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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TRAVIS MICHAEL JOHNSON,

Defendant-Appellant.

Supreme Court No. 163073

Court of Appeal No. 351308

Lower Court No. 17-007577-FH
17-007941-FH

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A STATUTE OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy personal and real property. Property rights are jeopardized, however, where fines, fees, and forfeitures are abused. And that abuse often results from governments unconstitutionally using the criminal justice system to raise revenues rather than protect the public.

IJ is the nationwide leader in litigating against unconstitutional financial interests and abusive fines and fees. See, e.g., *Timbs v Indiana*, 139 S Ct 682 (2019). It regularly files *amicus curiae* briefs in federal and state cases involving fines and fees abuse. See, e.g., *Nelson v Colorado*, 137 S Ct 1249 (2017); *Harper v Prof Probation Servs, Inc*, 976 F3d 1236 (CA 11, 2020); *Cain v White*, 937 F3d 446 (CA 5, 2019); *Caliste v Cantrell*, 937 F3d 525 (CA 5, 2019); *Beck v Elmore Co Magistrate Court*, 168 Idaho 909; 489 P3d 820 (2021); *City of Seattle v Long*, 198 Wash 2d 136; 493 P3d 94 (2021).

Given IJ's expertise in fines and fees litigation, it files this brief to apprise this Court of how other jurisdictions have addressed the constitutionality of using fines and fees, including court costs, to generate revenues. This brief examines (1) whether Michigan's court costs statute violates the Due Process Clause of the Fourteenth Amendment and, if so, (2) what remedy is appropriate in this case.

[1] No counsel for a party authored this brief, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. This Court invited the submission of this brief.

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether MCL 769.1k(1)(b)(*iii*) violates separation of powers by assigning the judicial branch tasks that are more properly accomplished by the Legislature.

The Court of Appeals answered, "No."

Defendant-Appellant Johnson answers, "Yes."

Plaintiff-Appellee the People answer, "No."

Amicus Institute for Justice gives no answer.

2. Whether MCL 769.1k(1)(b)(*iii*) violates due process by creating a potential for bias or an objective risk of actual bias.

The Court of Appeals answered, "No."

Defendant-Appellant Johnson answers, "Yes."

Plaintiff-Appellee the People answer, "No."

Amicus Institute for Justice answers, "Yes."

3. If MCL 769.1k(1)(b)(*iii*) is facially unconstitutional under either theory, what remedy follows?

The Court of Appeals gave no answer.

Defendant-Appellant Johnson answers, "This Court should sever the statute and order the circuit court to reimburse Mr. Johnson."

Plaintiff-Appellee the People answer, "Vacate the order of court costs."

Amicus Institute for Justice answers, "Declare MCL 769.1k(1)(b)(*iii*) unconstitutional, vacate the order imposing costs, and, if necessary, remand for re-sentencing."

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SUMMARY OF THE ARGUMENT

"All revenues from fines, penalties, and forfeitures levied by a court should be transferred to the state general fund, and should not be appropriated to the court receiving them or by a local unit of government that supports such a court." *Brown v Vance*, 637 F2d 272, 277 (CA 5, 1981) (quoting American Bar Association, *Standards Relating to Court Organization* § 1.53 (1974)). Yet Michigan trial courts depend on the court costs they impose for funding court salaries, supplies, and facilities. That financial interest violates due process.

Under the Due Process Clause of the Fourteenth Amendment, judges may not appear to have a financial interest in the cases that come before them. That means judges cannot adjudicate cases in which their institutions—their courts—have a substantial financial interest, known as an *institutional* financial interest. Such institutional financial interests can exist even if judges do not have executive responsibility for their institution's budget. What matters is whether it objectively appears that judges could be biased toward decisions that benefit their institution's accounts.

Michigan's trial-court financing scheme violates due process because it creates an institutional financial interest. When a defendant is convicted, MCL 769.1k(1)(b)(*iii*) gives a trial court discretion to order the defendant to pay court costs. Those costs cover "[s]alaries and benefits for relevant court personnel[, g]oods and services necessary for the operation of the court[, and] . . . expenses for . . . court buildings and facilities." MCL 769.1k(1)(b)(*iii*). When a defendant pays these costs, some portion is returned to the court's local funding unit—hence "the importance of court costs to the current budget of local funding units." AA 108a. Another portion is deposited into the state's court equity fund, which is mixed with other state funds and then, again, distributed to local funding units, this time following an equitable funding formula. See MCL 600.151b.

