

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. 158852

Court of Appeals Case
No. 339176

**PLAINTIFFS-APPELLANTS'
BRIEF IN SUPPORT OF
ARGUMENT ON APPLICATION
(MCR 7.305(H)(1))**

Frederick M. Baker, Jr., PLLC
Attorney for Plaintiffs-Appellants
Frederick M. Baker, Jr. (25415)
200 Washington Square North
Suite 400
Lansing, MI 48933
(517) 318-6190
fmbjrpllc@outlook.com

Sonal Hope Mithani (P51984)
Caroline B. Giordano (P76658)
Attorneys for Defendants-Appellees
Miller Canfield
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7786
mithani@millercanfield.com
giordano@millercanfield.com

NICOLA BINNS, JAYNE CARVER
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

LISA WALINSKE (P62136)
KATHLEEN GARBACZ (P79901)
Attorneys for Plaintiffs
REDETROIT EAST COMMUNITY
CENTER, PLLC
14344 E. Jefferson
Detroit, MI 48215
(313) 461-8440
lisa@redetroiteast.com

ERIC A. BUIKEMA (P58379)
BUIKEMA PLLC
Co-Counsel for Plaintiffs
901 Wilshire Drive, Suite 550
Troy, MI 48084
(248) 247-3300
eric@buikemapllc.com

SONAL HOPE MITHANI (P51984)
CAROLINE GIORDANO (P76658)
Attorneys, City of Detroit Defendants
MILLER CANFIELD PADDOCK & LAW
STONE, PLC
101 North Main Street, 7th Floor
Ann Arbor, MI 48104
(734) 668-7786
mithani@millercanfield.com
giordano@millercanfield.com

Jill M. Wheaton (P49921)
Kathryn J. Humphrey (P32351)
Whitley S. Granberry (P81202)
Attorneys for Defendant Great Lakes
Water Authority
DYKEMA GOSSETT PLLC
400 Renaissance Center, Suite 3700
Detroit, MI 48243
(313) 568-6848
khumphrey@dykema.com
jwheaton@dykema.com
wgranbery@dykema.com

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QUESTION PRESENTED

On January 24, 2020, this Court entered an Order¹ pursuant to MCR 7.305H)(1) directing the Clerk to schedule oral argument on DAART's Application for Leave to Appeal, and directing that parties to file supplemental briefs addressing the following question:

Whether the Court of Appeals erred in concluding that *Bolt v City of Lansing*, 459 Mich 152, 164 (1998), is distinguishable from this case on the basis that Detroit's sewer system is a combined system rather than a separate storm and sanitary sewer system.

DAART says, "yes."

The City presumably says, "no."

The Court of Appeals thought this distinction was significant.

STATEMENT OF FACTS

This Court's Order of January 24, 2020, begins by granting DAART's Motion to submit supplemental authority, *Gottesman v City of Harper Woods*, unpublished opinion per curiam of the Court of Appeals, Docket No. 344568 (rel'd December 2, 2019) ("*Harper Woods*") (copy attached as **Exhibit B**). In *Harper Woods* the plaintiff class challenged the City of Harper Woods' storm water charge under Const 1963, art 9, § 31 (the "Headlee Amendment").

Like the Rain Tax in the instant case, the Harper Woods charge was imposed to operate, maintain, and, in part, to pay for the Harper Woods' sanitary and storm water system and the cost of improvements to it required by state and federal water quality regulations to.

As in the instant case, Harper Woods' storm and sanitary effluents are discharged to a **combined** sanitary and storm water sewer system that serves several municipalities. **Exhibit B**, pp 2, 8-9.

¹ A Copy of the Order of January 24, 2020, is **Exhibit A**.

Harper Woods affirmed the trial court's finding that the Harper Woods drainage charge violates Headlee, as a matter of law. Like Detroit's Rain Tax, which was adopted (as a condition of emerging from bankruptcy) to replace the revenue DWSD lost when its facilities outside the City of Detroit (and the revenue they generated) were assigned to the newly created Great Lakes Water Authority ("GLWA") in exchange for a flat \$50,000,000 annual "lease" payment to DWSD, the Harper Woods storm water charge advanced a regulatory purpose. Nevertheless, the *Harper Woods* Court concluded that it also served a revenue-generating purpose, because it was imposed to replace former funding sources, and to fund the expense of future improvements to Harper Woods' sewer system required by state and federal law.

Thus, even though the facts in *Harper Woods* were in all essentials on all fours with those in this case, the *Harper Woods* Court incorrectly distinguished the Court of Appeals opinion in the instant case (referred to in its opinion as "*Binns*") on the basis of the Court of Appeals *erroneous* factual finding in this case that the City of Detroit uses the revenue from the Rain Tax only to pay for the cost of *past* improvements, not the cost of future improvements. See **Exhibit B**, pp 7 and 8.

In addition (and more disturbingly, because the Opinion in *Harper Woods* seems to reflect reliance on several errors in the analysis contained in the Opinion below in this case), at page 9 of its Opinion, the *Harper Woods* Court (1) seems to imply that charges under DWSD's Rain Tax take into account the characteristics of the storm water discharges (i.e., pollutants) from individual Detroit properties (they indisputably do not); and (2) stresses how "closely calibrated" DWSD's Rain Tax supposedly is to the actual dimensions (supposedly "measured from the sky" with "scientific accuracy") of the impervious areas of each Detroit parcel (again, not so, for all of the reasons demonstrated in DAART's Application and within).

