STATE OF MICHIGAN
IN THE SUPREME COURT

MACKINAW AREA TOURIST BUREAU, INC., *et al*.,

Plaintiffs/Appellants,

v

VILLAGE OF MACKINAW CITY, a Michigan municipal corporation,

Defendant/Appellee.

Supreme Court No. 167281

COA No. 361625

Cheboygan County Circuit Court
Case No. 19-8746-CZ

MACKINAC CENTER LEGAL FOUNDATION'S
MOTION TO FILE AN AMICUS CURIAE BRIEF

Proposed amicus curiae Mackinac Center Legal Foundation moves for leave to file the attached amicus curiae brief (Exhibit 1) in support of plaintiffs-appellants' application for leave to appeal. In support, it states:

1. The Mackinac Center Legal Foundation is not affiliated with the parties in any way, despite any similarities between their names.
2. The Mackinac Center Legal Foundation is a part of the Mackinac Center for Public Policy (MCPP).
3. The MCPP is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.
4. This matter involves interpretation of the Michigan Constitution's "Headlee Amendment." The author of the Headlee Amendment, Dick Headlee, had been, during his life, an advisor to the MCPP. Therefore, MCPP has an institutional interest in defending and upholding the Headlee Amendment.
5. The Michigan Court Rules do not directly address the filing of amicus curiae briefs at the application stage. However, this Court's Internal Operating Procedures state: "The Court not only permits the filing of amicus briefs at the application stage but encourages it." IOP 7.305(A)(10), p 10. Accordingly, this motion is filed under the general motion rule, MCR 7.311(A).

For the reasons stated above and in more detail in the proposed brief, the Mackinac Center Legal Foundation asks the Court to grant leave to file the attached brief.

MACKINAC CENTER LEGAL FOUNDATION

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August 30, 2024

EXHIBIT 1

Proposed Amicus Brief

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MACKINAC CENTER LEGAL FOUNDATION'S AMICUS CURIAE BRIEF

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STATEMENT OF QUESTION INVOLVED

Under the Headlee Amendment, are municipal fees limited to paying for regulatory administrative costs and prohibited from being used to also pay for resulting costs such as capital construction for the general public?

Plaintiff/Appellant says: Yes.

Defendant/Appellee says: No.

The Court of Appeals says: No.

Amicus says: Yes.

STATEMENT OF INTEREST OF AMICUS

The MCPP is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

This matter involves interpretation of the Michigan Constitution's "Headlee Amendment." The author of the Headlee Amendment, Dick Headlee, had been, during his life, an advisor to the MCPP. Therefore, MCPP has an institutional interest in defending and upholding the Headlee Amendment.

STATEMENT OF FACTS

Amicus accepts the facts as stated by the parties and has no basis for knowledge as to any disputed facts.

ARGUMENT

Summary of the Argument.

This case requires a determination whether a particular charge is a fee or a tax. That can turn in part on whether the charge serves a regulatory purpose. The Court of Appeals held it did and this is an error. The Court of Appeals found that increasing "water and sewer rates to generate revenue to fund necessary capital improvements to the systems serves a regulatory purpose." COA Opinion Slip copy at 2. The court reasoned that because a regulatory agency required the capital improvements, it served a regulatory purpose. As such, the court found that this met the first of the three criteria from *Bolt v Lansing*, 459 Mich 152 (1999), and that the revenue brought in was a fee and not a tax because it served a regulatory purpose. "If the charge primarily serves a regulatory purpose, it tends to support that the charge is a user fee. … Raising money for the construction of the second water tower plainly served the underlying regulatory purpose of providing water services to rate payers." Opinion, Slip Copy at 15.

However, this interpretation misreads *Bolt* and this Court's other precedents. The regulatory-purpose factor has its origins in the distinction between a government's taxing authority and its police-power regulatory authority. And when a fee is charged as an exercise of the government's police-power regulatory authority, then the fee may only cover the cost of the expense of the specific regulation's administration itself. If the fee covers more than the expense of the cost of the specific regulatory administration for that limited purpose, and instead generates revenue for broadly shared public capital goods, then it becomes a tax.

