STATE OF MICHIGAN

IN THE COURT OF APPEALS

TIFFANY DOBSEN and JENNIFER BROGNO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

CITY OF ANN ARBOR, a municipal corporation,

Defendant-Appellee.
_____/

Court of Appeals
Docket No. 257634

Washtenaw County Circuit Court
Case No. 03-1282-CZ

BRIEF OF AMICI CURIAE

THE MICHIGAN MUNICIPAL LEAGUE
THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN
THE MICHIGAN TOWNSHIPS ASSOCIATION
PROTEC

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the brief of Defendant-Appellee City of Ann Arbor is correct and is adopted by the amici curiae.

STATEMENT OF QUESTIONS PRESENTED

Did the circuit court err in concluding that the test set forth in *Bolt v City of Lansing* is inapplicable to the cable franchise fees that the cable companies charge the Plaintiffs?

Defendant-Appellee would answer	"No"
Plaintiffs-Appellants would answer	"Yes"
The circuit court apparently answered	"No"
Amici curiae answer	"No"

Did the circuit court err in concluding that the Plaintiffs were not the true parties-in-interest, and therefore have no standing, because they are not "taxpayers" as required under the Headlee Amendment?

Defendant-Appellee would answer	"No"
Plaintiffs-Appellants would answer	"Yes"
The circuit court apparently answered	"No"
Amici curiae answer	"No"

STATEMENT OF FACTS

The amici curiae Michigan Municipal League, Public Corporation Law Section of the State Bar of Michigan, Michigan Townships Association, and PROTEC accept the statement of facts asserted by the Defendant-Appellee City of Ann Arbor as complete and correct.

DESCRIPTION OF THE AMICI CURIAE

The Michigan Municipal League

The Michigan Municipal League is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is to improve the quality of municipal government within the state by providing technical, educational, and administrative resources to the cities and villages that make up its membership, while increasing public awareness of the functions and needs of local governments in Michigan. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation that may affect the structure, operation, authority, or financial well-being of municipalities within the state.

The Public Corporation Law Section of the State Bar of Michigan

The Public Corporation Law Section is an affiliate section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to municipalities and other public entities in the state. The Section provides educational programs for its members as well as the public at large. Any member of the State Bar of Michigan is eligible for membership in the Public Corporation Law Section.

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a non-profit organization formed in 1953 to provide a unified voice for Michigan's township governments and to help township leaders govern more efficiently and improve the services they provide to residents. More than 99% of Michigan's 1,242 townships are MTA members. Through its website, seminars,

publications, county chapters, written communication, telephone calls, monthly electronic newsletters and legislative faxes, MTA keeps members informed of current township issues.

PROTEC

PROTEC is an incorporated organization of several Michigan municipalities devoted to protecting their citizens' interests in preserving control over local rights-of-way. The cities which are members of PROTEC include Albion, AuGres, Battle Creek, Bingham Farms, Britton, Burton, Cadillac, Centerline, Columbiaville, Dearborn, Detroit, Douglas Durand, Essexville, Genesee County Small Cities & Villages Association, Huntington Woods, Livonia, Mackinaw City, Metamora, Monroe, Montague, Montrose, Mt. Morris, Mt. Pleasant, Michigan NATOA, New Baltimore, Oak Park, Oxford, Parchment, Paw Paw, Rosebush, Rochester, Saline, Schoolcraft, Southfield, South Lyon, St. Ignace, Sturgis, Swartz Creek, Tecumseh, Troy, Vicksburg, Warren, and Whitehall.

INTRODUCTION

The case at bar has profound implications for the constituencies of all four amici curiae. Along with a handful of cases currently pending before this Court,[1] this case will help determine whether the scope of Section 31 of the Headlee Amendment, Const 1963, art 9, § 31, will remain true to its original intent, or whether it will be expanded to a realm that may lead to absurd results while threatening vital municipal revenues generated from proprietary enterprises that fall outside the purview of the traditional "user fee" versus "tax" debate sparked by *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998).

