April 2017, the City unilaterally announced: (1) drastic, but disparate, reductions of the 2013 charge (from \$852 to \$598) and the 2016 Rain Tax (from \$750 to \$125), (2) a plan to delay the extension of the 2016 Rain Tax to parcels not yet subject to either impervious acreage charge, and (3) a 5-year “phase-in” plan that would gradually result in the 2013 charge and the 2016 Rain Tax converging at a uniform rate of \$677. Exs 14-19 (the implications of these actions on the issue of the proportionality of the 2016 Rain Tax are discussed in I (C), and I (E) addresses the City’s lack of authority to institute them).

Though the City has described its storm water revenue needs, noted above, the City has studiously not disclosed in any document found or the Affidavits it has filed: (1) how much revenue the City annually billed and collected for the 2013 charge; (2) how much revenue it projected, from its supposedly “scientific” measurements and calculations, that the 2016 Rain Tax would yield; (3) how much the City will (a) bill and (b) collect after its enormous and disparate 2017 reductions of both charges; (4) how those amounts compare to DWSD’s annual expenditures for (a) storm water treatment, and (b) retiring the debt for past capital outlays, and (c) the cost of the annual unamortized capital outlays required under its NPDES described *ante*, note 13, which the City and the Court below never acknowledged, but which are plainly required by the provisions of the City’s NPDES (discussed in Argument I(C)); (5) how much revenue the City billed and realized from its pre-bankruptcy, meter-based drainage charge. The April 2018 Brown Affidavit, Ex 21, ¶ 3, does reveal, however, that in FY 2016, ending on June 30, 2016, before the 2016 Rain Tax was imposed, DWSD’s annual “working capital requirement” was \$260,714,286. That is \$109,000,000 more than DWSD’s “overall revenue requirement of \$151 million” for FY 2017,

which includes the \$122 million the City was required to pay GLWA. Brown May 2017 Affidavit, Ex 22, ¶ 25. This, too, is discussed in argument I (C).

THE COURT OF APPEALS RULINGS AND ORDERS

On the first *Bolt* factor, whether the charge is a regulatory or revenue measure, the Court concluded that there was “no evidence” that the 2016 Rain Tax funds “activities previously funded by general fund revenues,” apparently in the belief that the *Bolt* test requires such a showing.¹⁷ Op. 16. Failing to acknowledge the radical differences between the City’s pre-bankruptcy meter-based drainage charge and the impervious acreage charges the City replaced it with when it emerged from bankruptcy, and without any information about the revenues each yielded, the Court simply asserted that, since “a drainage charge had already existed in one form or another for many decades” before the 2016 Rain Tax was adopted, DAART is merely “speculating” that the Rain Tax is being used to “replace revenue purportedly lost as a result of the City of Detroit’s bankruptcy and the formation of the GLWA.” Op 17. Therefore, the Court concluded, in the absence of evidence that a revenue generating purpose outweighs the regulatory purpose, the Rain Tax “primarily serves a regulatory purpose.” *Id.*

As to the second *Bolt* factor, whether the amount of the charge is reasonably proportional to the cost of regulation, the Court reasoned that because storm water treatment is a “utility” service, the 2016 Rain Tax rate¹⁸ must be presumed reasonable. Op p 17. Noting that under *Bolt*

¹⁷ *Bolt* does not require such a showing, nor has DAART ever contended that the 2016 Rain Tax (or the 2013 charge) replaced general fund revenues, because it is undisputed that both charges replace the former meter-based drainage charge. Ex 20, p 2. In any event, in *Bolt* merely regarded the fact that Lansing’s Rain Tax replaced some general fund revenues as an “additional factor” that was “not dispositive.” 459 Mich at 168. Here, general fund revenues were simply irrelevant.

¹⁸ The Court did not acknowledge or discuss the drastic changes in the Rain Tax rates in 2017, so it is impossible to say which rate the Court presumed to be reasonable, the original \$750 rate,

a fee may include some properly amortized capital investment component, Op pp 17-18, the Court relied on the Hudson Affidavit, Ex 23, which it discussed at Op pp16-17, to conclude that there was “no evidence”¹⁹ that the Rain Tax is used to fund “future expenses for large scale capital improvements,” and found that it is used only to amortize existing debt costs for past capital expenditures, in keeping with accepted accounting principles, as *Bolt* requires. Op, pp 17-18, nn16 and 17. Therefore, the Court concluded, once again, that DAART had presented “no evidence” to overcome the presumption of rate reasonableness, particularly because there was no showing that, as in *Bolt*, some of those subject to the charge already had paid for capital improvements and thus would not benefit from the Rain Tax.²⁰ Op, p 18.

The Court also concluded that the Rain Tax rate was proportional, because (1) the charge was based on “individualized measurements” of each parcel’s impervious area, “calculated on the basis of aerial photography as well as city assessor data to determine the amount of impervious area on each parcel,” Op, pp 18-9; (2) properties that do not use the City’s sewer, and drain directly to the Detroit and Rouge Rivers, are not subject to the charge, Op, p 19; and (3) the system includes mechanisms to challenge the impervious area measurement and to secure credits for “Green” improvements that reduce drainage discharge. The Court cited as additional confirmation of its conclusion of proportionality the Hudson Affidavit’s averment concerning the amount of cash on

the reduced \$125 rate, or any of the gradually increasing rates to be charged between 2017 and 2022 reflected in Ex 15 and 18. This is discussed in I (C).

¹⁹ This erroneous assessment of the record is discussed in I (C).

²⁰ Since, unlike Lansing, the City is not separating its sewers, but is instead expanding and equipping its combined sewer system to handle peak storm flows, the comparison is inapt, but the Court was mistaken. It ignored the evidence DAART proffered that the 2016 Rain Tax will fund Green infrastructure projects benefiting selected properties and capital improvements required by the City’s NPDES to remedy CSOs at specific outfalls serving specific areas of the City, as discussed in I (C).

hand, which the Court stated was 5.4% of (an unspecified amount of) total receipts, which it said Hudson described as equating to 115 days of operating expenses, below the industry standard of 250 days, as of June 30, 2016. Op, p 19.²¹

The Court of Appeals agreed with DAART that the City's Rain Tax does not satisfy the *Bolt* test's volitional prong, but concluded that, because the regulatory purpose and proportionality requirements were satisfied, Op. p --, and no one criterion of the *Bolt* test is determinative, the City's Rain Tax does not violate Headlee.

Finally, the Court below agreed with DAART that the 2016 Rain Tax does not satisfy the volitional prong of the *Bolt* test. Because that conclusion is plainly correct, DAART's application focuses on the analytical errors in the Court's analysis of *Bolt* test's regulatory purpose and proportionality prongs.²²

²¹ The only Hudson Affidavit found in the record, Ex 23, contains no such information. Moreover, the figures the Court ascribes to it are literally impossible: If 1/20th (5.4%) of DWSD's annual receipts were sufficient to operate DWSD for 115 days, then 3/20^{ths} would be sufficient to operate DWSD for 345 days, nearly a full year. If DWSD can operate on 15% of its annual revenues for a year, DWSD's revenues far exceed what the law allows: As a utility, DWSD is required to charge an amount reasonably related to the cost of service. See I (E), *infra*. (cont'd following page).

It appears that Director Brown's April 2018 Affidavit, Ex 21, is nearer the truth. It avers, at ¶ 3, that for the fiscal year ending June 30, 2016, three months before the 2016 Rain Tax took effect, when the information could be of no relevance or probative value concerning whether the Rain Tax produces revenues reasonably related to the cost of regulation, DWSD's working capital on hand was "just over \$10 million, which is approximately 14 days of working capital for DWSD based on the total DWSD budget for that same fiscal year." As previously noted, however even the \$260,714,286 of annual working capital DWSD required in FY 2016 to which that translates is far more than DWSD's "overall revenue requirement of \$151 million" averred in Ex 2.

²² But the volitional factor cannot be dismissed so lightly. As the Court below noted, Op, p 21, all three *Bolt* factors are interrelated, and no one is determinative. But the City admitted, Ex 24, Mobley Affidavit, ¶ 6, and the Court below accepted, without any apparent recognition of its significance, Op. p 20, that **59.4% of those subject to the 2016 Rain Tax were unable to pay it.**

ARGUMENT

THE COURT OF APPEALS COMMITTED CLEAR AND SERIOUS ANALYTICAL ERRORS PRESENTING QUESTIONS OF SUBSTANTIAL PUBLIC INTEREST AND IMPORTANCE TO THE STATE'S JURISPRUDENCE THAT WILL RESULTING IN MANIFEST INJUSTICE TO MICHIGAN TAXPAYERS BY IMPAIRING THE VOTER APPROVAL REQUIREMENT OF MICH CONST 1963, ART 9, § 31.