The origin and development of the tax versus fee distinction.

As far back as 1876, the tax versus fee distinction was becoming apparent. *Jones v Detroit Water Commissioners*, 34 Mich 273 (1876), dealt with a charge for water services that was placed on properties even if certain properties were vacant and did not use water. Nonpayment of these charges could, by legislative act, be treated like a tax lien, thereby raising the question of whether it was a tax.[1] "The law of 1869 is the first attempt to enable the board to raise money by rates or assessments except from water consumers."[2]

The *Jones* court held that water rates are not taxes, "but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private

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[1] The question in *Jones* was whether the charge was an assessment, a tax, or a "specific tax." At that time, the 1850 Constitution allowed the state to charge "specific taxes" on behalf of municipalities. See, for instance, *Youngblood v Sexton*, 32 Mich 406 (1975) where the Legislature levied a specific tax on liquor selling. The tax in *Youngblood* was levied by the state, collected by the state, and then distributed to localities. Such a tax is no longer possible after the Headlee Amendment and not relevant to our distinction here. *Airlines Parking v Wayne County*, 452 Mich 527 (1996) held that:

> We disagree that *Youngblood* requires the result advocated by plaintiff for a fundamental reason: *Youngblood* was decided under the 1850 Constitution, which expressly permitted the state to impose tax revenues for purposes of local government. Under the current constitution, the state has no power to compel local governments to impose a new tax. See art. 9, § 29. The resulting change in the relationship between the state and local governments mandated by Headlee, expressly precludes the *Youngblood* approach, thus removing the linchpin of plaintiff's analysis as it applies to state taxes not levied in lieu of property taxes. … The Headlee Amendment makes the crucial inquiry, for purposes of analyzing tax limitations, the entity responsible for levying the tax. The claim that the recipient of the tax proceeds, rather than the entity levying the tax, determines whether the tax is state or local is refuted by the structure of the amendment and the structure of its purpose."

Id, at 543-544.

[2] *Jones*, supra, at 275.

water works, for the supply of gas or water."[3] Further, it found that the revenues collected from nonusers must be a tax. This was true because it went to a general fund that benefited everyone, preventing it from being an assessment:

> There is nothing in the amendatory act of 1869 to devote the taxes against persons not using water to any specific purpose, and, if valid, they must go, like the water rates, into the general fund of the commissioners, to be used for any of the lawful purposes and expenses of the commission. The amount is not applied to expenses or constructions on the street or in any district within which it is raised, and is not proportioned in any way to the cost of any such outlays.
>
> The burdens levied cannot come within the class of local assessments whereby local expenditures for certain purposes are divided among the various premises in the district benefited.
>
> ***
>
> The tax must be regarded as something very different from a local assessment.
>
> Its purposes being general, it is to be regarded as a tax in the most general sense of that word, and subject to the rules of law which govern taxes.[4]

In 1891 this Court, in *Brooks v Mangan*, 86 Mich 576 (1891), determined that what was ostensibly a license fee was a tax if it was excessive for its claimed regulatory purpose. Municipalities were issuing hawker-and-peddler permits at excessive rates.[5] This Court found that the fees were excessive and did not further the claimed regulatory purpose. In particular, it was found that the amount charged "was so heavy as to be in effect a penalty rather than a license. This by-law, as before said, had its purpose, which was not in the direction of a police regulation, but

[3] *Id*.

[4] *Id*, at 276.

[5] See also, *Chaddock v Day*, 75 Mich 527 (1889).

in restraint of trade."[6] Although vague for our purposes here, this is the start of the distinction between fees covering regulatory administrative costs and general revenue raising.

Another hawker/peddler case was decided, *Saginaw v McKnight*, 106 Mich 32 (1895), and this opinion was explicit about the distinction. It was urged, and this Court agreed:

> The fee charged for the license is excessive and unreasonable. The business of a transient dealer if subjected to the payment of a fee must be with a view to taxation, or to cover the expense of regulation under the police power. In this case it cannot be said that the fee can be sustained as a tax, because the charter does not indicate an intention upon the part of the legislature to authorize the municipality to tax the business, but only to license to the end that it may regulate it.[7]

If it is a tax, it must come from the municipality's authority to tax — but here it was not authorized as such. Licensing comes from the police powers to regulate. And the regulatory fee should only cover the expense of the regulation.

