STATE OF MICHIGAN
IN THE SUPREME COURT

MIDWEST VALVE & FITTING COMPANY, a Michigan corporation, individually and on behalf of a class of similarly situated persons and entities,

Plaintiff-Appellant,

vs.

CITY OF DETROIT, a municipal corporation,

Defendant-Appellee.

Supreme Court Case No. 165726

Court of Appeals Case No. 358868
Circuit Court Case No. 18-014337-CZ
Hon. Edward Ewell

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AMICUS CURIAE BRIEF OF MICHIGAN MUNICIPAL LEAGUE LEGAL DEFENSE FUND, MICHIGAN TOWNSHIPS ASSOCIATION, AND GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF CITY OF DETROIT

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STATEMENT OF BASIS OF JURISDICTION

The Michigan Municipal League, Michigan Townships Association, and Government Law Section of the State Bar of Michigan (collectively, "*Amici*") take no position on the basis of jurisdiction of the Supreme Court.

STATEMENT OF *AMICI CURIAE* INTEREST

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership comprises 566 Michigan cities and villages (and 5 charter townships), many of which also contribute to the MML's Legal Defense Fund (LDF), and which contributions are separately held by the MML only for use by its LDF. The MML's Legal Defense Fund is operated by a separate Board of Directors, consisting of the Michigan Association of Municipal Attorneys (MAMA) Board of Directors, the MML's Executive Director and the MML's President. While the MML's Legal Defense Fund is operated through the MML, decisions of the Legal Defense Fund Board of Directors are made independently.

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of more than 1,225 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the State of Michigan. The MTA is governed by a Board of Directors who are township government officials.

Both the MML Legal Defense Fund and the MTA have an interest in helping their members in their efforts to protect the public health, safety, and welfare and to do so in a way that comports with the law.

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 1,186 attorneys who generally represent the interests of government corporations, including cities, villages, townships, counties, boards and commissions, and special authorities throughout the state. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures that impact local governmental units. The GLS provides education, information, and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The GLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the GLS participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed by the Government Law Section in this *amicus curiae* brief is not the position of the State Bar of Michigan.

Upon the invitation of this Court in its April 12, 2024, Order in this case, the MML, MTA, and GLS have authorized and directed the attorneys appearing on this brief to file the following *amici curiae* brief in this case in support of the Defendant-Appellee City of Detroit, and the MML, MTA, and GLS will be solely responsible for compensating the attorneys.[1]

[1] This brief was written in its entirety by the *amici* counsel listed, and no monetary contribution intended to fund the preparation or submission of this brief was made by a party or any other person aside from the *amici* parties for whom this brief was written, as identified in the text accompanying this footnote.

STATEMENT OF QUESTIONS PRESENTED

Appellant's questions presented do not comport with the arguments it presented to the Court in the Argument section of its Application for Leave to Appeal in this case. Accordingly, and more in line with MCR 7.305(A)(1)(e),[2] *Amici's* questions presented below track the Arguments section of this brief, which address the arguments Appellant actually presents in its Application for Leave:

I. Should the Court deny leave because the Court of Appeals Opinion does not contravene the Headlee Amendment or current case law in Michigan or satisfy the other criteria for leave (Application Arguments I and II), and because the lower courts properly found that the City's annual permit fee charged to certain property owners for services provided under the City's fire prevention regulatory program constitutes a lawful fee and not a tax?

Plaintiff-Appellant answers: "No."
Defendant-Appellee answers: "Yes."
Amici answers: "Yes."

II. Should the court deny leave because Appellant does not have a cause of action for violation of MCL 141.91, and even if it did, the City's annual permit fee charged to certain property owners for services provided under the City's fire prevention regulatory program does not constitute a tax (Argument II)?

Plaintiff-Appellant answers: "No."
Defendant-Appellee answers: "Yes."
Amici answers: "Yes."

III. Should the Court deny leave because the Court of Appeals correctly ruled that the Detroit City Council's retroactive approval of the permit fees was proper and lawful (Application Arguments I and III)?

Plaintiff-Appellant answers: "No."
Defendant-Appellee answers: "Yes."
Amici answers: "Yes."

[2] MCR 7.305(A)(1)(e) requires, in relevant part: "a concise argument . . . in support of the appellant's position on each of the stated questions . . ."

INTRODUCTION

The Court is no stranger to the long string of fee challenge class action cases that have bombarded Michigan's legal system and local governments since its 4-3 decision in the *Bolt v Lansing* case. There has been a significant increase in these cases over the past 10-15 years, some of which challenge essential public utility user fees and others of which challenge license or permit fees. The Court has denied leave in the vast majority of those cases, and it should do so again in this case. Behind all of Appellant's rhetoric and changing arguments is a very basic and common type of city permit with a relatively modest fee that does not even generate enough funding to support the regulatory program services for which it is charged. The revenue raising subterfuge that this Court was concerned about in *Bolt* simply does not exist in this case.

Whether due to its own lack of knowledge or otherwise, Appellant filed this case with allegations that inaccurately portray the City as charging an "inspection fee" for inspections it doesn't perform, supposedly creating a pot of money that exceeds what is used. As became known through this lawsuit, the truth of the matter is that there is no inspection fee, and instead there is a full-fledged fire prevention regulatory program supported by City ordinances, which includes as one of its requirements a use and occupancy permit for certain commercial, industrial, and multiple-family apartment buildings in the City and, as mentioned above, a permit fee that doesn't even generate enough money to fund the regulatory program. Did Appellant discontinue its attack after learning all this? No.

The City, through its litigation of this case and briefings to this Court, has done a phenomenal job of covering the issues and explaining why this Court should deny leave or, if not, affirm the lower courts' decisions in its favor. *Amici*, upon this Court's invitation, and through this brief, provide the Court with additional insights through the broader lens and experience of local governments across the state.

Amici point out that Detroit is not unique or alone in establishing this type of regulatory program and the permit fee charged under it. Communities across the state, and indeed across the country, have adopted necessary and important fire prevention regulatory programs, which include the issuance of and charging a fee for various types of permits related to fire prevention and protection in connection with the construction, use, and occupancy of commercial, industrial, and multiple-family residential buildings. These regulatory programs are established through local government ordinances, which adopt an extensive set of regulations and administrative guidelines that have been developed and published by national and international organizations as fire prevention and protection industry standards.

These class action lawsuits have a profound negative impact on local governments, not only in the event of adverse rulings, but also when the municipality succeeds in its defense. As the City explains in its briefings to this Court, it has expended all of the permit fees it has collected to pay for its regulatory program. Naturally, when local governments are hit with these types of cases, their fiscal stability is put in doubt, which can potentially impact projects, services, budgets, bonding, and other matters. They cannot remedy that destabilization by simply

discontinuing public utility services or whatever other regulatory program fees are being challenged during the litigation.