THREE GROUNDS FOR GRANTING LEAVE EXIST, UNDER MCR 7.305(B)(2), (3), AND (5)(a) and (b).²³

The City's claim that the Rain Tax is not a new revenue source is incorrect: As the facts stated show, the City plainly acknowledges that the impervious acreage-based drainage charge it adopted when it emerged from bankruptcy, of which the 2016 Rain Tax is a component, completely replaces its pre-bankruptcy meter-size-based drainage charge. It is literally irrelevant

This is not merely a remarkable statistic, it is **stunning**, particularly in light of the City's claims that (1) the Rain Tax is not a "new charge," because the City has had some form of drainage charge for nearly half a century, and (2) the Rain Tax was designed "scientifically," using "overflight technology," to measure the City's impervious area and enable the City to calculate a charge that yields precisely the amount of revenue the City requires to pay for a service the City has always rendered to its citizens. If property owners subject to the 2016 Rain Tax cannot pay the charge, and they cannot avoid it, *Bolt's* third volitional factor is more important than the Court below realized, because it means that the owners who cannot pay the charge will lose their property in foreclosure, as discussed within.

²³ MCR 7.305(B)(2), (3), and (5)(a) and (b) pertinently provide:

Grounds. The application must show that

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions ...;

(3) the issue involves a legal principle of major significance to the state's jurisprudence;

(5) in an appeal of a decision of the Court of Appeals,
 (a) the decision is clearly erroneous and will cause material injustice, or
 (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; ...

to the issues of whether the 2016 Rain Tax is a revenue measure or a regulatory measure, and whether it is proportional to the cost of the service, that the City has imposed “some form” of drainage charge since 1975. It is undisputed that the 2016 Rain Tax applies to 22,000 parcels that were never charged for storm water treatment, and was adopted after the City already had adopted the 2013 charge that, with other revenues, met DWSD’s FY 2016 \$260,714,286 working capital requirement. None of that revenue was from the 2016 Rain Tax, which did not become effective until October 1, 2016, three months after FY 2016 ended, when DWSD “added to its billing system approximately 22,000 parcels that had been contributing storm water to the DWSD combined sewer system but had not been billed for the burden they placed on the system (i.e., ‘new-to-world customers).” Ex 24, Mobley Affidavit, ¶ 5,

We know that the a monthly \$852 impervious acreage charge the City instituted in July 2013, to which the Court below does not even allude, was imposed on DWSD’s existing 200,000 customers in July 2013, when the City emerged from bankruptcy shorn of the revenues that were diverted from the City to GLWA, which assumed control of the City’s water treatment plant (“WTP”), sewerage treatment plant (“STP”), and all revenues from the City’s water and sewer system except those from Detroit retail customers. Ex 23.

Even taking the City at its “word” that, as the Court read Ex 23 to imply, but which it does not say,²⁴ the City did not impose the 2013 charge to raise new “operational” revenue, or replace

²⁴ Ex 23, ¶ 8, says: “There are no expenses attributable to the City’s retail water and sewer operations that were previously covered by wholesale customer revenue.”

Of course that does not answer the question whether, before that undefined “wholesale revenue” was lost to GLWA in the bankruptcy, the City’s “wholesale revenue” was used to cover (1) expenses that the City now must cover by paying GLWA what it calls its “mortgage payment” to GLWA (\$59.8 million), see Ex 20, p 7, or (2) whether the City used the “wholesale revenues” to cover the 83 % of the cost of the City’s CSO-related capital, operation, and maintenance costs allocated to the City under the Order in *US v Detroit* in 1999, long before, as the City admits, the

“operational” revenue the City formerly received from “wholesale” customers outside the City now served by GLWA.²⁵ the City admits unequivocally that the 2016 Rain Tax added 22,000 “new-to-world customers” who had never before been billed for the burden they placed on the storm water system. Ex 24.

The City has never explained how it arrived at the \$750 per acre per month rate it charged these “new to the world” customers, or why their addition to the existing impervious acreage-based revenue flow from the 2013 charge did not automatically produce a reduction of the 2013 charge’s \$852 per acre per month rate without producing new revenue. That is because it is clear that it did produce new revenue: the City adopted the 2016 Rain Tax to generate new revenue, ostensibly to help it pay its share of all of the costs described in Exs 15, 16, and 19²⁶ and 20 and 22.

The Court of Appeals simply erred in regarding the existence of a prior (meter-based) drainage charge as “proof” that the 2016 Rain Tax was not imposed to raise new revenue to accomplish non-regulatory purposes and serves only a regulatory purpose. The record contains no evidence establishing any logical or mathematical relationship between the two that allows the meter-based charges to be equated with the new impervious area charges.

loss of revenues coupled with the City’s undiminished obligation to pay that allocation, made that allocation unsustainable. See Ex 20, pp 6, 7 (the City says that It “has started conversations with appropriate parties as a prelude to renegotiation of the allocation provision,” but meanwhile it imposed the Rain Tax to enable it to meet its “debt service related expense [of] \$59.8 million [which] is essentially the (GLWA held) mortgage payment on facilities that are in place o handle wet weather flows.”

²⁵ In exchange for all of that “wholesale” revenue, the City now receives only an annual “lease” payment from GLWA of \$50,000,000 annually, which is earmarked for the repair and maintenance of the City’s aging water and sewer treatment infrastructure. That GLWA lease payment is \$9,000,000 less than the City’s so-called “mortgage payment to GLWA. Ex 20, p 6,7; Ex 33. Because the Court below did not acknowledge these facts, it did not do the math.

²⁶ See *ante*, note 13, regarding capital improvement costs the 2016 Rain Tax will fund.

The stakes in this case are high. The City admits that the means it chose to address its need for new revenue by imposing a drainage charge for the first time on “new to the world customers,” imposed a new tax burden so disproportionate to their means that a large majority of them -- over 59% -- could not afford to pay the 2016 Rain Tax. If they cannot do so, they will eventually lose their property.²⁷ Sadly, the result below reflects precisely the “business as usual” attitude toward new and increased taxes that prompted the taxpayer revolt that led the People of Michigan to adopt the Headlee Amendment. *Bolt*, 459 Mich at 161.²⁸

²⁷ As in *Bolt and Jackson County v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), which both considered it probative evidence on the volitional factor, under DWSD’s governing ordinance, “sewage service charges shall be assessed against the premises served and shall be a lien against the same and shall have the same force and effect and shall be subject to the same terms and conditions as provided for water charges in division 3 of article II of this chapter and Section 7-1502 of the Charter.” **Ex 35**, Detroit City Code, § 56-3-14. Indeed, if the 2016 Rain Tax is not paid, DWSD has several coercive collection options: State and local law provide that an unpaid water, sewer, or drainage bill is a lien on the property, enforceable by foreclosure, in the same manner as a tax lien. In addition, water service can be terminated, which renders a home or business uninhabitable, and the City can bring a legal action to recover unpaid charges, even if the property is foreclosed. Additionally, a City of Detroit license to do business may be suspended or revoked for failure to pay a DWSD bill. See **Ex 36**, DWSD’s “Interim Collection Rules and Procedures,” Rule 19.

²⁸ The Headlee Amendment “grew out of the spirit of ‘tax revolt’ and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct control.” *Waterford School Dist. v. State Bd. of Ed.*, 98 Mich.App. 658, 663, 296 N.W.2d 328 (1980). More recently, this Court has stated,

The Headlee Amendment was “part of a nationwide ‘taxpayers revolt’ ... to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level.” [*Airlines Parking, Inc. v. Wayne Co.*, 452 Mich. 527, 532, 550 N.W.2d 490 (1996).]

Against this background, it is clear that this case is of not merely significant, but *enormous* public interest. The Court of Appeals erroneous and insensate analysis will have enormous impact on Headlee jurisprudence in the storm water context, as explained within.

The Court of Appeals failed to recognize that the City's delay in implementing the 2016 Rain Tax, the so-called "phase in" period that supposedly will remedy "rate shock," will not solve the confiscatory problem posed by this enormous new and highly inequitable charge: The "phase-in" period simply delays the reckoning, because property owners have no new source of income from which to pay the Rain Tax when it rises in 2022 to \$677. That is only \$73 less than the \$750 rate that produced the 59.4% delinquency rate. Eventually the 2016 Rain Tax will doom many of the 22,000 property owners subject to it to lose their property in foreclosure.

Why? Because unlike the meter-based rate, to which everyone with water and sewer service was subject, the impervious acreage charge of the 2016 Rain Tax falls with the greatest force, and disproportionately concentrates the cost of storm water treatment, on owners of unmetered property with impervious surface area. Property without water and sewer service is unsuited to human occupation, and is inherently less economically productive, yet the City has chosen to transfer to the owners of such property not only the costs of collecting, treating, and disposing of storm water, and amortizing the cost of past investment in storm water infrastructure (to which all who had water and sewer service formerly contributed), but also of unamortized capital improvements required under the City's NPDES permit, and of collecting and treating the storm water runoff from both the *impervious surface of City-owned streets* and privately and publicly owned *pervious surfaces*. Whether by design or oversight, the 2016 Rain Tax transfers a disproportionate share of the cost of treating the City's storm water formerly borne by meter-size-

based charges to the City's prosperous downtown business area to the outlying, and now depressed and sparsely populated, areas of Detroit's 138 square miles.²⁹

The 2016 Rain Tax is contrary to *Bolt*, which requires that a "fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society." It is part of a system of charges that allocates the entire cost of treating storm water and storm water treatment infrastructure – including the cost of treating storm water generated by all 23,000 acres of the City-owned streets – solely to the owners of impervious surface area. But storm water treatment benefits all of the City's inhabitants, whether or not they own impervious area. The inequity – and lack of proportionality – of the 2016 Rain Tax is compounded by the fact, of which the Court can take judicial notice, that though the rate of storm water runoff from impervious areas may be higher, storm water runoff is not confined to impervious area.³⁰ For this reason, too, as this Court noted in *Bolt*, the benefit conferred on those

²⁹ As an example, before the 2016 Rain Tax, DAART member Central Avenue Auto Parts paid \$4216 in annual drainage charges. After the 2016 Rain Tax was levied, its annual drainage charges increased to \$50,746, a 1200% increase overnight. Ex 27.

