STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

KELWIN DWAYNE EDWARDS,

Defendant-Appellant.

Supreme Court No. 163942

Court of Appeals No. 354647

Wayne Circuit Court No. 13-000329-FC

AMICUS CURIAE BRIEF OF DETROIT JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, STREET DEMOCRACY, MICHIGAN STATE PLANNING BODY, AND LEGAL SERVICES ASSOCIATION OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT KELWIN DWAYNE EDWARDS

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2. Whether MCL 769.1k(1)(b)(iii) violates due process by creating a "'potential for bias'" or an "objective risk of actual bias," *Caperton v AT Massey Coal Co*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009, quoting *Mayberry v Pennsylvania*, 400 US 455, 465-466; 91 S Ct 499; 27 L Ed 2d 532 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9; 136 S Ct 1899; 195 L Ed 2d 132 (2016).

3. Should the Court find MCL 769.1k(1)(b)(iii) facially unconstitutional under either theory, what remedy follows?

The Court of Appeals answered question 1, "No."

Plaintiff-Appellee answers question 1, "No."

Defendant-Appellant answers question 1, "Yes."

Amici Curiae Detroit Justice Center, American Civil Liberties Union of Michigan, Street Democracy, Michigan State Planning Body, and Legal Services Association of Michigan answer question 1, "Yes."

The Court of Appeals answered question 2, "No."

Plaintiff-Appellee answers question 2, "No."

Defendant-Appellant answers question 2, "Yes."

Amici Curiae Detroit Justice Center, American Civil Liberties Union of Michigan, Street Democracy, Michigan State Planning Body, and Legal Services Association of Michigan answer question 1, "Yes."

Amici Curiae Detroit Justice Center, American Civil Liberties Union of Michigan, Street Democracy, Michigan State Planning Body, and Legal Services Association of Michigan answer question 3 that an immediate remedy is necessary, but its nature depends on the precise nature of the Court's holding.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Detroit Justice Center

The Detroit Justice Center (DJC) is a non-profit law firm working alongside Metro Detroit communities to create economic opportunities, transform the justice system, and promote equitable and just cities. DJC represents low-income and no-income Detroiters involved in the criminal legal system because they owe money that they cannot afford to pay, stemming from traffic-related citations or offenses. DJC attorneys have witnessed the ways in which MCL 769.1k(1)(b)(iii) leads judges to order unpayable court fines, fees, and costs for indigent defendants, with no regard to their economic hardship. In March 2020, DJC published a report of these findings. Chowning, Keith & Leonard, *Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration* (March 2020) (Appendix A) (hereafter *Highway Robbery)*.

Despite their substantial traffic debt, many DJC clients drive to survive because of the lack of reliable public transit options in this region. The intersection of poverty and limited public transit investment exacerbates the crisis and prevents clients from easily attending court hearings in municipalities outside the city of Detroit, transporting their children to and from school, traveling to work or to pursue gainful employment, receiving medical care at hospitals in nearby suburbs, or traveling to suburban grocery stores for those who live in areas known as food deserts. The necessities of each client's life dictate their need to travel. Tragically, most clients are charged with offenses stemming directly from their own indigence and impoverishment (such as lack of insurance or expired license plates), rather than being true matters of public safety.

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

Time and time again, DJC has found that when a client could not afford to pay a single civil infraction, they fell into a struggle that included a cycle of license suspensions, misdemeanor charges, and subsequently, a web of traffic-court related debt trapping the client in multiple courts. When attorneys provide judges with evidence of poverty, judges either ignore or scoff at this documentation and go on to order steep monetary penalties. The imposition of these fines, fees, and court costs destabilizes poor defendants and leaves them increasingly unable to function safely in society, as they then face warrants and other barriers to employment and financial security caused by their inability to pay.

American Civil Liberties Union of Michigan

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.6 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan.

The ACLU of Michigan has helped lead efforts to draw attention to the problems associated with Michigan's heavy reliance on court-imposed assessments to fund the judicial system. In October 2010, the ACLU published the report *In for a Penny: The Rise of America's New Debtors' Prisons*, containing a detailed section discussing issues in the Michigan courts relating to legal fines and obligations, including the problems created when excessive court-imposed costs lead to incarceration of the indigent.[2] In 2011, the ACLU of Michigan engaged in court watching around the state and filed emergency appeals in five district court cases in order to draw attention to the

[2] See <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>.

widespread problem of "pay or stay" sentences.[3] In 2012 and 2013, the ACLU of Michigan again engaged in court watching and found that the practice of imposing so-called "pay or stay" sentences without an indigency hearing remains endemic throughout the state. The ACLU has filed numerous cases challenging "pay or stay" sentencing, including *In re Anderson*, Case No. 15-2380 (Macomb Circuit Court), a superintending control action to halt "pay or stay" sentencing practices in the 38th District Court in Eastpointe.

Street Democracy

Street Democracy is a nonprofit organization providing holistic legal services to help people suffering through poverty and oppression and to transform systems that oppress them into systems of opportunity. One example of their work is the development Street Outreach Court Detroit ("SOCD") in 2012, a collaborative specialty docket at 36th District Court where a person's efforts to address the root causes of their homelessness are used to resolve their outstanding fines, costs, and jail time. In SOCD, people "pay off" their tickets with enrollment in a job training program, attending sobriety meetings, studying for a GED, and seeing their doctor regularly.[4]

Street Democracy shifted its focus to criminal justice reform after clients at their soup kitchen clinic repeatedly stated that driver's responsibility fees, license suspensions, warrants, and debt brought on by unaffordable court-imposed costs, fines, and fees were the primary reasons they could not escape poverty. The district courts' reputation for "pay-or-stay" sentencing and harsh collection tactics were so ingrained in the community that SOCD has to hold its hearings at a local soup kitchen to garner community buy-in.

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[3] See ACLU, *ACLU Challenges Debtors' Prisons Across Michigan* (August 4, 2011) <http://www.aclumich.org/article/aclu-challenges-debtors-prisons-across-michigan> (Appendix B).

[4] For more information, see <https://socd.streetdemocracy.org >.

Despite SOCD-style sentences' proven track record, courts continue to be resistant to adopting alternative sentencing regimes like homeless courts[5] or functional sentencing.[6] Underlying the judges' continued reluctance to waive fines is concern that their "generosity" will have negative consequences when they go to justify their annual budget before the local funding unit.

Legal Services Association of Michigan

Legal Services Association of Michigan (LSAM) is a Michigan nonprofit organization incorporated in 1982. LSAM's members are twelve of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.[7] LSAM members have daily contact with low-income persons directly affected by fees and costs imposed under MCL 769.1k and have seen how those policies impact and harm low-income families and low-income communities.

LSAM members share a deep institutional commitment to ensuring that our court system is accessible to low-income persons and that low-income persons are treated with fairness and dignity in the judicial system. The impact of MCL 769.1k is to fund our court system through a fee and cost system imposed on unwilling participants in the criminal justice system and disproportionately imposed on low-income persons.

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[5] See Street Democracy, *Street Outreach Court Detroit: Three Years Later…* (August 2018) (Appendix C)

[6] See Street Democracy *What If Courts Were Designed to Provide Opportunity Instead of Punishment? A Report on the Efficacy of Functional Sentences* (October 2018) (Appendix D)

[7] LSAM's members are the Center for Civil Justice, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

Michigan State Planning Body

The Michigan State Planning Body (MSPB) is an unincorporated association of about 35 individuals who are leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations and who are interested in Michigan's indigent civil legal aid and indigent defense systems. MSPB acts as a forum for planning and coordinating the state's efforts to deliver civil and criminal legal services to the poor; its mission is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan.

Central to the MSPB is its commitment to ensuring equal access to the legal system for the poor. Planning Body members recognize that the current court funding system is a system that funds the court system in significant part through fees, fines, and costs extracted from defendants in criminal cases and in civil and traffic infraction cases. Planning Body members recognize from their respective practices that these fees are disproportionately collected from low income and minority persons. Planning Body members believe that a system that funds itself through fees fines and costs primarily collected from the state's poorest and most marginalized communities creates two fundamental systemic problems: (a) such a system lacks credibility in the communities that it preys upon; (b) judicial officers in such a system have incentives—subtle or overt—to find defendants guilty in order to fund their own courts.

On a daily basis, clients of Planning Body member programs are directly affected by the current system. On the criminal side, costs are assessed against these clients; on the civil side, costs assessed against a family member often trigger other family crises—including evictions, consumer debt problems, etc. This case is of great importance to the Planning Body, since it provides the Court with the opportunity to create more independent judges and move towards a court system that is seen as a resource to low-income communities, not an enemy.

INTRODUCTION

The judiciary must strive at all times to attain the highest level of actual and perceived fairness, independence and impartiality. Separation of powers doctrine guarantees this independence, and MCL 769.1k(1)(b)(iii) ("subsection (b)(iii)") violates separation of powers principles for two separate, albeit related, reasons. First, it foists core tax assessment and collection duties, a non-judicial responsibility, on the judiciary. It instructs courts to assess a tax by selecting which of its expenses to include in the tax, then authorizes those courts to pick and choose which defendants will have to pay that tax—and makes courts' fiscal survival depend on those choices. In so doing, it thrusts courts into an improper revenue raising role that is constitutionally assigned to the political branches and entangles courts in the political thicket. Second, subsection (b)(iii) threatens the integrity and independence of the court by creating both actual and perceived conflicts of interest for judicial officers who must raise funds by convicting people and assessing costs to ensure that their courts remain funded.

Due process principles also require that the judiciary be independent and not seen to be motivated by fiscal concerns, and subsection (b)(iii) violates these principles as well. Almost a century ago, the Supreme Court recognized the foundational maxim that a judge cannot be paid with the fines they impose. *Tumey v Ohio*, 273 US 510, 523; 47 S Ct 437; 71 L Ed 749 (1927). These same principles have evolved to make clear that judges may not be compelled to operate in a judicial system in which the fiscal solvency of their courts depends on the fees that they collect. On its face, subsection (b)(iii) creates an impermissible temptation to the average person to skew the balance of justice away from the accused, and creates an appearance of such impropriety even when judges do not succumb to the fiscal pressures foisted upon them by the statute.

Imposing day-to-day operating costs only on defendants found guilty in order to raise funding for the judicial system poses a problem of great significance to all of Michigan's citizens.

Amici respectfully urge this Court to find that subsection (b)(iii) is unconstitutional for the two reasons highlighted above. First, it violates separation of powers principles by foisting the non-judicial duties of assessing and levying a tax on the judiciary and, relatedly, by imperiling the independence and integrity of the judiciary. Second, it violates defendants' due process rights because it incentivizes and actually does cause courts to place their financial needs over criminal defendants' rights, and creates an appearance of impropriety in every case.

BACKGROUND AND IMPACT OF COURT FEES ON AMICI'S CLIENTS

The following background first explains the legislative history of subsection (b)(iii) and how the statute was both intended to, and in fact does, function as a source of revenue generation. Amici then explain what they have seen and learned from representing low-income individuals in a court system where subsection (b)(iii) looms large. Amici have repeatedly witnessed courts imposing staggering costs on defendants. Judges have admitted both in court filings and to amici that they cannot do otherwise because of fears of revenue loss and pressure from local funding units. Despite amici's clients' desires to satisfy court obligations, their inability to pay court-imposed costs often creates cascading collateral consequences and a devastating cycle of poverty.

I. Courts and a State Funding Commission Have Concluded That Subsection (b)(iii) Was Specifically Enacted to Fund the Judiciary and It in Fact Does So.