Worse yet, if a local government were, for whatever reason, to lose this type of class action challenge, it will typically have no or very little funding to issue the refunds, and it likely will be left with no funding source to support the public service going forward. It will be in a situation of deciding whether to discontinue the services or go to the voters for a tax increase to pay for the services, which may or may not happen. In most instances, including this case, discontinuing the program services will create serious issues for property owners as well as public health, safety, and welfare consequences. As the Court can imagine, these precarious and troublesome circumstances plague these fee challenge cases, whether they involve public utility fees or permit licensing fees like this case.

This is why the Michigan Constitution, art 7, § 34, requires the courts to construe the Headlee Amendment and other laws liberally in favor of local governments. It is also why this Court has, for over 80 years, directed Michigan courts to grant great deference to local government decisions in matters such as this, and to presume that the ordinances and decisions they make are lawful and valid. Because of the potentially devastating effects an adverse ruling in cases like this can have not just on local governments, but on communities as a whole, *Amici* spend a significant portion of this brief discussing and applying the above rules of construction, presumption requirements, and doctrines of judicial deference to and non-interference with local government decision-making. Not only do they solidify the

City's basis for this Court to deny leave, but if the Court decides to grant leave, *Amici* urges the Court to apply and deeply reinforce how important these rules and standards are in these cases, such that potential future claimants will be less likely to inundate the courts and local governments with these cases, except when there are truly legitimate and factually substantiated claims, as opposed to engaging in fishing expeditions based on incomplete, inaccurate, and misconstrued information.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amici accept and incorporate herein the facts set forth in Section I, pages 1-3, of the Court of Appeals slip opinion in this case (Exhibit A), as well as the factual statement and procedural history set forth at pages 1-3 of Appellee's Answer to Plaintiff's Application for Leave to Appeal ("Appellee's Answer to Application") and at pages 4-6 of Appellee's Supplemental Brief in Opposition to Plaintiff's Application for Leave to Appeal ("Appellee's Supplemental Brief").

STANDARDS OF REVIEW

The question of whether this Court should accept this case for review is governed by MCR 7.305(B). *Amici* agree with and incorporate herein the standards of review set forth at pages 3-4 of Appellee's Answer to Application.

ARGUMENT

I. This Court should deny leave because the Court of Appeals Opinion does not contravene the Headlee Amendment or current case law in Michigan or satisfy the other criteria for leave (Application Arguments I and II), and because the lower courts properly found that the City's annual permit fee charged to certain property owners for services provided under the City's fire prevention regulatory program constitutes a lawful fee and not a tax.

In *Bolt v Lansing,* 459 Mich 152, 160; 587 NW2d 264 (1998), this Court confirmed that there is "no bright-line test" for distinguishing between a valid fee and an unconstitutional tax. Instead, the Court identified three primary criteria to guide the analysis for determining when a tax has been disguised as a fee by a local government in order to avoid the requirements of Mich Const 1963, art 9, §31 (the "Headlee Amendment"). *Bolt,* 459 Mich at 160-61. The three factors are commonly referred to as regulatory purpose, proportionality, and volition.

A municipality **does not** need to meet all three *Bolt* criteria for a court to find that an assessed charge is a fee and not a tax. *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Indeed, the cases since *Bolt* (and *Graham*) have consistently adopted a balancing test application of the *Bolt* criteria. For instance, *Wheeler v Charter Township of Shelby*, 265 Mich App 657, 665-66; 697 NW2d at 186 (2005), further elaborated on the proper manner for weighing or balancing the three *Bolt* elements: "These 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." See also, *Shaw v. City of Dearborn*, 329 Mich App 640, 658; 944 NW2d 153 (2019); *Westlake Transp Inc v Mich Pub Svc Comm'n*, 255 Mich App 589; 662 NW2d 784 (2003).

It is critically important that the rules of construction, deference, judicial non-interference, and presumption under Mich Const 1963, art 7, § 34, and well-established case law are accorded significant weight in the Court's application of each *Bolt* factor in this case. Accordingly, those rules lead off the discussion below, followed by application of the *Bolt* criteria.

A. Michigan Constitution, art 7, § 34, and case law applicable to the analysis of whether a fee, of any kind, is a hidden tax in violation of the Headlee Amendment require the Court to: (1) construe MCL 141.91 and the Headlee Amendment liberally in favor of finding that the City's charge is a lawful fee, and not a tax; (2) give a high level of deference to the municipal decision-makers in establishing the amount of the fee; and (3) presume that the charge is a reasonable fee and not a tax.

1. The Michigan Constitution, art 7, § 34, requires the courts to construe the Headlee Amendment and MCL 141.91 in favor of finding that the City's charge for its fire prevention regulatory program in this case is a lawful *fee* and not a tax.

In evaluating Appellant's Headlee Amendment and MCL 141.91 claims, another provision of the Constitution—Mich Const 1963, art 7, §34—requires the courts to do the following:

> ***The provisions of this constitution and law concerning*** counties, townships, ***cities*** and villages ***shall be liberally construed in their favor***.

(Emphasis added.)

The Headlee Amendment and MCL 141.91 are "provisions of the constitution and law" "concerning" the City of Detroit and its fees in this case that Appellant is asking this Court to "construe". *Id*. Therefore, as an overarching standard to guide all aspects of its review of this case, the Court must liberally construe the Headlee

Amendment and MCL 141.91 in a manner that favors a conclusion that the City's charges are lawful *fees* and not unconstitutional taxes. Const 1963, art 7, §34; see e.g., *Associated Builders and Contractors v City of Lansing*, 499 Mich 177, 186-87; 880 NW2d 765 (2016).

2. Case law in Michigan requires courts to show deference to the City's decisions about its fee and presume that the charge for its fire prevention regulatory program in this case is a lawful fee (and not a tax), and that Appellant failed to provide any "clear" evidence overcoming that presumption.

"The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable." *Trahey v City of Inkster,* 311 Mich App 582, 594; 876 NW2d 582 (2015). *Trahey* relied heavily on the Supreme Court's decision in *City of Novi v Detroit,* 433 Mich 414, 432–433; 446 NW2d 118 (1989), which includes stark language limiting the ability of courts to second-guess municipal fees: "Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of **presumptive reasonableness** of municipal utility rates." *City of Novi,* 433 Mich at 428 (emphasis added).