³⁰ Under MRE 201(b) the Court may take notice of a fact that is "not subject to reasonable dispute that is either (1) generally known ...or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The City's entire Rain Tax program rests on the unspoken, but manifestly false, premise that pervious surfaces generate no storm water runoff, and do not benefit from the City's storm water control and treatment systems. On that basis, the City completely exempts pervious area from the 2016 Rain Tax.

That premise is false as a matter of elementary hydrology. Saturated soils generate runoff:

Saturation-excess overland flow comes from two distinguishable sources. Rain falling on already-saturated soil has no option but to run off - this case is termed direct precipitation on saturated areas (DPSA). The other source, termed return flow, occurs if the rate of interflow entering a saturated area from upslope exceeds the capacity for interflow to leave the area by flowing downhill through the soil. The excess interflow thus "returns" to the surface as runoff, hence the term. Whereas DPSA runoff only occurs during and just after a rainfall event, return flow seepage can continue as long as an interflow excess exists.

subject to the 2016 Rain Tax is disproportionate to entire the cost of the City's storm water collection and treatment system, which the Rain Tax imposes only on the owners of impervious area. 459 Mich at 161.

The Court of Appeals analysis is oblivious to all of these features of the Rain Tax. It will foreseeably inflict a manifest injustice on those City taxpayers who cannot afford a charge that funds the maintenance, operation, and continuing infrastructure construction necessary to implement a regulatory program required for the common good of all.

DAART recognizes that the Supreme Court's function is not to correct mere error, and may choose, for any number of reasons, to leave an erroneous Court of Appeals decision undisturbed, especially an unpublished one that has no precedential effect.³¹ DAART submits, however, that, as a practical matter, the decision below will have an outsized, essentially precedential impact, not only because it addresses the same issue pending in another case challenging the same 2016 Detroit Rain Tax,³² but also because the same issue is presented in other pending cases involving the Rain

"Variable Source Area Hydrology," Cornell University Soil and Water Lab, http://soilandwater.bee.cornell.edu/research/VSA/processes/processes_sat.html (last accessed December 12, 2018).

The premise of the Rain Tax is also false as a matter of Michigan law: The Michigan Soil Sedimentation and Erosion Control Act, 1994 PA 451, MCL 324.9101, *et seq.*, requires the Department of Environmental Quality to "promulgate rules for a unified soil erosion and sedimentation control program, including provisions for the review and approval of site plans, land use plans, or permits relating to soil erosion control and sedimentation control," section 9104, and regulates all activities constituting "earth changes," which are defined as "a human-made change in the natural cover or topography of land ... which may result in or contribute to soil erosion or sedimentation of the waters of the state." Section 9101(9).

³¹ Although an unpublished Court of Appeals opinion has no controlling precedential effect, it may be cited when no published precedent is available for a proposition of law, with an explanation for the reason for doing so. MCR 7.215(C).

³² The Headlee Amendment Rain Tax claim of the Court of Appeals amici in *DAART, Trappers Properties, et al*, is being held in abeyance in the Wayne Circuit, pending the outcome of this case. See *Trapper's Properties, LLC, et al v City of Detroit, et al*, Wayne County Circuit

Taxes of other jurisdictions.³³ If the decision below is technically not “precedent”, it certainly will have controlling effect in pending and future § 31 cases.

The decision below reflects analytical departures from *Bolt, Jackson Cty v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013) (“*Jackson*”), and their progeny, which establish the rules for interpreting § 31. It therefore presents an issue of significant public interest and an incorrect application of a legal principle of major significance to the state’s jurisprudence. Its analysis also reflects clear error that will result in a material injustice, not only to those subject to the 2016 Rain Tax, quite literally thousands of whom are threatened with the loss of their property because they cannot pay the City’s ruinous charge, but also to taxpayers in other Michigan jurisdictions to which the decision below will be a clear signal that their local governments are free to impose drainage charges unlawful under the Headlee Amendment without fear that the Court of Appeals or this Court will intervene.

STANDARD OF REVIEW

Bolt succinctly states the standard of review of a Court of Appeals decision in an original Headlee action:

Whether the storm water service charge imposed by Ordinance 925 is a “tax” or a “user fee” is a question of law that this Court reviews de novo. *Saginaw Co. v. John Sexton Corp. of Michigan*, 232 Mich.App. 202, 209, 591 N.W.2d 52, (1998). If, as plaintiff contends, the charge is a tax, it unquestionably violates the Headlee Amendment, Const 1963, art 9, § 31, which provides in relevant part:

Court No 17-017274-CZ (assigned to Hon. John A. Murphy, the same Judge who approved the *Michigan Warehousing* settlement discussed within). See, Record, COA Docket Entry No. 34, Trapper’s Reply to Answers to Motion for Leave to file Amicus Brief, p 3.

³³ Cases involving Rain Taxes imposed by other jurisdictions and raising the same § 31 issue here are pending in Wayne Circuit, see *Gottesman v City of Harper Woods*, Wayne County Circuit Case No. 17-014341, assigned to Hon. Susan L. Hubbard (the same firm that represented Michigan Warehousing represents plaintiff in *Gottesman*), and other circuits. See Trapper’s Properties Reply, supra, at p 9 (collecting cases).

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

However, if the charge is a user fee, as the city maintains, the charge is not affected by the Headlee Amendment.

Bolt, 459 Mich at 158–59.

This Court reviews de novo, as a question of law, whether a storm water service drainage charge is a “tax” or a “user fee.” *Bolt*, 459 Mich at 158. Plaintiffs bear the burden of establishing the unconstitutionality of a charge under the Headlee Amendment. *Jackson*, 302 Mich App at 98.

A. The Court of Appeals committed clear legal error by specifically relying on reasoning in a pre-*Bolt* federal decision that was repudiated after this Court’s Decision in *Bolt* to uphold the 2016 Rain Tax’s exemption for City-owned streets.

The City claims that the 2016 Rain Tax applies to all owners of impervious acreage, including the City.³⁴ This is what *Bolt* requires, because a fee must be “reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged.” *Jackson*, 302 Mich App at 109. If the City receives and benefits from the service it renders, it, too, must pay for the service.

³⁴ Ex 4, ¶ 20, p 6 of 15, states:

“20. Is the City of Detroit, the Land Bank, state and county properties, and roads and railroads charged [sic]?

All parcels in Detroit with impervious area will be charged for drainage services. Every retail customer is billed for drainage services using the same methodology. The City of Detroit, the Land Bank, and other government owned parcels are billed in the same manner as private property. Wayne County and State of Michigan roads and highways are charged pursuant to settlement agreements entered into Federal Court in 1989.” (Emphasis added)

In fact, however, although county and state roads are subject to a drainage charge,³⁵ the City exempts its own 23,000 acres of impervious street surface from the Rain Tax. This exemption shifts the cost of collecting and treating storm water that falls on and is contaminated by contact with the City's streets to all private and non-city governmental parcel owners adjacent to the City's streets. The rationalizes the exemption by categorizing the City's streets as a storm water "conveyance", as if they are sewers."³⁶ The Court of Appeals held that "the drainage charge is not rendered disproportionate by the DWSD's failure to charge the City of Detroit itself a drainage fee for storm water flowing from city streets into the combined sewer system." Op, p 20. The Court upheld the exemption because DAART "presented no evidence to dispute the DWSD's explanation that '[c]ity streets which are lower than parcels, are part of the conveyance infrastructure for facilitating the flow of storm water from Detroit properties into the catch basins, then into the combined sewer system, and then finally terminating at the [WTP].'" *Id.* As support for its conclusion the Court cited *Detroit v Michigan*, 803 F2d 1411 (CA 6 1986), in which the

³⁵ The charges are based on a settlement embodied in a federal court order. Ex 4, ¶ 20, p 6 of 15.

³⁶ **"9. How is the term 'conveyance' being defined as it applied to city streets?** City streets, which are lower than parcels, are part of the conveyance infrastructure for facilitating the flow of storm water from Detroit properties into the catch basins, then into the combined sewer system, then finally terminating at the wastewater treatment plant.

10. What is the total acreage of city owned/controlled property that will be characterized as a conveyance? Is the conveyance exception being applied to any other property than city owned streets?