Indeed, the *Harper Woods* opinion reflects no awareness that, as a result of the City of Detroit's repeated *ad hoc* modifications of the 2016 Rain Tax after its adoption, (1) *the 2016 Rain Tax is not uniform by property class*; or (2) that the City repeatedly manipulated the Rain Tax, reducing it for selected properties to as little as 1/6 of the amount DWSD supposedly "scientifically calculated" to be the precise amount required to defray only the cost of the service supposedly being rendered only to property owners subject to the DWSD's Rain Tax.

Though the *Harper Woods* Court noted that the ordinance before it, as in the instant case, expressly exempted Harper Woods' streets from the charge, the *Harper Woods* Court found it unnecessary to discuss that factor, because other features of the Harper Woods storm water charge so clearly invalidated it. This city street exemption, too, is one of the characteristics of DWSD's Rain Tax, which exempts all City-owned streets from any charge, and it was one of the indicia indicating that the charges in both *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), and *Jackson Co v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), were a tax, imposed to fund the common good, in violation of the Headlee Amendment, rather than a true user fee uniformly imposed upon *all* property owners, and reasonably related to both the value of the service rendered, and the cost of rendering the service, to each property owner subject to the charge.

The *Harper Woods* decision, which correctly affirmed the trial court's decision that the Harper Woods charge violates Headlee's requirements far less (albeit far less egregiously than the Rain Tax in this case), illustrates the confusion, inconsistency, and error that the Court of Appeals decision in this case – *which was issued without any opportunity for oral argument, and is infused with error as a result* – has introduced into settled Headlee jurisprudence. It is already being treated as "precedent."

DAART moved this Court to consider the unpublished opinion in *Harper Woods*, on the ground that it is pertinent to this Court's decision on DAART's Application for Leave, because *Harper Woods* expressly cites and relies upon the Court of Appeals decision in this case. *Harper Woods* actually relied on *the errors* in the Opinion in this case to fortify its conclusion that the Harper Woods charge gave rise to a Headlee violation, distinguishing the facts of the case before it by reference to erroneous factual findings in this case that, if corrected, put this case analytically on all fours with *Harper Woods*, *Bolt*, and *Jackson*, for the reasons set forth in DAART's Application and within.

As this Court has not directed the parties to address in the supplemental briefing for their Argument on the Application the other erroneous aspects of the Court's reasoning in this case noted above and within, DAART here states only the visceral facts pertinent to the question posed in the Order of January 24, 2020, and requests reference to its Application and Reply, and the extensive briefing and exhibits submitted by Amicus Trappers Alley, as necessary.

DAART understands the Court to be concerned primarily with the patently false distinction drawn by the Court of Appeals to which the Order of January 24, 2020, directs the parties' attention, which is posited in the language bolded in the following passage of the Court of Appeals Opinion in this case, *i.e.*, **that the physical distinction between a combined sewer system and the separated sewer systems in *Bolt* and *Jackson* (and now *Harper Woods*) gives rise to a legal distinction between this case and *Bolt*.**

The application of the *Bolt* criteria to the facts of the present case leads to the conclusion that the city of Detroit's drainage charge is a user fee rather than a tax and that the charge is therefore not subject to the Headlee Amendment. With respect to the first factor, the drainage charge serves a regulatory purpose rather than a revenue-raising purpose. Again, "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. A tax, on the other hand, is designed to raise revenue." *Bolt*, 459 Mich. at 161 (quotation marks and citations

omitted). Here, a service is rendered in the form of removal and treatment of storm water runoff. **The present case differs from *Bolt and Jackson Co.* in that, unlike the separated storm water and sewer systems being created and maintained respectively in *Bolt and Jackson Co.*, the city of Detroit has a combined sewer system, meaning that storm water runoff flows into the same pipes as unsanitary wastewater, i.e., sewage, and there is no plan to separate Detroit's sewer system because it would be cost prohibitive to do so.** The combined sewage is treated at Detroit's WTP and CSO facilities before being released back into the environment. Federal and state regulations have required the DWSD to invest more than \$1 billion in CSO control facilities in order to prevent untreated CSOs from spilling into Michigan waterways. As noted in *Detroit v. Michigan*, 803 F2d 1411, 1421 (CA 6, 1986), the city of Detroit has been legally required since 1977 to render full secondary treatment to storm water flows. The DWSD has instituted the present drainage charge to pay for capital, operations, and maintenance costs for the WTP, CSO control facilities, and combined sewer system components. **Therefore, unlike in *Bolt and Jackson Co.*, in which storm water was allowed to be released back into the environment untreated, *Bolt*, 459 Mich. at 167; *Jackson Co.*, 302 Mich. App. at 106, the DWSD provides full treatment to the combined sewage comprised of storm water and unsanitary waste water, as required by federal regulations and orders. This indicates the existence of a significant regulatory component in the present cases that was absent in *Bolt and Jackson Co.***

This federally mandated treatment of combined sewage that includes storm water runoff constitutes the provision of a service. This conclusion is supported by the persuasive analysis of a federal appellate court addressing Detroit's combined sewer system in the context of a claim under the Revenue Bond Act of 1933. In *Detroit*, 803 F2d at 1418, the federal appellate court held that “the treatment of storm water runoff from [the Wayne County Road Commission's (WCRC)] roads within the City of Detroit constitutes a ‘service rendered’ within the meaning of the Michigan Revenue Bond Act of 1933.” The court reasoned that a municipality has a right “to charge those who use a municipality's sewer system for the disposal or treatment of storm water runoff.” *Id.* at 1419. “[A] municipality, acting pursuant to a proper delegation of authority, may charge those who use or otherwise benefit from its sewer system, even though such use or benefit is based upon the disposal or treatment of storm water running into the municipality's sewers.” *Id.* at 1420. The court determined that the “WCRC receives a benefit from the disposal and treatment of the storm water running off WCRC's roads and into the City of Detroit's sewer system, and as such, we believe that this is a ‘service rendered’ within the meaning of the Revenue Bond Act of 1933.” *Id.*