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Court costs, along with other fines and fees, pay on average for nearly half the expenses of Michigan's trial courts. About 26% of trial court budgets are paid for by fines, fees, and costs imposed by the courts and returned to their local funding units. AA 91a. Another 23% comes from the State, but most of that money in fact comes from costs imposed by trial courts, remitted to the State and then redistributed to courts. AA 99a. Only 2.24% of trial court funding comes from the State's general fund. AA 100a. This funding scheme gives trial courts a substantial financial interest in imposing court costs on defendants. Trial courts know that they must impose costs to keep the lights on, pay their staff, or purchase supplies, which appears to create a financial interest in imposing court costs at sentencing.

That financial interest, expressly created by MCL 769.1k(1)(b)(*iii*), violates due process. Michigan trial courts face a possible temptation to impose costs on defendants, not in the interests of justice, but in order to raise more revenue. That is unconstitutional. As a remedy, this Court should reverse the court of appeals decision, declare MCL 769.1k(1)(b)(*iii*) unconstitutional, and vacate Defendant Johnson's current sentence imposing costs.

ARGUMENT

I. MCL 769.1k(1)(b)(*iii*) unconstitutionally creates an apparent potential for bias, because it financially rewards courts for imposing court costs on defendants.

Due process prohibits courts from having a financial interest in the cases that come before them. This rule comes from the centuries-old principle that "[n]o man can be judge in his own case." *Caliste v Cantrell*, 937 F3d 525, 525 (CA 5, 2019) (quoting Edward Coke, *Institutes of the Laws of England*, § 212, at p 141 (1628)); see also *Williams v Pennsylvania*, 579 US 1, 9–10 (2016) ("[N]o man is permitted to try cases where he has an interest in the outcome." (quotation marks omitted)). It is presumed that judges can remain neutral despite many influences, including family ties, friendships, or politics. See *Caperton v A.T. Massey Coal Co*, 556 US 868, 877 (2009)

("[p]ersonal bias or prejudice alone would not" violate due process (quotation marks omitted)). But financial influences are categorically different. A financially interested court always raises due process concerns. See *id.*; *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996) (listing "pecuniary interest in the outcome" as one way a judge may appear biased) (quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975)).

The issue in this case is whether Michigan trial courts appear to have a financial interest that violates due process. They do, and the following sections explain why.

First, the relevant legal standard is whether there objectively appears to be a potential for bias—*i.e.*, does it *appear* that a trial court could be biased toward imposing costs to raise revenue. Defendants do not need to show actual bias affected their cases, only that it appears there is a potential for bias.

Second, many circumstances may show the appearance of a potential for bias. A judge could have a personal financial interest, for instance, if she receives a small sum for ruling against defendants. But she could also have an institutional interest, where the institution the judge serves—the court, or a local government—stands to benefit from ruling against defendants.

Third, the court of appeals incorrectly concluded that the appearance of institutional bias requires a judge to have a role in budgeting the funds her court raises. But in fact, institutional bias can exist if the judge knows she must impose costs in order to maintain her court's operations.

And fourth, taking the proper legal standards into account, Michigan trial courts have an unconstitutional financial interest in imposing court costs. At sentencing, trial courts get to choose whether to impose costs. And they rely on those costs to fund their courts' salaries, supplies, and facilities. This financial dependence on court costs appears to create a potential for bias toward imposing more court costs.

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A. The correct legal standard is whether a financial interest objectively *appears* to create a potential for or risk of bias.

Everyone knows judges can't be paid to rule against a certain defendant. Such judges would clearly have an "actual, subjective bias." *Williams*, 579 US at 8; *Bracy v Gramley*, 520 US 899, 909 (1997) (stating evidence, including judge's record of taking bribes, may show he was "actually biased in petitioner's own case" (emphasis omitted)). But judges also cannot *appear* to be biased "based on objective and reasonable perceptions." *Caperton*, 556 US at 884; MCR 2.003. As it stated in *Caperton*, the Supreme Court "asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" 556 US at 881.

