

STATE OF MICHIGAN  
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff-Appellee,

SC: 163073

v.

Travis Michael Johnson,

COA: 351308

Defendant-Appellant.

Alpena County Circuit Court

Case Nos. 17-007577-FH

& 17-007941-FH

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**AMICUS CURIAE BRIEF OF THE**  
**MICHIGAN DISTRICT JUDGES ASSOCIATION**

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**STATEMENT OF THE QUESTIONS INVOLVED**

- I. *Does MCL 769.1k(1)(b)(iii) violate the Fourteenth Amendment of the United States Constitution by authorizing trial court judges to impose the costs of court operations on convicted criminal defendants, while at the same time requiring those same jurists to determine the defendants' guilt or innocence and also making those jurists responsible for ensuring that the courts receive sufficient costs and fines to operate?*

Amicus Curiae MDJA answers: Yes.

**STATEMENT OF INTERESTS OF AMICUS CURIAE MICHIGAN DISTRICT COURT JUDGES ASSOCIATION**

The Michigan District Judges Association (“MDJA”) is an association of judges who sit in district courts throughout the State of Michigan. The MDJA is comprised of 255 members, representing the vast majority of district judges serving in the State of Michigan, as well as Probate and other judges performing District Court work. The MDJA espouses the following purposes:

1. To further understanding and cooperation among members of the judiciary of the State of Michigan and members of the legislative and executive branches of state, county, and local governments.
2. To actively promote a public awareness of the functions, responsibilities and activities of the District Court in the State of Michigan.
3. To actively promote and support activities designed to improve and maintain a sound and efficient administration of justice in the District Court.
4. To encourage among members of the Association and the practicing bar, the highest level of judicial and legal competence.

[www.mdja.org](http://www.mdja.org) (last accessed February 20, 2023).

The main purpose of MDJA's participation as amicus curiae at this leave grant stage is to address the following question posed in this Court's order: "(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 A T Massey Coal Co, Inc*, 556 US 868, 881, 886 (2009)." (07/22/2022 Sct Order).

The MDJA raised this constitutional issues in its previous Amicus Brief in *People v Cameron*. Although this Court denied leave after oral argument in that case, Chief Justice McCormack issued a concurring opinion that questioned the constitutionality of the statutory provision under federal law, based on the briefing and argument presented by the MDJA. *People v Cameron*, 504 Mich 927; 929 NW2d 785 (2019) (McCormack, concurring). Justice McCormack was not comfortable addressing the constitutional question in *Cameron* as it has not been "squarely presented" in that case with a "fully developed record." *Id.* at 928. In the instant appeal, however, the constitutional issue was raised in the lower court, argued in the Court of Appeals, briefed by Defendant in this Court, and argued on application with the participation of amicus curiae. (Appx 35a-38a, 42a; 04/08/21 COA Opinion; 10/27/21 SCT Order granting MOAA).

## INTRODUCTION

The statutory provision contained in MCL 769.1k(1)(b)(iii) allows courts (including district courts) to impose costs on criminal defendants who either plead guilty, plead no contest, or are convicted after trial. MCL 769.1k(1)(b)(iii). The trial courts are authorized to impose on those defendants “the actual costs incurred by the trial court” including salaries of court personnel and other operational expenses. MCL 769.1k(1)(b)(iii). It is the position of Amicus Curiae Michigan District Judges Association that the court funding system created by the Legislature unconstitutionally shifts the funding burden on to the courts, and by doing so, creates an inherent conflict of interest in the judges who are simultaneously charged with determining guilt or innocence and then sentencing convicted defendants, but also forced to fund their courts and their counties by assessing costs against defendants who have pled guilty or been convicted of a criminal offense. This conflict violates a defendant’s right to due process under the Fourteenth Amendment of the United States Constitution, as has been recognized by the United States Supreme Court for nearly 100 years.

The MDJA believes that this legislative scheme inappropriately takes the district courts away from their obligation of enhancing public safety and forces them to focus on court funding, which should be the job of the Legislature not the Judiciary. District court judges are disproportionately impacted by this statutory provision based on the funding mechanisms used to operate the district courts, as compared to the circuit courts of this State, as district courts obtain more of their funding from local sources. Accordingly, the MDJA asks this Court to strike MCL 769.1k(1)(b)(iii) as unconstitutional.

## STATEMENT OF FACTS

For purposes of the issues on appeal, Amicus Curiae MDJA accepts the facts as presented by both the Defendant-Appellant and Prosecutor-Appellee.

This Court initially granted oral argument on the application in its October 27, 2021 order. (10/27/2021 Sct Order). That order invited the Michigan District Court Judges Association, among others, to participate as

amicus. (10/27/2021 Sct Order). In addition to filing an amicus brief, the Michigan District Judges Association sought leave, and was granted, permission to participate in oral argument. (03/08/2022 Motion for leave; 03/09/2022 Sct Order).