City owned parcels will not be characterized as a conveyance. This term applies only to city streets, i.e. areas common to all that serve as a storm water conveyance." Ex 4, "Infrastructure and Storm Water Management," p 9 of 15 (underlined italic emphasis added).

Sixth Circuit held that the City could charge for storm water services to State and county owned roads while exempting itself from such charges. DAART informed the Court below³⁷ that the Court of Appeals itself repudiated this analysis twenty years ago, in *Bolt v City of Lansing (on remand)*, 238 Mich App 37, 46-47; 604 NW2d 745 (1999),³⁸ because “the Supreme Court's decision in *Bolt* established a different analytical framework for distinguishing user fees from a tax.” 238 Mich App, at 47. Therefore, the Court below departed from the analysis *Bolt* prescribes by relying on *Detroit v Michigan*. *Bolt* requires that a charge must apply to all who receive the service to avoid classification as a tax.

DAART did not claim, as the Court below implies, Opinion, at p. 15, that the City does not render some “service” when it treats storm water. Of course, it does. Indeed, that aspect of *Detroit*

³⁷ Record, DAART’s Supplemental Brief, at p 8, n 12.

³⁸ *Detroit v Michigan* was decided in 1986, 12 years before *Bolt*. The Sixth Circuit thought it unimportant that Detroit did not charge itself a fee for storm water services to its own streets, holding that the City could nevertheless charge the county a fee for that service. (cont’d)

After this Court’s decision in *Bolt*, however, the Court of Appeals held in *Bolt v City of Lansing (on remand)* that Headlee forbids a municipality to calculate a drainage fee without reference to, and without including in its calculations, the value of the service being rendered to itself, or to exempt itself from the equation by disregarding the effects of City-owned impermeable surfaces, such as streets:

Given the *Ripperger/Merrelli* test and this pattern of case law, Michigan municipalities could have reasonably concluded that charges such as the storm water service charge were user fees, and not subject to Headlee Amendment requirements. However, when the Supreme Court decided plaintiff’s case, the Court replaced the *Ripperger/Merrelli* test with a three-part test and concluded that the charge was not a user fee primarily because (1) a portion of the charge covered capital infrastructure expenditures that would outlast the thirty-year payment program and (2) one goal of the program was to address environmental concerns that benefited everyone, not only the property owners. 459 Mich. at 165-167, 587 N.W.2d 264.

Clearly, the Supreme Court's decision here established a different analytical framework for distinguishing user fees from a tax
Bolt (On remand), 238 Mich App at 46-47 (emphasis added).

v Michigan is both intact and consistent with *Bolt*, and DAART relies on it. By exempting itself from any charge for the service it provides to its own streets, on the rationale that “the streets are part of the storm water conveyance system,” the City imposes on those subject to the 2016 Rain Tax the cost of a program that “address[es] environmental concerns that benefit[] everyone, not only the property owners.” *Bolt (On remand)*, 238 Mich App at 47.

This feature of the City’s Rain Tax is hopelessly irreconcilable with *Bolt* and *Jackson*; it is the hallmark of a tax, because it brands the 2016 Rain Tax as a charge imposed upon the few to effect a common good for the many: the owners of private (and non-City governmental) impervious area are taxed to cover the cost of treating storm water generated by the 23,000 impervious acres of the City’s publicly-owned streets and all of the City’s pervious areas.

The Court below departed from the clear holdings in *Bolt* and *Jackson* in concluding that this exemption is permissible under *Headlee* because “DAART failed to produce any evidence” that Detroit’s streets are not, generally speaking, lower than the property immediately adjacent to them. *Op*, p 20. As in every city in the world that has curbs, gutters, and sewers, the city streets exempted from the Rain Taxes in Lansing and Jackson also were lower than the adjacent parcels subject to the charge. The simple fact is that streets both generate and convey runoff, precisely because they are impervious. That is why exempting them was a sign that the charge was a tax. Here, as in *Bolt* and *Jackson*, the impervious area of the property subject to the 2016 Rain Tax bears no necessary or logical relation to the impervious area of the city’s streets. And that was why this Court deemed that feature of the Lansing Rain Tax to be an earmark of a tax in *Bolt*: the charge was imposed to accomplish a purpose for the common good (the collection and treatment of storm water runoff from impervious city streets), and therefore was not reasonably proportional the reasonable cost of a service rendered to the property owner. Indeed, the City’s admission that

its streets are “areas common to all,” Ex 4, p 9 of 15, Question 10, puts to rest any doubt that the 2016 Rain Tax is a tax for common benefit of all, rather than a charge for the benefit conferred or a service rendered to particular parcels served; that is the hallmark of a tax, as the Court explained in *Jackson* in addressing the exemption for city streets.³⁹

Bolt and *Jackson* require the Court to determine whether a charge is imposed in exchange for, and is reasonably proportionate to the cost of, a service rendered to the person subject to the charge, or to provide the revenue necessary to “to address environmental concerns regarding water quality...[, achieve] [i]mproved water quality ... [and avoid] federal penalties for discharge violations ... [--] goals that benefit everyone in the city, not only property owners.” *Bolt*, 459 Mich. at 166 (emphasis added). Because the Court below failed to do so, it erred in holding that the City’s Rain Tax satisfies the *Bolt* test, and in permitting the City to shift the cost of collecting and treating the storm water discharge generated by 23,000 acres of impervious City streets to those subject to the 2016 Rain Tax.

The City’s exemption of the 23,000 impervious acres of its streets, and its selective allocation only to the owners of property containing impervious area of the burden of collecting

³⁹ We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*, benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax. *Bolt*, 459 Mich. at 166, 587 N.W.2d 264. *Jackson*, 302 Mich App at 108-109 (emphasis added).

and treating the storm water discharge its streets generate, violate the Headlee Amendment. *Bolt*, *supra*, 459 Mich at 167; *Jackson*, *supra*, 302 Mich App at 108-109. On this ground alone, leave ought to be granted, because the Court below so clearly departed from the reasoning consistently applied in the controlling cases.

B. The Court of Appeals misapplied the regulatory purpose prong of the *Bolt* test when it incorrectly distinguished *Bolt* and *Jackson* on the ground that this case involved “a significant regulatory component ... absent” in those cases.

The Court below drew a spurious “distinction” between *Bolt* and *Jackson* and this case, suggesting that the storm water charges in *Bolt* and *Jackson* involved no regulatory purpose, because in each case the city released untreated storm water from its separated sewers, while Detroit has a combined sewer, and is required by federal rules and a court order to treat its combined storm and septic effluent. *Op.*, pp 14-15. Such a “distinction” is dangerous, because, carried to its logical conclusion, it suggests that the drainage charge of any city that does not have separated sewers automatically satisfies *Bolt*’s regulatory purpose requirement.

In fact, like the City here, in both *Bolt* and *Jackson*, the cities acted for a regulatory purpose. This Court noted in *Bolt* that Lansing adopted its Rain Tax to fund its effort to comply with the requirements of the NPDES discharge permit program requiring treatment of storm water and sanitary waste discharges.⁴⁰ Likewise, in *Jackson*, the Court noted that the city imposed its storm

⁴⁰ See *Bolt*, 459 Mich at 155: “In an effort to comply with the Clean Water Act (CWA) and the National Pollutant Discharge Elimination Standards (NPDES) permit-program requirement to control combined sewer overflows, the city of Lansing elected to separate the remaining combined sanitary and storm sewers.” (Emphasis added).

water utility charge to enable it to satisfy the requirements of state and federal water quality regulations.⁴¹

That a charge is adopted in part to advance a regulatory purpose does not, as the Court below seems to suggest, automatically mean that the charge satisfies the regulatory purpose requirement. A detailed inquiry is required. Lansing and Jackson merely chose *different solutions* to the same regulatory problems than the City faces here: finding a way to satisfy the requirements of *state and federal water quality regulations and their NPDES permits*. They chose to impose a charge to fund sewer separation (Lansing) and a separate storm water utility (Jackson), respectively. Here, the City has chosen to devise means of preventing CSOs without separating its sewers. That the cities chose different solutions to the same regulatory problems does not alter the fact that *in each case the cities acted, in part, for a regulatory purpose under the same state and federal water quality requirements*.

That the cities in *Bolt* and *Jackson* acted for a valid regulatory purpose did not insulate their charges from § 31's prohibition against raising revenue to accomplish a common good by imposing a charge in the guise of a fee, or its requirement that a charge be proportionate to the cost of the service rendered or the benefit conferred by the regulatory activity it funds. Only if it satisfies these requirements of the *Bolt* test will a charge be deemed a fee rather than a tax requiring voter approval under § 31.

⁴¹ "The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations." *Jackson*, 302 Mich App at 105 (emphasis added).

Therefore the “distinction” on which the Court below relied to deny relief is not only incorrect, the mere existence of some regulatory purpose does not support its conclusion that the *Bolt* test was satisfied.