Plainly, WCRC is benefitted by being relieved from the dangers and damages which may be occasioned by flooding from storm waters and which might, in the absence of drainage into the DWSD's sewer system, result in liability, or at least in damage to WCRC's roads.... Obviously, no one is responsible for this flow. The fact remains, however, that this water has to go somewhere, especially if WCRC

is to keep its roads in reasonable repair and, for at least some of this water, WCRC has obtained drainage by tapping into the DWSD sewer system. [*Id.* at 1420-1421.]

The federal appellate court further reasoned:

The storm water which constitutes the runoff from WCRC's roads may have come from God or nature in the first place, just as all water entering the DWSD's sewer system must have at one time or another. Nevertheless, the refuse or foreign matter that water accumulates as it courses through WCRC's roads must now be subjected by law to primary and secondary treatment to the extent such runoff enters Detroit's sewage treatment system. And to that extent, at least, WCRC is a user of the facility provided by DWSD. [*Id.* at 1421.]

Accordingly, the court held that “[t]he drainage and treatment of storm water from WCRC's roads into the City of Detroit's sewer system constitutes a ‘service rendered’ within the meaning of section 18 of the Revenue Bond Act of 1933.” *Id.* (citation omitted).

Likewise, in the present cases, a service is provided to property owners by virtue of the drainage and treatment of storm water that enters Detroit's combined sewer system from the property owners' parcels. **The regulatory weakness identified in Bolt and Jackson Co. concerning the release of untreated storm water back into the environment is not present in the instant cases.** [Ex C, CoA Opinion, pp 14-16. (Emphasis added).]

This Court's Order of January 24, 2020, directs that the parties focus on the specific question whether *Bolt* [and, presumably, its progeny, including *Jackson* and *Harper Woods*] is distinguishable from this case because Detroit has a combined sewer system rather than the separate storm and sanitary sewer system to which the City of Lansing sought to convert its combined sewer system by imposing its Rain Tax.

More specifically, the question is whether the Court below was correct in asserting that this case is distinguishable, because DWSD's 2016 Rain Tax includes “**a significant regulatory component in the present cases that was absent in Bolt and Jackson Co.**” because “**unlike in Bolt and Jackson Co., in which storm water was allowed to be released back into the environment untreated, Bolt, 459 Mich. at 167; Jackson Co., 302 Mich. App. at 106, the**

DWSD provides full treatment to the combined sewage comprised of storm water and unsanitary waste water, as required by federal regulations and orders.”

The short answer, of course, is that the Court below ignored DAART’s explicit arguments on this point to reach this completely mistaken conclusion. DAART clearly informed the Court below that this Court expressly 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.² Likewise, DAART alerted the Court below that in *Jackson* the Court noted that the city imposed its storm water utility charge to enable it to satisfy the requirements of state and federal water quality regulations.³

In all three cases, the charges were imposed to achieve a regulatory purpose, satisfying the first prong of *Bolt*’s three-part test.

In all three cases, the charges nevertheless fail the *Bolt* test, because they are transparently revenue measures, because they violate the proportionality requirement of the second prong of that test, as well as because they do not include the requisite element of volition.

Lansing in *Bolt*, and Detroit in this case, each sought to fund and construct improvements

² 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)

³ **"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).

in their storm water control and treatment systems to achieve precisely the same regulatory purpose: the elimination of the chronic problem of “combined sewer overflows” (CSOs) during “rain events.” The two cities merely chose different technical solutions to the same regulatory problem: the City of Detroit’s DSWD chose to address CSOs by constructing peak flow holding capacity within its combined sewer system sufficient to allow retention, controlled release, and treatment of combined storm and septic waste during peak flows accompanying Rain Events, while the City of Lansing chose to address the identical problem with a different technical solution, the separation of its combined sewer system and the creation of a separate storm water sewer system that would divert storm water from the WTP, and thereby prevent CSOs during Rain Events.

But both cities acted for precisely the same regulatory purpose, i.e., to solve the septic waste discharge caused by CSOs from their combined sewers caused by Rain Events, and thereby comply with precisely the same NPDES permit requirements for eliminating septic discharges to the Grand River, and the Detroit River, respectively, from their combined sewer system.

ARGUMENT

The Court of Appeals erred in concluding that *Bolt v City of Lansing*, 459 Mich 152, 164 (1998), is distinguishable from this case on the basis that Detroit's sewer system is a combined system rather than a separate storm and sanitary sewer system, and thus includes a significant regulatory component that was absent in *Bolt*.

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:

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.

INTRODUCTION

Determining whether a storm water charge is a fee or a tax “requires consideration of several factors,” no single one of which is determinative. *Id.*, 459 Mich at, 161, 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.”

By contrast, a “tax” is an exaction imposed primarily for public purposes, for the common good, rather than private purposes. *Id.* 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.*

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).

Based on these general principles, drawn from over a century of 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.* (emphasis added).

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. *Bolt*, 459 Mich at 162.

The *Bolt* test has only three moving parts, but the Court of Appeals correctly found that the third prong, volition, is not satisfied.

As demonstrated above, the conclusion of the Court below that this case below “includes a significant regulatory component that was absent in *Bolt*” because “Detroit's sewer system is a combined system rather than a separate storm and sanitary sewer system” is simply *factually incorrect*.