The Court went on to further instruct that the judiciary refrain from scrutinizing rate-making because, among other things, "[t]he rate-making authority of a municipal utility is expressly reserved to the legislative body given the power to set rates under the municipal charter." *City of Novi,* 433 Mich at 429-30.

*City of Nov*i relied on earlier cases. One was *Detroit v Highland Park*, 326 Mich 78, 100-101; 39 NW2d 325 (1949), in which the Court stated:

> [t]he rate lawfully established by [the municipal utility] is assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is

> capricious, arbitrary or unreasonable, and the burden of proof is on the [challenging party] to show that the rate is unreasonable.

Another was a US Supreme Court case, *Federal Power Comm'n v Hope Natural Gas Co,* 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944), which included language confirming that ratemaking challenges should focus not on whether a fee is reasonable **in theory** but on whether its impact is **in fact reasonable**:

> Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. **It is not theory but the impact of the rate order which counts**. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. **The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged**. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries **the heavy burden** of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." [Citations omitted. Emphasis added.]

That last part—warning that the mere allegation of unreasonableness is insufficient—is echoed in *City of Novi*, 433 Mich at 432, where this Court firmly warned about the danger of allowing the simple assertion of unreasonableness to shift the burden to the municipal utility:

> Although the Court of Appeals nominally leaves the burden of proof on the plaintiff, stating that "it is enough for the challenging party to show that the water rates do not reflect the actual cost of providing the service,"[] the burden of proof is effectively shifted to the defendant to justify its rate or rate-making method because any given formula will employ approximations of the factors used to arrive at an approximation of the actual cost of service.

> This effective shift of the burden of proof is ill-advised in that it would lead to a **plethora of needless litigation**. [Emphasis added.]

These cases are also decided against a broader backdrop of judicial reticence to get deeply involved in running a municipality: "Where a municipality has the power to engage in an activity for a public purpose, ***the courts will not interfere with the discretionary acts of its municipal officials*** . . ." *See, City of North Muskegon v Bolema Const Co*, 335 Mich 520, 526; 56 NW2d 371 (1953), quoting *Wolgamood v Village of Constantine,* 302 Mich 384, 395; 4 NW2d 697 (1942) (emphasis added).

Multiple Headlee fee challenge decisions follow the requirements for deference and the mandatory presumption of validity. In order to demonstrate "***clear evidence*** of illegal or improper expenses," the plaintiff must identify "what amount, if any, of the water and sewer rate account[ed] for expenses ***unrelated*** to water and sewer." *Trahey,* 311 Mich App at 594 (emphasis added)(no "clear evidence of illegal or improper expenses" in city's water and sewer rates where expert reports showed no evidence that challenged rates accounted for "expenses unrelated to water and sewer.") See also, *Shaw,* 329 Mich App at 654.

Shaw elaborated on Michigan's presumption of validity standard, stating as follows:

> Courts typically afford great deference to municipal-ratemaking authorities. See *Novi v Detroit*, 433 Mich. 414, 425-426, 446 N.W.2d 118 (1989). "Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Trahey v Inkster*, 311 Mich App 582, 594, 876 N.W.2d 582 (2015). **A fee charged by a municipality is "presumed reasonable unless it is facially or evidently so wholly out of proportion to the expense involved that it must be held to be a**

> **mere guise or subterfuge to obtain the increased revenue."** *Kircher v. Ypsilanti*, 269 Mich. App. 224, 232, 712 N.W.2d 738 (2005) (cleaned up). This is because "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich at 427, 446 NW2d 118. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430, 446 NW2d 118. "Absent **clear evidence of illegal or improper expenses included in a municipal utility's rates**, a court has no authority to disregard the presumption that the rate is reasonable." *Trahey*, 311 Mich App at 595, 876 NW2d 582 (emphasis added).

Shaw, 329 Mich App at 653-654 (emphasis in original).

And in *Youmans v Charter Township of Bloomfield*, 336 Mich App 161, 227; 969 NW2d 570 (2021), the Court of Appeals fully explored the presumption of validity requirement established through the fee challenge cases cited above and then concluded its listing of the three *Bolt* criteria with the following: "**Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor**." Citing, *Shaw*, 329 Mich App at 654 (emphasis added). The court in *Youmans* also emphasized, repeatedly, the well-established doctrine of deference to and judicial non-interference with local government decisions regarding fees and services. *Youmans*, 336 Mich App at 214, 221-222, citing and quoting, *City of Novi*, 433 Mich at 425-433.

Novi, Trahey, *Kircher*, *Shaw, Youmans,* and the other cases cited above—going back over 80 years—all properly acknowledge the overarching importance of the presumption of validity and deference to the validity of local regulatory actions and

decision-making in *Bolt*-Headlee fee challenge cases. As a result, Appellant was required to carry a very heavy burden in trying to support its claims that the City's fees were disproportionate, excessive, and unreasonable in this case.

From a review of the record in this case, it appears that Appellant presented no expert or other witness testimony of its own and provided only minimal documentary evidence that was discredited by the City's witnesses and evidence as explained in the City's briefings to the Court. Thus, Appellant failed to carry that burden here.

3. While Appellant has ignored the constitutional and case law requirements to liberally and favorably construe, provide deference to, and presume the validity of the City's actions in establishing its fee in this case, the Court of Appeals and Circuit Court properly followed those requirements, and this Court should do the same and deny leave.

The City took the position below that—given the presumption and all of the evidence produced—Appellant had ***not*** raised a ***genuine*** issue of material fact on the elements of its Headlee Amendment and MCL 141.91 claims. While Appellant consistently ignored these Constitutional and case law aspects of the analysis to be undertaken in this case, the Circuit Court and Court of Appeals undertook their analyses correctly, presuming that the City's charge for the fire prevention program services is a valid fee and not a tax, with the understanding that it was Appellant's burden to show otherwise with clear evidence.

Additionally, a 1963 Constitutional provision (art 7, § 34) that predated the 1978 Headlee Amendment (and that the Headlee voters must be deemed to have known existed), cannot simply be ignored—contrary to what Appellant has done

throughout the case. Indeed, the Headlee Amendment, MCL 141.41, and the three *Bolt* factors discussed below—all being provisions of "law" and the "constitution" concerning "cities"—must be construed in a manner that favors a finding that the City charge for its fire prevention regulatory program is a lawful fee, and not a tax. Const, art 7, § 34; *Assoc. Builders*, 499 Mich at 186-87.

B. Consistent with *Bolt's* first factor, the City's charge for its fire prevention regulatory program is motivated by important <u>regulatory</u> purposes, and there is no revenue raising purpose.