Subsection (b)(iii) was designed by the Legislature to provide a funding stream to the judiciary by allowing judges to reverse engineer court costs and impose them on each criminal defendant when they are found guilty. Revenue generated by subsection (b)(iii) accounts for millions of dollars in revenue to local cities and counties, which have become increasingly reliant on this source of funding and exert pressure over courts and judges to maintain and increase that revenue. Imposing costs functions as an additional punishment to defendants and creates pervasive incentives to regressively fund government from the shallow pockets of the poorest Michiganders.

See State Court Administrative Office, *Court Costs Imposed and Collected 2016-2020* (January 10, 2022) <https://www.courts.michigan.gov/48de81/siteassets/reports/statistics/reporting-materials/ccic-2016-2020.xlsx> (Appendix E).

Prior to 2014, Michigan's trial courts routinely required convicted defendants to pay "court costs"—reflecting the costs of running the judicial system "per criminal case"—in addition to restitution, penal fines, and other specifically authorized costs and fees. See *People v Cunningham*, 496 Mich 145, 148; 852 NW2d 118 (2014). Courts did so on the basis of a provision that authorized imposition of "[a]ny cost in addition to the minimum state cost . . . ." *Id.* at 151–152, discussing former MCL 769.1k(1)(b)(ii). In *Cunningham*, this Court held that the statute did not authorize the imposition of such costs, explaining that the expansive interpretation of the statute that lower courts were relying upon rendered much of the rest of the statute nugatory and would therefore be inconsistent with its structure and history. *Id.* at 154–158. Instead, this Court held that the statute authorized the imposition only of costs that were elsewhere authorized by statute. *Id.* at 158 ("[W]e find that MCL 769.1k(1)(b)(ii) seeks comprehensively to incorporate by reference the full realm of statutory costs available to Michigan courts in sentencing defendants, so that the Legislature need not compendiously list each such cost in MCL 769.1k.").

After *Cunningham*, the Legislature promptly amended MCL 769.1k to add subsection (b)(iii). 2014 PA 352; see *People v Konopka*, 309 Mich App 345, 354–355; 869 NW2d 651 (2015). The Legislature described this act as a "curative measure" to allow courts to impose the costs of running the judicial system following *Cunningham*. 2014 PA 352, enacting statement, § 2.

Subsection (b)(iii) was renewed in 2017. 2017 PA 65. In that Act, the legislature also created the Trial Court Funding Commission ("the Commission"). The Commission's final report acknowledged that the Act was enacted in direct response to *Cunningham*, and that as a result of

Cunningham, courts had lost "the authority to assess monies that pay for roughly 26 percent of trial court expenses." *Trial Court Funding Commission Final Report* (September 6, 2019), p 8 <https://bit.ly/3IhiwNQ>. (Appendix C of Appellant's Application for Leave to Appeal).

The Commission, which included five judges from around the state, documented the direct connection between subsection (b)(iii) and court funding. It recounted that "many stakeholders [are] concerned that the courts are under increasing pressure from state and local governments to increase revenue. Some stakeholders believe that even the perception that judges are considering revenues when making judicial decisions can undermine the public trust in the court system." *Id.*, p 9. The report's recommendations section concluded that the use of court costs to both fund courts and other government services creates an "ethical dilemma of judges being incentivized to maximize revenue from parties to support their budgets." *Id.*, p 27. It therefore proposed legislative reforms to "eliminate the ethical dilemma judges face as well as the public perception that judges fine individuals in order to fund their courts." *Id.*, p 28.

Judicial decisions have also recognized that subsection (b)(iii) was intended to, and actually does, directly link court cost assessments to court funding. Courts that have considered challenges to subsection (b)(iii) on legal grounds *other* than those at issue in this appeal have recognized that courts' imposition of subsection (b)(iii) costs is understood to directly impact court budgets. In *Konopka*, the Court of Appeals analyzed challenges to subsection (b)(iii) that were based on substantive due process and alleged violations of the Ex Post Facto Clause. 309 Mich App at 365–376. In upholding subsection (b)(iii) against the ex post facto claim, *Konopka* stated that the specific purpose of the statute was "to fund the court's operation rather than to punish convicted defendants." *Id.* at 373; see also *id.* at 375 (stating that "the aim of the assessment of costs is to

fund court operations" and "the decision to place this funding burden on criminal defendants is a rational policy decision").

In *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (2017), the Court of Appeals revisited the purpose of subsection (b)(iii) and concluded that both its purpose and its actual function was to fund courts. *Cameron* agreed with a criminal defendant who argued that costs collected under the subsection are taxes, not user fees. Citing *Konopka*, *Cameron* recognized that subsection (b)(iii) "functions to raise revenue for the courts." 319 Mich App at 223. *Cameron* went on to hold that subsection (b)(iii) is a tax, *id.* at 229–231, and thus is subject to the Distinct Statement Clause of the Michigan Constitution, which requires that the tax be "distinctly state[d]" in the enacting law. Const 1963, art 4, § 32. *Cameron* then concluded that subsection (b)(iii) was a distinctly stated tax because the original 2014 act stated that its purpose was to raise court revenues and there was "no evidence indicating that the Legislature did not intend MCL 769.1k(1)(b)(iii) to raise revenue for the courts or that the court costs collected are directed to a use unintended by the Legislature." 319 Mich App at 231. Thus, subsection (b)(iii) has survived constitutional challenges on grounds *other than those* at issue in this appeal only because it has expressly been held to be intended to directly fund courts and to actually fulfill that function.

II. Courts and Local Governments Have Become Dependent Upon Subsection (b)(iii) Funds.

The legislative purpose of subsection (b)(iii) of taxing criminal defendants to fund the court system is, in fact, playing out every day in Michigan's trials courts. Courts can, and do, charge defendants hundreds of dollars solely for the purpose of producing revenue. See *Highway Robbery*, p 26 n 154. This source of revenue can influence courts because courts would otherwise face a funding crisis. *Trial Court Funding Commission Final Report*, p 13. A quarter of court-generated revenue is currently retained locally with municipalities and redistributed to the courts.

Judges consistently maintain costs as a revenue stream in order to sustain their courthouse budgets. See Court Costs Imposed and Collected 2018 under MCL 769.1k (Appendix B of Appellant's Application for Leave to Appeal); see also *Court Costs Imposed and Collected 2016-2020* (Appendix E).

Courts generate substantial revenue from fees and costs and many even provide a surplus to local governments. Those governments become increasingly reliant on court revenue and place pressure on courts and judges to generate more by assessing more costs on criminal defendants. In the 2019 fiscal year, the 43rd District Court in Hazel Park brought in a total revenue of $3,268,846 to the city despite having only $1,308,846 in court operating expenses, resulting in a net profit of nearly 2 million dollars—*more than double the court's budget*. *Highway Robbery*, p 28 n 173. If the court's budget is considered as a part of the city's general fund budget, the court accounts for 20% of all revenue—one out of every five dollars made—but only 8% of all expenditures. *Id.* In Taylor, a full 18% of the city's general fund revenue comes from money raised by their district court. *Id.*, p 29 n 178. Wealthy cities lean heavily on their traffic courts as well. In the 2018-2019 fiscal year, 15% of the general fund revenue for the City of Ferndale came from its district court. *Id.*, n 179.

Conversely, when courts fail to bring in "sufficient" funds to their jurisdiction, political pressure is brought to bear against them. The City of Southfield's budget report for 2019-2020 noted that because "District Court revenue and expenses continue to decline with reduced caseload[s]," the court's revenue is "being propped up with increased fees" charged to individuals. *Id.*, p 28 n 174. Likewise, in Eastpointe's 2015-2016 budget, the court reported working with the city's prosecutors to charge people with civil infractions under local ordinances instead of state law so additional revenue would go to the city rather than the state. *Id.*, p 28 n 175. In many poorer

jurisdictions, including cities like Lincoln Park, Eastpointe, Warren, and Allen Park, judges regularly impose $400 in costs on offenses that carry only a $100 fine—a 400% bonus to the bottom line. *Id*, p 29.

Moreover, when cities enact ordinances, local courts can set their own schedule of fines for these ordinances to ensure that the funds collected stay within the local government. *Highway Robbery*, p 28 n 175; see MCL 257.951 (authorizing municipalities to adopt the Uniform Traffic Code by reference). Funds are distributed after collection between local governments and courts based on which code (local or state) is used in the charging document. See Fines and Costs Distribution Table (Appendix F). The promise of significant revenue collection can impact charging decisions, and ultimately, court-imposed fines, fees, and costs. Municipalities can pressure judges to generate more revenue locally, creating incentives and perceptions that judges use cost assessments to generate revenue for their court operations.

This pressure on court budgets collides with judges' administrative responsibility to keep courts functioning because other statutes and rules, like MCR 8.110(C)(3)(f), MCL 600.8271, and MCL 257.951, give judges authority and responsibility to spend and allocate funds generated, in part, through subsection (b)(iii). MCR 8.110, commonly referred to as the Chief Judge Rule, gives chief judges supervisory and decision-making authority over how their courts' budgets are spent. Among other things, the rule requires chief judges to "supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting." MCR 8.110(C)(3)(f). And MCL 600.8271 further confers upon chief judges the authority to "establish personnel policies and procedures, including but not limited to, policies and procedures relating to compensation, fringe benefits, pensions, holidays, leave, work schedules, discipline, grievances, personnel records, probation, and hiring and termination practices." MCL 600.8271(5)(a).

Judges from all over the state have shared their concerns about the pressure to use subsection (b)(iii) to generate revenue for their local governments. In fact, the Michigan District Judges Association (MDJA) first asked this Court to find subsection (b)(iii) unconstitutional in *People v Cameron*. Brief for Michigan District Judges Association as Amicus Curiae, p 16, *People v Cameron*, 504 Mich 927 (2019) (Docket No. 155849) ("MDJA *Cameron* Amicus Brief"), and have continued to do so through the years, including in this case. MDJA has detailed how it opposed the amendments to MCL 769.1k back in 2014 because of the potential conflicts of interest it creates and the pressures to which it subjects judges to raise revenues for court operations. *Id.*, pp 12–13. The MDJA argued that their fears have come to pass as multiple judges throughout the state have been pressured by their local governments to raise more revenue through increasing convictions or imposing more subsection (b)(iii) costs. *Id.*, pp 14–15. Along with their brief, the MDJA submitted letters from various judges who had been pressured by their government units to generate revenue through fees and costs. *Id.*; see also *id.*, Appendices C, E-H. The MDJA squarely acknowledges that "the 'possible temptation' of raising more revenue through increasing the number of criminal convictions infringes upon defendants' due process rights guaranteed to them under the Fourteenth Amendment, rendering MCL 769.1k(1)(b)(iii) unconstitutional." *Id.*

The MDJA's position mirrors statements made by judges to amici's attorneys. In the 35th District Court in Plymouth, a DJC client was convicted of driving with a suspended license, which carried a typical overall financial imposition of approximately $850 in that court, almost $500 of which reflected court costs. When the DJC attorney asked the judge if he could waive fines and/or costs, the Plymouth judge first said to this attorney, off the record, that "if we start waiving fines and costs, this court would financially implode." On the record, he simply insisted (erroneously) that he did not have the authority to waive fines and costs. *Highway Robbery*, p 28. In a separate

case involving a homeless individual in Southfield, a judge informed the same DJC attorney off the record that "unfortunately, the city has made this court the tax collector." At a more systemic level, two different district courts have informed the leadership of Street Democracy that the courts were unwilling to implement functional sentencing—i.e., sentencing systems that replace fines and fees with referrals to supportive in-community services—because of the budgetary implications of doing so. Similarly, a Pontiac judge reasoned that the prevalence of poverty in the community justified the denial of fee waiver to a homeless client because otherwise such waiver would apply to most of the defendants before the court.

