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by Sidney Davy Miller

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December 16, 2013

Via Hand Delivery
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Avenue
Lansing, MI 48915

Re: CITY OF RIVERVIEW, CITY OF RIVER ROUGE, ET AL. v. THE STATE OF MICHIGAN AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
Supreme Court Case No: 147924

Dear Clerk:

Enclosed for filing in relation to the above captioned matter, please find an original and twenty-four (24) copies of the Brief of Amici Curiae the Michigan Municipal League and the Michigan Townships Association. Also enclosed is our Proof of Service of same upon counsel of record.

We understand that a motion is not necessary pursuant to MCR 7.306(D)(2).

Please stamp and return the extra copy with our messenger and file in accordance with your usual procedures. Thank you for your assistance in this matter.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: Paul D. Hudson
Paul D. Hudson

PDH/ etc
Enclosures
cc: Parties of Record (via USPS)
21798186.1\088888-03979

STATE OF MICHIGAN
IN THE SUPREME COURT

CITY OF RIVERVIEW,
CITY OF RIVER ROUGE, and
ALL OTHERS SIMILARLY SITUATED
Plaintiffs – Appellants

Supreme Court No. 147924
COA Nos. 301549, 302903,
301551, 302904, 301552, 302905

v

THE STATE OF MICHIGAN and
THE MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY
Defendants – Appellees.

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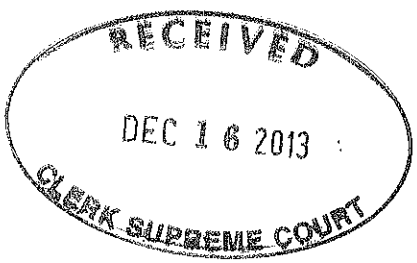
BRIEF OF AMICI CURIAE THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION



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STATEMENT OF BASIS OF JURISDICTION

Amici curiae concur in Appellants' statement of the basis of this Court's jurisdiction.

STATEMENT OF QUESTION PRESENTED

1. The Court of Appeals held that the Municipal Plaintiffs' ownership and operation of municipal separate storm sewer systems, which are defined by the State Defendants to include roads and their adjacent catch basins, is an "optional" activity and thus not subject to the Headlee Amendment. This holding was erroneous – the maintenance of existing roads and adjacent catch basins is a purely governmental function that local units are required to exercise pursuant to State law and, further, not intended to be included within the water and pollution regulatory scheme of the MDEQ. The application of MDEQ regulations to public roadways is a new municipal requirement, and Headlee Amendment restrictions on unfunded mandates apply. This issue is of considerable importance to the public in general and to Appellants and Amici Curiae. Should this Court grant leave to appeal?

Plaintiffs-Appellants answer:	Yes.
Defendant-Appellees answer:	No.
Amici Curiae answer:	Yes.

DESCRIPTION OF AMICI CURIAE

The Michigan Municipal League

Amicus Curiae Michigan Municipal League (the "League") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Defense Fund (the "Defense Fund"). The League operates the Defense Fund through a board of directors. The purpose of the Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amicus curiae is authorized by the Defense Fund's Board of Directors, whose membership includes the president and executive director of the League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, city attorney, Troy; Clyde J. Robinson, city attorney, Kalamazoo; Randall L. Brown, city attorney, Portage; Catherine M. Mish, city attorney, Grand Rapids; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League. Because the League is an association representing various political subdivisions of the State and this brief is filed on their behalf, the League requests that this Court accept this amicus curiae brief without a motion for leave. MCR 7.306(D)(2).

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a Michigan non-profit corporation whose membership consists of over 1,230 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.

INTRODUCTION

In 1978, Michigan voters amended the Michigan Constitution, in what is known as the "Headlee Amendment." The Amendment prohibits local units of government from levying new taxes or increasing existing taxes without voter approval. To balance that prohibition, the Headlee Amendment also added Section 29 to Article 9 of the Constitution, which prohibits the State from mandating that local governments provide new or expanded activities or services unless the State provides full funding for those activities or services. This provision is referred to as the "prohibition on unfunded mandates," or "POUM" provision.