The Court reiterated that rule in *Williams v Pennsylvania*, stating it is "an objective standard that, in the usual case, avoids having to determine whether actual bias is present." 579 US at 8. A judge violates due process where there is "an unconstitutional ***potential*** for bias" or an "objective ***risk*** of bias" that would "endanger[] the ***appearance*** of neutrality." *Id.* at 8, 14 (emphases added). The Supreme Court restated this rule again in 2017, reversing a Nevada Supreme Court decision that had "applied the wrong legal standard" by requiring evidence that the "judge was 'actually biased'" in a particular case. *Rippo v Baker*, 137 S Ct 905, 907 (2017) (per curiam). The correct standard is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.*

The Supreme Court applies this objective "appearance" standard because it is hard to determine the subjective mindset of a particular judge in a particular case. True, "judges often inquire into their subjective motives and purposes," especially when ruling on recusal motions. *Caperton*, 556 US at 882. But "[t]his does not mean the inquiry is a simple one," and judges may "misread[] or misapprehend[]" their own motives, to say nothing of their colleagues'. *Id.* at 882–

883. For that reason, "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Id.* at 883 (citing, *inter alia*, *Tumey v Ohio*, 273 US 510, 532 (1927)).[2]

The Supreme Court's "appearance" standard accords with the longstanding practice of lower federal courts. In the words of the Sixth Circuit, "[t]he mere *possibility* of temptation to ignore the burden of proof is all that is required." *DePiero v City of Macedonia*, 180 F3d 770, 782 (CA 6, 1999) (emphasis in original); see also *Gacho v Wills*, 986 F3d 1067, 1068 (CA 7, 2021) ("Evidence that the presiding judge was actually biased is . . . not necessary."); *Echavarria v Filson*, 896 F3d 1118, 1130 (CA 9, 2018) ("A showing of a constitutionally intolerable risk of bias does not require proof of actual bias.").

And state supreme courts, too, have held that due process is violated if it merely appears a financial interest could potentially bias decisions—regardless of whether the interest in fact biased a particular decision. See, e.g., *Haas v San Bernardino Co*, 27 Cal 4th 1017, 1033; 45 P3d 280 (2002) (stating "the rule mandated by due process" is that "actual bias need not be shown when the alleged bias is due to a financial interest in the outcome of the dispute" (quotation omitted)); *State v Daigle*, 241 So 3d 999, 1000; 2018-0634 (La, 4/30/18) ("[T]here has been no allegation or showing that the trial judge harbors any actual bias or that he is not a diligent district court judge.

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[2] The People attempt to distinguish *Caperton*, saying that case's $3 million in contributions to the judge far outweighs Defendant Johnson's $1,200 in costs. (People Br 14.) But that factual difference is not material. It is true that Courts have allowed financial interests "so small that they may be properly ignored as within the maxim *de minimis non curat lex*." *Tumey*, 273 US at 531. But in *Ward v City of Monroeville*, the Supreme Court found a substantial financial interest in a mere $50 fine, because altogether fines added up to anywhere from 35% to 50% of the municipality's revenue. 409 US 57, 57–58 (1972). Likewise here, taking Johnson's $1,200 together with all the other costs imposed by trial courts, court costs make up a substantial amount of revenue for Michigan trial courts. See AA 91a ("A significant proportion of the funds generated by the trial courts are assessments on criminal defendants as part of sentencing.").

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However, . . . the standard . . . dictates recusal on this matter."); *In re Ross*, 99 Nev 3, 9; 656 P2d 832 (1983) ("[I]t should be stressed that we are dealing here not with a charge of actual bias, but with a challenge to a procedure as presenting a constitutionally unacceptable potential for bias . . . ."); *In re Paternity of B.J.M.*, 392 Wis 2d 49, 62; 2020 WI 56; 944 NW2d 542 (2020) (holding judge was "objectively biased due to the probability of actual bias").

Thus, the question here is whether Michigan's court-funding scheme objectively appears to create "the mere *possibility* of temptation," *DePiero*, 180 F3d at 782 (emphasis in original), for a Court to "not to hold the balance nice, clear, and true between the state and the accused." *Ward*, 409 US at 60 (quoting *Tumey*, 273 US at 532).

