STATE OF MICHIGAN

COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, by and through its Water and Sewerage Department, and CITY OF LIVONIA,

Plaintiffs

vs.

Case No. 2018-000259-MZ
Hon. Christopher M. Murray

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant

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**MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' 05/28/2019 MOTION FOR LEAVE TO AMEND COMPLAINT TO INCLUDE HEADLEE AMENDMENT UNFUNDED MANDATE CLAIM**

*Amici curiae*, the Michigan Municipal League, Michigan Townships Association, and Government Law Section of the State Bar of Michigan hereby respectfully request leave of the Court to jointly file an amicus curiae brief in support of Plaintiffs' 05/28/2019 Motion for Leave to Amend Complaint to Include Headlee Amendment Unfunded Mandate Claim. In support of their motion, *Amici* state:

1. *Amicus* 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 is comprised of hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan

Municipal League operates the Legal Defense Fund through a board of directors, which is broadly representative of its members. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

2. *Amicus* Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,325 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 of and statutes of the State of Michigan. The MTA is governed by a Board of Directors who are township government officials.

3. *Amicus* Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 650 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Government Law Section 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 Government Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Government Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The positions expressed in this *amici* curiae brief are that of the Government Law Section only and are not the position of the State Bar of Michigan.

3. The governing bodies of the above entities have all authorized and directed this office to move this Honorable Court to grant leave to said entities to file an *amici curiae* brief in the within cause in support of the Plaintiffs and, upon leave granted to file an *amici curiae* brief for such purposes. A copy of *Amici's* proposed Brief is enclosed with this Motion.

4. Although the Court of Claims does not have a rule or procedures specific to the filing of *amicus* briefs, proposed *Amici* have endeavored to comply with the rules applicable to briefs in support of motions filed in the Court of Claims, pursuant to Local Rule 2.119.

Accordingly, Amici respectfully ask this Court to grant their Motion for Leave to File a Brief as *Amici Curiae* in this matter.

Respectfully submitted,

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Dated: July 3, 2019

## PROOF OF SERVICE

I hereby certify that on July 3, 2019, I served a copy of the above document in this matter on all attorneys of record, at their addresses below, via first class U.S. Mail:

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# ATTACHMENT TO MML, MTA & GLS AMICI MOTION

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**PROPOSED AMICI CURIAE BRIEF BY**

**MICHIGAN MUNICIPAL LEAGUE (MML), MICHIGAN TOWNSHIPS ASSOCIATION (MTA) AND GOVERNMENT LAW SECTION (GLS) OF THE STATE BAR OF MICHIGAN**

**IN SUPPORT OF PLAINTIFFS' 05/28/2019 MOTION FOR LEAVE TO AMEND COMPLAINT TO INCLUDE HEADLEE AMENDMENT UNFUNDED MANDATE CLAIM**

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## INTRODUCTION

In 21st Century civilized America, Michigan's Department of Environmental Quality[1] has taken the position in this case that the systems that supply public drinking water to millions of people are voluntary and optional, which naturally means that cities, villages and townships can simply shut them down any time they want. In its zeal to oppose contributions of state funding for the eradication of lead in private service lines and its refusal to accept that the LCR amendments it adopted are flawed, Defendant appears to have blinded itself to the tragic irony and self-contradictions that are rooted in arguing such a position. For it is in the wake of the Flint water crisis and with the supposed objective of ensuring that people will have a safe supply of drinking water in the future, that Defendant argues to this Court that local governments across the state are not required to continue to supply public water to their residents and businesses. Defendant professes that doing so is "optional" and "voluntary," necessarily meaning that those public water systems can be lawfully turned-off and permanently discontinued at any time. This would, of course, leave millions of people without any water at all if exercised by just a few of the larger water systems in Michigan—a scenario with mind-blowing life, safety, and health consequences that need no explanation. Even still, Defendant's argument, if correct, necessarily results in a legal conclusion that, under Michigan law, permanently turning-off the water to an entire community is an option that is lawful and available to all public water suppliers in the state.