III. Subsection (b)(iii)'s Tax on Criminal Defendants Is Exacerbated by the Harm Caused By Additional Fines and Fees, and By Judicial Failures to Conduct Required "Ability to Pay" Analyses.

In criminal and traffic misdemeanor cases, court costs under subsection (b)(iii) can be imposed in addition to a sentence of imprisonment and other fines and fees. Even before subsection (b)(iii) costs are added to the defendant's sentence, other assessments are already high. The actual criminal fine charged depends on each jurisdiction's preference and the amount assessed is only limited by the penalty statute, MCL 257.907(7); MCL 600.8727(7), with default fines of up to $5,000 for felonies and $500 for misdemeanors authorized by statute. Statutes authorize significant fines as well. MCL 750.503; MCL 750.504. Then there are mandatory fixed fees such as minimum state costs, justice system assessments, and crime victims' rights fees.[8]

Moreover, courts have broad discretion to impose other amounts, that can add hundreds of dollars in costs such as:

1. *Warrant Fees and additional costs.*
    a. MCL 769.1k(2) - additional costs incurred in compelling appearance

[8] MCL 769.1j ($50 per misdemeanor; $68 per felony); MCL 600.8727(4) ($10); MCL 600.8827(4) ($10); MCL 257.907(12) ($40); MCL 780.905 ($75 per misdemeanor; $130 per felony).

   b. MCL 600.2559(n) - bench warrant fees in civil infractions $40 plus hourly fees for execution of bench warrant.
   c. After sentencing, courts will add multiple costs over time until the bill is paid in full, sometimes entitled "supplemental sentencing."

2. MCL 769.1f. Reimbursement of prosecution and law enforcement costs for specified crimes.

3. MCL 771.3(2)(c); MCL 771.3c. *Probation Costs*. Supervision costs and costs of court-ordered services imposed as part of a probationary sentence, such as drug testing, education, counseling.

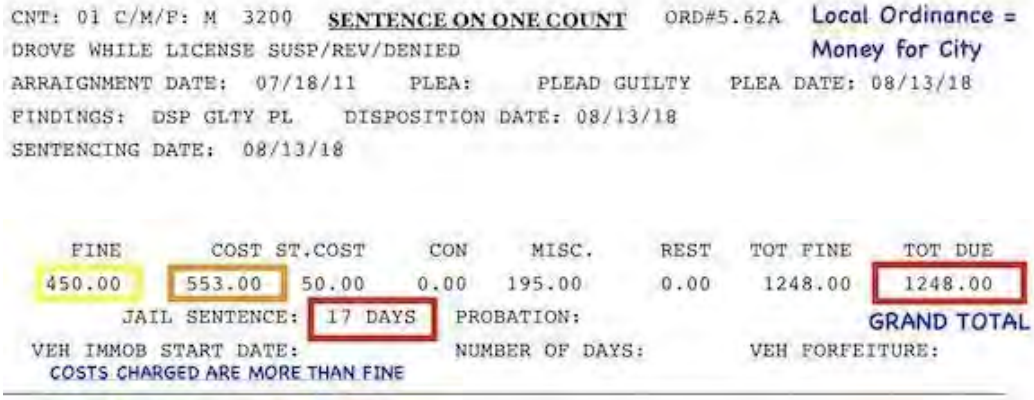
4. MCL 769.1k(1)(b)(iii)(C)(iv) - attorney's fees.

5. MCL 600.4803. *Late Fees.* 20% of total amount owed, 56 days after due date, i.e., sentencing date.

See also *Cunningham,* 496 Mich at 155–156 & n 9 (referencing statutes authorizing costs). In addition, staggering civil infraction costs are often also imposed at or near the same time.

One typical example of a case's register of action is displayed below and illustrates the situation: the court costs ($553) exceed the actual fine ($450), more than doubling the bill.[9]

[9] This DJC client was also assessed $120 each for two other violations on the same ticket, bringing her total to $1468, and she was expected to pay the total in four months. Because she also went to jail for 17 days on the date of sentencing, she lost her job and could not pay $1468 in four months. Instead, it took her another *two years* to pay off the balance plus a 20% late fee of $294, bringing her total paid to $1762. The court did not ask defendant about her ability to pay before sentencing or offer to reduce the amount assessed due to her indigent status.


CNT: 01 C/M/P: M 3200 **SENTENCE ON ONE COUNT** ORD#5.62A Local Ordinance = Money for City
DROVE WHILE LICENSE SUSP/REV/DENIED
ARRAIGNMENT DATE: 07/18/11 PLEA: PLEAD GUILTY PLEA DATE: 08/13/18
FINDINGS: DSP GLTY PL DISPOSITION DATE: 08/13/18
SENTENCING DATE: 08/13/18

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
450.00	553.00	50.00	0.00	195.00	0.00	1248.00	1248.00

JAIL SENTENCE: 17 DAYS PROBATION: GRAND TOTAL
VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:
COSTS CHARGED ARE MORE THAN FINE

A DJC's client bill for violation of a city ordinance.

This clearly demonstrates how fines, fees, and costs cumulatively assessed on one defendant become excessively punitive, especially for people with lower incomes and other vulnerable populations.

The problem is exacerbated by the fact that courts often do not factor in a person's ability to pay before imposing fines and fees. The requirement to assess a defendant's ability to pay only arises later in the process once a court seeks to *enforce* collection of costs. MCR 6.425(D)(3). Under state law and Michigan's court rules, judges have the discretion to order additional time to pay, payment alternatives, or a reduction or waiver of the amount owed. See MCL 600.8729(4); MCL 600.8829(4); MCL 771.3(6)(b); MCR 6.425(D)(3)(b). However, amici have observed that judges statewide often avoid doing so, failing to conduct even a threshold ability to pay inquiry, even at show-cause hearings which are specifically designed for this purpose. That is especially so when the defendant is unrepresented. And even when required by the court rules to assess a defendant's ability to pay, many courts ignore the law and use the threat of imprisonment to collect fees—fees that ultimately fund court operations.

In 2019, for example, a DJC client was arrested on a warrant for failure to pay his fines and costs for a traffic ticket in Lincoln Park. The DJC attorney asked the judge to consider the defendant's inability to pay the imposed fines, fees, and costs, and argued that the client had little work history, had been homeless, and stated that he had no present ability to pay the balance owed. The judge said that if the defendant had paid $0.50 a day from the date of his arrest until the date of his sentencing, he would have paid in full, and based on that reason alone, the judge determined that the defendant had the ability to pay the fine. The client had been experiencing unemployment, homelessness, and jail time since receiving the ticket, rendering even a $0.50 daily payment impossible.[10] The judge failed to consider the indigency factors or whether payment would result in manifest hardship to the defendant, as required by MCR 6.425(D)(3)(c).

Even when judges *do* inquire into a person's ability to pay, they frequently opt to extend the payment deadline or place people on payment plans rather than waiving costs, even if the person is unemployed or otherwise has no foreseeable way to make payments. When DJC attorneys have asked judges to waive outstanding traffic debt, many judges have claimed that they have no authority to waive discretionary fines and fees, even when presented with the statutes that explicitly outline their ability to do so. *Highway Robbery*, p 29.

Moreover, "pay or stay" sentencing practices have long been rampant throughout the state. The ACLU of Michigan has documented this unconstitutional "pay or stay" practice in seven different counties in Michigan: Wayne, Oakland, Macomb, Montcalm, Muskegon, Kent, and Ionia. In 2011, ACLU attorneys challenged the jail sentences of five defendants from various state

[10] See also Alvarez, *Detroit Court Gets Tough on Traffic Tickets,* Bridge (June 8, 2017) <https://www.bridgemi.com/urban-affairs/detroit-court-gets-tough-traffic-tickets-county-taxpayers-get-stuck-tab>; Shapiro, *Supreme Court Ruling Not Enough To Prevent Debtors Prisons*, NPR (May 21, 2014) <https://text.npr.org/313118629>.

district courts who could not afford to pay their court debt. For each defendant, the judge failed even to hold a hearing that would assess their ability to pay and refused to give the defendant the option of a payment plan or community service.[11]

Since then, reforms have been made. MCR 6.425(D)(3)(a)-(c) was adopted, prohibiting a court from sentencing a defendant to jail or revoking probation for failing to pay unless the court finds that the defendant has the ability to pay without manifest hardship, and recent legislation has aimed to reduce incarceration. Amici and their attorneys have zealously advocated for indigent clients and urged courts to waive fines, fees, and costs.

But despite the legislative and court rule changes, judges are still not required to account for someone's ability to pay at sentencing when subsection (b)(iii) fees and costs are imposed, and even when required to do so when enforcing collection, judges often are still reluctant to do so. Some judges have essentially weaponized statutes that provide courts with authority to punish nonpayment, including MCL 769.1k(10), MCL 771.3, MCL 600.8729, and MCL 600.8829. They have, for example, issued show cause orders and/or urged prosecutors to charge a defendant with a misdemeanor for nonpayment, see MCL 600.8827(8), and even jailed defendants for civil contempt for failure to pay, see MCL 257.908. Defendants held in contempt are sometimes incarcerated until they pay or until they have spent one day in jail for each $10 they owe the court. See MCL 257.908(5). By statute and under the United States Constitution, a court can jail a defendant under such circumstances only if the defendant has the ability to pay and has not made a "good faith effort to obtain the funds required for payment." See *Bearden v Georgia*, 461 US

[11] ACLU, *ACLU Challenges Debtors' Prisons Across Michigan* (August 4, 2011) <http://www.aclumich.org/article/aclu-challenges-debtors-prisons-across-michigan> (Appendix B).

660; 103 S Ct 2064; 76 L Ed 2d 221 (1983); MCL 257.908(3); MCL 769.1k(10); MCR 6.425(D)(3). But judges have routinely used incarceration as a collection tool in violation of these restrictions. In December 2017, a district court sentenced one of Street Democracy's indigent clients with a learning disability to 40 days in jail because, the court reasoned, his lack of physical disability and his failure to ask his part-time employer for more hours constituted a lack of good faith effort to pay his fees, a ruling that was upheld on appeal. In 2019, a judge in Pontiac admonished another homeless Street Democracy client for bringing her child to court because it potentially complicated an otherwise routine process of incarcerating her for failure to pay.

IV. When Judges Focus on Revenue Generation, They Condemn the Poor to Deepening Poverty and Often Homelessness.

When judges ignore the poverty of defendants and the laws requiring poverty-based waiver of fines and costs owed, crushing debt often results. Mr. B., a DJC client whose license was suspended for an unpaid ticket after he lost his job in 2013, owed the City of Detroit $3,600 in civil infraction traffic tickets when DJC met him in 2019. He also had 18 pending traffic misdemeanor cases—which could have cost him between $300 and $500 in fines and costs each, or an additional $5,400 to $9,000. *Highway Robbery*, p 30. All these tickets stemmed from the same job loss, and Mr. B's need to drive with a suspended license to find work to pay off his tickets. As a result of this debt, Mr. B was arrested and held in jail for a week, and continued to face arrest warrants for other jurisdictions, further limiting his ability to work. *Id.* This cascading effect is confirmed by the criminal histories of graduates of the Street Outreach Court Detroit program, who, on average, enter the program with 11 open matters in Detroit alone.[12]

[12] Street Democracy, *Street Outreach Court Detroit 2020*, p 1 (Appendix G).