In 2003, the State Defendant-Appellees implemented a new storm water permit program and related regulations. The regulations added to the water and waste disposal systems subject to Michigan Department of Environmental Quality ("MDEQ") permitting requirements a new category referred to as "municipal separate storm sewer systems," or "MS4s." MCR § 323.2103(o); MCR § 323.2161(1)(c). MS4s are defined, in pertinent part, as municipally owned or operated "separate storm sewer systems" that discharge waters to state surface waters. MCR § 323.2013(o). A "separate storm sewer system" in turn is defined as "a system of drainage, including, but not limited to, roads, catch basins, curbs, gutters, parking lots, ditches, conduits, pumping devices, or man-made channels" that are not part of a combined storm water-sanitary waste system or part of a publicly owned treatment works. MCR § 323.2104(m).

In other words, the State Defendant-Appellees now require sewer permits from municipalities across Michigan simply for having public roads within their boundaries – roads that were never intended to be, nor, prior to 2003 were construed as, storm sewer systems. Prior

to the State's new permit requirement, only municipalities with true sewer systems were subject to sewer-system regulations; now every municipality with a road is subject to the regulations, and must expend considerable funds to comply with them.

This case presents issues of great public significance regarding the application of the POUM provision to local governments across Michigan. The Trial Court properly construed the POUM provision, holding that it prevents the State from applying new costs to already cash-strapped local units who, under the Headlee Amendment, are precluded from raising revenue to meet those costs. The Court of Appeals' reversal of the Trial Court's decision misconstrues the distinction, on the one hand, between the expansive, and necessary, system of public roadways in the State and the scope of environmental protections regulated by the MDEQ, and, on the other hand, the purposes for which the constitutional protection afforded to local units by Article 9, Section 29 of the Headlee Amendment and the environmental protections carried out by the MDEQ are meant to provide.

Amici Curiae have a vital stake in the outcome of this case. The Court of Appeals' decision, if it stands, will greatly impact the resources available to Amici's constituents to properly and safely maintain public roadways in their communities, and, moreover, to continue to provide necessary services to their residents without fear of additional State-imposed financial burdens.

The League and the MTA respectfully ask this Court to grant leave, or in lieu of the same, to reverse the decision of the Court of Appeals.

ARGUMENT

THE STATE'S INCLUSION OF ROADS IN THE DEFINITION OF DRAINAGE SYSTEMS SUBJECT TO MDEQ PERMITTING REQUIREMENTS CONSTITUTES AN UNCONSTITUTIONAL UNFUNDED MANDATE UNDER THE HEADLEE AMENDMENT

A. MCL 21.231, *et seq.* defines, and provides exceptions to, new or increased activities and services requiring State funding under Article 9, Section 29 of the Headlee Amendment

Article 9, Section 29 of the Headlee Amendment to the Michigan Constitution provides, in pertinent part, that neither the legislature nor any state agency of Local Government may require "[a] new activity or service or an increase in the level of any activity or service beyond that required by existing law . . . unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs." *Id.*

The State Disbursements to Local Units of Government Act, Act 101, Public Acts of Michigan, 1979 ("Act 101") was created to implement Article 9, Section 29 of the Headlee Amendment to the Michigan Constitution. The implementing legislation recites the POUM provision language to define "state requirement" as "a state law which requires a new activity or service or an increased level of activity of service beyond that required of a local unit of government by an existing law." MCL 21.234(5). As the Court of Appeals cited in its decision, Section 4(5) of Act 101 expressly excludes from the definition of state requirement to which the POUM provision applies, in pertinent part:

> (h) A requirement of a state law which does not require a local unit of government to perform an activity or service but allows a local unit of government to do so as an option, and by opting to perform such an activity or service, the local unit of government shall comply with certain minimum standards, requirements, or guidelines.

(i) A requirement of a state law which changes the level of requirements, standards, or guidelines if an activity or service that is not required of a local unit of government by existing law or state law, but that is provided at the option of the local unit of government.