[1] *See Kowalski v City of Livonia*, Docket No 255623; *Stanton v Charter Twp of Canton*, Docket No 255716; *Siegel v City of Muskegon*, Docket No 254683; *Morgan v City of Grand Rapids*, Docket No 255311; *Temple v City of Westland*, Docket No 255827; *Van Baak v City of St Clair Shores*, Docket No 255388.

In this case, the court below granted summary disposition for the Defendant City of Ann Arbor based principally on the conclusion that the Plaintiffs do not have standing because the City does not impose the fees on the Plaintiffs, but rather on private companies who have chosen to do business with the City and are willing to negotiate and pay consideration for rental of the right-of-way for that business. The circuit court opinion properly characterizes the Plaintiffs' reliance on *Bolt* as misplaced. The court's opinion notes that *Bolt* involved user fees, imposed directly upon the users pursuant to ordinance. *See* Cir Ct Op at 6. The charges at issue in this case are franchise fees, pursuant to contract, for which only the cable companies are ultimately responsible. The circuit court properly observed that in this case "there is no fee legislatively imposed directly on the cable user." *Id.*

A reversal of the circuit court's decision would impair municipalities' ability to enter into contracts and engage in proprietary activity for the benefit of all taxpayers. Municipalities hold public property and rights-of-way in trust for the benefit of all taxpayers. *See* 12 McQuillin, Municipal Corporations (3d ed rev), § 34.17, p 70. Local governments should not be prohibited from realizing the economic value of public property, especially when permitted to do so under the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (together, the "Cable Act"), 47 USC § 521 et seq. If there is market demand for the commercial use of public property by way of mechanisms such as franchises or licenses, public policy dictates that municipalities ought to be able to seek the fair market value for that use. Such proprietary transactions generate revenues from willing private companies whose business judgment guides their decisions regarding what to pay for and how much to pay for it. Those revenues, in turn, lower the financial burden borne by all

taxpayers in general. A reversal of the circuit court's decision would render municipalities virtually powerless to obtain fair market value for property they hold in trust on behalf of their citizens.

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT THE HEADLEE AMENDMENT AND RELATED CASELAW ARE INAPPLICABLE TO THE AGREEMENT BETWEEN THE CITY AND THE CABLE COMPANY.

A. The Franchise Fee Is Contractual Consideration, or Rent, for the Use of Public Streets and Rights-of-Way.

A scenario for the Court to consider: The City of Eden, to save the old city hall from the wrecking ball, requests proposals from developers to lease the old city hall from the City, renovate it, and sublease it to firms and/or individuals needing office and retail space downtown. The City of Eden and Developer negotiate and execute a long-term lease, which includes market-value lease payments from Developer to the City. Developer is responsible for all costs of the project and the City of Eden considers the matter a wise business decision and use of public resources. Such lease payments, even if transferred to the City's general fund, would surely not be considered a "tax" within the meaning of the Headlee Amendment.

The franchise fee in the case at bar is no different. The City of Ann Arbor has entered into a proprietary agreement with a private entity (the cable operator), which, guided only by its independent business judgment, negotiated the terms of that agreement. The fee represents contractual consideration—rent—paid by the cable operator to the City in return for the City's granting the operator permission to install and operate its cable system in the public rights-of-way. A panel of this Court recently observed that "the direct purchase price for the provision of

a service as part of a voluntary transaction[]" is not the equivalent of a tax. *Lapeer County Abstract & Title Co v Lapeer County Register of Deeds*, 264 Mich App 167; 691 NW2d 11 (2004). Regarding franchise fees specifically, courts have recognized that "'a franchise fee is essentially a form of rent: the price paid to rent use of public right-of-ways.'" *Texas Coalition of Cities for Utility Issues v FCC*, 324 F3d 802, 806 (CA 5, 2003) (quoting *City of Dallas v FCC*, 118 F3d 393, 397 (CA 5, 1997)).

Plaintiffs' brief on appeal states that the revenue at issue is "either a fee or a tax." Pls.-Appellees Br. at 7. Beginning with the very next sentence, Plaintiffs argue that

> [t]he debate should be focused on what portion of the license fee is a valid *user fee*, and what portion is an invalid user fee, and therefore, pursuant to *Bolt*, a tax in violation of Headlee. To argue that the license fee is some other amorphous concept, and to argue that it is really the cable company that is paying the fee and not the citizens, will only serve to ignore reality . . .