Monetary fines and costs, when assessed without regard to ability to pay, push the poor into deeper poverty and homelessness. Street Democracy launched a pilot program for "functional sentencing," a sentencing protocol that replaces fines and fees with referrals to in-community services with the goals of reducing criminogenic risk and assisting defendants with job placement, sobriety, education, and medical services. Fifty-nine percent of the indigent clients who did *not* receive a functional sentence experienced housing instability because of monetary fines. This group was 4.5 times more likely to experience such instability than those who received functional sentences and minimal fines. As one Street Democracy client put it, "I fell behind on rent, food, and utilities. [It was] like a domino effect." Street Democracy, *What If Courts Were Designed to Provide Opportunity Instead of Punishment? A Report on the Efficacy of Functional Sentences* (October 2018) (Appendix D). Even if ordered to pay the minimum fines and costs required by law, the resulting debt can still be unsurmountable when poor people are presented with the impossible "choice" between having a roof over their head and settling their hefty court fines.

This system bolsters discriminatory policing of the poor. The incentives for courts to maintain their revenue streams through fees and costs are inextricably linked to law enforcement. Michigan police spend an inordinate amount of time and resources pursuing traffic charges. Across the state, half of all criminal prosecutions are for minor traffic offenses, like driving with a suspended license or having expired plates. *Highway Robbery*, p 23. In many cities across Metro Detroit, including Allen Park, Hazel Park, Romulus, Taylor, Lincoln Park, Madison Heights, and Ferndale, police issue 50 to 75 traffic tickets per every 100 residents in just one year. *Id.*, p 21. These tickets are disproportionately targeted against poor and Black drivers, in part due to Michigan's many laws that functionally criminalize driving while poor. *Id.*, pp 18–20, 23. In Dearborn, 47.7% of police citations in 2019 went to Black drivers in a city where less than 4% of

the population is Black, and 52% of citations were for license plate violations.[13] For years, the ACLU of Michigan has documented racial profiling by the Michigan State Police and called on the agency to hire an expert to review the agency's policies and troopers' practices.[14] A recent study by Michigan State University using MSP data confirmed that "African Americans were significantly more likely to be involved in a traffic stop than we would have expected based on their representation in the population," and the same study noted that Black drivers were 33% more likely to be pulled over during the daytime when their race would be more easily discernible to troopers.[15] This expansive and discriminatory system of policing helps bring defendants into the courtroom.

Meanwhile, such inequities contribute to poor relationships between law enforcement and the communities they are supposed to serve, as impacted individuals are all too aware that the system is biased against them. At a community-led meeting in 2019 to discuss residents' concerns with the traffic court system, one participant described it as "the law of economic averages. If you look poor, if you're Black, police assume they have a better chance of catching you with a suspended license or without insurance, so they pull you over." *Highway Robbery*, pp 22–23.

Indigent residents fear the courts as well as the police. The racial disparities in the criminal legal system are not limited to policing, but persist through adjudication as well, as demonstrated

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[13] Accountability for Dearborn, *2010-2020 Dearborn Police Citations Data* <https://www.accountabilityfordearborn.org/policing-in-dearborn/dearborn-police-data/citations>.

[14] ACLU of Michigan, *ACLU Sues Michigan State Police for Racial Profiling and Unlawful Search and Seizure During Traffic Stops* (June 23, 2021) <https://www.aclu.org/press-releases/aclu-sues-michigan-state-police-racial-profiling-and-unlawful-search-and-seizure>.

[15] Wolfe, Carter, and Knode, *Michigan State Police Traffic Stop External Benchmarking: A Final Report on Racial and Ethnic Disparities* (2021), pp 8, 11 <michigan.gov/msp/-/media/Project/Websites/msp/reports/Wolfe_et_al_MSP_external_benchmark_FINAL_REPORT_2021.pdf>.

by a recent study of racial disparities in sentencing in the Washtenaw Circuit Court.[16] At this Court's hearing on court rule amendments in 2016, Street Democracy clients shared powerful testimony on how they feared facing judges who could send them to jail when they could not afford to pay court fines, fees, and costs. This fear paralyzed them so intensely that they avoided court for years, leading to a cycle of poverty and homelessness until they were offered the assistance of the Street Outreach Court program. They implored the Court to adopt "ability to pay" rules to allow poor defendants to attend court without fear of incarceration.[17]

ARGUMENT

Subsection (b)(iii) violates separation of powers principles by unconstitutionally foisting non-judicial responsibilities on the judiciary and threatening judicial integrity and independence. It also deprives defendants of due process by creating a substantial temptation for judges to find guilt in order to generate revenue for the judiciary. As such, this Court should find subsection (b)(iii) unconstitutional and reverse the lower court's ruling.

I. Subsection (b)(iii) Violates Separation of Powers Principles.

Separation of powers principles prohibit the legislative branch either from foisting non-judicial duties onto the judicial branch or from otherwise imperiling the judiciary's integrity and independence. Subsection (b)(iii) violates both principles for interrelated reasons. It flunks the anti-foisting test by foisting the non-judicial duties of a tax assessor and collector onto the judicial branch. And it flunks the integrity and independence test because it both creates actual conflicts of

[16] See generally Citizens For Racial Equality in Washtenaw (CREW), *Race to Justice* (August, 2020) <https://www.citizensforracialequitywashtenaw.org/crew-s-report>.

[17] Michigan Supreme Court, Public Administrative Hearing (May 18, 2016) <https://www.youtube.com/embed/9cgGLMpC7Jc?t=1027s>.

interest for judicial decision-makers by linking their decisions to the funding of the courts and creates a widespread public perception that such conflicts may drive judicial decision-making.

A. The Legislature May Neither Foist Non-Judicial Duties onto the Judiciary Nor Otherwise Threaten Judicial Integrity and Independence.

As a threshold matter, this Court is not limited by federal law in determining whether subsection (b)(iii) violates separation of powers principles. Federal cases applying federal separation of powers principles can be persuasive when interpreting the Michigan Constitution. See *Blank v Dep't of Corrections*, 462 Mich 103, 114–115; 611 NW2d 530 (2000) (opinion by KELLY, C.J.). But as this Court has recognized, "strictly interpreting the judicial power of Michigan courts to be identical to the federal court's judicial power does not reflect the broader power held by state courts." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 362–363; 792 NW2d 686 (2010). Indeed, unlike federal courts, this Court has emphasized that when analyzing a separation of powers question under the *Michigan* Constitution, "if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers." *Civ Serv Comm'n of Michigan v Auditor Gen*, 302 Mich 673, 683; 5 NW2d 536 (1942). Thus, the Michigan Constitution typically provides for an even more stringent separation of functions between the branches than the federal constitution does.

With that said, federal cases helpfully illuminate the separation of powers issues at stake in this case. In *Nixon v Adm'r of Gen Servs*, 433 US 425, 443 (1977), the United States Supreme Court held that separation of powers principles may be violated when the legislature "prevents" a coordinate branch from "accomplishing its constitutionally assigned functions." 433 US at 443. Even when there is a "potential for disruption" of another branch's authority, the legislature overreaches unless the disruptive "impact is justified by an overriding need to promote objectives within the constitutional authority of [the legislature]." *Id.*

In *Mistretta v United States*, 488 US 361; 109 S Ct 647; 102 L Ed 2d 714 (1989), the United States Supreme Court applied *Nixon*'s observations in a case that concerned the balance between the legislature and the judiciary. *Mistretta* identified two axioms limiting the legislature's intrusion into the judicial power: (1) "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'" and (2) "that no provision of law 'impermissibly threaten[] the institutional integrity of the Judicial Branch.'" *Id.* at 383, quoting *Morrison v Olson*, 487 US 654, 680–681; 108 S Ct 2597; 101 L Ed 2d 569 (1988) and *Commodity Futures Trading Comm'n v Schor*, 478 US 833, 851; 106 S Ct 3245; 92 L Ed 2d 675 (1986). Put another way, the legislature violates separation of powers principles either when it foists nonjudicial duties onto the judicial branch or when it threatens the integrity and independence of the judiciary by arrogating power or calling the judiciary into disrepute.

As detailed below, each of *Nixon/Mistretta*'s prongs—the anti-foisting test and the integrity test—apply with even greater force under the Michigan Constitution. And subsection (b)(iii) is unconstitutional under either test.

B. Subsection (b)(iii) Unconstitutionally Foists Legislative Responsibilities onto the Judiciary.

1. The Anti-Foisting Test Is More Exacting Under the Michigan Constitution than the Federal Constitution.

This Court has been more rigorous than federal courts in enforcing the principle that foisting non-judicial duties on the judiciary is unconstitutional. For well over a century, it has been recognized that "[t]he design of the constitution is that each of the three branches of the government shall be kept, so far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others." *Houseman v Kent Circuit Judge*, 58 Mich 364, 367; 25 NW 369 (1885). In particular, "[a]ny legislation . . . authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to

either of the others, cannot be regarded as valid." *Id.*[18] Applying this principle, courts repeatedly "have struck down attempts by the legislature to give nonjudicial powers to courts." *Dearborn Twshp v Dail*, 334 Mich 673, 682–683; 55 NW2d 201 (1952) (collecting cases).

Houseman specifically applied these anti-foisting principles to hold that the Legislature may not foist tax assessment and collection duties onto the judicial branch. In *Houseman*, a lower court entered an order invalidating a municipal tax assessment involving a drainage ditch and ordered a surveyor to survey the property in question so that the court could revise the invalid tax assessment. 58 Mich at 365–366. The lower court's order was issued pursuant to a statute that instructed lower courts to conduct such tax assessments whenever they found an original assessment unlawful. This Court held that the statute was unconstitutional because it foisted taxing authority to the judiciary: "[S]ending out surveyors or other persons to make examination or surveys to relevy taxes in place of invalid ones, are each and all acts which do not pertain to the judicial branch of the government." *Id.* at 367.

This strong prohibition against foisting non-judicial duties on the judiciary was strengthened in the 1963 Constitution. It provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as *expressly provided* in this constitution." Const 1963, art 3, § 2 (emphasis added). A comparison of this provision and prior provisions in earlier Michigan constitutions compels the conclusion that Article 3, §2 "made more precise" the "proscription . . . against the [one branch's] exercise of Powers properly belonging to another branch." *Buback v Romney*, 380 Mich 209, 225; 156 NW2d 549 (1968) (opinion by ADAMS, J.). Thus, "[t]o hold that executive, quasi[-]judicial, administrative, or

[18] *Houseman* applied separation of powers principles under the Constitution of 1850. As discussed below, the principles announced in *Houseman* apply even more strictly under the current Michigan Constitution.

ministerial functions can be shouldered at will upon the judicial branch of government would ignore the strengthening of the judiciary that occurred in the 1963 Constitution." *Id.* at 228. Rather, the Legislature can confer non-judicial powers on the judiciary "only when it can find authorization in the Constitution." *Id.* at 225–226. Applying these principles, *Buback* concluded that the Legislature could not authorize judges to preside over proceedings involving the removal of executive officials for cause—even though such proceeding was quasi-judicial in nature—because the removal power was constitutionally vested in the political branches. *Id.*

More recently, this Court similarly held that although courts can rule on whether zoning decisions by the political branches were lawful, judicial officers violate separation of powers principles when they engage in *re*zoning rather than leaving such decisions to the political branches. See *Schwartz v City of Flint*, 426 Mich 295, 311; 395 NW2d 678 (1986). That was so because zoning is a legislative act that cannot be performed by the judiciary. *Id.* at 307–308.