Under *Bolt's* first factor, a fee must serve a regulatory purpose and not exist primarily to generate revenue. *Id*., at p. 161. A regulatory purpose is one grounded in the police power—a local government's authority and duty to protect the public health, safety and welfare. *Wheeler,* 265 Mich at 664-665. This Court, in *Merrelli v City of St Clair Shores*, 355 Mich 575, 582; 96 NW2d 144, 147–48 (1959), plainly stated that license and permit fees are "regulatory measures." Furthermore, as Appellee points out at pages 8-9 of its Supplemental Brief, *McQuillin, Municipal Corporations* (3rd Ed.), at § 26:16, explains that a charge for a "license as a mode of regulation" is a fee, and not a tax. And a fee can raise money without being deemed a tax, so long as it supports an underlying regulatory purpose. *Graham*, 236 Mich App at 152.

The City's charge is regulatory because it is used solely to pay for the costs that the City incurs to undertake its fire prevention regulatory program, which is necessary and benefits commercial, apartment, and industrial building owners in the City. As the City established below, the fee does not raise revenue for any other purpose, and unlike any of the cases cited by Appellant, the City has been charging

the fee for over 30 years. On this basis alone, the City's charge materially differs from the fees that were held to be insufficiently "regulatory" in *Bolt, Jackson County,* and other cases.

There are many additional bases supporting the regulatory purpose of the fee in this case, which were well-established by the City in the lower courts and discussed in its briefings with this Court. There is also common sense and "real world" support for the regulatory nature of the City's program fees, which *Amici* believe to be critically important for the Court to understand and consider in this case.

1. As a matter of established fact, fire prevention programs like the City's are common in local governments across the state and country, and by their very nature they serve a regulatory purpose and are not a core service.

Without any factual or expert support, Appellant places heavy reliance on its repeated factual assertion that the City's fire prevention program is a "core service" that must be funded solely by tax dollars. Appellant argues that a quote from a Court of Appeals dissenting opinion in *Bolt v Lansing*[3] supposedly declares that all aspects of fire and police services constitute core services that should be paid with tax revenue. Appl. Lv., p. 30. Appellant's argument is based on a false factual premise and a lower court dissenting opinion.

In terms of *Bolt*, neither the Court of Appeals dissent nor this Court's subsequent majority decision reference "core services." Moreover, while the

[3] 221 Mich App 79, 98; 561 NW2d 423 (1997). It is noted that a portion of this dissenting opinion was subsequently incorporated into the Supreme Court *Bolt* majority decision, but this Court did not accept or in any way reference in its decision the portion of the dissent that Appellant quotes in its Application for Leave.

dissenting opinion mentioned police and fire services,[4] it was, at best, dicta because *Bolt* related to stormwater system usage fees. It did not address or decide anything about a regulatory-based fire prevention program or permit fees under such regulations.

With respect to the factual premise for its core services argument, Appellant appears to lack any knowledge or understanding of how fire departments are organized and the different types of services they may provide.[5] Some of those services are core services, others are optional regulatory services.

(a) Core Services.

It is common knowledge, and the Court can take judicial notice, that there are indeed certain core services that essentially every operational fire department make available and provide to the community as a whole. These include 911 emergency services, such as responding to and addressing active fires, accidents, explosions, disasters, and other emergency incidents. These core services are not based on regulating anything—they are non-regulatory—and they are available and provided 24/7/365 to citizens, non-citizens, and property and business owners throughout the City. There are no facts in this case demonstrating that the fees at issue have been

[4] The dissenting opinion also included "parks" in this list. Many parks systems across the state of Michigan charge fees for certain aspects of their local and state parks systems. According to Appellant, and its incorrect application of Michigan law in this case, those fees could be deemed taxes.

[5] Again, Appellant, despite having the burden of proof, did not provide any expert or even lay testimony or other evidence in the trial court regarding its repeated factual allegation about the City's fire prevention services being a core service. The evidence from the City's Fire Marshal and the City's ordinances, however, established that it is a regulatory service that the City provides.

collected or used for making available or providing these types of services to the public.

(b) Optional Regulatory Services.

Separate and apart from the above emergency services, fire departments in cities, villages, and townships across the State of Michigan, and indeed across the country, often employ a division or set of designated personnel to support and provide fire prevention and protection regulatory programs in their communities. The purpose or goal of these programs is to *prevent* emergency incidents before they happen through the establishment of and required compliance with a set of regulations. These programs benefit property owners by reducing the likelihood or extent of damage to their properties and liabilities that often result from loss of life, personal injuries, and property damage to others absent compliance with such regulations.

Most local governments that have decided to establish a fire prevention program (including Detroit) do so through the adoption of ordinances and other regulations, typically referred to as "fire prevention" or "fire prevention and protection" codes. See, e.g., Detroit's Ordinance No. 13-17, Exhibit B. These codes establish the building standards and regulations, designate personnel (e.g., fire marshal, inspectors, enforcement officials, etc.) who are trained and employed to implement the fire prevention program and establish various types of permits and associated fees related to the fire prevention and protection regulations, including permits for the occupancy and use of certain buildings and structures in the community. *Id*. See also, City Council Resolution Confirming Fees, Exhibit C.

In fact, for many decades, municipalities across the nation (including Detroit) have adopted by reference, *standardized* fire prevention codes prepared by experienced fire and emergency prevention professionals, who are experts in the field of preventing fires and similar emergency incidents.[6] These individuals work within organizations such as the National Fire Protection Association (NFPA) and International Code Council (ICC), which publish the standardized codes. The fire prevention codes are substantial, but the purposes and a general idea of the regulations contained within them can be gleaned from the attached initial introductory pages and tables of contents from the NFPA's and ICC's fire prevention codes. (Exhibits D and E.)[7]

As such, this is not something that the City of Detroit concocted to raise revenue, as Appellant appears to want this Court to believe. Moreover, local governments are not duty-bound or required to establish fire prevention programs or enforce fire prevention codes.[8] They are optional. For this reason, and also because they do not provide or involve firefighting, emergency rescue, or other similar emergency services, fire prevention programs and personnel are not a tax funded core service, although they may be physically located within a fire department.

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[6] See, Detroit Ordinance Adopting NFPA 2015 (Exhibit B). As contemplated by the standardized codes themselves, in the adopting ordinances, most communities will incorporate adjustments to the provisions as necessary to make the standardized code properly fit their individual community, as Detroit has done. *Id.*

[7] Complete copies of the NFPA and ICC fire codes are hundreds of pages in length and can be reviewed for free on line at www.nfpa.org/for-professionals/codes-and-standards/list-of-codes-and-standards/free-access and https://codes.iccsafe.org/IFC2015.