Id. This logic implies that *all* fees are *user* fees, and that to suggest otherwise is nonsensical. The California Court of Appeal would not agree with Plaintiffs' conception of reality; that court has held that

> [a] franchise is a negotiated contract between a private enterprise and a governmental entity for the long term possession of land. Franchise fees are paid as compensation for the grant of a right of way, not for a license or tax nor for a regulatory program of supervision or inspection.

Santa Barbara County Taxpayers Ass'n v Bd of Supervisors for the County of Santa Barbara, 209 Cal App 940, 949 (Cal App 2 Dist, 1989). The *Santa Barbara County Taxpayers Ass'n* court further found that "fees paid for franchises *are not taxes, user fees or regulatory licenses*." *Id.* at 950 (emphasis added). The California court's characterization of franchise fees as rent is especially relevant to the case at bar because the California Constitution contains a litany of tax

limitations that are practically identical to those contained in the Headlee Amendment, including the voter approval requirement. [2]

Indeed a franchise fee is far from an "amorphous concept." It operates in the same way as rent that a building owner charges a tenant: Each is contractual consideration paid by a lessee in exchange for some portion of the lessor's property rights. As the United States Supreme Court stated in a case involving a municipal fee imposed on a telegraph company for the right to install poles on public property:

> [The appropriation of public space for telegraph poles] is a use different in kind and extent from that enjoyed by the general public. Now when there is this permanent and exclusive appropriation . . . , is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; *who would question the right of the city to charge for the use of the ground occupied, or call such a charge a tax, or anything else except rental*? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in its terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the *nature of a rental.*

City of St Louis v Western Union Tel Co, 148 US 92; 13 S Ct 485; 37 L Ed 380 (1893) (Brewer, J.) (emphasis added). The reasoning in *City of St. Louis* maps perfectly over the case before this

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[2] The California Constitution contains the following provisions:

> No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body. . . .
>
> No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Cal Const 1879, art 13C, § 2(a), (d); *see also id.*, arts 13A, 13B.

Court more than a century later, and one could imagine Justice Brewer authoring almost precisely the same passage in this case, only substituting "cable" for "telegraph."

B. A Cable Operator's Business Decision to Itemize Its Franchise Fee Expense on Its Invoices, as Permitted Under the Federal Cable Act, Does Not Change the Nature of the Fee.

The Cable Act states that a cable service provider may not operate within a municipality without first entering into a franchise agreement with that municipality. 47 USC § 541. The Cable Act authorizes a municipality to charge a fee in exchange for granting such a franchise. 47 USC § 542. In addition, the Cable Act authorizes, but does not require, a cable operator to itemize on its bill the portion of its retail price that is attributable to recovering the operator's franchise fee expense. 47 USC § 542 (c), (f); *see also The City of Pasadena v FCC*, 16 FCC Rcd 18192 (2001). Thus the fee itemization only occurs as a result of a cable operator's business decision to disclose its rental costs to subscribers. From a marketing standpoint, no rational company is likely to pass up the opportunity to shift a portion of the "blame" for its price. The fact that this particular cost of doing business is itemized and shown to consumers does not make it different from any other cost that a company pays to a government entity yet is ultimately recovered through the prices paid by the company's customers.

Suppose, for instance, we return to the City of Eden to find that Developer has renovated the old city hall and restored it to its former glory. Demand becomes great and Developer subleases it to various businesses and individuals who need office and retail space downtown. Developer makes the business decision to disclose to sublessees the cost of Developer's own lease payment to the City; each subtenant's monthly rental invoice therefore includes an itemized amount equal to a pro-rated portion of Developer's lease payment.