In an amicus brief, the Legislature contends that the separation of powers principles under the Michigan Constitution are, in fact, more flexible than suggested above. Leg Am Br, pp 3–7. But its discussion of general principles that may apply in other separation of powers contexts, or under federal separation of powers law, ignores (and does not even attempt to discuss) the *specific* holdings of this Court that a delegation of *legislative power* to the *judiciary* is permissible "*only* when it can find authorization in the Constitution." *Buback*, 380 Mich at 225 (emphasis added).

2. Subsection (b)(iii) Fails the Anti-Foisting Test By Assigning the Quintessentially Legislative Task of Taxing to the Judiciary.

Subsection (b)(iii) is unconstitutional under *Houseman* and its progeny. Just as in *Houseman*, subsection (b)(iii) forces judicial officers to play an improper judicial role; they must first assess how much tax should be owed by criminal defendants and then levy and collect those taxes. Under *Houseman*, *Buback*, and *Schwartz*, this foisting of non-judicial power onto the

judiciary violates Article 3, § 2 unless it is permitted by a specific provision of the Constitution. But there is no provision of the Constitution that permits such foisting. To the contrary, the Constitution confers upon the Legislature the sole authority for taxation. Const 1963, art 9, § 1. By contrast, "[c]ourts are not tax-gatherers." *People v Barber*, 14 Mich App 395, 405; 165 NW2d 608 (1968); see *Civ Serv Comm'n*, 302 Mich at 682 ("[T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, *and not to be surrendered or abridged*, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people." (emphasis added)).[19]

Subsection (b)(iii) also causes precisely the type of disruption between the branches of government that the anti-foisting principle is designed to prevent. The Legislature enacted the provision *precisely* in order to shift the unpopular responsibility of raising revenue from the political branches onto the judiciary—and that is *precisely* what has occurred in practice, as recognized by legislators, courts, and the Trial Court Funding Commission. See *supra*, Background, section I. As a result, the judiciary has become further entangled in a political and fiscal tug of war with their funding units. Thus, subsection (b)(iii) violates the separation of powers by "expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power" of the political branches. *Mistretta*, 488 US at 393. It thereby deflects political responsibility for fiscal matters from the political branches, where they

[19] The 1963 Constitution further illustrates the separation of powers concerns that arise when the judiciary becomes enmeshed in revenue generation. Article 8, § 9 provides that all fines assessed and collected in criminal cases shall be paid into funds for the support of public libraries. The Constitution's allocation of funds raised through criminal fines to the apolitical and innocuous purpose of maintaining libraries underscores the Constitution's concern that miring the judicial power in the inherently political task of revenue-raising sullies the integrity of the judicial branch.

belong, onto the judiciary. The result is that "courts are under increasing pressure from state and local governments to increase revenue" and "the perception that judges are considering revenues when making judicial decisions" is "undermin[ing] the public trust in the court system." *Trial Court Funding Commission Final Report*, p 9; see also *supra*, Argument, section II.D.

Furthermore, the delegation of taxation power here is not a marginal delegation. Rather, the Legislature has delegated the very core of the taxation power, instructing courts to use their (standardless) discretion to determine which defendants should pay the tax and to decide which expenses and costs should be included in the tax. The range of tax-policy decisions a court must make in assessing what to include in its subsection (b)(iii) assessment is staggering. Which staff salaries are to be included? Security guards who also screen people entering the courthouse for civil and criminal matters? The court's general counsel? And what fixed expenses will be included in the assessment? The cost of metal detectors? Landscaping? Benches for the lobby? Electrical repairs? The cost of new monitors in the courtroom? The court's umbrella insurance policy? What about the costs of the court's holiday party? Each court also appears free to decide how to allocate its expenses amongst different divisions in the courthouse. Should it prorate expenses between different divisions who share resources? Should this be done based on the number of cases each division handles? The complexity of the cases the division handles? The number of judges or courtrooms in each division? These questions are just the tip of the iceberg of submerged taxation policy issues that lurk beneath subsection (b)(iii)'s delegation to courts to assess a tax that covers "salaries and benefits," "goods and services," and "necessary expenses for the operation and maintenance of the court building and facilities." The State's blithe assertion that subsection (b)(iii) "does not require judges to set tax policy," Appellee Br, p 11, simply ignores these

complexities and offers no explanation as to why these questions—and countless other ones raised by assessing subsection (b)(iii) taxes—are not matters of tax policy.

These same principles also explain why the Legislature's reliance on isolated quotations from *Mistretta* and *Morrison* is misplaced. See Leg Am Br, pp 5–7. It again bears noting that those federal cases do not apply neatly in Michigan where our state constitution provides express separation of powers guarantees lacking in the federal Constitution. Const 1963, art 3, § 2. But, even taking the Legislature's arguments on its own terms, the Legislature quotes *Mistretta* for the proposition that a legislative delegation of power to the judiciary may not violate (federal) separation of powers principles when it "do[es] not trench upon the prerogatives of another branch." Leg Am Br, pp 5–6, quoting *Mistretta*, 488 US at 388. And it quotes *Morrison* for the proposition that a legislative delegation of power to the judiciary may not violate (federal) separation of powers principles when the delegation is "directly analogous to functions that federal judges perform in other contexts." *Id.*, p 7, quoting *Morrison v Olson*, 487 US 654, 687; 108 S Ct 2597; 101 L Ed 2d 569 (1988). But delegating to the judiciary the power to both determine the amount of a tax and then assess that tax in any discretionary manner it deems fit *does* trench upon the (exclusive) taxation prerogative of the Legislature and is *not* directly analogous to any (proper) judicial function for all the reasons just described.

3. The Additional Arguments Offered by the Legislature Are Unconvincing.

The Legislature's amicus brief attempts to resist this straightforward analysis on three additional grounds, none of which is convincing. First, the Legislature relies on an inapposite case that permits probate courts to enter judgments that included the legislatively determined inheritance taxes as an expense when settling an estate. Leg Am Br, p 14 n 11, discussing *Union Trust Co v Durfee*, 125 Mich 487, 494; 84 NW 1101 (1901). Second, the Legislature relies on a

line of distinguishable out-of-state cases, some of which expressly disagree with *this state's* own caselaw, and many of which come from states with out-of-control court fees systems. *Id.*, pp 11–12. Third, the Legislature relies on antiquated (and defunct) Michigan statutes that do not remotely resemble subsection (b)(iii)'s delegation of taxation power. *Id.*, pp 7–9. Each of these arguments is incorrect on its own terms, as explained below. But notably, *none* of the cases or history the Legislature relies upon involve delegating the kind of authority to the judiciary that subsection (b)(iii) does, as just described in the preceding paragraph. None involve a situation in which the judicial branch is not only authorized to impose a discrete fee at the time of adjudication, but also to administratively determine a tax schedule in advance based on countless tax policy decisions, and then to determine which defendants should pay that tax—all for the express purpose of providing funds to serve as a central funding source for the court.

First, the Legislature contends that *Durfee* allows the Legislature to delegate taxing powers to courts. But *Durfee* does no such thing. In *Durfee*, the Legislature had imposed a tax on inheritances with progressive taxation rates that varied based on the value of the estate. 125 Mich at 491, 496. Thus, when probate courts adjudicated matters involving estates, it became necessary for the court to order that the executor of the estate pay the legislatively determined tax as part of the settlement of the estate. In a short paragraph with minimal discussion, this Court found that no improper duties had been assigned to the judiciary. The lack of discussion in *Durfee* is unsurprising because the statute at issue in *Durfee* required the court to do nothing more than apply a *legislatively determined taxation formula* to the value of the estate—simple multiplication based upon the statutory tax rate and the proven value of the estate. By sharp contrast, subsection (b)(iii) permits courts to develop their *own* tax assessments for defendants in their courts based on their *own* calculations about the appropriate amount of the tax and then leaves courts free to determine

when to impose the tax. *Durfee* says nothing that remotely blesses a legislative delegation of such core taxation powers to the judiciary.

Next, the Legislature relies on a string of out-of-state cases, with the lead cases coming from Texas and Oklahoma, that suggest there may not be separation of powers problems (under those states' constitutions) with courts assessing certain taxes if the taxes are "reasonably related to the costs of administering the criminal justice system and are not simply an executive branch 'tax.'" Leg Am Br, p 11 quoting *State v Claborn*, 870 P2d 169, 171 (Okla Crim App, 1994). The reliance on these cases is misplaced for several reasons. First, *Claborn* overruled a prior Oklahoma case, *Ex parte Coffelt*, 93 Okla Crim 343; 228 P2d 199 (1951), which had held that a court fee *did* constitute an unconstitutional judicially delegated tax if it did not "bear a true relation to the expenses of [that particular] prosecution." *Claborn*, 870 P2d at 171, quoting *Coffelt*, 228 P2d at 201 (alteration in *Claborn*). And *Coffelt*'s more rigid separation of powers analysis was cited extensively, with approval, by this state's Court of Appeals in *Barber*, which expressly found "validity in the [*Coffelt*] court's reasoning." 14 Mich App at 405. In turn, most of the Legislature's cases flow from *Claborn* and its progeny—all of which are at odds with *Michigan*'s separation of powers doctrine.

The Legislatures cases also involve nothing like the tax at issue here. All but one of its cases involve fixed fees of a legislatively pre-determined amount or restitution payments that were not even taxes—and in several the courts found even these fees to be unconstitutional taxes.[20]

[20] *Peraza v State*, 467 SW3d 508, 517–518 (Tex Crim App, 2015) (upholding fixed mandatory $250 DNA collection fee); see also *Salinas v State*, 523 SW3d 103, 106–107 (Tex Crim App, 2017) (striking down fee going to children's counseling centers); *Claborn*, 870 P2d at 170 (upholding legislative fixed $4 law enforcement training fee, $100 victims' compensation assessment, and $500 drug assessment in drug cases); *State v Johnson*, 124 NC App 462, 474; 478 SE2d 16 (1996) (upholding fixed $100 restitution fee in drug convictions to pay for costs of lab tests of the substance); *State v Lane*, 649 A2d 1112 (Me, 1994) (upholding legislatively imposed

None involve a delegation such as subsection (b)(iii) delegates to courts the very core of the tax power: determining which costs taxpayers should bear, assessing the amount of the tax, and determining against whom to impose it. While costs and fees such as the ones at issue in the Legislature's out-of-state cases might pose closer questions under Michigan law, none speak to the wholesale type of delegation of core taxation powers to the judiciary that is at issue in this case.