B. An unconstitutional financial interest can arise from a judge's concern for her institution, even if she does not personally benefit.

Many circumstances can create the appearance of a potential bias. Most obviously, judges cannot be paid to rule for a particular party. Such "a direct personal pecuniary interest" was held unconstitutional in in *Tumey v Ohio*, where the judge was paid $12 from each conviction he imposed.[3] *Tumey*, 273 US at 523, 531.

But courts have recognized another financial interest that creates a potential for bias—called an "institutional" financial interest. An institutional interest arises "where the decisionmaker, because of his institutional responsibilities, would have so strong a motive to rule in a way that would aid the institution." *Alpha Epsilon Phi Tau Chapter Housing Ass'n v City of Berkeley*, 114 F3d 840, 844 (CA 9, 1997) (quotation marks omitted). In other words, when a judge's ruling financially benefits her court, even if it doesn't benefit her personally, she has an institutional interest.

[3] That's around $200 in today's dollars. US Bureau of Labor Statistics, Inflation Calculation, https://www.bls.gov/data/inflation_calculator.htm.

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In *Tumey*, the Supreme Court held this institutional interest to be a second, independent reason for invalidating the $12 fee. The personal interest of the mayor-judge was "not the only reason for holding that due process of law is denied." *Tumey*, 273 US at 532. There was also the court's institutional interest: "The statutes were drawn to stimulate small municipalities" and the mayor-judge had an institutional interest "in the financial condition of the village." *Id.* at 532–533. In that case, the Court asked, "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?" *Id.* at 533.

The Supreme Court affirmed this holding a half-century later, in *Ward v Village of Monroeville*, concluding that another Ohio court had an unconstitutional interest in generating revenue. The village derived a "major part" of its income "from the fines, forfeitures, costs, and fees imposed by [the judge] in his mayor's court." *Ward*, 409 US at 58. Although the mayor had no personal interest, "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." *Id.* at 60. The village as an institution relied on fines and fees revenue, giving the mayor, who had responsibility for the institution's budget, an institutional interest in generating more fines and fees.

A pair of recent cases from the Fifth Circuit show how judges' concern for their institutions can create a financial interest. In those cases, the Fifth Circuit held that judges concerned for "the fiscal health of the public institution that benefits" have an unconstitutional institutional interest. *Caliste v Cantrell*, 937 F3d 525, 531 (CA 5, 2019); see also *Cain v White*, 937 F3d 446, 454 (CA 5, 2019).

Cain v White involved a challenge to a municipal court's fines and fees collections. 937 F3d at 450. Fines and fees were deposited into the Judicial Expense Fund, which was part of the

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court budget. *Id.* at 448–449. A quarter of the Judicial Expense Fund came from these fines and fees, and the Fund was about 10% of the court budget. *Cain v City of New Orleans*, 281 F Supp 3d 624, 657 (ED La, 2017), aff'd sub nom *Cain v White*, 937 F3d 446 (CA 5, 2019). That 10% was used to pay for court expenses, including supplies, staff salaries, and staff benefits—although it did not pay for judges' salaries. *Cain*, 937 F3d at 449, 454. The Fifth Circuit held that, even though the judges did not benefit personally, this funding scheme gave the judges an "institutional interest in the [Judicial Expense Fund]." *Id.* at 454. That interest deprived plaintiffs of due process at their ability-to-pay hearings, because those hearings should be held before a neutral, financially disinterested court. See *id.* at 450–451, 454 (affirming district court judgment that "failure to provide a neutral forum for determination of . . . ability to pay is unconstitutional.").

The Fifth Circuit also held an institutional interest unconstitutional in *Caliste v Cantrell*. There, it held that the judge who adjudicated bail amounts had an unconstitutional conflict of interest because the court's finances depended on bail-bond fees. *Caliste*, 937 F3d at 526. Nearly two percent of each bail bond collected by a surety was paid to the court as a fee. *Id.* These fees went straight into the same Judicial Expense Fund that was at issue in *Cain*. *Id.* Bond fees were "20–25% of the Expense Fund." *Id.* at 531. This system created an institutional financial incentive: "[T]he more often the magistrate requires a secured money bond as a condition of release, the more money the court has to cover expenses." *Id.* at 526.