This purported “distinction” is especially insidious because, if uncorrected, the Opinion below is likely to be consulted by other courts in the pending cases awaiting the decision in this case, and in future cases involving storm water charges imposed by cities that, like Detroit, still have combined sewers. It will serve to validate, on the basis of a specious distinction, storm water charges imposed by cities that have combined sewers. This Court should grant leave to prevent that.

C. The Court of Appeals incorrectly found that the 2016 Rain Tax was not disproportionate to the benefit conferred or the cost of the service to those who are subject to it, and was not adopted to supplement diminished revenues.

The Court below did not acknowledge or discuss the undeniable significance of three undisputed facts that establish that the City’s impervious acreage charges – including the 2016 Rain Tax -- indisputably violate *Bolt’s* proportionality requirement.

First, in response to political opposition (primarily from churches) to the 2016 Rain Tax’s original \$750 per acre per month impervious acreage charge, originally scheduled to take effect on October 1, 2016, the City unilaterally reduced the charge to \$125, on March 31, 2017,⁴² and

⁴² On March 31, 2017, however, Mayor Mike Duggan announced modifications of the drainage charge and the prior drainage charge (“the March 31 modifications”). Exs 15 and 16. Under the March 31 modifications, DWSD’s implementation of the drainage charge for “[c]ustomers who currently pay based on meter size or who have never been billed for drainage will pay \$125 per impervious acre starting April 2018. Customers will phase to the full rate over 5 years with transition credits applied.” Ex 15 (emphasis added). In a single stroke, the City reduced the 2016 Rain Tax to 1/6 of its original \$750 per impervious acre monthly amount.

again on April of 2017.⁴³ See Exs 15 through 19. Thus, the City reduced the 2016 Rain Tax to one-sixth of its original amount the \$750 per acre charge that the City claimed (and the Court below evidently believed) had been “scientifically determined,” by “overflight mapping” and precise measurement of the City’s impervious area, would yield the precise amount of revenue the

Meanwhile, under the same March 31 modifications, the approximately one-half of DWSD’s commercial customers who were then currently being billed under the prior drainage charge of \$852 per impervious acre per month would see only a 30% reduction in that rate, to \$661 per impervious acre per month, effective on July 1, 2017. Exs 15, 16, 18. They would thus be subject to a charge **more than five times higher** than the new \$125 per acre drainage charge.

Further, the March 31 modifications provided that non-residential customers being assessed under the prior drainage charge “who were billed \$852 per impervious acre (Fiscal Year 2015-2016) will see a 30% reduction in their rate in 2018, which will drop to \$598.” Ex 18 (emphasis added).

Which charge, one might well ask, is proportional to the value of the service rendered?

⁴³ On April 19, 2017, less than three weeks after the March 31 modifications, the City announced, yet more modifications of the drainage charge (“the April 19 modification”), which further compounded the Headlee violations already inherent in the drainage charge, and further violated the proportionality requirement. See Exs 15-19. DWSD deferred implementing the 2016 Rain Tax for the 22,000 unmetered parcels comprising 850 impervious acres that had not been assessed under the prior drainage charge program for several selected classes of property. At the same time it also wrought additional changes to the prior drainage charge.

For Detroit churches and other houses of worship (so-called “faith based” DWSD customers), the April 19 modification changed three significant aspects of the existing prior drainage charge and the implementation of the new drainage charge: (1) “faith-based” properties already being assessed under the 2013 charge received a further reduction: Beginning on July 1, 2018, it was further reduced from the (already reduced) \$661 monthly rate under the March 31 modifications, to an even lower \$598 per impervious acre per month rate; (2) “faith-based” properties that (a) had been paying no drainage charge at all before October 1, 2016, or (b) that had been paying a flat fee under the prior meter-based drainage charge, would not be subject even to the reduced \$125 per impervious acre per month until July 1, 2018, a six-month extension of the original January 1, 2018, implementation date for faith-based properties, see Ex 20, p 2 of 15); and (3) the drainage charge will now be phased in over a five-year period, ultimately reaching a (further reduced) maximum charge of \$677 per impervious acre per month only in 2022. Thus, even after the March 31 modification’s 30% reduction or the prior drainage charge to \$661, and the April 19 modification’s further reduction of the prior drainage charge to \$598 for commercial properties, the rate for owners of property subject to the July 2013 drainage charge is 400% higher than the reduced \$125 drainage charge under the 2016 Rain Tax. See Exs 15-19.

City needed to defray the expense of treating the city's storm water. See Ex 20, pp 2, ¶ 4; p 4 ¶ 4; Ex 21, May 2017 Brown Affidavit, ¶¶ 21-27.

According to the City (and the Court below) "The drainage charge amount that each of the City's customers pays only reflects the burden each user places on the treatment system as measured by the impervious acreage of each particular parcel..."⁴⁴ This statement is demonstrably untrue, because the City calculated the "new drainage 'per acre' rate that reflected the revenue requirement assigned to the City by the [GLWA]," Ex 20, *without reference to any of the 23,000 impervious acres of City-owned streets*, which were exempted from the City's newly-devised Rain Tax. See I (A), *supra*.

Second, the City unilaterally reduced to \$598 the original 2013 impervious acreage charge of \$852 the City substituted for its meter-based drainage fee immediately after emerging from bankruptcy. That charge was to be applicable to all of the impervious area in the City except the 22,000 unmetered parcels omitted from the 2013 charge that are subject to the 2016 Rain Tax. The Court below did not even acknowledge or discuss this. This was a 30 per cent reduction of the

⁴⁴ Ex 22, DWSD Director Brown's Affidavit, states, at ¶¶ 19, 20, 21, and 22: "In 2015, as geographic information system (GIS) technology became increasingly accurate and readily available, the City obtained GIS data for the entire city using aerial flyover views. Using this GIS flyover data, the City was able to determine the impervious acreage allocable to each individual parcel contributing surface water and storm water flow to the City's systems. Through the use of individually-measured GIS data, the City's revised drainage charge helps ensure that the City's drainage customers are paying an even more proportional share of the overall costs of services for combined sewage treatment and disposal than ever before. The drainage charge amount that each of the City's customers pays only reflects the burden each user places on the treatment system as measured by the impervious acreage of each particular parcel..." (Emphasis added). (cont'd)

How does the drainage charge of each DWSD customer become "even more proportional" if the additional revenue captured from "new-to-world" customers who have never paid a drainage charge does not produce a corresponding reduction in the 2013 charge?

Because the Court below never acknowledged or considered these facts, it did not consider this aspect of the clear disproportionality of the City's two-tiered rate structure fore the same service.

2013 charge payable by all 200,000 owners of the 380,000 properties that, because they had water meters and were already on the DWSD billing system, were first subjected to the new impervious acreage charge. Supposedly the 2013 charge, too, was the precise amount needed to yield the revenue the City required to meet its storm water system expenses. Which charge -- \$852, \$661, or \$598 -- was proportional to the value of the service rendered to customers subject to the 2013 charge? And which charge -- the scientifically calculated \$750 or the arbitrarily reduced \$125 -- was the precise amount to defray the service rendered to property subject to the 2016 Rain Tax? And since the same service was being rendered to all subject to the 2013 charge or the 2016 Rain Tax, which one -- \$852, \$750, \$661, \$598, or \$125 -- was proportional to the cost of rendering it?

Third, another fact not acknowledged by the Court below, clear rate disproportionality resulted from the City's arbitrary creation, by fiat, of a two-tiered rate structure imposing disparate drainage charges for the same service. According to the City's own description of these modifications of the 2013 charge and the 2016 Rain Tax, this rate disparity will continue for 5 years, until the rates converge at \$677 per acre per month, in 2022. Exs 15-19. The City has undeniably created a two-tiered, explicitly non-proportional, charge for the same service: collecting, transporting, and treating storm water, and constructing the facilities required under DWSD's NPDES permit. The City offered no rationale consistent with *Bolt's* proportionality requirement for imposing such vastly different drainage charges on properties supposedly responsible for the same amount of storm water runoff collection and treatment charges. Again, which charge is proportional to the value of the service rendered?

To be sure, *Bolt* and its progeny do not require "mathematical precision" to satisfy the *Bolt* test's requirement that the charge be "reasonably proportionate" to the "direct and indirect costs of providing the service for which the fee is charged." *Jackson County v City of Jackson*, 302

Mich App 90, 109; 836 NW2d 903 (2013), *Kircher v City of Ypsilanti*, 269 Mich App, 224, 232-232; 712 NW2d 738 (2005).

But here, not merely by hypothesis, and certainly not by “speculation,” as the Court below found, but by the City’s own admission, DWSD customers are now paying rates that differ by a factor of as much as 400%, and will continue to pay at differential, and therefore by definition non-proportional, rates for the same service until at least 2022.

The Court below did not acknowledge or discuss this, nor did it consider its obvious implications on the “revenue vs. regulatory purpose” issue on which it concluded DAART had merely “speculated.” Neither the Headlee Amendment nor *Bolt* authorizes any exception allowing a five-year “grace period,”⁴⁵ during which disproportionality so great that it renders a fee a tax will be permitted. Certainly “mathematical precision” is not at issue when the City charges a rate that is one-sixth or one-quarter of the rate DSWD charges other similarly situated property owners for the same service.