In addition to being wrong-minded, Defendant's position in this regard is based upon case law that is distinguishable and a legal analysis that misses the point. The primary case relied on by Defendant does not apply to a public water system. Instead, that case stands for the proposition

[1]Now re-named and known as the Michigan Department of Environment, Great Lakes, and Energy, but for the sake of consistency in the briefings to this Court, *Amici* continues to refer to this department as the Michigan Department of Environmental Quality.

that government ownership and operation of a *landfill* is optional, i.e., not mandatory. The continued public operation and supply of drinking water to families and businesses, in today's world, is vastly different and cannot be closed down at any time, like a landfill. Moreover, Defendant misses or refuses to acknowledge the fact that its amended LCRs are not applicable to some aspect of *the public water systems built by Plaintiffs and other local governments*, but instead they mandate, for the first time, that the owners of public water supply systems must inspect and replace *separately owned private water lines* on private properties that are not part of the cities', villages', townships' and water authorities' systems. As such, these are *new* mandates applicable to private water lines that Plaintiffs and other local governments across the state have *not* volunteered or chosen to install, own, operate, maintain, or replace. Therefore, under the Headlee Amendment, if Defendant's new mandates regarding inspections and replacement of these private lines are to be implemented, they must be funded by the state.

## STATEMENT OF FACTS

*Amici* adopt the factual statements set forth in Plaintiffs' 05/28/2019 Motion for Leave to Amend Complaint to Include Headlee Amendment Unfunded Mandate Claim (including the proposed amended complaint attached thereto) and the Factual Background as set forth in Plaintiffs' 2/15/2019 Response in Opposition to Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8).

## ARGUMENT

Plaintiffs' proposed amended complaint alleges that the Defendant's LCR amendments violate the Headlee Amendment by mandating that Plaintiffs take jurisdiction over, inspect, and replace (if necessary) water service lines on private property without providing any funding to support implementation of the new requirements. As explained in Plaintiffs' and *Amici's* prior

briefings in this case, Plaintiffs and nearly all other local governments with public waterworks systems do not presently install, own, operate, maintain, or replace private water service lines past the curb-stops within their public rights-of-way, because those lines are for the exclusive private use of the property owners and have been installed and maintained by the individual property owners. (See *Amici Curiae* Brief by MML, MTA and GLS in Support of Plaintiffs' 2/15/2019 Response in Opposition to Defendant MDEQ's 2/01/2019 Motion for Summary Disposition (referred to hereinafter as "*Amici's* Prior Brief"), pp. 4-6). In addition, Defendant has created and failed to fund various other parallel rules and requirements for local governments to undertake in connection with the replacement of the service lines, including costly underground inventories and public education activities.

Defendant argues that it did not mandate, in the first instance, that Plaintiffs own or operate municipal public water systems and implies that these proposed changes to the LCR are merely regulations that should have been expected and contemplated as the natural result of the voluntary ownership of a public water supply system and that therefore the "Prohibition on Unfunded Mandates" or "POUM" clause of the Headlee Amendment (Headlee second sentence) does not apply. What Defendant misses is the underlying fact that the new rules at issue in this case do not involve the public water systems that Plaintiffs and other local governments own and operate. Instead, they apply to the above-described private water lines on private property and suddenly require local governments, for the first time, to take jurisdiction over those private water lines by testing, inspecting and replacing them.

Defendant compounds its miss by primarily relying on *Livingston County v. Department of Management and Budget*, 430 Mich. 635, 425 N.W.2d 65 (1988) to support its position. *Livingston County* held that art. 9, § 29 applies only to increases in the level of any service or

activity "required" by state law, not "optional" services or activities. *Id.* at 642-44. The facts in the *Livingston County* case, however, are substantively distinguishable from those in this case and the Supreme Court's decision is inapplicable.

The Court in *Livingston County* found that the unit of local government in that case was, in effect, required by the overall command of the Solid Waste Management Act to maintain its sanitary landfill, once it had voluntarily decided to undertake operation of that landfill. The present case is significantly different. Plaintiffs have never undertaken to maintain privately installed and owned service lines as part of their public water systems. Furthermore, as part of its discussion of what is a "voluntary" or "optional" undertaking, the *Livingston County* case does not consider or discuss a state requirement to *expand* the physical scope of the public infrastructure or service that is owned and operated by the local government. Instead, *Livingston County* purely focuses on the physical improvement – a landfill – that the local government in that case either purchased or constructed when it voluntarily undertook to operate it in 1972.