[8] As the Court knows, many municipalities in Michigan do not have a sufficient number or size of commercial and multi-family buildings in their communities to justify a fire prevention program or they may simply lack available personnel to undertake a fire prevention program.

Even still, fire prevention programs are important and necessary, especially in major cities across the state and country like Detroit, for the simple reason that they regulate uses and occupancy of property in a manner that will help to prevent or lessen the impact of fires and disasters on buildings and structures, and increase the ability to save lives of occupants of property owners' buildings and firefighters when those emergencies do happen. Requiring a fee to be paid by the owners of high-rise buildings and other commercial, apartment, and industrial buildings in support of this regulatory purpose is not only reasonable, but fair considering the comparatively extraordinary costs to property owners that are associated with fires, explosions, and similar emergencies at such places when they do occur—an obvious and significant benefit to those owners, which leads into the next *Bolt* factor.

C. The use and occupancy permit fees under the City's fire prevention regulatory program are proportional to the costs of the program services, because they do not exceed—and according to the evidence submitted in the case are actually far less than—the costs incurred by the City to undertake the regulatory program and are shared in a reasonably proportional manner among the property owners that are served and primarily benefit from the program.

Under the second *Bolt* factor, a fee must be proportionate to the necessary costs of the service rendered or the benefit conferred. *Bolt*, 459 Mich at 161-62. However, a fee can provide a service or benefit to the fee payers and also a collateral benefit to the community-at-large without running afoul of Headlee. In *Wheeler*, 265 Mich App at 665-66, property owners in the township received an individualized service from the mandatory use of a single waste-hauler, which also provided generalized benefit in the form of waste disposal that minimized harm to citizens at large. See also, e.g., *Arlington Estates, LLC v Twp of Muskegon*, unpublished opinion of the Court of

Appeals, issued May 5, 2011 (Docket No. 294197), p. 3 (attached as Exhibit F) (sewer services provided distinct benefits to mobile-home owners but also benefited the township by helping to eliminate hazardous waste).

As discussed at pages 6-12 of this brief, for over 80 years, the Supreme Court and Court of Appeals have agreed that courts "must *presume* the amount of the fee to be reasonable, 'unless the contrary appears upon the face of the law itself, or is established by proper evidence'...." *Graham,* 236 Mich App at 154–155; quoting *Vernor v. Secretary of State,* 179 Mich 157, 168; 146 NW 338 (1914)(emphasis added); and W*heeler,* 265 Mich App at 665-6. As also mentioned earlier (*supra*, pp. 6-7), for over 60 years, Article 7, § 34 of the Michigan Constitution has required courts to apply and construe other sections of the Constitution liberally in favor of municipalities when deciding on the lawfulness of their decisions. This liberal construction would of course apply to *Bolt's* proportionality and other factors for determining whether the City in this case has violated the 1978 Headlee Amendment to the Constitution.

With the above presumptions and rule of construction in mind, *Amici* refer the Court to Appellee's Response to Application for Leave and its Supplemental Brief which contain a thorough statement of law and analysis of the proportionality factor with substantial evidentiary support. Below, *Amici* provide some legal and policy insights from a somewhat broader perspective.

1. Unlike a tax and unlike *Bolt* and *Jackson County*, only properties that actually receive and primarily benefit from the use and occupancy permit issued under the fire prevention regulatory program in the City are charged the fee; i.e., it is not imposed on all properties in the City.

In the forest of ever increasing, divergent, and often novel arguments put forward by parties and decided by courts over the last 26 years since this Court decided *Bolt*, the fundamental purpose of the three criteria sometimes seems to get lost. The fundamental objective of the three *Bolt* factors is to discern whether a municipal charge is a tax or a fee. In other words, what characteristics does a tax have that a fee does not and vice versa?

One classic characteristic of a tax is that it is charged to and must be paid by *all property owners* within the local governmental unit.[9] While it is possible that a fee could be required of every property owner in a municipality and not be a tax—e.g., if every property owner connects to a public water system and has to pay the utility fee—such scenarios are not the norm, except perhaps in the most fully developed cities.

The City does not charge the fee at issue in this case to every property owner in the City. Far from it. According to the U.S. Census, as of 2020, there were over 250,000 single-family residential homes in the City of Detroit that are not subject to the regulations and do not have to pay the fee.[10] As more thoroughly explained and established with supporting evidence in the City's briefs, only developed properties

[9] The only way to get out of paying a local property tax is if the property qualifies for and is granted an exemption under the General Property Tax Act. MCL 211.7, *et seq*.
[10] www.infoplease.com/us/census/michigan/detroit/housing-statistics

with commercial, industrial, or multiple-family (apartment) buildings are subject to the City fire prevention regulations that require a use and occupancy permit from the Fire Marshal.

As a result, the City's fire prevention program use and occupancy fee is fundamentally different from the storm water utility charges held to be taxes in *Bolt* and *Jackson County*. In those cases, the cities charged **all** property owners the disputed fee. See *Bolt*, 459 Mich at 167-68 (all property owners in the city were required to pay the fee and thus, "had no choice whether to use the service and [were] unable to control the extent to which the service [was] used"); *Jackson County v City of Jackson*, 302 Mich App 90, 93, 111-12; 836 NW2d 903 (2013) (all city property owners were assessed a fee and could not receive total exemption from fee).

The City's fire prevention program use and occupancy fee is charged, by contrast, only to those properties that are required to obtain a use and occupancy permit from the City under its fire prevention regulatory program. If those properties were not developed and used in a manner that involved commercial buildings (from high-rise office buildings to stand-alone shops), industrial businesses (factories, warehouses, etc.), or multiple-family rental housing (apartment buildings), there would be no need for the City's fire prevention regulatory program, and the use and occupancy fees associated with it would not exist.

It makes sense that these particular types of buildings and uses would and should be required to comply with the fire prevention program and pay fees to the City to cover the administrative costs and expenses of administering that regulatory

program. In most cases, the buildings required to obtain the permit and pay the fee at issue in this case will be occupied by large numbers of employees, customers and families, and those buildings will often have many floors, dozens or hundreds of different rooms, industrial HVAC and other equipment, sometimes significant quantities of supplies and materials that may be toxic, flammable, or even explosive, and other features that give rise to the need for a heightened level of regulation, which would not otherwise apply or be necessary were it not for the intensity of development and use involved.

Furthermore, the Appellant and other property owners like it throughout the City are the primary, if not the only, financial beneficiaries of being permitted to develop and continue to use the properties that way, and so they should pay the fees needed to fund the public costs of cities (like Detroit) in having to establish and administer the heightened level of regulation that is required as a result, as opposed to the quarter million homeowners in the City who, if the charges were to be deemed by the Court and ultimately have to paid with general fund taxes, would receive absolutely no benefit from the buildings or the regulations that apply to them.