Many other federal and state courts have invalidated funding systems where, even though judges did not personally benefit, the institutions those judges served stood to benefit. See *DePiero*, 180 F3d at 782 (holding a mayor's court system, similar to that in *Ward*, violated due process); *United Church of the Med Ctr v Med Ctr Comm'n*, 689 F2d 693, 699 (CA 7, 1982) (striking down a development commission's property-use adjudications, where the commission

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benefited by receiving real property from certain rulings); *Harper*, 976 F3d at 1243 (holding private probation system violated due process where the probation company institutionally benefited from keeping probationers on probation); *Meyer v Niles Twp*, 477 F Supp 357, 362 (ND Ill, 1979) (holding that township funds benefited by denying claims under state medical care program); *In re Ross*, 99 Nev at 9 (holding state bar adjudications violated due process, where state bar institutionally benefited from findings of misconduct).

So too here. The question is whether Michigan trial courts' institutional interest in court costs creates the objective appearance they could be biased toward imposing more costs. It does.

C. A court can have a financial interest even if it does not retain full control over all the money it collects.

The court of appeals reviewed many of the same cases discussed above, as does the People's brief. But both the court and the People incorrectly interpret those cases. The court of appeals held that an institutional financial interest exists only if the convicting courts also control the budgets into which court costs are paid: "[D]efendant [has not] provided any evidence that 'the costs imposed under MCL 769.1k(1)(b)(*iii*) are funneled into a special or specific fund to be administered by judges, analogous to the Judicial Expense Fund at issue in *Caliste* and *Cain*.'" AA 56a. It analogized this case to *Dugan v Ohio*, 277 US 61 (1928), saying there was no conflict of interest because "the entity exercising the judicial role . . . did not have control over administration of the revenue." AA 56a.

The court of appeals' reading of the law is wrong. A decisionmaker can have an institutional financial interest even if they have no "executive" responsibility for, or control over, that budget. A responsibility for finances might be one reason why a decisionmaker cares to maintain a revenue stream. That was the case in *Ward*, where the mayor-judge had mayoral responsibility to maintain the city's budget. But other cases, like *Caliste* and *Harper*, hold that

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decisionmakers might have alternative motives for producing revenues, such as the continued running of the institution on which their employment depends. What ultimately matters is whether decisionmakers have an interest in using their roles to boost their institution's revenues.

Consider again *Cain* and *Caliste*. As the Fifth Circuit recognized, those cases concerned two different, independent reasons that decisionmakers might be financially interested: in *Cain* it was the judges' executive or administrative responsibilities, but in *Caliste* it was the judge's judicial responsibilities. See *Caliste*, 937 F3d at 526 n 2 (stating *Cain* concerned "a separate conflict of interest"). The judges in *Cain* had an interest in maintaining the court's finances via fines and fees because they had "administrative" responsibility for the Judicial Expense Fund. *Cain*, 937 F3d at 451. Administering the budget was their responsibility, and to do that well they needed revenue. But in *Caliste*, the Fifth Circuit held there was a different, independent interest: The judge wanted his court to keep operating.[4] It wasn't the judge's budgetary responsibilities that created a conflict of interest; it was his judicial responsibilities. To perform his judicial responsibilities well, indeed to perform them at all, the court needed money from fines and fees:

> Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff. Judge Cantrell cannot simultaneously preside as judge and court reporter (he employs two). 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.

937 F3d at 530. Thus, a decisionmaker's institutional financial interest can come from either an interest in successfully performing one's executive roles (as in *Cain*) *or* an interest in successfully performing one's judicial roles (as in *Caliste*). Each is a sufficient reason to find the decisionmaker

[4] The judge in *Caliste* did participate in executive control over the judicial expense fund, but that was not relevant to the analysis. The court said the judge's executive powers over the court budget created "a separate conflict of interest" raised by the plaintiffs in *Cain*. 937 F3d at 526 n 2. Hence, the "dual role" noted in *Caliste*, *id.* at 530, referred to the judge serving as both decisionmaker and revenue-raiser—the same roles at issue in this case.

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has an institutional interest to generate revenue. As will be shown, Michigan's funding scheme is like the one in *Caliste*, where judges have an interest in imposing costs to adequately fund their court operations.