To suggest that the voluntariness argument set forth in *Livingston County* applies to the facts in this case would require the Court to add facts to *Livingston County* that do not exist. For instance, in that case the county was not required, by a state law or rule, to take jurisdiction over private improvements on private property adjacent to the existing landfill, as is the situation with the private water lines on private property in this case. In order for *Livingston County* to be factually analogous to the present case, the amendments to the Solid Waste Management Act at issue in that case would have had to include, for example, a requirement that the landfill must take over a privately owned waste transfer station on the private property next door to the landfill and operate it based upon a finding that the transfer station is also part of an overall waste disposal system and is used to transport waste through the waste stream thereby impacting the operation of

the landfill. Such facts and state mandates do not exist in the *Livingston County* case, rendering it inapplicable to this case.

Defendant's reliance on *Livingston County* also fails to recognize the difference between the "new requirements" at issue in Livingston County, and the "new requirements" at issue in this case. The "new requirements" at issue in *Livingston County* simply required Livingston County to do more and spend more with respect to the on-going operation of the existing landfill that they purchased or constructed. The "new requirements" in this case make the local governments, *for the first time*, take over the operation and replacement of private plumbing on private property that local government did not construct, did not purchase, have never maintained, and would have problems actually accessing due to its location in private yards. (See *Amici's* Prior Brief, pp. 4-6). This is substantially and materially different from the new requirements that were under review in *Livingston County,* which all existed within the physical boundaries of what the county purchased, constructed, and historically operated and maintained in that case.

With *Livingston County* being inapplicable, Defendant is unable to point to any case finding that a new state law or rule is not an unfunded mandate when it forces local governments to take jurisdiction over the inspection, testing, and replacement of private improvements on private property that the local governments did not previously decide to undertake voluntarily. Instead, Defendant embarks on a lengthy discussion and various attempted interpretations of statutes in an effort to support its argument that the operation of public water systems is permissive. Defendant fails to recognize, however, that there are a multitude of mandatory state acts and state regulations outside of the HRCA, Fourth Class Cities Act, and or Townships Act that make services provided by cities, villages and townships state mandated *obligations,* despite being described as "permissive" in the Home Rule City Act, Fourth Class City Act, or Townships Act.

For example, as the Court of Appeals decided in *Department of Environmental Quality v. Worth Twp*, 299 Mich. App. 1, *7, 829 N.W.2d 31 (2012), vacated in part, appeal denied in part by 494 Mich 860, 831 N.W.2d 239 (2013), and as the Supreme Court affirmed in *Department of Environmental Quality v. Worth Twp.*, 491 Mich. 227, 246-51, 814 N.W.2d 646 (2012), local government is responsible for and obligated to provide sewage disposal, even though it may appear at first glance to be a "permissive" charter provision.

The purpose and intent of the HRCA, for instance, is to set forth the general framework of government that a community must follow when initially incorporating. *City of Detroit v Walker,* 445 Mich. 682, 688-89, 520 N.W.2d 135 (1994). The Act also lists the types of activities that the city is authorized to regulate, including operating utilities. MCL 117.1 *et seq*. The provisions described as "mandatory" and set forth in Section 3 of the HRCA are intended to inform the founders of a community of the required *structure* of city government -- i.e., that a city must have a mayor and a city council, must impose taxes on its residents, and must provide for the public health, safety and welfare. MCL 117.3. However, the HRCA (and other comparable acts created to provide the framework for township and village government) is not intended to be a conclusive list of statutory and regulatory obligations imposed on cities by the state. Just because the HRCA states that it is *permissible* for a city to include authority in its charter allowing it to operate a water and/or sewer utility, does not mean that separate state regulations may not *mandate* or *require* a city to operate a sewer system as recognized by the court in *Worth Township. Department of Environmental Quality*, 491 Mich. at 246-51.