The Court of Appeals interpreted Section 5 of Act 101 to strictly limit application of the POUM provision to activities and services which are not "voluntarily" provided by local units of government, and to accept MS4s as voluntarily provided municipal services. As this Court has held, however, Article 9, Section 29 of the Headlee Amendment is intended to "limit legislative expansion of requirements placed on local government." *Durant v. State Bd of Education*, 424 Mich. 364, 378 (1985). By focusing on the distinction between municipal activities which are expressly required by state law and those which a local unit may, under state law, provide at its option as articulated in Section 5 of Act 101, the Court of Appeals has erroneously, and to the detriment of Michigan municipalities, shifted attention away from the main issue: whether roads should be included in the systems regulated by the MDEQ, and if so, whether *roads* should be construed as voluntary, regardless of the voluntary character of other separate storm sewer systems.

B. Maintenance of Existing Roads is Not an "Optional" Municipal Service

The Court of Appeals held that the POUM provision does not apply to the MDEQ permitting requirement for MS4s because the operation of a *drainage and sewer system* is "optional," and not required by law. But the operation and maintenance of roads is not "optional." As Plaintiffs-Appellants have provided, public roadways were established across the State pursuant to a variety of statutory schemes and regulations. [See Application for Leave to Appeal at 15-27.] Local units may have some discretion in establishing and improving roadways under general municipal incorporating laws, *see, e.g.*, the Home Rule City Act, Act 279, Public

Acts of Michigan, 1909, as amended, MCL § 141.117.1, *et seq.*, but the operation and maintenance of roadways that were located in, and for which costs have been paid by, Michigan municipalities long before the enactment of the Headlee Amendment, are not "optional" municipal services. Under the State's new regulations, these existing roadways are now "separate storm sewer systems," and municipalities must pay for MDEQ permits whether they have a true sewer system or not. If a municipality has a road, it has to pay.

The operation and maintenance of roadways is not an optional matter for local units of government. Roadways are subject to numerous local and state laws and regulations, none of which have, prior to 2003, involved the MDEQ. *See e.g.*, the Michigan Zoning Enabling Act, Act 110, Public Acts of Michigan, 2006, as amended, MCL § 125.3101, *et seq.*, which consolidated and replaced the City and Village Zoning Act, Act 207, Public Acts of Michigan, 1921, MCL § 125.581, *et seq.*, the Township Zoning Act, Act 184, Public Acts of Michigan, 1943, MCL § 125.271, *et seq.*, and the County Zoning Act, Act 183, Public Acts of Michigan, 1943, MCL § 125.201, *et seq.*

The State Trunk Line Highway System Act, Act 51, Public Acts of Michigan, 1951, as amended, MCL § 247.651, *et seq.* ("Act 51"), moreover, governs the construction, maintenance and improvement of roads, streets and highways located within Michigan cities and villages. Section 7 of Act 51 requires that a local unit obtain approval from the State, through its highway commissioner, to include or eliminate a street from its street system. MCL § 247.657. In other words, a city or village, pursuant to pre-Headlee Amendment State law, does *not* have the option to abandon its responsibility for a street and thus avoid permitting costs required by the MDEQ.

Counties are also required to maintain certain roadways. Under Act 293, Public Acts of Michigan, 1966, as amended, MCL § 45.501, *et seq.*, charter counties *shall* provide in their charters for the creation of road commissions, for counties with populations less than 1,500,000,

and "for the continuation of a county road system within the county," for counties with populations of 1,500,000 or more. MCL § 45.514(d)(i) and (ii). The Public Highways and Private Roads Act, Act 283, Public Acts of Michigan, 1909, as amended, MCL § 220.1, *et seq.* ("Act 283"), requires townships to improve public highways in accordance with standards adopted by the road commissioners of the county in which the township is located. MCL § 224.20g. Act 283 provides counties some authority to abandon a roadway, but when a county does so, jurisdiction and control of the roadway "*shall* revert to the municipality within which the road is situated." MCL § 224.18(3) (emphasis added).

State law, therefore, may provide for the control of roadways to shift between different levels of government, but does not allow for the operation and maintenance of public roads to be a *voluntary* activity of the municipalities. A scheme which is interpreted to both define public roadway operation as optional and subject roadways to MDEQ water and pollution control regulations absent a provision for State funding to comply with the regulations is inconsistent with the purposes for which roadways and environmental regulations exist.