Mr. Adam, a resident of the City of Eden and a sublessee, notices this itemization of his pro-rated portion of the lease payment to the City of Eden on his monthly invoice. Mr. Adam retains counsel and sues the City, claiming that the itemized portion of his sublease payment that is equal to his pro-rated share of Developer's lease payment to the City is a tax in violation of the Headlee Amendment. Mr. Adam argues that no portion of the rental payment received by the City will go toward the City's recovering its costs related to this project, as the City has no costs in leasing the old city hall to Developer. As result, claims Mr. Adam, any revenue the City receives from the lease becomes a tax under the Headlee Amendment as interpreted in *Bolt*. It would defy logic to conclude that this simple sequence of business transactions suddenly causes the original rental charge imposed on Developer to morph into a tax imposed upon Mr. Adam. Plaintiffs, however, are asking this Court to conclude just that.

C. Plaintiffs' Position Undermines the Purpose of the Headlee Amendment and the *Bolt* Case

By extending the City of Eden hypothetical even further, one can illustrate the logical and economic failing of Plaintiffs' position. Assume Mr. Adam sells apples, and given his central location and Eden's relative remoteness, virtually all of his customers are Eden residents. His apples sell at $1.99 per pound. Of course his operating costs, including rent, figure into the price of his apples. Mr. Adam decides that on the price tags for his apples he will itemize the portion of the $1.99 price attributable to the share of his rent that is ultimately paid to the City. Can an apple-purchasing Eden resident now succeed on a Headlee Amendment claim against the City? Under Plaintiffs' theory, there would be nothing standing in the way.

The City of Eden hypothetical is indistinguishable from the current case for purposes of Plaintiffs' Headlee Amendment claim. Both are a far cry from any reasonable interpretation of the restrictions the voters intended to place on the taxing power of local governments in approving the Headlee Amendment. They are also a far cry from the attempts to circumvent the Headlee amendment that Michigan Supreme Court was trying to put an end to in the *Bolt* case. Plaintiffs' claim is within neither the spirit nor the letter of the Headlee Amendment.

The purpose of the Headlee Amendment was to place limits on government's authority to increase taxpayers' burden. In his *Bolt* dissent at the Court of Appeals, then-Judge Markman asserted that the citizens of Michigan "presumably enacted the Headlee Amendment . . . because they believed their liberties were . . . threatened by governmental spending and taxing decisions . . . ." *Bolt v City of Lansing*, 221 Mich App 79, 88; 561 NW2d 423 (1998) (Markman, J., dissenting), rev'd 459 Mich 152; 587 NW2d 264 (1998). The City of Ann Arbor is neither taxing nor spending in this case. Rather it is *relieving* taxpayers' burden by supplementing general fund moneys with revenues generated from willing private enterprises, which are foreign to the City and desire to use public property in a wholly proprietary context. Invoking the Headlee Amendment as a means of placing limits on local governments' ability to engage in municipal proprietary activity not only goes far beyond the intent of the Headlee Amendment, but moreover it transforms the Headlee Amendment into a self-defeating mechanism that works to restrain municipal proprietary activity, ultimately leaving taxpayers with even greater tax liability or fewer public services.[3]

[3] The terms "greater" and "fewer" are used relative to the level of liability or services when proprietary revenues such as cable franchise fees are available.

Moving beyond the Headlee Amendment itself, *Bolt* was intended to provide direction to courts[4] enforcing Headlee by preventing governments from disguising taxes as "mandatory user fees" in an effort to avoid the obligation to seek voter approval. Headlee Blue Ribbon Commission, *A Report to Governor John Engler* (the "Headlee Blue Ribbon Commission Report"), § 5(1)(B) (1994). The *Bolt* decision was a response to the Headlee Blue Ribbon Commission Report's recommendation that the terms "user fee" and "tax" be defined so as to prevent governments from using the former to circumvent the requirements of the latter.[5] *See* Headlee Blue Ribbon Commission Report, § 5(1)(E). Courts have held that the issues identified in the Headlee Blue Ribbon Commission Report and dealt with in *Bolt* do not apply to all situations in which governments receive some sort of payment. *See, e.g.*, *Lapeer County Abstract & Title*, *supra*; *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412; 671 NW2d 572 (2003) lv den 675 NW2d 590 (2004); *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999).