Thus, the Court below clearly applied the first prong of the *Bolt* test incorrectly: certainly, part of the purpose DWDS sought to achieve here was regulatory, just as it was in *Bolt*. But that

regulatory purpose does not, as the Court below concluded by applying its incorrect “regulatory purpose distinction” between this case and *Bolt*, insulate Detroit’s Rain Tax from constitutional scrutiny, any more than it did in *Bolt*, in which the City acted for the same regulatory purpose. If it is not decisively rejected as both factually and legally incorrect, the purported “distinction” drawn below would effectively nullify Headlee in any case in which a city has combined sewers and chooses not to separate them to achieve compliance with discharge requirements.

Headlee is a constitutional requirement, and applies to any method a city chooses and finances with user fees to meet regulatory requirements.

That leaves only the second “proportionality” prong of the *Bolt* test for inquiry in this case. But the factual issue of proportionality cannot be assessed in isolation from the regulatory purpose prong: Whether an exaction is imposed to achieve a regulatory purpose, as opposed being a revenue measure, can be assessed only by reference to the proportionality between the amount of the revenue generated by the charge and cost of rendering the service (and the value of the service rendered) to those who are subject to the charge.

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).

Courts are, of course, reluctant to impose enormous refund liabilities on municipalities merely because of an arguable disparity between the charge imposed and the cost or value of the regulatory service rendered, and the legislature has addressed the same concern by adopting a short one-year statute of limitations on Headlee-based refund claims. But Courts do enforce Headlee to

require that a fee is “exchanged for a service rendered or a benefit conferred,” and that “some reasonable relationship exists between the amount of the fee and the value of the service or benefit.” *Bolt*, 459 Mich at 161.

A serendipitous (and surely unintended) benefit of the City’s pernicious⁵ settlement in the *Michigan Warehousing* case regarding commercial properties subject to the original 2013 Rain Tax greatly narrowed the definition of the class in this case.⁶ As redefined, the class in this case excludes any original class members subject to the 2016 extension of the Rain Tax who also owned property subject to the original 2013 Rain Tax. As a result, any owners of the over 200,000 property owners subject to the original 2013 Rain Tax who also own any of the 22,000 parcels subject to the 2016 Rain Tax extension to parcels that have no sewer or water service are excluded from the class in this case. The remaining class in this case thus comprises only an unknown fraction of the owners of the 22,000 parcels to which DWSD extended the Rain Tax in 2016.

Thus, any refund that may be required will be relatively small, because (1) the 2016 Rain Tax applied to a relatively small class of 22,000 owners, (2) that class has been narrowed by excluding from it any who also owned property subject to the class action settlement in *Michigan Warehousing*, (3) as discussed within, DWSD deferred collecting the 2016 Rain Tax from many

⁵ Though beyond the scope of the question this Court directed the parties to address, the lucrative and grotesque “Headlee Storm Water Charge settlement” cottage industry that has grown like a mushroom in the circuit courts, unexposed to the light of appellate review, and the tactics to which the practitioners of such settlements have gone to protect it from appellate scrutiny, are described in DAART’s Application at pp 43-46.

⁶ See **Exhibit C**, *Binns* Opinion, p 2 n2: “The original plaintiffs other than DAART in Docket No. 339176 were Galilee Missionary Baptist Church, Danto Furniture Company, Central Avenue Auto Parts, and Judith Sale, but pursuant to a stipulation of the parties, those plaintiffs were dismissed, and the other plaintiffs identified above were substituted into the case “as DAART Representative and Named Plaintiffs in place of the dismissed parties.” *Detroit Alliance Against the Rain Tax v. Detroit*, unpublished order of the Court of Appeals, entered March 27, 2018 (Docket No. 339176).

of the properties subject to it until 2018, (4) more than half of the owners of property subject to the 2016 Rain Tax were unable to pay the full original charge, and (5) once DWSD reduced the charge to 1/6 of its original amount to pacify opposition to it, the amounts collected were so greatly reduced that most were able to pay it, at least according to DWSD.⁷ For all of these reasons, for the most part, any relief in this case will be declaratory and prospective only for most Detroiters subject to the Rain tax. This case thus entails none of the “zero sum” liability that merely converts a judgment for a tax refund into a judgment levy assessment, nor any potentially harmful disruption of DWSD’s finances or the City’s fiscal stability. Relief will, for the most part, consist merely of ordering DWSD to redesign its storm water funding mechanism to comply with Headlee’s requirements.

For these reasons, this case represents perhaps the last chance to correct Headlee jurisprudence in the storm water drainage fee context without inflicting severe fiscal consequences on the City of Detroit and other municipalities that have adopted charges like the Rain Tax in this case.

To appreciate why, the existence of a regulatory purpose notwithstanding, the Rain Tax in this case violates both of the first two prongs of the *Bolt* test, this Court needs to understand that the City admits that the Rain Tax funds the entire cost of a regulatory program that remedies a problem caused by the entire City’s storm water discharges with a charge that applies only to privately owned impervious property.

⁷ The Court of Appeals noted, apparently without recognizing its significance, that **59.4% of Detroit property owners were unable to pay the 2016 Rain Tax.** Ex C, Op. p 20. If Detroit property owners cannot pay the charge and they cannot avoid it, the third volitional factor is far more important than the Court below appears to have realized, because it means that the owners who cannot pay the charge will lose their property in foreclosure, as discussed in detail in DAART’s Application.