The issue returned in *Vernor v Secretary of State*, 179 Mich 157 (1914), in the early days of automobile regulation. State-wide legislation was passed for the regulation of automobiles and the stated purpose was "for the registration, identification and regulation of motor vehicles upon the highways, ..."[8] However, the legislation was found to be invalid as it "changed its object to the exercise of the taxing power of the state without changing the title of the original act" in violation of then Const. 1850, art. 5, § 21. An act with explicit regulatory purpose was amended to have what this Court found to be a revenue-raising purpose:

> The amendatory act of 1913 clearly requires the payment of a sum largely in excess of what will be required for registration and regulation, and for this reason it is contended it must be regarded as a tax law. The expense to the state of furnishing the number and identification plates, and the corps of clerks and employés [sic] in

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[6] *Chaddock*, supra, at 534.

[7] *McKnight*, supra, at 34.

[8] *Vernor*, supra, at 160.

> the Secretary of State's office in the registration of motor vehicles, the preparing and filing of lists with the county clerks, it is fair to say, will not exceed the old fee of $3.[9]

Using an act titled for the purpose of regulation could not be amended to encompass taxing authority as the two subjects are different.

The act specifically took what were called fees, and used these for revenue for the purpose of, among other things, capital improvements — "the building and improvement of the highways of the state."

> Section 15 of the amended act reads as follows: 'All fees paid to the Secretary of State as provided in this act shall be turned over to the state treasurer, and applied to the state highway fund, five per cent. of which shall constitute a fund to be used for salaries and running expenses of the state highway department, the remainder to be applied to the building and improvement of the highways of the state under such division of said fund and for such purposes as the highway laws of the state shall provide, to be paid out by the state highway commissioner in accordance with the statutory provisions therefor. Any moneys remaining in either fund at the close of any year shall be carried over by the Auditor General and added to the funds which become available for the following year.'[10]

The *Vernor* Court again analyzed this by determining what the underlying purpose was, and which governmental power it stemmed from – the police power or the taxing authority. "It is therefore necessary to inquire upon what principles of law it depends, and what limitations surround their application. In the outset it should appear that this form of excise is primarily for revenue; regulation being incidental."

The *Vernor* Court would conclude that if the money obtained was used for more than "the cost of issuing the license, and the regulation of the business to which it applies," it was a tax:

> To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure

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[9] *Id*, at 163.

[10] *Id*, at 165.

> will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies.
>
> ***
>
> Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure.[11]
>
> ***
>
> If, upon investigation, the fee is found to be only sufficient to pay the expense that may reasonably be presumed to arise in the supervision and regulation of the automobile licensed, its disposition should not have the effect of converting it into a tax.
>
> The act we are considering provides for no policing or police regulation. The expense of operating the department, including the furnishing of the lists of owners to the county clerks, will be so inconsiderable, compared with the amount collected, that we must take judicial notice that the great amount of surplus (probably more than half a million dollars) renders the imposition of the license fee or tax so wholly and palpably unreasonable as to invalidate the law as a license measure, and to stamp upon it the intention of imposing a tax instead of a license. The clear purpose of the Legislature in exacting so large an amount from the owners of automobiles was to produce a fund for highway purposes under the guise of regulation, which makes it a tax measure which clearly is not covered by the title of the act.[12]

In *Ripperger v Grand Rapids*, 338 Mich 682 (1954), in a case cited by *Bolt*, the issue of sewage fees came up. The *Ripperger* court simply applied the reasoning of *Jones*. "We believe the same reasoning that was applied to water charges in the above mentioned case [*Jones*] should be applied to sewage charges in the present case."[13] The Court accepted water use as a proxy for sewage disposal.[14]

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[11] *Id*, at 167-168.

[12] *Id*, at 169.

[13] *Ripperger*, supra, at 686.