Harper also concerned decisionmakers with only judicial roles. In *Harper*, probation sentencing decisions and the collection of fines, fees, and costs were performed by a private probation company's employees. 976 F3d at 1239. Those employees did not have any executive position in the municipal court or government. Nor did they control the money that was collected (the contract indicated the money went to the company itself, not the probation officers it employed). Still the Eleventh Circuit held, without any discussion of "executive" powers, that those employees' decisions were "not impartial because [their institution's] revenue depended directly and materially on . . . sentencing decisions." 976 F3d at 1244.

The same was true in *Harjo v City of Albuquerque*, 326 F Supp 3d 1145 (DNM, 2018). There, the court found that forfeiture prosecutors had an unconstitutional financial interest in prosecuting more forfeitures. *Id.* at 1194–1195. That was true even though the executive budgeting decisions were made by city officials, not prosecutors. See *id.* at 1194 ("[T]he City Council—a detached authority—by law, has the authority to appropriate funds to the forfeiture program . . . .").

The court below and the People do not discuss this authority, instead arguing the point was settled by *Dugan v Ohio*. *Dugan*, which did not find an unconstitutional financial interest, does say that the judge "ha[d] himself as such no executive, but only judicial, duties." 266 US at 65. But this statement does not fully encapsulate its reasoning. Other factors were also relevant. The Court noted, for instance, that there was no evidence the judge's pay depended on convictions. And, more relevant here, *Dugan* did not involve "a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced." *Id.* Given that

neither the judge's pay nor the city's finances were in jeopardy, and given that the judge was an elected official with "only judicial[] duties," the judge simply had no reason to consider the city's finances when making decisions. *Id.*

But, again, that the *Dugan* judge didn't have a reason to care for his institution's finances doesn't mean that another judge, in a different institutional set-up, would also lack concern for her institution's finances. Indeed, in *Caliste* the Fifth Circuit held the judge "ha[d] . . . even less influen[ce]" over "spending decisions" than the judge in *Dugan*. 937 F3d at 531. Yet he still had an "interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate." *Id.* That institutional interest came from his need to "manage his chambers to perform the judicial tasks the voters elected him to do," and the portion of court funding from fees was "sizeable enough that it makes a meaningful difference in the staffing and supplies judges receive." *Id.*

Dugan's reasoning that a judge may have a financial interest if she has executive budgetary responsibilities does not define the universe of possible financial interests. The court of appeals thus erred in holding that institutional financial interests are limited to circumstances where judges also have executive "control over administration of the revenue." AA 56a. Instead, courts should consider such control just one factor among many that show a decisionmaker's interest in the financial well-being of his institution.

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D. MCL 769.1k(1)(b)(*iii*) is unconstitutional because it appears to give trial courts a financial interest in imposing more court costs.

Michigan trial courts not only benefit from court costs, they depend on them: "The current [funding] system is dependent upon court assessments (fees, fines, and costs) to generate substantial revenues . . . ." AA 99a. Michigan trial courts *must impose court costs to maintain at least a quarter of their revenues*. For that reason, Michigan defendants come appear before courts that, at the very least, appear to be financially biased toward imposing costs. That violates due process.

When a defendant is convicted or pleads guilty, MCL 769.1k(1)(b)(*iii*) lets a trial court order the defendant to pay costs "reasonably related to the actual costs incurred by the trial court," including "[s]alaries and benefits for relevant court personnel," "[g]oods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities." Court costs, along with other fines and fees, pay on average for nearly half the expenses of Michigan's trial courts. Twenty-six percent of trial court resources are paid for by fines, fees, and costs imposed and retained by the courts. AA 91a. Another 23% comes from the State, but most of that money in fact comes from costs imposed by trial courts and remitted to the State. AA 99a. Those remittances are then pooled and redistributed back to the trial courts. Only 2.24% of trial court funding comes from the State's general fund. AA 100a.

Michigan trial courts' financial dependence on court costs places this case within the bounds of *Ward*, *Cain*, and *Caliste*. In each of those cases, the courts found that a municipality's or court's financial dependence on fines and fees violated due process. If a court's finances depend on imposing court costs on a defendant, that defendant is not appearing before a neutral, disinterested court when he is sentenced. And given that trial courts so heavily depend on these

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costs—for at least a quarter, and perhaps up to one-half, of their incomes—there can be no suggestion their financial interest is *de minimis*. "[C]ertainly, any person suddenly deprived of 10% or more of his income would find the loss substantial." *DePiero*, 180 F3d at 780 (quotation marks omitted).