As thoroughly explained in *Amici's* previously filed brief, a plain reading of the Michigan Safe Drinking Water Act's definition of "public water supply" establishes, as a matter of law, that the service lines at issue in this case are *not* part of the public water supply and are therefore not

part of what Plaintiffs have undertaken to own, operate, or maintain as part of their public water systems. (See *Amici's* Prior Brief, pp. 6-12).

Consistent with these statutory limits on what is currently considered to be part of a local public water system and as also discussed in *Amici's* prior brief, local governments throughout Michigan that own and operate public water systems, in practice, do not own, install, or maintain the interior or exterior water lines located on private property. (See *Amici's* Prior Brief, pp.4-12). Instead, the *customers* of the public water supplier install these private service lines on their private property for purposes of taking the flow of water delivered from public water mains located in the public rights-of-way and transporting it across their private property into their house or building. *Id.* Accordingly, as both a practical matter and statutory law, Plaintiffs, and nearly every other local government public water supplier across the state, do not treat or consider such service lines as part of their public water systems. *Id.* Therefore, the LCR amendments are mandates that extend beyond the scope of what is currently required by the MSDWA[2] and what nearly all local governments with water systems in Michigan have previously undertaken responsibility for providing.

In sum, Plaintiffs have the objective of providing safe drinking water to the people of the state of Michigan, and Defendant appears to share that goal. The disconnect is that Defendant is not seeing or understanding that the infrastructure it believes is causing a problem—private service lines—are not now and have never been part of the public water supply system in law or in practice across the state. The Defendant's new rules require Plaintiffs, *for the first time*, to take jurisdiction over and replace infrastructure that they have never owned, did not construct, have never

[2] Perhaps this explains why the state legislature has never amended the MSDWA to include private service lines on private property—because it recognizes that doing so would require state funding under the Headlee Amendment. See *Amici's* Prior Brief, p. 11.

maintained, and have no authority under the law to take control or ownership of—because it is private property. As a result, the LCR amendments are a new mandate related to something that the local governments have excluded from their systems and services (i.e., have not voluntarily undertaken), and therefore the local governments cannot be required by the state to comply with the new mandates unless the state funds them.[3]

## CONCLUSION

As part of fully evaluating Defendant's arguments about voluntariness, one should picture a large city in Michigan deciding to exercise its supposed "option" to close-up its water department and discontinue supplying public water to its residents and businesses. Then imagine multiple cities, townships, and villages across the state doing the same. Based on Defendant's arguments of futility in this case, the legal conclusion that must flow from them is that the law in Michigan would fully support such decisions as completely lawful, regardless of the resulting devastation to the public health, safety and welfare.

Of course, neither the Plaintiffs, nor these *Amici* have agreed with such a position, and the Court does not necessarily have to rule on that question right now because there is an additional flaw in Defendant's position. Foisting a set of new state regulations upon Plaintiffs and other local governments with water systems requiring them to take jurisdiction over and replace privately owned infrastructure that is not part of their current water systems and which they never

[3] Interestingly, while Plaintiffs have explained their concerns about lack of funding to implement the LCR amendments and about having to divert funds away from other aspects of their systems, the MDEQ has remained silent about why it is opposed to state funding for lead and copper protections. It seems likely that the people of the state of Michigan and other parties that are dedicated to the cause of providing the public with healthy and safe drinking water would not be opposed to funding from the state for implementation of the rules. The state has a strong interest in safeguarding the public water supply and has the means to do so through initiatives and mandates that do not violate the law and do not impose a massive unfunded obligation on local governments to finance the replacement of private infrastructure on private property.

contemplated maintaining is a textbook unfunded mandate under the Headlee Amendment. The state is in a better position and could more readily Accordingly, this Honorable Court should grant Plaintiffs' Motion and allow them to amend their Complaint to add their proposed claim for an unfunded mandate under the Headlee Amendment, which is a meritorious claim that is properly before this Court and does not cause prejudice or unfairness to Defendant in this case.

Respectfully submitted,

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