Clearly, as a matter of simple mathematics, the Rain Tax cannot possibly satisfy the second prong of the *Bolt* test: The largest single component of the 40 percent of the City that is impervious “hardscape”⁸ subject to the Rain Tax is the 23,000 acres of City-owned streets that the city has exempted from it by classifying City-owned streets as, in effect, sewers. By that simple expedient, DWSD allocated to the owners of only 19.5625 square miles of the City (a mere 14.1 % of the City ‘s total land area) the entire cost of collecting and treating the storm water runoff from the entire 138.75 square miles of the City’s land area.⁹

Thus, by using “impervious area” as the sole proxy for storm water runoff (rather than using a combination of charges, as it did under the meter-based/impervious area system that was in place before the City substituted the Rain Tax), the City has imposed on the owners of only 14% of the land area of the City of Detroit the cost of treating the storm water runoff of the other 119.1875 square miles of the City’s land area.

Moreover, even acknowledging that an impervious surface discharges a greater percentage of the storm water that falls on it to the City’s sewers than the 60% of the City’s land area that is pervious, as a matter of undisputed hydrological fact, pervious area also is a source of significant storm water runoff during any Rain Event, as discussed in DAART’s Application, at 22-23.

Yet under the Rain Tax the owners of the mere 19.5625 impervious square miles of the City are required to pay for the treatment of all storm water runoff from the 86% of the City that

⁸ See **Ex D**, the City’s Answer to DAART’s Application, p 15.

⁹ The City’s total land area is 138.75 miles. Forty percent of that area is equal to 55.5 square miles. The 23,000 acres of city street is equal to 35.9375 square miles. The difference is 19.5625 square miles, which is the remaining impervious area subject to the Rain Tax.

See <https://en.wikipedia.org/wiki/Detroit#Geography>

is subject to no charge whatsoever, which includes both pervious area comprising 60% of the City's land area, and the 26% of the City's land area that is impervious City-owned streets.

DAART submits that no "reasonable relationship" exists between "the amount of the fee and the value of the service or benefit" that the owners of the 14% of the City's land area are required to pay under the Rain Tax.

Rather, the Rain Tax bears all of the earmarks of a tax, because it is a charge that "generates revenue to fund activities for the common good," for "public rather than private purposes." 459 Mich at 167. The owners of 14% of the City's property fund DWSD's entire storm water remediation program, which benefits every resident of the City.

For these reasons, and those addressed in greater detail in the specific arguments that follow, not only is the purported "regulatory purpose" distinction drawn below between DWSD's expanded-retention-capacity-combined sewer solution and Lansing's combined-sewer-separation solution in *Bolt* insupportable, but here, as in *Bolt*, the gross disparity between the "amount of the fee and the value of the service or benefit" DWSD renders to the owners of the 14% of the City's property who fund the entire storm water remediation program unquestionably brands the Rain Tax as a tax levied to achieve that regulatory purpose that serves the common good of all Detroit property owners, including the City itself.

A. 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.

As noted above, in the introduction to this argument, 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. *Ex C, Op.*, pp 14-15.

Such a "distinction" is not only factually false, as shown in the introduction, it is dangerous to the Headlee Amendment's enforcement: carried to its logical conclusion, such a distinction suggests that the drainage charge of any city that does not have separated sewers automatically satisfies *Bolt's* regulatory purpose requirement.

As noted in the Statement of Facts, *ante*, notes 2 and 3, the Courts in both *Bolt* and *Jackson* expressly noted that the cities in those cases acted for a regulatory purpose in imposing their Rain Tax exactions.

The charges were invalid not because they did not advance a regulatory purpose, but because they were impermissible revenue measures exacted to achieve a permissible regulatory purpose. They impermissibly extracted revenue from the few who were charged, in the guise of a fee, to achieve a common good, for the city at large.

That a charge is adopted in whole or in part to advance a regulatory purpose does not, as the Opinion of the Court below seems to suggest, automatically mean that the charge satisfies the regulatory purpose requirement. Detailed further inquiry is required, because the question whether a charge is a tax or a fee cannot be answered without examining the interplay between the first (regulatory purpose) the second (proportionality) *Bolt* factors.

Lansing and Jackson merely chose *different solutions* to the same regulatory problems that DWSD faced 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. In each case

the charge violated Headlee under the three-factor *Bolt* test not because the charge was not applied to accomplishing a laudable and necessary regulatory goal, but because the disproportionality (under the second prong of the *Bolt* test) between the benefit conferred upon those subject to the charge and the amount of the charge revealed that the charge was imposed to generate revenue for a program for the common good of all, not for the benefit of those who paid for the program.

Here, the City has devised a means of preventing CSOs without separating its sewers. That Lansing and Jackson chose different solutions to the same regulatory problem 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.*

Further to the same point, that the cities in *Bolt* and *Jackson* acted for a valid regulatory purpose did not insulate their charges from Headlee's prohibition against raising revenue to accomplish a common good by imposing a tax in the guise of a fee, or from Headlee's requirement that, to be a fee permissible without voter approval, a charge must be proportionate to the cost of the service rendered or the benefit conferred by the regulatory activity it funds. Only if the charge satisfies these requirements of the *Bolt* test will it be deemed a fee rather than a tax requiring voter approval under the Headlee Amendment.

