

Supplemental Written Testimony  
House Tax Policy Committee  
Re: HB 4361

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In previous testimony before the House Tax Policy Committee on March 16, 2011, I testified that it would be unconstitutional for the legislature to tax state employee pensions. In contrast, Lt. Governor Calley testified before the House Appropriations Committee on February 17, 2011, that it was constitutional to tax state retiree pensions. Lt. Governor Calley's legal analysis is incorrect and deserves comment.

Lt. Governor Calley's argument is based principally on the Michigan Supreme Court decision in *Studier v Mich Public School Employees' Retirement System*.<sup>2</sup> In *Studier*, retired public school teachers had claimed that changes in their health benefits were unconstitutional for two reasons:

1. Retiree health care benefits were "accrued financial benefits" guaranteed by the Mich Const, Art 9, §24.
2. Statutory retiree health care benefits were contractual and therefore could not be changed in violation of US Const, Art 1, § 10, and Mich Const, Art 1, § 10.

However, in *Studier*, the Supreme Court rejected both claims of the retirees. The Supreme Court held as follows:

1. Retiree health care benefits are not "accrued financial benefits" and therefore not guaranteed by Mich Const, Art 9, § 24.
2. Retiree health care benefits are not contractual and therefore not guaranteed by either the US or Michigan constitutions.

However, the decision in *Studier* is not applicable because it addressed retiree health benefits, not pensions. It is incontestable that pension benefits are "accrued financial benefits" and are protected from reduction by the Michigan Constitution. Importantly, the applicable pension tax exemption is found in the same retirement act<sup>3</sup> that creates the pension. Thus, the protections of Mich Const, Art 9, § 24, prohibit the legislature from taxing state retiree pensions. Obviously,

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<sup>1</sup> Former General Counsel, Michigan Civil Service Commission; Former Member, State Employees' Retirement Board.

<sup>2</sup> 472 Mich 642 (2005).

<sup>3</sup> The State Employees' Retirement System Act (SERS Act), 240 PA 1943, MCL 38.40.

the statutory tax exemption was intended to ensure that state employees received 100 percent of their accrued pension after retirement and that future legislatures could not raid the pension funds by taxing pensions.

Also, the *Studier* analysis addresses the power of one legislature to bind a later legislature; it does not address the power of a *constitutional provision* (Mich Const, Art 9, § 24) that limits a future legislature's power. Thus, *Studier* is simply not relevant to the constitutional arguments raised by state retirees.

Finally, Lt. Governor Calley also suggested that a section<sup>4</sup> of the Michigan Constitution prohibits the state from surrendering its taxing authority under any circumstances. This, too, is incorrect. In fact, the *Studier* court expressly recognized that it is possible for the legislature to create contractual rights that are constitutionally guaranteed and bind future legislatures.<sup>5</sup>

Thus, nothing in Lt. Governor Calley's analysis addresses or undermines my previous legal conclusion that it would be unconstitutional for the legislature to tax state retiree pensions.

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<sup>4</sup> The reference is undoubtedly to Mich Const, Art 9, § 2, which provides as follows:

The power of taxation shall never be surrendered, suspended or contracted away.

<sup>5</sup> 472 Mich at 660-661.