The *Lapeer County Abstract & Title* court specifically held that *Bolt* does not apply to a context in which individuals or individual entities pay for particularized benefits in voluntary commercial settings. *Lapeer County Abstract & Title*, *supra*, at 185. A franchise that a local government grants to a cable operator is unquestionably a particularized benefit, for it allows the cable operator to do something that those without a franchise cannot: install and operate thousands, if not millions, of dollars worth of the operator's private profit-making plant along

[4] The *Bolt* court found that a valid user fee must 1) serve a regulatory purpose, 2) be proportionate to the cost of regulation, and 3) be voluntary in the sense that one can refuse the service for which the fee is charged. *Bolt*, *supra* at 161-62.

[5] It should be noted that the Blue Ribbon Commission recommended legislative, not judicial, action.

every street in a city. Cable franchise fees in no way resemble taxes, and Plaintiffs cite no authority whatsoever for the proposition that a negotiated rental price, established as a matter of contract between a government and a willing private company, fits into the *Bolt* analysis.

II. THE TRIAL COURT PROPERLY RULED THAT PLAINTIFFS ARE NOT THE TRUE PARTIES-IN-INTEREST UNDER THE HEADLEE AMENDMENT.

A. The City Does Not Impose Cable Franchise Fees on Subscribers.

Governments frequently enter into contracts with private entities, contracts under which those governments receive monetary consideration. Such monetary consideration that a private entity pays is simply part of its cost of doing business, and figures into its pricing formula. Cable franchise fees are no different. Characterizing a portion of the price of a good or service as a "tax" on the consumer simply because an expense that the seller incurs under a government contract figures into the seller's pricing formula fails even minimal logical or economic scrutiny. It would mean, for instance, that all consumers of a business's service (as opposed to or in addition to the business itself) have standing to challenge any fee or tax imposed by government on that business, as in the City of Eden hypothetical. Thus, all consumers could challenge a corporate income tax or a tax on a business's property.

Plaintiffs state that the City is charging the franchise fee to taxpayers "through the cable provider . . ." Pls.-Appellants' Br. at 5. This assertion runs afoul of a panel of this Court's holding in *County of Sagina v John Sexton Corp of Michigan*, 232 Mich App 202; 591 Nw2d 52 (1998). The court in that case found that a landfill surcharge, collected by private landfill operators, violated the Headlee Amendment. *Id.* at 209. However, the court first made the critical determination that each landfill operator had merely "a ministerial duty . . . to collect

fees payable by those who deposit waste in the landfill . . . and remit its collections quarterly to the county treasurer." *Id.* at 208. The *John Sexton* court specifically based its holding on the fact that the citizens were ultimately liable for payment of the surcharges. In the instant case, the opposite is true: The cable operators are liable to the City for the fees under the agreements, not the Plaintiffs or any other private citizen.

B. Plaintiffs Are Not Taxpayers Under the Headlee Amendment

The Headlee Amendment grants standing to any "taxpayer," but does not define that term. Const 1963, art 9, § 32; *see also Waterford School Dist v State Bd of Educ*, 98 Mich App 658, 661-63; 296 NW2d 328 (1980). In the absence of an express definition, common understanding of the term controls. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000); *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971). According to the common understanding of the term, a "taxpayer" is a person or entity on which the government legally imposes the obligation to pay the tax, assuming there is a tax in the first place. *See* Merriam-Webster Dictionary of Law (1996).

Here, the taxpayer is unquestionably the cable operator, not the subscriber. Even if a subscriber were to withhold payment of that portion of her cable bill attributable to the franchise fee, the cable operator would still owe the City 5% of the amount of the bill that the subscriber does in fact pay to the operator, and any revenue margin shortfall the operator suffers as a result of the subscriber's withholding would be the operator's debt collection problem with the subscriber, not the City's.

Essentially, the *Bolt* court's intention was to draw the line between a "tax" and a "user fee" for purposes of interpreting the Headlee Amendment. In the case at bar, not only are the

cable franchise fees not taxes, but they are not even user fees imposed *upon the Plaintiffs*. *Bolt* left municipalities with a sense of uncertainty, and *Bolt*-related cases have become platforms for lively debate, with no shortage of amici curiae questioning the wisdom of applying *Bolt* in certain contexts. However, the case before this Court falls far outside of that debate because the complaining party is not a taxpayer. There is simply no case law in which a court has invoked *Bolt* to analyze a consumer's objection to a cost imposed by a governmental entity on a private business from whom the consumer purchases service. Any suggestion that the City is "charging" franchise fees to the Plaintiffs is patently incorrect, as the cable operator is the only party on whom the fee is legally imposed and who has the legal obligation to pay, and thus the only party in a position to challenge the fee.