Consider, as well, what the experiences of states like Texas and Oklahoma reflect about the malignancies that stem from allowing the separation of powers walls between the judiciary and the tax power to crumble. A comprehensive study that examined the imposition of fines and fees in several counties in Texas, Florida, and New Mexico found that the counties "spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone." Brennan Center for Justice, *The Steep Costs of Criminal Justice Fees and Fines* (November 21, 2019) <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>. A study in Oklahoma quoted a judge describing his expectation that fees would be successfully collected in only 5 to 11 percent of cases, and documented the numerous pernicious consequences and racial disparity that Oklahoma's fines and fees have had of piling unsustainable debt on poor, justice-involved families. Oklahoma Policy Institute, *The Cost Trap: How Excessive Fees Lock Oklahomans Into the Criminal Justice System Without Boosting State*

10% surcharge on top of other fines and fees to cover costs of incarceration); *State v Smith*, 118 Ariz 345; 576 P2d 533 (App, 1978) (holding that restitution fees imposed as part of probation sentence are not a tax); *State v Young*, 238 So 2d 589 (Fla, 1970) (upholding $1 legislatively imposed conviction fee); *Safety Net for Abused Persons v Segura*, 692 So 2d 1038, 1042 (La 4/8/97) (striking down as an unconstitutional tax a $3 fee to support family violence organizations); *Ali v Danaher*, 47 Ill 2d 231; 265 NE2d 103 (1970) (upholding $1 legislatively determined fee to fund local law libraries); *Wenger v Finley*, 185 Ill App 3d 907; 541 NE2d 1220 (1989) (upholding $1 legislatively determined fee for alternative dispute resolution centers); *Crocker v Finley*, 99 Ill 2d 444, 455-57; 459 NE2d 1346 (1984) (striking down $5 fee to support family violence organizations).

Revenue (February 2017) <https://okpolicy.org/cost-trap-excessive-fees-lock-oklahomans-criminal-justice-system-without-boosting-state-revenue-part/>. And the broken systems of fines and fees in Louisiana have repeatedly been held unconstitutional under federal law as described in Section II, below. The point is not that these states' loose approaches to separation of powers is bad policy (though it certainly is); the point is that allowing such intermingling of the judicial power and taxation powers distorts the proper functioning of both the courts and the tax power—which is why the power to tax is not constitutionally assigned to the judiciary in the first place.

Finally, the Legislature relies on a number of old Michigan statutes allowing courts to impose the individual costs of prosecutions on litigants. But aside from the question of whether each of these antiquated statutes were, themselves, constitutional in the first place, they all involve charging losing litigants with the actual, direct, costs of prosecution. And under those statutes "[t]he expenses in question must have been incurred in connection with the particular case . . . and, hence, excludes expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of law." *Barber*, 14 Mich App at 402, quoting *People v Teasdale*, 335 Mich 1, 5; 55 NW 2d 149 (1952); see also *People v Hope*, 297 Mich 115, 118–119; 297 NW 206 (1941) (similar; holding that jury fees are impermissible). And notably, *People v Wallace*, 245 Mich 310; 222 NW 698 (1929), a case the State and the Legislature rely upon to justify the constitutionality of subsection (b)(iii), actually invalidated an award of court costs that did *not* reflect the *actual* costs of prosecuting the particular case. *Id.* at 314. Thus, at most, the history the Legislature relies upon shows that Michigan courts may have imposed certain specific costs of a prosecution on a case-by-case basis, in response to individual controversies—just as courts impose individually calculated costs in numerous

contexts. But this history in no way supports the constitutionality of delegating core taxation powers to the judiciary.

4. The Court of Appeals Analysis in *Cameron* and the State's Arguments About Courts' Sentencing Powers Do Not Compel a Contrary Result.

In *Cameron*, 319 Mich App 215, the Court of Appeals held that subsection (b)(iii) does not offend separation of powers principles. But in so holding, *Cameron* did not discuss any of the anti-foisting caselaw discussed above. That is unsurprising, because none of the relevant caselaw was presented to the *Cameron* Court. Rather, the appellant in *Cameron* "cite[d] no authority in support of his argument that MCL 769.1k(1)(b)(iii) violates the separation-of-powers doctrine." *Id.* at 232. No doubt because of this briefing, the *Cameron* Court's separation of powers analysis exclusively focused on the "delegation doctrine." That doctrine provides that "the Legislature may 'delegate a task to an *executive branch agency* if it provides sufficient standards'" for the agency to follow. *Id.* at 233 (emphasis added), quoting *McNeil v Charlevoix Co*, 484 Mich 69, 102; 772 NW2d 18 (2009) (MARKMAN, J., concurring in part and dissenting in part). As the italics in the quoted provision demonstrate, the delegation doctrine pertains to the Legislature's ability to delegate authority *to the executive branch*—a branch that is politically accountable and necessarily engaged alongside the Legislature in the push-and-pull of policy-making. The delegation doctrine does *not* establish that the Legislature may delegate legislative-type tasks *to the judiciary* with the same ease. *Hauseman* and its progeny make plain that this is not so. Those cases prohibit foisting duties such as tax assessments and zoning determinations upon the judiciary, even though it is uncontroversial that such matters *can* be delegated to the politically accountable executive branch and local legislative bodies so long as the Legislature provides sufficient standards for those politically accountable bodies to follow.

Tellingly, the only example *Cameron* (or the State) discuss of a delegation of power by the Legislature to the judiciary is "the legislative delegation of sentencing discretion to trial courts." *Cameron*, 319 Mich App at 234 (citation omitted).[21] The State echoes this argument in its brief. Appellee Br, pp 5–7.

But this example proves the point. Sentencing is unique because it is *not* an inherently legislative task; rather, "the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Mistretta*, 488 US at 390. Thus, this Court has recognized that it is an inherent part of the judicial power to sentence a criminal defendant in a manner consistent with a legislative scheme. *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003). So the judiciary's exercise of sentencing discretion is not a *delegation* of legislative power; it is an inherently *judicial* power. Moreover, the 1963 Constitution expressly contemplates the Legislature enacting sentencing laws that confer discretion on the judiciary. See Const 1963, art 4, § 45 (authorizing the Legislature to impose indeterminate sentences); see also *People v Cooper*, 236 Mich App 643, 661–662; 601 NW2d 409 (1999) (discussing the history of Article 4, § 45). By contrast, revenue generation and tax assessment are core obligations of the political branches that the Constitution expressly vests only in the legislative branch. Const 1963, art 9, § 1.

[21] *Cameron* also discussed several other delegation doctrine cases. Each involve delegation of legislative powers to the executive branch or local legislative bodies. See *Hoffman v Otto*, 277 Mich 437, 440; 269 NW 225 (1936) (upholding delegation of taxing powers to municipal governments); *Westervelt v Natural Resources Comm'n*, 402 Mich 412, 438; 263 NW2d 564 (1978) (upholding legislative delegation of rulemaking authority to the Department of Natural Resources); *City of Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303, 308; 514 NW2d 224 (1994) (upholding delegation of the power to grant tax exemptions to an executive administrator of a legislatively authorize strategic fund to promote research and development).

Similarly, the State's argument that the imposition of subsection (b)(iii) fees is simply an implementation of the Legislature's power to mandate the sentences or range of sentences a court can impose, Appellee Br, p 7, is misplaced. No one disputes that the Legislature has been constitutionally assigned the role of defining sentences (and may define them in an indeterminate fashion). That is what the Constitution says. Const 1963, art 4, § 45. But a tax to fund the judicial system is *not* a sentence because it is *not* part of the punishment imposed on a defendant. Punishing a defendant involves an individualized inquiry into culpability and other factors that are squarely aligned with the judicial role. By contrast, and as described above, see *supra*, p 28, assessing a tax involves a host of policy decisions entirely removed from a court's judicial job of deciding factual and legal questions on a case-by-case basis. Put simply: the power to tax is not an incident of the power to sentence. That is why the Constitution allows the Legislature to delegate facets of the latter power to the judiciary and does *not* permit delegations of the former power.

If this Court were to hold that the legislative-executive delegation doctrine applied in the same fashion to legislative delegations of authority *to the judiciary*, the results would be stunning. It would mean it would be constitutional for the Legislature to foist upon the judiciary any of the countless range of pseudo-legislative tasks that form the meat and potatoes of the modern administrative state. "No one would argue the obvious fact that the legislative delegation of rule-making power to administrative agencies is a crucial dimension of our system of government." *Westervelt v Natural Resources Comm'n*, 402 Mich 412, 440, 263 NW2d 564 (1978); see *In re Certified Questions from the United States Dist Court*, 506 Mich 332, 379–382; 958 NW2d 1 (2020) (cataloging "various broad delegations" of power to the executive that are constitutionally permissible). But presumably it is also the case that no one would seriously argue that similar delegations *to the judiciary* are crucial, or even tolerable, to our system of governance. This is

consistent with the concern expressed by Chief Justice McCormack in her concurrence regarding this Court's denial of leave to appeal in *Cameron* when she observed that although subsection (b)(iii) may not violate *the delegation doctrine*—which, again, is a doctrine allowing broad delegation of authority from the legislature to the executive—it may still violate separation of powers principles under *Mistretta* and related cases. *Cameron*, 504 Mich at 927 (MCCORMACK, C.J., concurring).

C. Subsection (b)(iii) Also Violates Separation of Powers Principles By Imperiling the Judiciary's Integrity and Independence.

The second prong of the *Nixon/Mistretta* test examines whether a legislative act has imperiled the integrity of the judicial branch. This test "serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Schor*, 478 US at 848, quoting *Thomas v Union Carbide Agricultural Prods Co*, 473 US 568, 583; 105 S Ct 3325; 87 L Ed 2d 409 (1985), and *United States v Will*, 449 US 200, 217–218; 101 S Ct 471; 66 L Ed 2d 392 (1980).

Michigan separation of powers doctrine is in accord. It is "well settled" that the judiciary has "all the authority necessary to exercise its powers as a co-ordinate branch of government." *Gray v Hakenjos*, 366 Mich 588, 595; 115 NW2d 411 (1962). This authority is the "only . . . manner that the independence of the judiciary can be preserved." *Id.* Accordingly, "[t]he courts cannot be hampered or limited in the discharge of their functions by either of the other 2 branches of government." *Id.* And any "legislative mandate" that attempts "to control judicial power" is unconstitutional. *Bielecki v United Trucking Serv*, 247 Mich 661, 665; 226 NW 675 (1929).

These principles demand that the political branches minimize any interference in the budgetary affairs of the judicial branch.[22] This Court has upheld the constitutionality of the scheme whereby local funding units provide a significant portion of court funding, see *Grand Traverse Co v State*, 450 Mich 457, 473; 538 NW2d 1 (1995), but has repeatedly rejected attempts by the political branches to use that power of the purse to influence court operations or the performance of court staff. See *Judicial Attorneys Ass'n v State*, 459 Mich 291, 302–303; 586 NW2d 894 (1998); *Hakenjos*, 366 Mich at 594–595; see also *Ottawa Co Controller v Ottawa Probate Judge*, 156 Mich App 594; 401 NW2d 869 (1986).

In *Judicial Attorneys*, this Court held that "case law . . . has come to strongly affirm that the fundamental and ultimate responsibility for *all aspects of court administration*, including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch." 459 Mich at 299 (emphasis added). Only "the judicial branch is constitutionally accountable for the operation of the courts," and any intrusion on that accountability threatens judicial integrity. *Id.* at 302. *Judicial Attorneys* also cited *Ottawa County* with approval. See *Judicial Attorneys*, 459 Mich at 300, 302. In *Ottawa County*, a local funding unit broke its appropriation of funds for the local probate court system into several line-items rather than simply appropriating a bulk sum for the court's overall operations. *Ottawa Co*, 156 Mich App at 606. The Court of Appeals held that the line-item appropriations were unconstitutional because

[22] Article 6, § 7 of the Michigan Constitution embodies a specific commitment to the principle that any funds raised by judicial decision-making not be tethered to judicial budgets. It states that "All fees and perquisites collected by the court staff shall be turned over to the state treasury and credited *to the general fund*." Const 1963, art 6, § 7 (emphasis added). In violation of this constitutional mandate, the monies courts raise through subsection (b)(iii), rather than being directed to the Treasury's general fund, are steered into the justice system fund, MCL 600.181(2), and from there, significant portions are steered back towards the judicial system as well as to various line items that impact branches of local funding units, MCL 600.181(3).

they would allow "the county board of commissioners, as a legislative body, [to] substantially control and frustrate the functioning of the probate court by tying the appropriation to detailed, specific expenditures." *Id.* at 606.