The fees in this case are in many ways similar to zoning permit fees, site plan fees, engineering, and other fees charged by local communities across the state relating to the establishment and administration of zoning, land use, engineering, and other similar regulations associated with the private development and use of land. Those fees are not charged to single-family homeowners or the lessees and occupants of the commercial, industrial, and apartment buildings, but to owners of

the properties who are required to comply with the regulations. However, unlike these other regulatory fee examples, fire prevention programs require ongoing work after construction is completed to administer the regulations—all year, every year.

2. There is no "measurement of usage" associated with most, if not all, licensing and permitting regulatory programs, and therefore, much of the argument put forth by Appellant should not be applied to this case, or any other case involving license or permit fees.

Appellant presses the Court to apply language in *Bolt* regarding proportionality that relate to stormwater system and perhaps other utility type fees. However, those parts of the *Bolt* case do not properly fit when it comes to license and permit fee cases. The City correctly explains this, in great detail, at pages 28-32 of its Supplemental Brief.

Not only does the City's analysis of this aspect of the proportionality factor comport with existing case law relative to license and permit fees in Michigan and elsewhere, but it just makes sense. Simply put, there is no "metering of usage" (or even measurement of usage) associated with most, if not all, licensing and permitting regulatory programs. As such, much of the argument put forth by Appellant should not be applied to this case or any other case involving license or permit fees. This is an important distinction that the lower courts understood and got right. Although this Court need not grant leave in this case, if it does, this is a subject that should be reinforced consistent with the City's explanation of the law.

3. The facts and expert findings in this case show the fees collected by the City satisfy the proportionality factor because they are far *less than* the "the amount required to support" the services rendered under its fire prevention regulatory program, and the City has demonstrated that the permit fees are solely used for and directly connected (i.e., "tethered") to the cost of running the fire prevention program.

In what appears to be an effort to paint the City in the worst light possible, the claims in Appellant's Complaint are entirely based on its repeated allegation that the City collected millions of dollars in "inspection charges" every year but did not perform inspections. The lower courts and Appellant's Supplemental Brief (pp. 1-3) filed with this Court, explain that Appellant's repeated use of the term "Inspection Charges" is a completely false characterization of what are actually "Permit Fees." The City further explains that Appellant previously *admitted* the fees collected were not inspection charges.

Amici would note that, instead of gracefully bowing out of this case once the City came forward with uncontestable evidence that it wasn't charging an inspection fee for inspections that it did not perform for Appellant or anyone else—which is the entire basis for each and every claim in its Complaint—Appellant has characterized its claims *on appeal* differently than what is stated in its Complaint and plows forward. Leave should be denied on this basis alone. Appellant's arguments no longer track with the claims in its Complaint.

That said, Appellant's new claim is that the permit fees are "untethered to any possible associated service or cost." This, however, is not the test for proportionality. "The test is whether the fee is proportional, not whether it is equal, to the amount

required to support the services it regulates." *Wheeler,* 265 Mich at 615. It was Appellant's burden to show that the fees collected did not accurately reflect the actual cost of the regulatory services provided. *City of Novi*, 433 Mich at 425-433.

As the City demonstrated by evidence submitted to the trial court and its arguments on appeal, Appellant's argument does not comport with the uncontested facts and uncontested expert findings in this case, which show the fees collected by the City are far *less than* the "the amount required to support" the services rendered under its fire prevention regulatory program. Moreover, the City has demonstrated that the subject fees are solely used for and are directly connected (i.e., "tethered") to the cost of running the fire prevention program for commercial, industrial, and multi-family property owners, per the nationally-recognized regulations, standards, and practices that have been enacted.

Instead of charging too much, using the fees for something else, or not performing the services—as Appellant has changed its argument over time to allege—the City followed the rules by establishing fees that are not just reasonable and proportional, but its expert demonstrated that they are actually less than the amount it could collect. The City has been forthright, indicating that it does not collect enough to fund the more regular or routine building inspections that Appellant complains are not happening. In Appellant's fervor to cast the City in a negative light by complaining to the Court about the lack of inspections, it apparently cannot see that it is advocating for the City to *increase* the amount of the fee it charges in order to undertake those inspections.

This is a case that Appellant should have discontinued when it learned that there is no "inspection charge" and there is a well-established regulatory program in place. That did not happen, and given all of the above circumstances, this case is not a proper or worthy candidate for this Court to grant leave. However, if the Court does decide to grant leave, the lower courts' rulings regarding the Headlee Amendment should be affirmed with an emphasis on the rules of construction, deference, judicial non-interference, and presumption discussed earlier in this brief, *supra*, pp. 6-12.

D. The City's charge for a use and occupancy permit under its fire prevention program satisfies *Bolt*'s third requirement, because, just like other types of permits and licenses issued by local governments and state agencies across the state, the charge (fee) must be paid only if an owner of the property voluntarily chooses, of its own accord, to engage in a use, occupancy, or activity on its property that requires a permit or license under the City's fire prevention regulatory program, and because not every property owner in the City is required to obtain the permit or pay the fee.

The City's charge for a use and occupancy permit under the fire prevention program is voluntary, because only property owners who decide to use and occupy their properties for commercial, industrial, or apartment businesses and buildings are required to obtain the permit and pay the fee. The permit at issue in this case is much like most other types of permits and licenses issued by local governments across the state and country. In fact, there is a vast number of such fee-based permits and licenses across the state that are commonly issued by or through local governments and state agencies in Michigan: liquor licenses, building permits, mobile home park licenses, zoning permits, auto dealer licenses, cemetery permits, various types of cannabis operation licenses, junk yard licenses, massage business licenses, precious

metal and gem dealer licenses, adult business licenses, special event permits (carnivals, fairs, etc.), pawnbrokers business license, and the list goes on.[11]

All of the licenses and permits above are mandatory (not voluntary) for persons and property owners who *choose* to use and occupy their properties for these types of businesses and activities. This creates another scenario in which litigants and courts, if they are not careful, can get hung up by a narrow reading and application of the three *Bolt* factors that leads them away from the true objective at the heart of the analysis in these cases, being the differentiation between the characteristics of a fee versus those of a tax. A tax is *involuntary* in the sense that all property owners must pay it by virtue of owning land, but with licenses and permits such as those described above and in this case, the charge (fee) must be paid *only if the owner of the property voluntarily chooses*, of its own accord, to engage in a use, occupancy, or activity on its property that requires a permit or license under an applicable state law or local ordinance regulating it.