That makes the MS4 requirements here a far cry from the landfill requirements in *Livingston County v. Dept of Mgmt and Budget*, 430 Mich 635 (1988). There, the Court held that the municipal operation of a sanitary landfill was optional and not subject to the POUM provision. Not only did the Court of Appeals incompletely apply the *Livingston County* holding, which was based on disputed costs related only to the ownership of the landfill, and not the use of the landfill which the court held was a mandated activity; the activity found to be voluntary by the *Livingston County* Court is clearly distinguishable from public roads, for which State law, indeed, requires continued local control.

C. The Court Should Grant Leave to Appeal to Prohibit the Unfunded Mandate Imposed By the State's New Sewer Permit Requirements

The MDEQ was established to protect water resources and control water pollution in the State. MCL § 324.3103. Roads were never intended to fall within the water and waste disposal regulations of the MDEQ, and became subject to MDEQ regulations only upon the creation of an overly broad definition of MS4s, and corresponding permitting requirements, in 2003. Furthermore, Act 101, MCL 21.231, *et seq.* was intended to implement the provisions of the Headlee Amendment by defining the local activities and services to which the POUM provision is intended to apply, but was not enacted to allow for haphazard, unfunded regulation of activities and services by State agencies with no previous oversight of those activities and services.

As detailed above, municipal control of public roadways is required by State statutes. An interpretation of roadway operation and maintenance as "optional" under Act 101, and thus not subject to the POUM provision, produces an unworkable governance structure for roadways that also has the effect of frustrating the purposes of the MDEQ regulations and the implementing environmental legislation under the Natural Resources and Environmental Protection Act, Act 451, Public Acts of Michigan, 1994, as amended, MCL § 324.101 ("NREPA"). Michigan's environmental protection laws and regulations were created to protect the environment and the natural resources of the State.

After years of declining property values, populations, and municipal revenues in general, many municipalities are already struggling to maintain their daily operations. If Act 101 is interpreted to characterize the municipal operation and maintenance of public roads as voluntary, municipalities would face additional costs and staff time required to administer these new obligations, further burdening already troubled municipalities which have no means of increasing

revenues to cover these costs due to the Headlee Amendment restrictions. A municipality that is unable to meet costs associated with additional regulations related solely to the ownership and operation of previously unregulated roads might be forced to abandon upkeep of its roads. Indeed, under such an interpretation, a municipality would be free to disavow any responsibility for the roads whenever maintenance becomes cost prohibitive, or to *choose* not to repair roads. In this case, not only would the municipality be unable to sufficiently provide transportation routes to enable its residents and businesses to function, but the State's concern regarding the environmental impact of runoff water would still be present, as roads do not simply disappear. Such an outcome is clearly contrary to public policy and frustrates the purpose of NREPA and the MDEQ regulations to control pollution and preserve the quality of the State's waterways.

CONCLUSION AND RELIEF REQUESTED

Amici Curiae have a vital stake in the outcome here because this decision will greatly impact the resources available to their constituents to properly and safely maintain public roadways in their communities, and, moreover, to continue to provide necessary services to their residents without fear of additional State-imposed financial burdens. The Court of Appeals has taken a step backwards in upholding the protections afforded to local units of governments, and their taxpayers, under Article 9, Section 29 of the Headlee Amendment to Michigan's Constitution to maintain safe, healthy communities without additional cost burdens.

For the reasons set forth above, Amici Curiae respectfully ask the Supreme Court to grant leave, or in lieu of the same, to reverse the decision of the Court of Appeals.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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PROOF OF SERVICE

The undersigned certifies that on December 16, 2013 a copy of Brief of Amici Curiae the Michigan Municipal League and the Michigan Townships Association was served upon:

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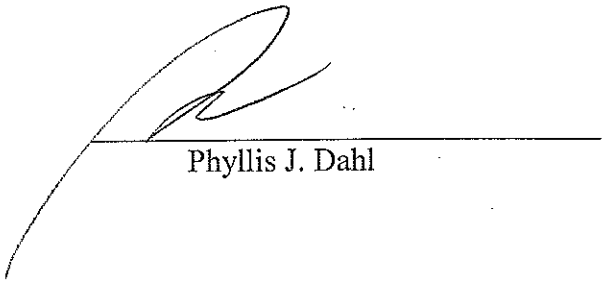
Service was made by first-class mail, postage prepaid, addressed as indicated.

I declare that the above statements are true to the best of my information, knowledge, and belief.



Phyllis J. Dahl

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