Six additional facts reinforce the inescapable conclusion that the 2016 Rain Tax does not satisfy the proportionality requirement:

First, if DWSD’s drainage revenues are sufficient to allow it to practice such irrational carpentry, creating two parallel rate structures for the same service, with one class of customers paying 1/6 as much as the other class, and sustaining that disparity over a 5 year period, the 2016 Rain Tax was plainly a revenue measure designed simply to shake additional fruit from the property-owner bushes of Detroit to replace decreasing revenues. Not only do the reduction to

⁴⁵ DAART addresses the Court of Appeals incorrect application of “utility” rate-making principles, including its approval of the City’s unauthorized “phase-in” program, in I (E), *infra*.

\$125 of the charge to the owners of the 22,000 unmetered parcels the City added to its drainage charge billing database for the first time by adopting the \$750 2016 Rain Tax, see Ex 4, ¶ 4, p 4 of 15, and the paltry 30% reduction to \$598 dollars of the 2013 charge establish a clear proportionality violation, it demonstrates that these new charges yielded revenues that exceeded the amount the City needed to fund its storm water system.

Second, the Court of Appeals superficial discussion of the City's ad hoc "solution" to "rate shock," the 5-year phase-in plan the City adopted, confirms that the 2016 Rain Tax is primarily a revenue measure, rather than a regulatory measure: The admitted fact – referenced in the Court of Appeals own opinion -- that *59.4% of those billed could not pay it*, highlights why this charge bears no real connection or resemblance to the relatively nominal pre-bankruptcy meter-based storm water charges dating back to 1975 that the City (and the Court below) invoked to support a conclusion that this enormous new charge is "not a new source of revenue," but merely an extension of an existing system of funding storm water collection and treatment that has existed for almost 50 years.

Third, the Court below never acknowledges that the City's drastic, 5-year reduction of the charges it claims it determined with "scientific accuracy" to be precisely the amount it needed to pay the cost of its storm water treatment program puts the City in an untenable double bind: *if, after reducing these charges so drastically, the City will nevertheless be able for the next five years to defray the "regulatory" expense of the storm water treatment system that the City claims the charges were precisely calculated to defray, the original charges were wildly excessive, and so is the targeted 2022 \$677 per acre charge.* The original charges had to exceed the revenue the City required by far more than a reasonable margin of error if, after unilaterally reducing the charge so drastically, the City can pay all its storm water system expenses.

Because the Court below did not even acknowledge these undisputed facts, it did not recognize that they are the equivalent of the proverbial “trout in the milk.”⁴⁶ Both charges (\$750 and \$125) cannot comply with *Bolt*’s proportionality requirement and its prohibition against using a fee to generate revenue. Because the conclusory Hudson Affidavit on which the City and the Court below relied as evidence that the Rain Tax was not a revenue measure does not address these undisputed facts, it amounts to nothing more than a Wizard’s assurance: “Pay no attention to that man behind the curtain – we are doing nothing wrong.”

The Court of Appeals uncritical acceptance of that response in the face of undisputed evidence that the 2016 Rain Tax violates the *Bolt* test⁴⁷ and its findings that the 2016 Rain Tax is proportional, generates only the revenue required to pay the expense of providing the service, and therefore is not a “revenue measure,” but serves only a regulatory purpose, Op, pp 15-16, cannot be reconciled with the *Bolt* test.

⁴⁶ “As ably stated by Thoreau: ‘Some circumstantial evidence is very strong as when you find a trout in the milk.’ *In re Arnson's Estate*, 2 Mich App 478, 487; 140 NW2d 546, 551 (1966) (citing 8 Writings of Henry David Thoreau, Journal, November 11, 1950 (Torrey Ed) p 95).

⁴⁷ If, after so drastically reducing the 2013 charge by 30%, to \$598, and the 2016 Rain Tax by 83%, to \$125, the revenues they generate will defray all storm water expenses *and* reduce the 2016 Rain Tax default rate from 59.4% to 9.2% *and* accrue – in the brief time between 2016 when it adopted its \$750 per acre charge, atop its \$852 per acre charge -- the 115-day expense reserve sufficient to cover all of its operating costs that the Court referred to, but which is not contained in the Hudson Affidavit, the City would seem to have some explaining to do, *because the City plans to increase those rates over the next 5 years until they converge at \$677 per acre per month*.

Neither the \$750 per acre per month 2016 Rain Tax that DAART originally challenged, nor the \$677 per acre per month rate (which is 90.26 % of the original \$750 per month rate) to which the City plans to increase that rate, after reducing it to *\$125 per acre per month*, can possibly satisfy the first and second prongs of the *Bolt* test for distinguishing a tax from a fee: if the revenues currently being realized at the \$125 per acre per month rate satisfy the *Bolt* test, the 2022 rate will not.

Fourth, contrary to the Court’s finding that the City did not adopt the 2016 Rain Tax to replace revenues lost to GLWA, Op, p 16, the City admitted that it imposed it because its storm water revenues were insufficient to pay its “debt service related expense [of] \$59.8 million [that] is essentially the (GLWA held) mortgage payment.” Op, p 18, n16; Ex 4, p 9 of 15.⁴⁸

By its own account, the City is in essentially the same position as the City in *Jackson*, which sought to make up a shortfall in the revenues it had previously used to pay its storm water utility expenses by imposing a new drainage charge. The City of Detroit imposed the new impervious acreage charge in 2013, immediately after emerging from bankruptcy, to replace the meter-based storm water revenue stream that apparently was sufficient before its bankruptcy, but became insufficient after it lost to GLWA all but the revenue from “retail services” to City residents. Ex 23. That \$852 impervious acreage charge was both calculated and sufficient to

⁴⁸ The Court’s Opinion reflects such a shaky and incomplete command of the complex facts of this case that it referred to the expectation, stated in Ex 20, which was published in 2016, long before the rate reductions and phase-in delays, in March and April 2017, that the \$750 rate (which has been replaced by the \$125 rate) would decrease by 32% by 2019, as it was extended to additional properties. This inaccuracy is significant for two reasons:

First, even before the City announced its drastic rate reduction, it admitted that the reason it was charging \$750 per acre was that its records were so poor that it would take until 2019 before it could extend the 2016 Rain Tax to all of the properties whose impervious area it had so scientifically measured. That means that the City charged the property owners it could identify a premium rate of \$750 that was based, not on the cost of rendering service to their property, but on the cost of rendering service to them *plus* the cost of providing service to properties that DWSD was incapable of billing. *That is the definition of how a tax works: a payment for the common good, rather than a payment reflecting the cost of providing the service to the person charged.*

Second, even after the reducing the rate by 83%, from \$750 to \$125 the City was able to cover its expenses and achieve the dramatic 80% percent payment delinquency reduction (from 59.4% to 9.2%). Clearer evidence that the original \$750 rate was higher than the cost of rendering the service to the properties subject to it, and that it was therefore both non-proportional *and* a revenue raising measure, cannot be posited. Yet the Court of Appeals saw no problem worthy of discussion, since it did not discuss any of these undisputed facts, derived from the City’s own documents.

enable it to meet its \$151 million annual storm water revenue requirement and all other “working capital” it required through June 30, 2016, 3 months before the 2016 Rain Tax was to take effect. See April 2018 Brown Affidavit, Ex 21.

The City then added the 2016 Rain Tax, for the stated purpose of enabling it to defray the same storm water revenue requirement that the 2013 charge was levied to satisfy. Ex 20. Therefore, DAART did not, as the Court of Appeals asserts, merely “speculate” that the drainage charge was used to replace or augment revenue “purportedly” lost as a result of the bankruptcy. The City said so. Indeed, the City’s admission that the 2016 Rain Tax was imposed to generate funds to repay debt for “past investment” in storm water facilities (i.e., the City’s 83% share of that indebtedness that it call its “GLWA mortgage,” for bonded indebtedness incurred before the bankruptcy), which, before the bankruptcy, *was repaid from sewer revenues the City lost in the bankruptcy to the GLWA*), confirms that the 2016 Rain Tax was imposed to replace pre-bankruptcy sewer system revenue that was used to pay this bonded debt before it was lost in the bankruptcy.

Fifth, the 2016 Rain Tax demonstrably funds *specific future capital improvements to its storm water system and “Green Infrastructure” program grants to specific individuals required under the terms of the City’s NPDES permit*, which must be completed by 2022, or the City may face a requirement that it construct yet more storm water control facilities.⁴⁹ The Court below did

⁴⁹ See *ante*, note 13; Ex 26, p 2 of 3, Ex 12 (NPDES Fact Sheet), pp 1, 11-15 (outlining the Facility Improvement Program mandated by the City’s permit).

In addition to storm water control facilities, the permit also requires capital expenditures for Green Infrastructure construction requirements, under which “DWSD will be required to spend an average of \$3 million per year during the life of this permit.” Ex 15, NPDES Fact Sheet, at p 15.