For example, a property owner who decides to build and operate a bar on its property must apply for and obtain a liquor license before engaging in that use and occupancy, and that license must be renewed every year under the local and state laws that regulate that type of use and occupancy.[12] That owner will also have to

[11] The Michigan Compiled Laws are filled with more examples of licenses and permits issued by state agencies and also authorized for local government issuance. Additionally, a website that contains the local ordinances for many local governments across the state of Michigan is www.municode.com, on which the Court can undertake searches for these and other types of licenses and permits issued by Michigan communities.

[12] See, Michigan Liquor Control Code of 1998, MCL 436.1101, *et seq*. and authority for local liquor licensing action at MCL 436.1501(2), under which local governments adopt their own ordinance-based liquor license regulatory program, permitting, and fees.

obtain a building permit and a certificate of occupancy under another state law and local ordinance regulatory program. And not every property owner in the City is required to obtain a liquor license or pay the fee for one.

The City of Detroit's fire prevention regulatory program and the occupancy and use permit and permit fee required under it are exactly the same as the liquor license and fee described above and a plethora of other licenses and permits across the state. Unlike a tax, not all property owners have to pay the fee. In fact, as mentioned earlier in this brief, approximately 250,000 single-family property owners in the City will never have to pay the fee at issue in this case. Neither will any owner of non-residential property in the City who doesn't choose to construct, have, or use a building and engage in the type of occupancies and uses that fall under the fire prevention regulatory program's occupancy and use permit requirements (e.g., vacant properties, surface parking lots, and possibly others).

II. The court should deny leave because Appellant does not have a cause of action for violation of MCL 141.91, and even if it did, the City's annual permit fee charged to certain property owners for services provided under the City's fire prevention regulatory program does not constitute a tax.

A. The Court of Appeals properly found that the City's charges were fees (not taxes) and dismissed Appellant's causes of action for violation of MCL 141.91 for the same reasons stated in its analysis of the *Bolt* factors

MCL 141.91 states:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a *tax*, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the

> city or village on January 1, 1964. [Emphasis added.]

The Court of Appeals in this case stated:

> In concert, [the Headlee Amendment and MCL 141.91] restrain a local government's ability to assess taxes. If the charges levied are not taxes, the Headlee Amendment is not implicated and appellant's claims here, based on violations of the Headlee Amendment and MCL 141.91, would necessarily fail.

Ultimately, the Court of Appeals found that the City's charges were fees and not taxes, and consistent with its above quoted statement, the Court affirmed the dismissal of Appellant's causes of action for violation of MCL 141.91 for the same reasons stated in its analysis of the *Bolt* factors.

B. Leave should be denied on this issue, because allowing Appellant's claim to enforce MCL 141.91 would open the door to arguments that a six-year statute of limitations applies to this case (and potentially many other cases) which is contrary to and would subvert the constitutionally established one-year statute of limitation under the Headlee Amendment, would create incongruent law in Michigan, and render the Headlee Amendment meaningless and unnecessary—all contrary to established rules of statutory construction and good public policy.

Amici agree with the City that leave should be denied, because the Court of Appeals properly affirmed the trial court's dismissal of Appellant's claims for violation of MCL 141.91 based on its findings under *Bolt*. However, *Amici* would add that leave should also be denied, because Appellant's causes of action for alleged violations of MCL 141.91 are nothing more than obvious attempts to skirt the Headlee Amendment's one-year statute of limitations for purposes of achieving a larger payday in this case to the detriment of *all* taxpayers in the City of Detroit.

Additionally, such a result would open municipalities across Michigan to potential class action challenges seeking refunds of six-years[13] worth of fees associated with all types of permit and license fees.

In most instances, not knowing they will face a legal challenge many years in the future, local governments that are served with this type of lawsuit will have already expended most or all of the fees collected to support the program during the prior six (plus) years—like Detroit indicates it has done in this case—and, if the legal challenge is successful, the refunding will then fall to the taxpayers in the communities challenged. To make matters even worse, in the event of an adverse ruling, the programs for which the fees were charged will either have to be discontinued to the detriment of the community or the program costs will be added to the tax bill to the detriment of ***all*** property owners. Such results are not fiscally sustainable, put the health, safety and welfare at risk unnecessarily (considering the Headlee Amendment will still apply and protect against disguised taxes), and are certainly not in keeping with good, stable, and responsible governance for our local communities in Michigan.

Fortunately, this Court previously recognized the good public policy that exists in support of construing a one-year statute of limitations, especially to avoid attempts to "dodge the bar set up by a limitations statute simply be resorting to an alternate form of relief provided by equity"—here, Appellant's unjust enrichment equitable

[13] Considering the amount of time required for litigation of such cases, the number of years will in most instances be more than six years, and with appeals the look-back period may be significantly longer.

claims for violation of MCL 141.91 (and the other ordinance and charter violation claims in equity). In *Taxpayers Allied for Constitutional Taxation v Wayne County*, 450 Mich 119, 127, n 9; 537 NW2d 596 (1995), the Court exercised its wisdom by acknowledging the purpose and importance of the one-year Headlee Amendment limitations period: it is "**a reasonable restriction designed to protect the fiscal integrity of governmental units who might otherwise face the prospect of losing several years' revenue from a tax that had previously been thought to comply with Headlee restrictions**." *Taxpayers Allied,* 450 Mich at 125-126 (emphasis added). See also, *Durant v Dep't of Ed. (On Second Remand)*, 186 Mich App 83, 98-99, 463 NW2d 461 (1990).

The Court should deny leave in this case, because to do otherwise would serve to facilitate Appellant's efforts to subvert Headlee and thwart the importance that this Court and the Michigan Legislature have placed on the one-year statute of limitations relative to cases such as this.

C. Leave should be denied because, as a matter of law and good public policy, Appellant does not have a private right to bring a cause of action under MCL 141.91.