Therefore the "distinction" between combined and separated sewers on which the Court below relied to deny relief is incorrect for a more fundamental reason: 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, as it was in *Harper Woods*. Cases pending in the circuit courts being held in abeyance for the outcome in this case, such as the claim of amicus Trapper's Alley, and claims in future cases involving storm water charges imposed by cities that, like Detroit, still have combined sewers will be decided wrongly, and the Headlee Amendment will become a dead letter is that class of cases. Such analysis should not be allowed to survive this Court's review, because it will serve to validate, on the basis of a specious distinction, storm water charges imposed by cities merely because they have combined sewers. The Headlee Amendment applies to all charges; it admits of no special classification for cities that, like Detroit, happen to have an expensive problem to solve.

The urgency of reviewing and rejecting this false distinction is also confirmed and highlighted by the following arguments, because the Court below rested that distinction on a pre-*Bolt* Sixth Circuit decision in a case that (1) turned on the Municipal Bond Act, not the Headlee Amendment, and (2) employed analysis that, as DAART repeatedly warned the Court below, had been expressly and thoroughly rejected by *Bolt* and its progeny.

B. The “distinction” between separated sewers and combined sewers posited by the Court below rests on analysis in a federal decision that was expressly superseded by *Bolt* and its progeny.

As reflected in the bold highlighting of the opinion excerpt set forth in the Statement of Facts discussing the purported distinction between combined and separated sewers, the Court below expressly relied on analysis contained in the Sixth Circuit's pre-Headlee Amendment – and pre-*Bolt* -- decision in *Detroit v Michigan*, 803 F2d 1411 (CA 6 1986), asserting that “[t]he City's decision to exempt its roads from the drainage charge was upheld by a federal appellate court over thirty years ago in *City of Detroit, supra*.” That is certainly true, but it does not follow from that historical observation that a “regulatory purpose element was absent in *Bolt*.”

The Court in *City of Detroit* merely determined that (1) because the Revenue Bond Act, MCL 141.118, provides that “free service shall not be furnished by a public improvement to” a public corporation; and (2) “the reasonable cost and value of any service rendered to a public corporation ... by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues....;” and (3) the “drainage and treatment of storm water from W[ayne]C[ounty]R[oad]C[ommission]’s roads into the City of Detroit’s sewer system constitutes a ‘service rendered’ within the meaning of [that] section;” (4) the City of Detroit had a statutory right to charge WCRC for “the reasonable cost and value’ of this service.” 803 F2d 1418-1421.

As to the City’s decision not to impose a similar charge on itself, the Court simply said that, since the City was ultimately liable for the bond payments, it was unnecessary for the City to do so. *Id.*, at 1416. The Sixth Circuit did not mention or consider the requirements in such a context of the Headlee Amendment, *which this Court did not address until 12 years later in its decision in Bolt*.

DAART agrees wholeheartedly with the Court below and DWSD that the Sixth Circuit correctly held that processing storm water discharged from streets is a “service.” *Id.*, at 1418; **Ex E**, City’s Answer to DAART’s Application, p 31. If that were not so, the Headlee violation resulting from DWSD’s rendering that service to the City without charging the City for it, and instead charging only private property owners for it, would not so starkly reveal the Headlee violation that is occurring in this case.

DAART also agrees with DWSD and the Court below that *City of Detroit’s* holding is consistent with the notion that a drainage charge serves a regulatory purpose. *Id.*, at 1418, 1421; **Ex E**, City’s Answer to DAART’s Application, p 32.

It does not follow, however, that, as the City asserted below, and as the Court below apparently agreed, “[i]t does not matter that *City of Detroit* predates *Bolt*.” City Answer, p 32, n 32.

On the contrary, as the Court put it in *Bolt v City of Lansing (on remand)*, 238 Mich App 37; 604 NW2d 745 (1999), explicitly rejecting the analytical approach in *City of Detroit, Bolt* “established a different analytical framework for distinguishing user fees from a tax.” *Bolt (On remand)*, 238 Mich App at 46-47.

DWSD’s pretense that it did not, and the Court of Appeals reliance upon *City of Detroit’s* suggestion, *in the context of the Municipal Bond Act issue before it*, that it did not matter if the City was charged for the same service the County was charged for, because it was ultimately responsible for the bond payments, to conclude 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,” is irreconcilable with *Bolt* and its progeny.

Precisely because *City of Detroit* was concerned solely with interpreting the Revenue Bond Act, it did not address the requirements of the Headlee Amendment. This Court’s decision in *Bolt*, and its holding (applied again in *Jackson*) that the cities’ failure in those cases to impose any impervious area charge on their streets was an indication that the Rain Taxes in those cases were imposed to achieve a common good, underscore why the Court’s reliance on *City of Detroit* was misplaced. The cities in *Bolt* and *Jackson*, like the City of Detroit, were receiving a service for which they did not pay, and for which the owners of private property subject to the unconstitutional “fee” were charged. That is the hallmark of a tax: it is a charge imposed to fund government services rendered for the common good, rather than for the exclusive or primary

benefit of those subject to the charge (the hallmark of a fee). By hypothesis, a charge that funds a service rendered to the public, but which is paid only by a small percentage of the public, is not proportional to the benefit conferred upon that small percentage of the public that is subject to the charge. With apologies to Mark Twain,¹⁰ such a charge is un-English. It is un-American; it is a tax.

Finally, another aspect of the Court's reasoning upholding DWSD's city streets exemption based on *City of Detroit* also must be rejected. The Court below effectively "overruled" *Bolt* and *Jackson* on this point with its "finding," premised on the superseded analysis in *City of Detroit*, that "Plaintiffs have 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].' See *Detroit*, 803 F2d at 1416 (the city of Detroit's failure to charge itself a drainage fee was not relevant to the city's claim against the WCRC for treatment of storm water running off the WCRC's roads within the city)." Ex C, p 20 (bold emphasis added).