Moreover, if these mandatory unamortized capital outlays funded by the 2016 Rain Tax do not enable the City to meet the water quality requirements of its NPDES permit, the permit itself states that the City will be required in the future to construct additional capital improvements and

not even allude to the terms of the City’s NPDES permit requiring the construction of facilities to alleviate storm water overflows emanating from specific identified areas of the City – and thus disproportionately benefiting the owners of the property in those specific areas that are generating those overflows. Plainly, the Court below erred in accepting uncritically the City’s claim that Rain Tax will defray only properly amortized debt incurred to fund *past* capital improvements. See Op, p 18, n 17. Under the most favorable interpretation of its Opinion, it appears that the Court of Appeals erroneously ascribed a meaning to the Hudson Affidavit, Ex 23, that it does not and could not have in light of these undisputed future capital outlay obligations when it found that the Rain Fee will not be used to “pay for large-scale capital improvements in the future.” Op. p 18. In fact, the Hudson Affidavit is completely silent on that point; at most, if believed, it avers only that the equivalency between the costs of and revenues derived from “wholesale operations” and “retail operations” continued after the GLWA took over wholesale operations in 2016.⁵⁰

Sixth, the Court below also overlooked Ex 22, DWSD Director Brown’s May 2017 Affidavit, from which it is clear that the 2016 Rain Tax *will* be and is being used to pay for the improvements required by the City’s NPDES permit, whether the City chooses to call them “large-scale” or not. The City made *no showing* that those improvements are materializing without cost out of thin air, nor that, like the facilities constructed in the past with bond proceeds, are “properly amortized in accordance with governmental accounting procedures.” Rather, the City admits that *if it does not succeed in satisfying the requirements of its NPDES permit by 2022, it “will be*

additions to its storm water system, which the City acknowledges it would be obligated to “pass onto” its customers. Ex 19, p1.

⁵⁰ Ex 23, The Hudson Affidavit, does not even refer to “capital improvements.” It addresses only “wholesale” and “retail” operational expenses. *Id.*, ¶¶ 7-8.

*required to spend \$1 billion to expand its system of retention basins and pass the additional cost onto [sic] its customers.”*⁵¹

The City’s Hudson Affidavit, on which the Court relied, did not even address the expenses of capital improvements it is required to make between now and 2022 under its NPDES permit, or those it will be required to construct after 2022 if the improvements it is already obligated to construct do not enable it to avoid the additional \$1 billion it may be required to ‘pass [along] to its customers.’ Ex 21-A, p 1 of 2. The Court of Appeals acceptance of the Hudson Affidavit as gospel-like evidence that the Rain Tax serves no revenue raising purpose would be touching in some contexts, but is discouraging in a Court exercising the original jurisdiction confided to it by the Headlee Amendment to protect Michigan voters’ constitutional right to approve any new tax. At best, the Court below erred in relying on it to conclude – even though it does not say so

⁵¹ Ex 19, p 1. As in *Bolt*, DWSD’s stated purpose for imposing the drainage charge includes “*pay[ing] for capital, operations and maintenance costs for the [overflow control facilities], wastewater treatment plant and combined sewer system components.*” Ex 20, “Understanding the Drainage charge,” ¶ 3, p. 1 of 15 (emphasis added). Compare *Bolt*, in which the City established the fund to which the unconstitutional storm water drainage charges were deposited, “*to help defray the cost of the administration, operation, maintenance, and construction of the storm water system.*” 459 Mich at 155 (emphasis added).

The City clearly explains in Ex 20 that it imposed the 2016 Rain Tax to enable DWSD to satisfy its past, current, and future capital expenditure obligations under the consent judgment and the 2002 second amended consent judgment entered by the United States District Court for the Eastern District of Michigan, and under the July 2011 Administrative Consent Order between DWSD and the Michigan Department of Environmental Quality, each of which obligated, and now obligate, DWSD to perform capital improvements to control CSOs. See Ex 15, DWSD’s NPDES Fact Sheet, at p 11.

anywhere -- that 2016 Rain Tax proceeds are and will be applied to retire only past bonded indebtedness that has been properly amortized.

Summary: The Court below reached its conclusions only by omitting and ignoring undisputed facts, established by the City's own documents, that are irreconcilable with them. See Op, pp 17-18. Even assuming that the Hudson Affidavit the Court cited is true with respect to the "operational" matters to which it appears to have been purposely confined, it was insufficient to sustain the Court's sweeping generalizations and patently erroneous conclusions on the on the proportionality and revenue issues.

D. The Court of Appeals ignored strong evidence that serial circuit court class action settlements are being used to circumvent and nullify § 31.

DAART submits that it was inappropriate for the Court below to dismiss as an improper "collateral attack" on the settlements in *Michigan Warehousing* and at least five other cases⁵² evidence that a cottage industry has grown up of bringing and settling circuit court class actions claiming that storm water and other sewage department billed charges violate § 31. Such settlements appear to yield rich 33% contingent fee awards for class counsel, but afford little relief of value to class members, who are then barred by a covenant not to sue from challenging drainage charges under the Headlee Amendment. The Court should been alert to the possibility that such cozy settlements have the effect of eviscerating the protections of the Headlee Amendment. Class

⁵² These include three cases that the undersigned was able to identify in which the settlements were achieved by the same counsel for the City in this case, *Binns*, and *Michigan Warehousing*, and the same class counsel for plaintiffs in *Michigan Warehousing*. See Ex 28, Ex 29, and Ex 30. Complete versions of the documents excerpted in these exhibits, and other related court filings in these and other Headlee Amendment class actions, can be obtained online, at <http://kickhamhanley.com/class-action/uhop-v-detroit> (last accessed 12-17-18).

actions filed and settled in circuit court under the alternative jurisdiction over Headlee actions conferred by MCL 600.308a. Class counsel reap large contingent/percentage fees,⁵³ while the settling municipalities are freed by the standard covenant not to sue to impose drainage charges without fear of their being challenged as violations of § 31. These circuit court settlements escape all appellate notice or scrutiny, side-stepping the purpose of the Headlee Amendment's grant of original jurisdiction to the Court of Appeals. It was not improper to bring this phenomenon to the Court's attention.⁵⁴

In *Michigan Warehousing*, the City was transparently trying to bar DAART's action by including the original named plaintiffs in DAART within the class defined in the settlement agreement, even though the class to which those subject to the October 1, 2016, charge that DAART challenges did not even exist when the plaintiffs in *Michigan Warehousing* pled the class allegations in their original August 3, 2015, complaint, or when they filed their second amended

⁵³ Rather than the hourly fee deemed appropriate for counsel who successfully prosecute a § 31 claim in *Bolt (on remand)*, *supra*, the class counsel are reaping one-third contingent fee awards from the compromise "re-fund in court" they secure for the taxpayers whose interests they represent. See Exs 28, 29, and 30.

⁵⁴ MCR 2.112, the unique rule governing Headlee Amendment claims, specifically allows any party to bring material facts to the Court's attention at any stage of the proceedings: "The parties may supplement their pleadings with additional documentary evidence as it becomes available to them."

Both the Court below (especially fortified by its original jurisdiction over Headlee actions) and this Court may take judicial notice of such settlements in the exercise of the judicial power they possess as the "one court of justice" created under Mich Const 1963, art 6, § 1:

"The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

Documents that are part of lower court records *in this or other cases* are within this Court's purview under principles of judicial notice, based on the one court of justice concept found in Michigan's constitution. *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972).

complaint, on February 26, 2016, seven months before the charge DAART challenges was first imposed.

DAART members appealed the circuit court's rejection of their objections to the *Michigan Warehousing* settlement. Plaintiff's attorneys responded by threatening to sue DAART and their counsel for the asserted "value" of the settlement (most of which consisted of "credits" of about a dime of each dollar of unpaid drainage fees that the City could never collect anyway – the actual cash payments to class members were \$2 million less than the \$7 million fee award to class counsel).⁵⁵ The DAART plaintiffs avoided such a suit only by agreeing to dismiss their appeal in *Michigan Warehousing*⁵⁶ in exchange for the City's stipulation that new representative plaintiffs could be substituted in this action who either opted out of the *Michigan Warehousing* settlement or did not own *both* property subject to the original 2013 Rain Tax and the new Rain Tax imposed on unmetered property on October 1, 2016 and/or had not been billed for or paid the 2016 Rain Tax before June 30, 2017, and were thus not members of the class barred by the settlement from asserting Headlee claims forever.⁵⁷

By cooperating with Plaintiff's tactic for preventing appellate scrutiny, the City preserved a settlement that it evidently hoped would not be affected by an adverse decision in this case, and

⁵⁵ See Ex 31. The Court really should read this letter, and consider who would ever object to a Headlee class action settlement or appeal its approval when such bully tactics will inevitably be employed. Only this Court can protect the right of voters to approve new taxes conferred by § 31. Class action counsel collecting 33% fees under the "fund in court doctrine, rather than the hourly compensation awardable under the rule in Bolt (on remand) to a prevailing taxpayer, are not going to do so.

⁵⁶ Ex 32.