In Michigan, parties do not have a private right of action under state laws that do not plainly confer such a right. In *Office Planning Group, Inc. v Baraga-Houghton-Keweenaw Child Dev. Bd.*, 472 Mich 479; 697 NW2d 871 (2005), this Court decided whether a disappointed bidder could bring a private cause of action to enforce the public access requirement of §9839(a) of the Head Start Act to gain access to other bidders' documents. "[I]n determining whether plaintiff may bring a private cause of

action to enforce the §9839(a), we must determine whether Congress intended to create such a cause of action." *Id.* at 481-482. The Court found that "[b]ecause the Head Start Act does not evidence an intent to create a private remedy for an alleged violation of § 9839(a), plaintiff's action must be dismissed." *Id.* See also, *Lash v City of Traverse City*, 479 Mich 180, 196-197; 735 NW2d 628 (2007) (in the absence of authority in a statute, plaintiff's claim that a private cause of action for monetary damages may be pursued because it is the only mechanism by which the statute can be enforced is incorrect, where declaratory and injunctive relief may be pursued).[14]

Also, MCL 141.91 does not have any language authorizing a private cause of action of any kind. It does not mention the word "fees" or demonstrate that it has any application whatsoever to charges for municipal regulations and licenses or permits issued under such regulations. Therefore, as a matter of law, through its adoption of MCL 600.308a(2)-(4) authorizing private taxpayer lawsuits to enforce the Headlee Amendment as part of the Legislation implementing Headlee, the Legislature confirmed that MCL 141.91 ***should not*** be construed broadly to create or authorize a private cause of action, since MCL 141.91 contains no similar authority. See, *People v Lewis*, 503 Mich 162, 165-166; 926 NW2d 796 (2018) ("when

[14] Although Appellant's Application for Leave does not appear to include its claims for violation of City ordinances, the same no private cause of action rule applies to local government **ordinances**. *McMillan v Douglas,* 332 Mich App 354, 355-56; 913 NW2d 336 (2017) (holding that a landlord's alleged violation of a county ordinance governing issuance of rental permits did not create a private cause of action for a tenant to demand a refund of rent paid to the landlord). See also, *Ballman v Borges*, 226 Mich App 166, 168-69; 572 NW2d 47 (1997) (ordinance providing that no rent shall be recoverable if dwelling was unfit for human habitation, did not give rise to a private cause of action by tenant against landlord to recover rent previously paid).

the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional."). The Appellant and all others have the Headlee Amendment. They do not need MCL 141.91.

To erase any question or doubt about this, the law requires construction of MCL 141.91 as not including a private cause of action, since the Michigan Constitution mandates that: "The provisions of . . . law concerning . . . cities . . . shall be liberally construed in their favor." Const 1963, art 7, §34 (emphasis added). Michigan courts are constitutionally required to "liberally construe" MCL 141.91 **in favor of** finding both that MCL 141.91 does not provide for a private cause of action, and the City's use and occupancy fees at issue in this case are not in violation of MCL 141.91.[15]

Although this issue does not appear to have been addressed below, it is nonetheless an issue that could be impacted by a decision of this Court, if leave is granted. For example, a Supreme Court opinion of any kind regarding MCL 141.91 that does not mention the above long-standing public policy and legal principal would likely be construed in other cases as having sanctioned private causes of action for violation of state laws. At a minimum, this forms another basis upon which this Court

[15] *Amici* acknowledge that there are two ***unpublished*** Court of Appeals decisions—*Logan v West Bloomfield Township*, unpublished *per curium* opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 333452) (Exhibit G) and *Kincaid v Flint,* unpublished opinions of the Court of Appeals, April 16, 2020, and March 28, 2024, (Docket Nos. 337972 & 337976 (Kincaid II) and 365646 & 365657 (Kincaid III)) (Exhibit H), which allowed private causes of action enforcing statutory law to proceed. However, neither of these unpublished cases distinguish or even mention the long-standing rule (under the ***published*** cases *Amici* cites here) that statutes and other laws do not provide a mechanism for a private right of action, let alone a right to seek six years' worth of previously collected fees. As such, those cases were wrongly decided and inapplicable here.

should deny leave in this case; i.e., to avoid unnecessarily disrupting or confusing already well-established Michigan law that has not been contradicted or affected by the lower courts' decisions.

III. The Court should deny leave because the Court of Appeals correctly ruled that the Detroit City Council's retroactive approval of the permit fees was proper and lawful (Application Arguments I and III).

The City has provided this Court with a thorough and correct explanation of the facts and application of the law establishing that retroactive application of its resolution authorizing the fees at issue in this case was proper and lawful. *Amici* agree with and support that argument. *Amici* add the following two points.

First, the City Code and Charter provisions requiring City Council authorization of the permit fees do not specify that "pre-approval" is required. Construed liberally, as required by Mich Const, art 7, § 34,[16] the applicable City Charter and Code provisions can and should be read to provide City Council with the legislative discretion to decide to allow after-the-fact approval. Detroit's City Council could have rejected the resolution of approval, but it did not. The resolution at issue here is not an enactment of an ordinance, it is an administrative or ministerial act that is in the discretion of the City Council.

Second, Appellant's Complaint only alleges the fees were in violation of the City's ordinances (and not the charter) because they were not "necessary," and they were "imposed on or collected from persons and entities whose property did not actually receive a Fire Inspection." See, Appellant's Complaint, Counts VI and VII,

[16] See this brief, *supra,* at pp. 6-7.

¶¶ 81-83 and 90-92. Appellant's Complaint does not cite to or claim a violation of the part of the ordinance or charter that calls for City Council to adopt a resolution regarding permit fees. This is an issue the Court need not and should not address, as the issue was not pled and involves a hyper-technical issue that relates solely to the particular facts of this case and has no impact outside of the parties to this case.

CONCLUSION AND RELIEF REQUESTED

The Court should deny leave on the basis that the Court of Appeals decision is perfectly consistent with existing law and precedent, and also because the facts elicited at trial and in the motion for summary disposition remove any question about whether the fee charged is actually a disguised tax. This case involves a standard permit fee supporting a fire prevention regulatory program that serves and primarily benefits commercial, industrial, and multiple-family property owners in the City.

Furthermore, the City's fire prevention program is just like fire prevention programs in local communities across Michigan and the country. These programs administer and help property owners comply with a standardized set of building construction, occupancy and use regulations that have been prepared by experts across the country in the field of fire prevention and protection. Those regulations, with some modifications to fit specific circumstances in the City, have been legislatively enacted by the City Council, just as they have been adopted by other communities across the state. A more textbook regulatory purpose under *Bolt* would be hard to imagine, and any decision that does not affirm the lower courts' decisions

would negatively impact property owners and public health, safety, and welfare across the state.

The constitutionally required liberal construction of the Headlee Amendment and MCL 141.91 in favor of the City, together with this Court's long-standing presumption of validity and doctrine of judicial deference to and non-interference with local government decision-making, further support denial of the application for leave in this case.

For these reasons and all the other reasons stated in this brief and the City's briefs, the Court should refuse to accept this case.

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DATED: July 22, 2024

STATEMENT REGARDING WORD COMPLIANCE

Pursuant to MCR 7.212(B), I state that the foregoing brief consists of 10,064 words.

/s/ *Steven P. Joppich*
Steven P. Joppich (P 46097)

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the Court's e-filing system which will send notification of such filing to all counsel of record.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Sheila Bodenbach