Michigan trial courts receive a substantial financial benefit from the court costs that they have complete discretion to impose. Yet the court of appeals held that trial courts do not have a financial interest because there must be evidence that court costs were deposited "into a special or specific fund" that the judges control. AA 56a. This was error. As the Fifth Circuit held in *Caliste*, other reasons may similarly give decisionmakers an interest in generating revenue—including a judge's incentive to maintain regular operations given their local funding unit's budgeting policies. What matters is whether the decisionmaker's institution is going to benefit financially from an adjudication, and whether that decisionmaker has a reason to care for her institution's finances.

Michigan's court-funding scheme forces judges to care about imposing costs. Twenty-six percent of trial court revenues come from the trial courts themselves. AA 91a. Those costs pay for the courts' operations, including salaries, supplies, and facilities. MCL 769.1k(1)(b)(*iii*). Thus, as was the case in *Caliste*, court costs "help fund critical pieces of a well-functioning chambers. And if an elected judge is unable to perform the duties of the job, the job may be at risk." 937 F3d at 530. The City of Southfield threatened its court with eviction when revenues dried up, leaving the court "left to find its own resources to rent space to carry out its duties." AA 229a. One judge recalled that "her court's budget is not predicated on the needs of the court's operation but is tied exactly to the amount of revenue we generate through fines and costs." AA 46a (quotation marks omitted). And when trial courts do produce much needed revenue, local governments view the courts as the "cash cow of local government." AA 190a. As the dissent below noted, "MCL

769.1k(1)(b)(*iii*) requires courts to do exactly what our several constitutions have all barred—take money from convicted defendants and use it to fund its operations." AA 45a. A court so dependent on court costs is "not impartial because its revenue depend[s] directly and materially on . . . sentencing decisions." *Harper*, 976 F3d at 1244. Michigan trial courts are unconstitutionally dependent on court costs.

It does not matter that trial courts' dependence on revenues may differ based on the policies of officials within a local funding unit. MCL 769.1k(1)(b)(*iii*) on its face creates an incentive for courts to impose costs to fund salaries, supplies, and facilities. That incentive is the problem: The caselaw is "interested . . . in the inherent defect in the legislative framework. . . . The *Tumey-Ward* test, in sum, is levelled at the system, not the individual judge" or funding unit. *Brown v Vance*, 637 F2d 272, 284 (CA 5, 1981). Here, that defect is MCL 769.1k(1)(b)(*iii*), which lets courts charge defendants for the costs of their operations and thereby subsidize any funding from local funding units.

Below, the court of appeals recognized that this system appeared to inject a potential for bias, saying it "agree[s] that use of the funds generated pursuant to MCL 769.1k(1)(b)(*iii*) to finance the operations of the sentencing judge's court, coupled with intense pressure placed on that court by its local funding unit, *could create at a minimum an appearance of impropriety*." AA 57a (emphasis added). That appearance of a financial interest, as explained in Part I.A. *supra*, violates due process.

That the statute "might operate unconstitutionally"—by financially incentivizing trial courts to impose court costs at sentencing—makes the statute unconstitutional in all applications,

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under any set of circumstances.[5] It is the objective appearance of a *possibility* for bias that matters, not whether a trial court is actually biased in its decision-making. When defendants enter the court, they do not see a disinterested judge. Instead, what appears is a judge that must impose court costs in order to fund a substantial portion of the court's budget. Michigan's funding scheme objectively tempts trial courts to be financially interested. That "appearance of impropriety" makes MCL 769.1k(1)(b)(*iii*) unconstitutional. AA 48a.[6]

II. Because MCL 769.1k(1)(b)(*iii*) is facially unconstitutional, the appropriate remedy would be to vacate the defendant's sentence and, if necessary, remand for re-sentencing.

If MCL 769.1k(1)(b)(*iii*) facially violates due process by creating an unconstitutional financial interest, this Court should declare the statute unconstitutional, vacate Defendant Johnson's sentence, and if necessary remand for re-sentencing.