¹⁰ The quotation mangled is a favorite from Twain's commentary on the Dreyfus Affair, in "Concerning the Jews:"

I have no special regard for Satan; but I can at least claim that I have no prejudice against him. It may even be that I lean a little his way, on account of his not having a fair show. All religions issue bibles against him, and say the most injurious things about him, but we never hear his side. We have none but evidence for the prosecution and yet we have rendered the verdict. To my mind, this is irregular. *It is un-English. It is un-American; it is French.* Without this precedent Dreyfus could not have been condemned.

As previously noted, in *Bolt* and *Jackson* the Courts specifically and properly regarded the exemption of city streets from the rain water charge as an indicium that the charge was a tax imposed for the common good: the storm water charge shifted to private property owners subject to it the cost of regulating storm water generated by city owned property. Thus, rather than being a fee imposed for and proportionate to the cost of a service rendered to the owners of that private property, it paid for a service rendered for the common good of all.¹¹

Certainly, the lack of “end of pipe” treatment of storm water that resulted from separating the combined Lansing sewer does not provide a plausible distinction: The separation of Lansing’s combined sewer was undertaken to prevent the discharge of **untreated septic waste** to the Grand River, **not** the discharge of **untreated storm water**. In each instance, the purpose of the program funded by the Rain Tax was (and is) compliance with the requirements of NPDES permits that prohibit the discharge of **untreated septic waste** that occurs when a rain event causes a CSO.

That the cities chose different methods for complying with the requirements of their NPDES permits and the Clean Water Act does not alter that fact that in each case the solution was undertaken for a regulatory purpose. Even when that is so, the second *Bolt* requirement must be satisfied, *i.e.*, the charge must be reasonably related to the cost of rendering the service and the value of the service rendered. Here, for the reasons that follow, DWSD’s charge demonstrably does not and did not comply with that requirement. Rather they were imposed to generate fee revenue lost in the City’s bankruptcy, and thus not for a regulatory purpose.

¹¹ The Court’s further observation that “it is notable that city-owned parcels, as opposed to streets, are not characterized by the DWSD as part of the conveyance infrastructure,” **Exhibit C**, p 20, and its conclusion that the exemption of city streets has no significance in the application of the second *Bolt* factor is, to say the least, disingenuous. City owned parcels, as opposed to streets, also were not exempted in either *Bolt* or *Jackson*.

There is, in short, no distinction between *Bolt* or *Jackson* and the instant case other than the refusal of the Court below to apply and follow their reasoning.

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, 2017,¹² and again on April of 2017.¹³ See **Exs F through J**. Thus, the City reduced the 2016 Rain Tax

¹² On March 31, 2017, however, Mayor Mike Duggan announced modifications of the drainage charge and the prior drainage charge ("the March 31 modifications"). **Exs F and G**. 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 F** (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.**

¹³ On April 19, 2017, less than three weeks after the March 31 modifications, DWSD announced yet more modifications of the drainage charge, which further compounded the Headlee violations already inherent in the Rain Tax discussed above, and further violated the proportionality requirement. See **Exs F-J**.

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, DWSD also wrought additional reductions to the original 2013 Rain Tax as it applied to Detroit churches and other houses of worship. 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. Other changes were made that effected selective reductions from the supposedly "scientifically measured" and calculated impervious area rates that DWSD claims would yield only the amount needed to cover the cost storm water treatment, and thus were not designed to yield revenue.

The net result of these enormous, selective, and across the board reductions was that, even after the March 31 modification's 30% reduction of the 2013 Rain Tax's drainage charge to \$661, and even after the April 19 modification's further reduction of the 2013 Rain Tax to \$598 for commercial properties, **the rate for owners of property subject to the July 2013**

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, to yield the precise amount of revenue the DWSD needed to defray the expense of treating the city's storm water. See **Ex K**, pp 2, 4; p 4, 4; **Ex L**, May 2017 Brown Affidavit, 1121-27.

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... .*"¹⁴ This statement is demonstrably untrue, because the City calculated the "new drainage 'per acre' rate that

drainage charge remained 400% higher than the reduced \$125 drainage charge under the 2016 Rain Tax. See Exs F-J.

¹⁴ **Ex M**, DWSD Director Brown's Affidavit, states, ¶¶ 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).

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 for the same service.

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 Rain Tax of \$852 per impervious acre that the City substituted for its meter-based drainage fee immediately after emerging from bankruptcy. Supposedly, 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 30 per cent reduction of the 2013 Rain Tax 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-based Rain Tax in 2013.

Even more remarkably, the 2013 Rain Tax was supposedly "scientifically designed" to yield precisely the revenue DWSD required to meet its storm water collection and treatment system expenses.

Which charge, then -- \$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 monthly per impervious acre charge of the original 2016 Rain Tax, or the arbitrarily reduced \$125, monthly per impervious acreage charge under the revisions the DWSD announced, was the precise amount DWSD required to defray the service rendered to property subject to the 2016 Rain Tax?

And since the same service was being rendered to all impervious acreage subject to either the 2013 Rain Tax or the 2016 Rain Tax, which one -- \$852, \$750, \$661, \$598, or

\$125 --was proportional to the cost of rendering it?

The answer to this rhetorical question is obvious: The various charges are arbitrary, and reflect not the proportionality between the cost of the service rendered and the property to which the service is ostensibly rendered required under the second prong of the Bolt test, but the revenue DWSD wished to reap to fund a service that benefitted the entire City.