Subsection (b)(iii) runs afoul of similar concerns that call into question the integrity of the judiciary and subject it to control from the political branches. A core "responsibility" of the judicial branch is "to determine the guilt or innocence of [an] offender." *People v Jamieson*, 436 Mich 61, 79 n 7; 461 NW2d 884 (1990). The revenue raising function of subsection (b)(iii) threatens the integrity of the judiciary by placing that core responsibility at loggerheads with the need to preserve the courts' fiscal solvency. More convictions mean more money for the funding unit and the court. Furthermore, the local courts' determination of the amount of fees that will be appropriate to impose pursuant to subsection (b)(iii) is also directly connected to court funding. Assessing a higher amount of court fees means more money for the funding unit and the court. These incentives create pressure for courts to convict more defendants, assess more fees, and deny exemptions to defendants who are not able to pay such fees. Indeed, judges across the nation have concluded that "[c]ourts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges." Conference of Chief Justices and Conference of State Court Administrators, Resolution 4, adopted January 31, 2018 <https://ccj.ncsc.org/__data/assets/pdf_file/0016/28042/01312018-support-principles-national-task-force-fines-fees-bail.pdf> (endorsing the National Task Force On Fines, Fees, and Bail Practice's *Principles on Fines, Fees, and Bail Practices* (December 2017), Principle 1.5) (attached as Appendix H).

The American Bar Association has reflected similar concerns in a resolution stating that "judicial budget[s] should be governed by the following principles: 1) There should be a predictable general funding stream *that is not tied to fee generation* . . . ." American Bar Association, Resolution 107, Black Letter Recommendation A(1) (August 2004) (attached as Appendix I) (emphasis added). The accompanying report explained the judiciary's need for such budgetary independence:

> It is the courts that we turn to ensure that conflicts are resolved peacefully and according to the rule of law, that rights are protected, and that government actors operate according to the limits of the law. The predictability provided by the impartial application of law sustains our social and economic relationships. It is the decisional independence of judges to make their determinations according to the law without interference from other government actors or even the majority will of the moment, and the institutional independence of the courts to operate without undue influence of the other branches of government that enable the courts to perform their constitutionally prescribed role. [*Id.*, p 6.]

When courts "are over-dependent on fees, such reliance can interfere with the judiciary's independent constitutional role, divert courts' attention away from their essential functions, and, in its most extreme form, threaten the impartiality of judges and other court personnel with institutional, pecuniary incentives." Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), p 30 <https://www.brennancenter.org/our-work/research-reports/criminal-justice-debt-barrier-reentry>.

As demonstrated above, these concerns are not merely hypothetical. In Southfield and Eastpointe, courts have explicitly altered their practices to increase municipal revenue. See *supra* Background, section II. A Plymouth judge told an attorney employed by one amicus that "if we start waiving fines and costs, this court would financially implode." *Highway Robbery,* p 28. Judges have reported the same things publicly. The MDJA's experience shows that subsection (b)(iii) has directly led to judges being extorted by their funding units to assess more fees or face budget cuts. Just as in *Ottawa County*, where the county's attempt to exert control over its court's

budget through line-item appropriations was an unconstitutional attack on judicial integrity, so too subsection (b)(iii) creates a mechanism by which local funding units impermissibly—but predictably—try to "substantially control and frustrate the functioning" of the judicial branch. *Ottawa Co*, 156 Mich App at 606. The damage to the judiciary's integrity is further underscored not just by the *actual* instances in which subsection (b)(iii) has undermined judicial impartiality but also by the even more widespread public perception that convictions and fee assessments are being systematically driven by fiscal consideration statewide. *Trial Court Funding Commission Final Report*, pp 9, 27–28; *see supra*, Argument, section II.D.

The Court of Appeals nonetheless held that subsection (b)(iii) is constitutional because the provision does not expressly state that the funds raised under that section shall be directed to court funding. That conclusion, however, is belied by the facts that the Legislature, the Trial Court Funding Commission, and the courts themselves have *all* recognized that "the aim of the assessment of costs is to fund court operations." *Konopka*, 309 Mich App at 375; see also *supra* Background, section I. And, indeed, in its amicus brief at the leave application stage the Legislature concedes that, by its own design, all subsection (b)(iii) funds are given to county treasurers and that "[c]ounties then use that revenue to fund trial court operations." Leg Am Br, p 13.

These same observations demonstrate why the Court of Appeals was wrong to conclude that appellant has asserted only an "as applied" attack on the constitutionality of subsection (b)(iii). The simple fact is that subsection (b)(iii) was *designed* to raise revenue for the judiciary and alleviate pressure on municipal budgets. In so doing it creates an *inescapable* conflict between the branches. That conflict both creates actual budgetary conflict between the branches and a public impression that criminal convictions and judgments imposing costs are being made with an eye

towards revenue generation. That conflict, whether acted upon in any particular case, is *present* in every case and thus supports a facial attack on the statutory scheme.

Thus, subsection (b)(iii) is also unconstitutional because of the harm it wreaks upon the integrity and independence of the judicial branch.

II. Subsection (b)(iii) Violates a Defendant's Right to Due Process.

A. The Due Process Clause Prohibits Revenue Generation Models That Could Tempt an Average Person as a Judge Not to Act Impartially.

A fair trial is a basic requirement of due process. *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955). The United States and Michigan Constitutions guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." US Const, Am XIV; Const 1963, art 1, § 17. Due process entitles a defendant in a criminal trial to a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

In two seminal cases, the United States Supreme Court established that a defendant's right to due process is violated when any procedure could cause the average person as a judge to favor convicting the defendant or lead them to be otherwise partial. *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927); *Ward v Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972). The "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" when a judge stands to benefit from a defendant's conviction. *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). When judges are authorized, and then pressured, to generate revenue by convicting defendants and assessing costs to fund their own courts, this creates the type of direct pecuniary interests that violate due process.

In *Tumey*, a village mayor presided as a judge over certain criminal matters, determining the defendant's guilt and sentence. 273 US at 515–516. For a defendant who could not pay, the mayor could sentence the defendant to jail until the defendant's balance was deemed paid. *Id.* The

revenue generated was split between the state and the municipality, and the municipality could use the funds for city and law enforcement costs. As an executive, the mayor had authority over how the village's funds were spent. *Id.* at 517–519. The mayor also received a percentage of the village's portion of the funds in addition to his normal salary. *Id.* at 521–522.

The United States Supreme Court held that the mayor's court deprived defendants of due process of law. *Id.* at 523, 534. The Court held that the mayor had a "direct personal pecuniary interest" in convicting defendants because he could not impose fines and costs on anyone that he acquitted. The Court made clear that the due process test is whether an *average person*, in the shoes of an adjudicator, might be pressured to favor conviction for pecuniary reasons:

> Every procedure which would offer a *possible temptation* to *the average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law. [*Id.* at 532 (emphasis added).]

Critically, the Court emphasized that the problem was not just the mayor's *personal* financial incentive but also his *budgetary* motive. *Id.* at 532–533.

In *Ward v Monroeville*, the mayor of Monroeville, Ohio, presided as a jurist over ordinance violations and traffic offenses in the municipal court. As the village's executive, the mayor had authority over the village's finances, presided over city council, appointed village officials, and possessed decision-making authority for the municipality. 409 US at 58. The "revenue produced from a mayor's court provide[d] a substantial portion of a municipality's funds," but the mayor did not have receive a personal benefit from convictions. *Id.* at 59 (internal quotation marks omitted). To assist the mayor's court in raising revenue, the Chief of Police testified that he regularly charged defendants under village ordinances rather than state law when he had a choice. This decision affected how much revenue would be kept by the village as any revenue from state law charges was required to be shared with the state treasury. *Id.* at 58 n 1.

Ward held that the Monroeville arrangement violated the Fourteenth Amendment. *Id.* at 60. The Court rejected the argument that *Tumey* was distinguishable because Monroeville's mayor did not receive direct and personal benefit from the revenue generated. *Id.* The Court explained that although the mayor in *Tumey* had shared in the funds collected, this fact did "not define the limits of the [due process] principle." *Id*. Rather, the test is whether the situation offered the average person as a judge a possible temptation to "forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." *Id.*, quoting *Tumey*, 273 US at 532 (internal quotations omitted). The Court explained that such a "possible temptation" exists when the adjudicator's duties could influence them to ensure "a high level of contribution from the mayor's court." *Id.*

More recently, in *Caperton v AT Massey Coal Co*, 556 US 868, 883; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), the Supreme Court made clear that the average person test is met where there is an *incentive* for bias, even in the absence of actual bias: "[the] Due Process Clause has been implemented by objective standards that do not require proof of actual bias." Thus, "[i]n defining these standards the Court has asked whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 883–884, quoting *Withrow*, 421 US at 47 (internal quotation marks omitted).

B. Courts Have Applied the "Average Man as a Judge" Test When Judges Are Incentivized by State Statute to Generate Court Revenues.

When a judge plays a vital role in an adjudication that funds their work, the situation can create a "possible temptation" to overlook the rights of the accused within the meaning of *Tumey*, *Ward*, and *Caperton*. In *Caliste v Cantrell*, 937 F3d 525, 526 (CA 5, 2019), a Louisiana law provided that commercial surety bonds had a 1.8% court fee, which the court collected and

deposited in a "Judicial Expense Fund." These surety bond fees constituted approximately 20-25% of the revenue in the fund. *Id.* The fund, in turn, paid for court operating costs such as office supplies and travel as well as staff salaries (but not the judge's own salary). All the court's judges, including the magistrate, administered the fund. *Id*.

The Fifth Circuit held that, under the *Tumey/Ward* test, the defendants in the Louisiana court in question were being deprived of due process. *Id.* at 531–532. The magistrate responsible for imposing bonds argued that his decision-making should be reviewed under a more deferential "average judge" standard instead of the "average man as judge" standard and that the average *judge* could be impartial and avoid being tempted by the revenue generated from the fees. *Id.* at 529. The court rejected this argument, emphasizing that *Tumey* and *Ward* require asking what the average *person* might do thus "focusing on the strength of the temptation rather than an actual showing of impartiality." *Id* at 529–530.

Applying this standard, the *Caliste* court held that the funding scheme violated due process. *Id.* at 530. Although the magistrate himself was not paid from the Judicial Expense Fund, he had an interest in its balance because he benefited budgetarily. *Id.* The fund paid for "critical pieces" that made the court function, i.e., staff, court reporters, office supplies, etc. *Id.* Thus, the "arrangement pushes beyond what due process allows." *Id.* at 532.

Another panel of the Fifth Circuit similarly rejected the "average judge" standard in *Cain v White*, 937 F3d 446, 453–454 (CA 5, 2019). In *Cain*, when defendants did not pay their court debt, the court issued bench warrants. *Id.* at 450. After the defendants were arrested, the court ordered them to post a $20,000 surety bond or remain incarcerated until their debt was paid. *Id*. Defendants could spend up to two weeks in jail until their family and friends paid off their debt or the judge released them. *Id.* at 448, 450. The money collected for fees and fines went to the same

type of "Judicial Expense Fund," as was at issue in *Caliste*. A federal district court enjoined the arrangement, and on appeal the state court judges argued that the district court had improperly applied the "average man as judge" standard rather than an "average judge" standard, again arguing that judges are less susceptible to having their decision-making compromised by financial concerns. *Id.* at 451. *Cain* disagreed, holding that the "average man as judge" was the proper test and that the question of impartiality did not depend on whether a person might actually avoid temptation, but rather if an average person had the "possibility of temptation." *Id.* at 453. The Fifth Circuit also affirmed the district court's finding that the judges gained sufficient budgetary benefit from this collection process so as to render it contrary to principles of due process. *Id.* at 454.