⁵⁷ Exs 33, 34.

which prohibits the *Michigan Warehousing* class “forever” from bringing a claim against the City under the Headlee Amendment to challenge any storm water charge the City cares to impose.⁵⁸

The net result of this phenomenon is the creation of Headlee-free zones in which storm water and other sewer charges are immune from challenge under § 31. If this Court does not grant leave to at least consider the implications of that phenomenon, such settlements eventually will eviscerate § 31 in the storm water fee context in which *Bolt* and *Jackson* applied it. They will forever escape appellate scrutiny, as busy circuit judges approve complicated settlements to which both sides have a strong incentive to stipulate, and to which no single class member has the time, resources, or knowledge needed to raise any objection, or appeal if their objections are overruled.

In DAART’s view, the dismissive treatment of this information by the Court below is a compelling reason for this Court to regard this unpublished decision as involving a matter having jurisprudential significance and substantial public interest that warrants a grant of leave.

E. The Court of Appeals incorrectly applied utility rate-making principles to uphold the City’s ad hoc “phase-in” adjustments of the Rain Tax, which demonstrated that the rates charged are not proportional to the cost of rendering (or the benefit conferred by) the service.

The Court of Appeals reliance on the non-Headlee/pre-*Bolt* decision in *Novi v Detroit*, 433 Mich 414, 425-426, 428, 430;446 NW 2d 118 (1989), and the foreign authorities⁵⁹ cited in its Opinion, p 20, for the proposition that, as a “utility,” the City may invoke a “presumption of reasonableness,” and may, in its discretion, phase-in drainage charges at rates below the cost of

⁵⁸ See Exs 9, 28-30 (Covenants not to sue).

⁵⁹ *Citizens Action Coalition of Indiana, Inc v Indiana Pub Serv Co*, 76 NE3d 144, 153 (Ind App 2017); *Watergate East, Inc v Pub Serv Comm of Dist of Columbia*, 665 A2d 943, 949 (DC 1995).

the service rendered, immune from any challenge, illustrate just how far the Court below strayed in applying the *Bolt* test. Correctly understood, in light of facts of which the Court below was informed, but chose to ignore and omit from its opinion, they actually demonstrate how gravely the Court erred, in three ways.

First, the presumption of reasonableness attaches only to ratemaking that a utility is authorized by statute (or the Constitution) to perform. In *Novi v Detroit*, on which the Court below relied, the presumption applied because MCL 123.141, the statute applicable to Detroit's water rates, authorized the City to formulate its rates "based on the actual cost of service *as determined under the utility basis of rate-making.*" 443 Mich at 417. This Court merely held that the presumption applied because, in light of the City's statutory authority to employ utility rate-making methodology to determine the cost of service, the presumption applied to validate the City's water rates, because Novi had not carried the burden of showing that the rate did not reflect the actual cost of service. *Id.*, at 430-431. Nothing in *Novi v Detroit* suggests that "utility rate-making" authorizes a five-year phase in period in which (1) two vastly different rates are charged, (2) neither of which corresponds to the "scientifically determined" rate the City supposedly calculated with to provide precisely the revenue required to conform to the *constitutional* requirement under Headlee and the *Bolt* test (and its own ordinance)⁶⁰ that (3) the rate charged be proportional to the cost of service. Indeed, under "utility rate-making" principles, phased-in rates

⁶⁰ The City's storm water ordinance, with which DWSD's administratively carpentered drainage rate scheme is required to comply, likewise requires that storm water rates be related to the cost of service, as "determined by gauging, metering or any other equitable method of measuring," and provides no authority for providing service to some users at "phase in" rates that do not reflect the cost of service. See, Ex 8, Detroit City Code, § 56-3-2, and § 56-3-12(a) and (b).

of less than the cost of service must be specifically authorized by law, because they represent a departure from the fundamental utility rate-making cost-of-service principle.⁶¹

Second, no “presumption of reasonableness” can possibly attach to the arbitrarily disparate rates *for the same service* the City adopted to quell opposition to the original rates.⁶² Not only was the City originally charging significantly *different rates for the same service* (\$852 vs \$750) under the 2013 charge and the 2016 Rain Tax, it then reduced those rates so drastically and disparately that those subject to the 2016 Rain Tax were charged only 1/5th as much as those subject to the 2013 charge (\$125 vs \$598), even if the taxpayer was in the “faith based” category the City tried to placate. See Exs 15-19. To put a finer point on it: Was the meeting its costs when it

⁶¹ See, e.g., *In re Indiana Michigan Power Co*, 297 Mich App 332, 345–47; 824 NW2d 246 (2012) (Because MCL 460.11 explicitly provided that “if the commission determines that the impact of imposing cost of service rates on customers of an electric utility would have a material impact on customer rates, the commission may approve an order that implements those rates over a suitable number of years,” the Commission was not required limit utilities to “equal percentage increases or decreases” of all base rates pursuant to MCL 460.6a(1)); *Attorney General v Pub Serv Comm*, 269 Mich App 473, 479; 713 NW2d 290 (2005) (Under MCL 462.25, the PSC has broad discretion in determining issues such as rates, fares, charges, regulations, and practices.

⁶² *Trahey v City of Inkster*, 311 Mich App 582; 878 NW2d 582 (2015), on which the Court below erroneously relied, Op., p 17, is not to the contrary. Although the *Trahey* Court cited *Jackson, supra*, for the general propositions that courts may not disregard the “presumption that the rate is reasonable” in the absence of contrary evidence, and that “mathematic precision is not required” in setting a utility fee, 311 Mich App at 595, 597, *Trahey* was not a Headlee (cont’d) claim. Rather, the Court reversed the trial court’s rulings for plaintiff on his *statutory* claim under MCL 123.141(3) and his *ordinance*-based claim under § 14.3 of the Inkster City Charter. 311 Mich App at 588 and 596.

The *Trahey* Court merely held that, *in the absence of “evidentiary support for the trial court’s finding that a part of the debt component of the water and sewer rate was attributable to debt for expenses unrelated to water and sewer,” id.*, at 596 (emphasis added), it was not improper, in setting the new rates that plaintiff challenged, for the City to include a debt component in the water and sewer rates for debt incurred because the past rates were too low to cover the costs of providing service. Because plaintiff failed to provide “evidence showing that the method chosen by the city to maintain its operations was unreasonable,” *id.* at 597, the “presumption that a rate is reasonable” applied, and the Court would “not independently scrutinize the municipal ratemaking methods employed.” *Id.*, at 595, 598.

devised the original 2013 charge, when it added to the revenue from the 2013 charge the additional revenue yielded by the 2016 Rain Tax, or when it repeatedly, and unequally, slashed both of them? The Court below did not even consider that question, because it did not even acknowledge the undisputed facts in the record necessary to state it.

Even if *Bolt* does not require “mathematical precision” in the proportionality between the charge for, and the cost of rendering, a service, as the Court below correctly noted, Op, p 19; see *Jackson*, 302 Mich App at 109, it is *mathematically impossible* that \$125 and \$598 are *both* a reasonably proportional charge for the *same regulatory service*, i.e., collecting, transporting, and processing storm water for treatment.

Third, the foreign authorities the Court cited to support its decision, are actually authority for DAART’s position, because, just as in *In re Indiana Michigan Power Co*, *supra*, the utilities in each case were authorized by statute to incorporate the principle of gradualism in their rate-making, so long as the overall rates covered the cost of service.⁶³ By contrast, as DAART pointed out below, neither the *Bolt* test nor Detroit’s sewerage ordinance authorizes the City to use rates that do not reasonably reflect the cost of storm water service, let alone disparate rates that oblige some taxpayers to subsidize service to others. On the contrary, both the *Bolt* test and the City’s sewerage ordinance require drainage charges to be reasonably and equitably related to the cost of providing the service, to ensure that they are not used as a source of revenue or to impose upon some property owners the cost of providing service to others. For this reason, too, the Court of

⁶³ See *Citizens Action*, 76 N.E.3d at 153; *Watergate E, Inc v Pub Serv Comm'n of DC*, 665 A2d 943, 950 (DC 1995) (“gradualism is but one of many factors to be considered and weighed by the Commission’ in determining rate designs, and ... principles of gradualism cannot be allowed to ‘trump[] all other valid ratemaking concerns such as ensuring that Watergate and all other customer classes pay a fair share of WGL's costs of serving them”)

Appeals analysis is inconsistent with § 31 of the Headlee Amendment as this Court interpreted it in *Bolt*.

Conclusion and Relief.

For all of these reasons, this case cries out for leave to appeal, which DAART requests, pursuant to MCR 7.305(H)(1). In the alternative, DAART asks the Court to enter a final decision reversing the Court of Appeals and declaring the Rain Tax unlawful under § 31, direct argument on the application, remand this case to the Court of Appeals for reconsideration in light of the errors in its analysis noted in this Application, and/or issue such other relief or preemptory orders as are necessary to safeguard the constitutional right of Michigan voters to approve new taxes that § 31 of the Headlee Amendment confers and protects.

Dated: December 18, 2018

s/ Frederick M. Baker, Jr.
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