[14] Unlike storm sewers at issue in *Bolt*, the issue in *Ripperger* was waste sewage. Presumably an attempt to meter sewage outflows in the same way we meter water inflows was not feasible. But

Beyond importing the reasoning of the *Jones* court, *Ripperger* did not delve into the distinction between regulatory fees, assessments, or taxes, except that it may have hinted that a fee could be used for regulatory compliance and not just to cover the cost of regulatory administration as the previous cases had held. The opinion merely states that the sewage construction to be funded was required to "refrain from further pollution of the Grand river."[15]

However, as the *Ripperger* court did not expound on this, we cannot be sure how the Court stood on that issue. However, as we will see, such a proposition was subsequently rejected in *Bolt*, and support for such a holding only received support in the dissent.[16]

Moving forward to 1959, and a similar matter was again before this Court in *Merrelli v City of St Clair Shores*, 355 Mich 575 (1959). This time, a city sought to cover the cost of public services to an expanding population by raising fees on building permits to fund the rising costs of running the municipality.[17] Again, this Court looked at "2 sources of municipal funds, differing in governmental theory."[18] And, again, this Court found that fees should cover regulatory administration and enforcement costs, and no more.

> One involves an exercise of the municipal power of taxation. Its purpose is to raise money. The other is an exercise of the police power of the community. Its purpose is the protection of the public health, safety, and welfare. True, certain moneys may be obtained in connection therewith, but such moneys are incidental to the accomplishment of the primary purpose of guarding the public.[19]

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the two seem to be significantly enough correlated with each other and conservation or consumption of the later likely affected the former.

[15] *Id*, at 684.

[16] *Bolt*, supra, at 170-189 (J. Boyle, dissenting).

[17] *Merrelli*, supra, at 579-580.

[18] *Id*, at 583.

[19] *Id*.

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> But it was not the administration and enforcement of the codes relating to building construction that caused the increase in necessary and expensive governmental services. It was the increased population. The burden of additional revenue must, of course, be carried, for fire, and police, and sanitation, but ***it cannot be loaded onto the administration and enforcement of the building code, any more than could the increased costs for schools occasioned by those who live in the houses erected in compliance with the code.*** These are the public problems of the community and the expenses incurred in their solution are to be defrayed (absent valid legislation otherwise providing) from the general revenues of the city, not on a fee basis under the guise of regulating such matters as plumbing and wiring in the new houses.[20]

After the approval of the Headlee Amendment in 1978, the distinction between taxes and fees returned to this Court in *Bolt v Lansing*, supra. The parties here have thoroughly briefed *Bolt* in most respects. But the matter of the first criteria—serving a regulatory purpose—has not been fully discussed. As shown above, the cases that preceded *Bolt* found that the regulatory purpose only meant that such a fee would cover the cost of regulatory administration—not the cost of regulatory compliance.[21] Such capital investments for the general public that were required to comply with regulations would be a tax. *Bolt* endorsed and followed this distinction.

First, *Bolt* acknowledged that the storm sewers had to be separated from the sanitary sewers to comply with regulations. "In an effort to comply with the Clean Water Act (CWA) and the National Pollutant Discharge Elimination Standards (NPDES) permit-program requirement to control sewer overflows, …"[22] Next, the Court approvingly cited the standard articulated in

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[20] *Id*, at 586 (emphasis added).

[21] With the possible exception of *Ripperger*. But, again, we were not given enough information and the Court did not analyze it in this way.

[22] *Bolt*, supra, at 155.

Vernor. "To be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies."[23] *Bolt* would then emphasize that the subject funds would be used for capital improvements exceeding what was required to fund regulatory administration. "A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity."[24]

Here, the Court of Appeals relied on a post-*Bolt* opinion of the Court of Appeals *Graham v Kochville Township*, 236 Mich App 141 (1999). *Graham* was cited for the proposition that "a fee can 'raise money as long as it is in support of the underlying purpose. *Graham*, 236 Mich App at 151, 599 NW2d 793, citing *Merrelli v St Clair Shores*, 355 Mich. 575, 583, 96 NW2d 144 (1959)." [25] But that is not an accurate reflection of this Court's holding in *Merrelli* (or *Bolt*). Recall what *Merrelli* said was that the collection of money was "incidental" to the "primary purpose of guarding the public."[26] And then the *Merrelli* Court went on in the same paragraph to use the *Vernor* criteria for allowing the fee to only cover the cost of "issuing the license, and the regulation to which it applies."[27] This cannot be read to allow for money raising "to support the

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[23] *Id*, at 162, citing *Vernor*, supra, at 167.