Numerous other courts applying the *Tumey/Ward* "average man as a judge" test have similarly found due process violations, even when the sums involved are small. See, e.g., *DePiero v City of Macedonia*, 180 F3d 770, 782 (CA 6, 1999) (finding an adjudicatory scheme unconstitutional even though the funds raised constituted as little as 2% of the town budget; "the mere *possibility* of temptation to ignore the burden of proof is all that is required."); see also *Connally v Georgia*, 429 US 245, 250; 97 S Ct 546; 50 L Ed 2d 444 (1977) (invalidating a system of paying justices of the peace $5 for issuing warrants).

Here, the State relies on *Dugan v Ohio*, 277 US 61; 48 S Ct 439; 72 L Ed 784 (1928), but that case is distinguishable. In *Dugan*, fines assessed by a mayor went to the executive branch, but the mayor who assessed them had very limited executive authority himself because a city manager along with the city commission exercised all executive powers. Because of this tenuous connection, the Court found the *Dugan* mayor's relationship to budgetary matters "too remote" to raise due process concerns. *Ward*, 407 US at 60-61. Conversely, in *Ward*, the mayor had greater authority over the municipality's finances and decision-making in general.

Caliste and *Cain* have made clear that *Ward* applies with full force when judicial decision-makers are called upon to render verdicts that directly impact judicial budgets that will fund their staff and courtrooms because the connection between the judicial decision-making and budgetary necessity is not too remote. As *Caliste* explained,

> We conclude that Judge Cantrell is more like the *Ward* mayor than the *Dugan* mayor. Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate. And the bond fees impact the bottom line of the court to a similar degree that the fines did in *Ward*, where they were 37–51% of the town's budget. [*Caliste*, 937 F3d at 531 (citations omitted).]

C. Subsection (b)(iii) Creates a Temptation for Judges to Overlook the Rights of Defendants in Favor of Generating Revenue.

Subsection (b)(iii) creates an unconstitutional temptation under the *Tumey*/*Ward* test. After a defendant is convicted, subsection (b)(iii) allows a judge to impose costs based upon the *average* cost of adjudicating a case without a requirement that there be a calculation of costs associated with that *particular* case. These fees ultimately pay a share of court operating costs including staff salaries, goods, services, and necessary building expenses. MCL 769.1k(1)(b)(iii). Again, as discussed *supra*, the whole purpose of enacting this statute was to raise a significant share of courts' operating revenue from these costs. See, *supra*, Background Section I. Consequently, each judge receives a substantial budgetary benefit from the money collected from imposing court costs because a large portion of those costs are retained locally and redistributed back to the judiciary. *Trial Court Funding Commission Final Report*, p 8. Furthermore, because the fees are based on the cost of an average case, the budgetary benefit is greater in cases that are disposed of more quickly and with fewer hearings or less process. This substantial budgetary benefit would make the average person vulnerable to a "possible temptation." *Tumey*, 273 US at 532.

The Court of Appeals applied the wrong test by failing to focus on the degree of temptation. The Court of Appeals was bound by *People v Johnson*, 336 Mich App 688, 701; 971 NW2d 692 (2021), and it relied entirely upon *Johnson*. As this Court is aware, however, leave to appeal has been granted in *Johnson*, and that decision is being reviewed concurrent with review in this case. *Johnson*, in turn, recognized that MCL 769.1k(1)(b)(iii) was a "revenue-generating" statute, but the majority nonetheless reasoned that there was no due process violation because Mr. Johnson did not present evidence that the judges had direct control over the money raised by the "cost-imposing court." *Johnson*, 336 Mich App at 701. Specifically, the majority reasoned that there was no "direct correspondence" between the judge imposing the costs and the revenue generated from the costs imposed. *Id.*

But as discussed above in Background Section I, the history and application of subsection (b)(iii) establishes that it was enacted for the precise purpose of raising funds for the courts, and that the Legislature expected court budgets to *depend* upon fees raised under subsection (b)(iii). In Background Section II, amici demonstrate how the law gives judicial officers authority to decide the court's expenditures once their budgets are set by funding units. Thus, regardless of whether subsection (b)(iii) *directly* funnels money to particular judges on a case-by-case basis, there is no question that the legislative design was that courts must raise considerable amounts of funds through the use of subsection (b)(iii) in order to receive adequate funding.

Furthermore, the *Tumey*/*Ward* analysis does not require a "direct correspondence" between a fee and the court's budget. A *tempting* correspondence between the fees and a court's budget that might cause the average person to elevate fiscal concerns over jurisprudential ones is a due process violation. Just as the magistrate in *Caliste*, the judges who are imposing costs under subsection (b)(iii) benefit from the revenue generated from the costs. It was the express legislative

purpose of enacting the subsection that the costs collected would pay the court's bills—and both courts and the nonpartisan Trial Court Funding Commission have found that the statute actually has that very effect. See *supra*, Background Section I. A judge is going to benefit from bills being paid at their court because having staff, goods and services, and maintenance are all critical for a court to function. This was specifically recognized in *Caliste*:

> Unlike the *Tumey* or *Brown* judges, Judge Cantrell *does not receive a penny, either directly or indirectly, from his bail decisions*. But requiring a secured money bond provides him with *substantial nonmonetary benefits*. Most significantly, money from commercial surety bond fees helps pay the judge's staff. Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff. . . . Office supplies also promote efficiency. . . . And if an elected judge is unable to perform the duties of the job, the job may be at risk. So we do not think it makes much difference that the benefits Judge Cantrell and his colleagues receive from bail bonds are not monetary. [*Caliste*, 937 F 3d at 530 (emphasis added).]

So too here, it is undisputed that subsection (b)(iii) funds are predictably, and intentionally, funneled back to court budgets to perform essential court activities. That is all that is required under *Tumey* and *Ward* to demonstrate the prohibited degree of temptation.

D. The "Average Man" in Michigan Believes That the Judiciary Is Biased Towards Revenue Generation.

A review of Google-based public court reviews further confirm that a significant portion of Michigan residents view the neutrality of judges to be compromised by the temptations of revenue generation.[23] Approximately 25% of all written reviews of Detroit metro-area district courts surveyed express concerns about corruption, extortion, disregard for the financial position of defendants, or the court's wanting to generate as much revenue as possible. Factoring in upvotes,

[23] Street Democracy, *Public Perception of Judicial Bias in Revenue Generation* (2021) (Appendix J).

that number jumped to 32%. For the 43rd District Court, Hazel Park Division, a staggering 42% (69% weighted) of written reviews expressed similar concerns. Below are a few review excerpts:

> "My tickets came to $126, but after adding all the 'lawyer fees' 'state and city fees' and such, my total was at $430! If you pay the actual fines of the tickets, you are still held as liable for these miscellaneous fees, and you get charged more money if you do not. In a city where many of the citizens are trying to stay afloat, I feel it is shameful the way they are robbing us blind!"
>
> "They have a really bad system they're [sic] all they want is money they want you to plead to a different charge with no points just to get more money out of you cuz [sic] they think people don't know their rights."
>
> "No due process in court and will extort money any way they can."

The sheer volume of these type of negative comments indicate that they do not simply reflect the anger of people upset about the result of their cases, but rather a pervasive and common—and all too often justified—sense that the need to keep courts operating creates temptations that may be affecting outcomes due to subsection (b)(iii).

For the foregoing reasons, subsection (b)(iii) violates due process.

III. The Remedy this Court Must Apply May Depend on the Basis for Its Decision, But in Either Case, the Remedy Should Be Immediate.

If this Court holds that subsection (b)(iii) violates separation of powers principles, it should invalidate that section, vacate the imposition of fees in this case, and apply that remedy prospectively, including to cases currently on direct appeal. No further remedy would seem to be required. Should the Court elect to address the retroactivity of such a decision, the analysis would be governed by *People v Maxon*, 482 Mich 385, 393; 759 NW2d 817 (2008). Under *Maxon*, the test for retroactivity for a newly announced rule of criminal procedure examines "(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." *Id.*, quoting *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404 (1998).

If this Court holds that subsection (b)(iii) violates due process, the remedy may vary based on the precise nature of this Court's holding. Were the Court to hold that subsection (b)(iii) violates due process by denying defendants a neutral adjudicator *at the guilt* stage of a criminal proceeding, then the conviction would need to be vacated. Were the Court to hold that subsection (b)(iii) violates due process by denying defendants a neutral adjudicator only at the sentencing stage, then the portion of the sentence including subsection (b)(iii) fees would need to be vacated. In either case, should this Court elect to address the retroactivity of such a decision, the analysis would be governed by federal constitutional law as set forth in *Teague v Lane*, 489 US 288, 305–314; 109 S Ct 1060; 103 L Ed 2d 334 (1989). As relevant here, a *Teague* analysis would render a due process holding retroactive if this Court determined the new rule was "implicit in the concept of ordered liberty." *Id.* at 311 (cleaned up). In turn, such an analysis might be affected by whether this Court holds that defendants were denied a neutral adjudicator with respect to their guilt or merely with respect to the costs assessed in their case.

In any event, when determining a remedy, amici strongly urge this Court to make its decision effective immediately rather than allowing it to take effect after some set period of time. The Legislature has known for years—since the issuance of the Commission's 2019 report at the latest, and again at the end of last term when this Court granted the leave application in this case—that subsection (b)(iii) was problematic and constitutionally suspect. It has had time to address the problem, but has instead continued to extend the sunset date for subsection (b)(iii). After this Court heard oral argument on the leave application in this case last year, a bill was introduced, but not passed, to fund the courts using state money last term. 2022 HB 5957. This shows that the Legislature is capable of acting promptly to address a ruling of this Court if they need to do so. Subsection (b)(iii) has violated separation of powers principles and the rights of the criminally

accused for too long while the Legislature stood idly by and watched. This unconstitutional tax must be brought to an immediate end.

CONCLUSION

Subsection (b)(iii) hopelessly enmeshes the judiciary in the process of revenue generation and makes courts financially dependent upon the decisions they render. This dynamic creates perverse judicial incentives, harms the judiciary's public reputation, and intertwines the judiciary in tasks constitutionally assigned to the political branches. For the reasons stated above, these problems render subsection (b)(iii) unconstitutional both under the Michigan Constitution's separation of powers principles and as a violation of due process under the Fourteenth Amendment and Michigan Constitution. The courts cannot be seen as impartial when the incentive to place the courts' financial needs over the rights of the accused is created by statutory design.

The simple fact is that courts are not a private enterprise. Criminal defendants are not a special class of citizens upon whom the expenses of state government should be levied. Rather, "the costs of operating the government itself [should be] borne by all Michigan residents not merely or particularly by those that run afoul of the law." *People v Cunningham*, 301 Mich App 218, 225; 836 NW2d 232 (2013) (SHAPIRO, J., dissenting), rev'd 496 Mich 145 (2014).

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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WORD-COUNT CERTIFICATION

I hereby certify that this brief contains 15,601 words in the sections covered by MCR 7.212(C)(6)-(8).

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