When confronted by appeals from improper sentences—appeals that do not question the underling convictions—this Court routinely vacates sentences and remands for re-sentencing. See, e.g., *People v Reynolds*, 508 Mich 388, 398; 975 NW2d 821 (2021). Indeed, this Court has held

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[5] It's possible the court did not properly apply the "appearance of bias" standard because it confused the merits of this case with the "facial" versus "as-applied" distinction. The court of appeals held that the mere potential for bias did not establish that "no set of circumstances under which [MCL 769.1k(1)(b)(*iii*)] would be valid." AA 57a. But the facial standard should not be confused with the merits. The merits question is whether there objectively appears to be a possibility of an unconstitutional financial interest. That means that MCL 769.1k(1)(b)(*iii*) is unconstitutional if, on its face, it creates a mere potential for bias, even if certain judges do not succumb to that financial temptation. Actual bias is not required to succeed in a facial challenge.

[6] The court of appeals questioned whether financial interests are still unconstitutional where, as here, the defendant enters a plea. AA 53a. They are. The court's decision to impose court costs is still financially interested even if the Court never had to determine innocence or guilt. Moreover, though not at issue in this case, even the decision to plea could be tainted if the defendant suspects a court is biased. When the defendant enters a plea, he must consider his chances of prevailing at trial, and those chances look drastically different when the court appears to have a financial interest against the defendant.

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that, if a sentencing has violated due process, and the violation prejudiced the defendant, then "we would remand the case." *People v Eason*, 435 Mich 228, 251; 458 NW2d 17 (1990).

Thus, the correct remedy here is to declare Defendant Johnson's sentencing invalid and to remand for sentencing that does not apply MCL 769.1k(1)(b)(*iii*). This would not affect his guilty plea, and it would have no effect on any other determinations of guilt or innocence.[7] Defendant Johnson appealed his sentence to pay costs, not his guilty plea. See AA 42a. The court costs he appeals are not automatically imposed as a result of a guilty plea or conviction. Rather, the trial judge chooses whether to impose them "at the time of the sentencing." MCL 769.1k(1). And it is at sentencing that the trial judge has complete discretion over whether to impose subsection (b)(*iii*) costs at all. MCL 769.1k(b) ("The court ***may impose*** any or all of the following . . . ." (emphasis added)). If Defendant Johnson prevails in this challenge to his sentencing, his sentence should be vacated and, if necessary, his case should be remanded for re-sentencing.

The People argue that any holding that MCL 769.1k(1)(b)(*iii*) violates due process would necessarily invalidate both Defendant Johnson's sentence and his conviction. People Br 20. But that's not right. First, as mentioned, Defendant Johnson appealed only his sentence. And second, the act of sentencing is distinct from the act of imposing guilt or innocence. While a court could be tempted to find a defendant guilty in order to financially benefit from court costs, that possibility is distinct from whether a court will be tempted to impose court costs in order to financially benefit from court costs. Which is to say that it would be a different case in which this court would have to decide that MCL 769.1(k)(*iii*) incentivizes trial courts to find defendants guilty.

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[7] In a footnote, the People suggest the retroactive effect of ruling for Defendant Johnson on due process grounds could be to invalidate other defendants' convictions. (See People Br 20. n 5) Although Amicus is not an expert in Michigan retroactivity law, "Michigan law has regularly declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final." *People v Maxson*, 482 Mich 385, 392–393, 759 NW2d 817 (2008).

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Ultimately, all the parties agree that the correct remedy would be to declare MCL 769.1k(1)(b)(*iii*) unconstitutional and vacate Defendant Johnson's current sentence imposing costs. If further sentencing remains to be done, this Court should also remand this case for further sentencing.

CONCLUSION

Amicus Institute for Justice asks this Court to reverse the judgement of the court of appeals, declare MCL 769.1k(1)(b)(*iii*) unconstitutional, and vacate Defendant Johnson's current sentence imposing costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2023, I electronically filed the foregoing *Amicus Curiae* Brief of the Institute for Justice in Support of Defendant-Appellant, which was served on all Parties by the MiFILE system of the Michigan Supreme Court.

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*Temporary Admission

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