[24] *Id*, at 163 (internal footnotes omitted).

[25] Opinion, slip copy at 15.

[26] *Merrelli*, supra, at 583.

[27] *Id*.

underlying purpose," as *Graham* held, if that purpose exceeds the cost of administering and enforcing the regulation, as this Court has consistently held. Major capital costs cannot be called "incidental" to the purpose of the regulation.

Application to this matter.

The Court of Appeals here found that "Increasing water and sewer rates to generate revenue to fund necessary capital improvements to the systems serves a regulatory purpose."[28] The court went on to explain that the capital improvements were necessary to correct deficiencies identified by the DEQ. "Raising money for the construction of the second water tower plainly served the underlying regulatory purpose of providing water services to rate payers."[29] Here is where the lower court cited *Graham* for this proposition, based on *Merrelli*. But as shown above, *Merrelli* confined the chargeable amount allowed to cover regulation costs of the regulating authority, not the down-stream costs the regulation imposed. Covering the down-stream costs of implementing regulations was specifically denied in *Vernor*, where the regulatory costs could not include capital improvements for the general public such as public costs of roads, automobile operation, and traffic.

In *Merrelli*, fees were not allowed to cover the costs of "fiscal problems deriving from an unprecedented expansion of its population, and the demand for increased municipal services resulting therefrom, …" And in *Bolt*, this Court held:

> To be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police

[28] Opinion, slip copy at 2.

[29] Opinion, slip copy at 15.

> regulation, and the revenue derived therefrom is ***not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies***.[30]

When applied to a fee for service, the fee may only cover the payors' portion of the service. Covering more than that "constitutes an investment in infrastructure."[31] Such a fee in *Bolt* was impermissible where it was:

> …an investment in infrastructure that will substantially outlast the current "mortgage" that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter. Accordingly, the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens. The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.[32]

The distinction between fees deriving from constitutional police powers and constitutional taxing powers that was created before the Headlee Amendment survives. Nothing indicates that Headlee meant to change the fees versus tax distinction which predated and continued in the 1963 Constitution.[33] As this Court found in *School District of Pontiac v Pontiac*, 262 Mich 338 (1933) — a matter also about interpreting a constitutional tax-limitation amendment — when interpreting an amendment, in addition to crediting the language as understood by the electors[34], we presume

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[30] *Bolt*, supra, at 269, summarizing *Vernor* (emphasis added).

[31] *Id*, at 270.

[32] *Id*.

[33] The distinction between the two sources of authority continues in our current Constitution. Municipalities have the power to tax under Const. 1963, art 7, § 21 and, separately, police powers under Const. 1963, art 7, § 22.

[34] "It is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it. * * *

that the electors were mindful of the existing conditions at that time. "We are not here concerned with this particular limitation, except to note that in drafting the amendment, as well as in its adoption, the people were mindful of existing conditions and sought to so frame the amendment as to be in accord with such existing conditions."[35]

Here, the long-serving law was that fees for regulatory activities were allowable to the extent that it paid for the administrative costs of implementation, along with the cost of the product to the individual (if applicable, as in the case of water use). But it had consistently denied that the fee could cover the cost of the capital improvements other than those that specifically benefit fee payer.

CONCLUSION

For the foregoing reasons, this Court should grant the application and reverse the lower court, holding that a fee cannot be used for capital improvements that are for the general public.

Respectfully submitted,

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August 30, 2024

'In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished." *Pontiac*, supra at 346.

[35] *Id*, at 348.

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that this amicus curiae brief is approximately 4,248 words, including headers, footnotes and quotations, as counted by MS Word, and within the number of words allowed by MCR 7.212(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this motion and proposed amicus brief on the parties via the MiFile TrueFiling e-file system.

Respectfully submitted,

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