III. EVEN IF THE HEADLEE AMENDMENT APPLIED TO CABLE FRANCHISE FEES, THE FEES IN THE INSTANT CASE WOULD BE EXEMPT, HAVING BEEN AUTHORIZED PRIOR TO PASSAGE OF THE HEADLEE AMENDMENT.

A. "Taxes" Authorized Prior to December 23, 1978 are Exempt from the Headlee Amendment's Constraints

The Headlee Amendment expressly applies only to "taxes" not already authorized when the Amendment was ratified on December 23, 1978. Any "tax" that had been authorized prior to that date was and remains exempt from the Headlee Amendment's restrictions. Importantly, the language of the Headlee Amendment does not state that such a tax must have been *levied or collected* as of its date of ratification. Rather, § 31 requires only that such a tax be authorized under law or charter prior to the Headlee Amendment's effective date. Such intent was made clear in the *Drafters' Notes- Tax Limitation Amendment* ("Drafters' Notes") (Taxpayers United Research Institute, 1979):

> [T]he intent of the wording was to permit Local units to retain those taxing powers they had by state law or local charter prior to the effective date of the amendment. Thus a Local unit that *was not levying or imposing the full amount of its taxing authority* at the time of the effective date of the amendment *would continue to be able to exercise such power* after the effective date of the amendment.

Id. at 11-12 (emphasis added). The Michigan Supreme Court has echoed the theme of the Drafters' Notes:

> We agree with the decisions of several panels of the Court of Appeals that the Headlee exemption of taxes authorized by law when the section was ratified permits levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date.

American Axle, *supra*, at 357-58.

B. The Franchise Fees Were Authorized Prior to the Headlee Amendment

Assuming *arguendo* that cable franchise fees were indeed taxes, their statutory authorization predates the Headlee Amendment. It is uncontroverted that the charges, be they taxes or fees, stem from the franchise agreement. The authority for such agreements predates the Headlee Amendment. In addition to the Cable Act, the Michigan Constitution states that a utility provider may not use public rights-of-way without first obtaining a franchise from the municipality within which it seeks to operate:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities without the consent of the duly constituted authority of the [municipality]; or to transact local business therein without first obtaining a franchise from the township, city or village.

Const 1963, art 7, § 29. This provision is found in the 1963 Constitution,[6] which predates the Headlee Amendment.

[6] This provision originated in the Michigan Constitution of 1908. Const 1908, art 9, § 28.

The authority for a municipality's charging a fee for granting a franchise can be traced back even further in time. Justice Brewer's opinion in the 1893 *St. Louis* case, *supra*, provides unambiguous federal support for franchise fees. At the state level, the Michigan Supreme Court affirmed that with respect to a utility franchise, "considerable discretion is vested in cities concerning the terms of use[], and the proper rate to be paid to the city for permitting it." *City of Detroit v Detroit City R Co*, 76 Mich 421, 425; 43 NW 447 (1889). Moreover, in the instant case, the City entered into a franchise agreement with the predecessor to its current cable provider, which agreement provided for the cable company's payment of a franchise fee to the City. That agreement was originally executed in 1970 and the authorization to charge a franchise fee was subsequently codified in the Ann Arbor City Code. *See* Ord No 34-70, 7-20-1970. Although amici curiae steadfastly contend that cable franchise fees do not constitute a tax under the Headlee Amendment, it is clear that even if such fees were determined to be the equivalent of a tax, they would be exempt from the Headlee Amendment's restrictions because they were authorized prior to its ratification.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing arguments and authorities, the amici curiae Michigan Municipal League, Public Corporation Law Section of the State Bar of Michigan, Michigan Townships Association, and PROTEC respectfully request that this Court approve the remedies sought in the appeal of the Defendant-Appellee City of Ann Arbor, and affirm the circuit court's decision.

Respectfully submitted,

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