Third, another feature not acknowledged by the Court below, clear rate disproportionality, resulted from the City's ad hoc, arbitrary creation, by fiat, of a two-tiered rate structure imposing disparate drainage charges for the same service on property subject to the 2013 Rain Tax and the 2016 Rain Tax.

According to DWSD's own description of these modifications of the 2013 charge and the 2016 Rain Tax, this rate disparity would continue for 5 years, until the rates for both the 2013 Rain Tax and the 2016 Rain Tax converge at \$677 per acre per month, in 2022. **Exs F-J.** 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, as DAART has already acknowledged, *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, after the carpentered ad hoc revisions of the 2013 and 2016 Rain Taxes in March and April of 2017, DWSD customers were paying rates that differed 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 "constitutional holiday" from the application of the Headlee Amendment that grants an exception allowing a five-year "grace period,"¹⁵ during which disproportionality so great that it renders a fee a tax will be permitted.

Certainly, the question of "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

¹⁵ 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*.

rate 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.

Two features of what DWSD did establish that (1) the reduction to \$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 N**, p 4 of 15, and (2) the paltry 30% reduction to \$598 dollars of the 2013 Rain Tax establish a clear disproportionality violation. These wildly disparate charges demonstrate that these new charges yielded revenues that exceeded the amount that DWSD supposedly “scientifically calculated” it 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 rate phase-in plan DWSD adopted in response to property owner protests, 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. This Court should require that decisions on constitutional issues bear some relationship to reality.

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 put DWSD in an untenable logical double bind: *if, after reducing these charges so drastically, DWSD will nevertheless be able for the next five years to defray the "regulatory" expense of the storm water treatment system that DWSD claims the charges were precisely calculated to defray in 2013, the original charges were wildly excessive, and so is the targeted 2022 \$677 per acre charge.*

The original 2013 Rain Tax 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, let alone make any effort to harmonize them with the *Bolt* test, it did not recognize that they are the equivalent of the proverbial "trout in the milk."¹⁶ **Both** of the 2016 Rain Tax impervious acreage 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* test,¹⁷ and the Court of Appeals findings

¹⁶ "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) p95).

¹⁷ 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*

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, **Ex C**, Op, pp 15-16, cannot be reconciled with the *Bolt* test.

Fourth, contrary to the Court's finding that the City did not adopt the 2016 Rain Tax to replace revenues lost to GLWA, **Ex C**, Op, p 16, the City admitted that it imposed the 2016 Rain Tax 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." **Ex C**, Op, p 16, nl 6; **Ex N**, p 9 of 15.¹⁸ By its own account, the City is in essentially the same

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 acre 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.

¹⁸ 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 K**, which was published in 2016, long before the rate reductions and phase-in delays, in March and April 2017, that the \$750 2016 Rain Tax per impervious acre monthly rate (which was replaced in 2017 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 DWSD 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 2016 Rain Tax rate by 83%, from \$750 to \$125 the*

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: DWSD 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 O.** That original 2013 \$852 impervious acreage charge was both calculated and sufficient to 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 L.**

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 K.** 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. DWSD said so. Indeed, DWSD'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

City was able to cover its expenses and achieve the claimed dramatic 80% percent payment delinquency reduction (from 59.4% to 9.2%) that the Court referred to in its Opinion.

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, all of which are derived from the City's own documents.

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 the bulk of it was lost in the bankruptcy.

Fifth, contrary to the Court of Appeals assertion that the Rain Tax funds only exiting capital indebtedness, 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.¹⁹ The Court below did 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 **Ex C**, Op, p 18, n 17.

Sixth, the Court below also overlooked **Ex M**, 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

¹⁹ See **Ex P**, p 2 of 3, **Ex Q** (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

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 required to spend \$1 billion to expand its system of retention basins and pass the additional cost onto [sic] its customers."**²⁰

The Hudson Affidavit, on which the Court relied, did not address the expense 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 J**, p 1 of 2.

In the face of these admissions in the City's own explanatory documents, the Court of

²⁰ See **Ex J**, p 1. Thus, DWSD *admits* that the Rain Fee will be applied to the cost of future capital expenditures, as well as completing the capital expenditures required under its current NPDES permit, which expires on April 1, 2022. See **Ex Q**, p 12.

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."**

Also see **Ex K**, "Understanding the Drainage charge," 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).

Appeals acceptance of the Hudson Affidavit as gospel-like evidence that the Rain Tax “serves no revenue raising purpose” would be touching in a proceeding based on faith rather than evidence, but is discouraging in a Court exercising the original jurisdiction confided to it by the Headlee Amendment to Michigan’s Constitution for the protection of Michigan voters’ constitutional right to approve any new tax.

At best, the Court below erred in relying on the Hudson Affidavit to conclude -- even though it does not say so anywhere -- that 2016 Rain Tax proceeds are and will be applied to retire only **past** bonded indebtedness that has been properly amortized.

The City clearly explains in **Ex K** 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 F**, DWSD's NPDES Fact Sheet, p 11.

Conclusion and Relief.

For all of these reasons, the Court of Appeals conclusion that the storm water charge in this case is distinguishable on the basis that Detroit's sewer system is a combined system rather than a separate storm and sanitary sewer system, and that this asserted “distinction” permits or requires a different result than in *Bolt* is both factually incorrect and analytically untenable under this Court’s decision in *Bolt*.

For these reasons, as well as those outlined in DAART’s Application, this case cries out for leave to appeal, reversal, and the relief that DAART requested in its Application, which

DAART incorporates here, with thanks for the opportunity to be heard in argument on its Application.

s/ Frederick M. Baker, Jr.
Frederick M. Baker, Jr., PLLC
Attorney for Plaintiffs

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