After hearing oral argument, this Court issued an order requesting additional briefing from the parties. (05/31/2022 Sct Order). On July 22, 2022, this Court granted leave to appeal and once again invited the Michigan District Judges Association to participate as amicus. (07/22/2022 Sct Order).

## ARGUMENT

### **I. MCL 769.1k(1)(b)(iii) violates a criminal defendant's right to due process under the Fourteenth Amendment of the United States Constitution by allowing the judge who sits in judgment of a criminal defendant to also assess costs against that defendant for the operation of the court.**

At issue in this case is the validity of the Legislature's enactment of MCL 769.1k(1)(b)(iii), which permits the trial court to impose on convicted defendants certain operational costs of the courts. That provision states as follows:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred by statute or sentencing is delayed by statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo



contendere or the court determined that the defendant was guilty.

(ii) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

**(iii) Until October 1, 2022, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:**

**(A) Salaries and benefits for relevant court personnel.**

**(B) Goods and services necessary for the operation of the court.**

**(C) Necessary expenses for the operation and maintenance of court buildings and facilities.**

(iv) The expenses of providing legal assistance to the defendant.

(v) Any assessment authorized by law.

(vi) Reimbursement under section 1f of this chapter.

MCL 769.1k (emphasis added).

For many years, Michigan courts and the Legislature have struggled with finding a way to impose costs on criminal defendants. In Part A, this Brief Amicus Curiae provides a brief history of the challenges posed in Michigan against the imposition of costs, on both statutory and constitutional grounds. In Part B, this Brief Amicus Curiae describes the long history of United States Supreme Court jurisprudence that has held that judges cannot sit as an impartial jurist in a case while also being expected to impose the costs of the court's operation on criminal

defendants. Finally, in Part C, this Brief Amicus Curiae applies the United States Supreme Court authority to MCL 769.1k(1)(b)(iii) to show how the Michigan Legislature has created an inherent and unconstitutional conflict of interest between the judges and the defendants whose fate they decide.

**A. The imposition of costs for the purpose of funding the court system has been previously questioned on both statutory and Michigan constitutional grounds.**

Starting with the Michigan Constitution of 1835, and carrying through to the Constitution of 1963, the State of Michigan has directed that penal fines be allocated to the funding of public libraries. Const 1963, art 8, § 9. In 1949, the Legislature enacted a statute which required that “civil fines” (for civil infractions, such as speeding tickets) be “exclusively applied to the support of public libraries and county law libraries.” MCL 257.909. In contrast, under MCL 257.907(3), amounts collected that were designated as “court costs” were allocated to the county’s general fund.

The Michigan Constitutional Convention drafting our current Constitution in 1962 recognized the potential for conflict of interest in judges benefiting from the proceeds of their work. Groups, including the Michigan Municipal League, called on the Convention to prohibit “any member of the judicial branch of government from being compensated out of fees earned by the court over which he presides.” (Municipal League Recommendations concerning the Local Judiciary, attached at **Tab A**). The Convention delegates agreed. “The fee system as compensation for judges is prohibited.” (What the Proposed New State Constitution Means to You – A report to the people of Michigan by their elected delegates to the Constitutional Convention of 1961-62, page 7, attached at **Tab B**). The results of this change was the creation of the local government funded District Courts in 1968. Public Act 154 of 1968.

At some point, various governmental entities began to combat their funding problems (or, alternatively, enhance their revenue) by shifting a portion of each assessment on a criminal defendant to “court costs” (for the general county fund) and decreasing the portion of each assessment that was allocated to fines (for the libraries). *Saginaw Public Libraries v Judges*

of the 70th District Court, 118 Mich App 379, 383 (1982). For example, the judges in Saginaw County had the responsibility of devising a fine and cost schedule for civil infractions, which schedule apportioned the total assessment to each defendant among various fines, costs, and fees. *Id.* at 382. In 1972, the schedule for Saginaw County divided the assessment such that 50% of the assessed monies were designated as costs and allocated to the general county fund, while the other 50% was designated as penal fines and allocated to the public libraries. *Saginaw Public Libraries*, 118 Mich App at 383. By 1979, the allocation of the assessments had leaned even more greatly towards county funding, with 89% of the assessments being allocated to the general county fund, and only 11% of the assessments being allocated as fines for the funding of libraries. *Id.* at 383.

As a result of this funding disparity, the libraries sued the district court judges, to force them to revise their system of allocating costs, fines, and judgment fees. *Id.* at 383. The circuit court in *Saginaw Public Libraries* determined that the judges' practice of labeling a disproportionately large percentage of the total amount collected in a particular case as a court cost diverted penal fines from the libraries, and was not authorized by statute. *Id.* at 387. Instead, the statute at issue, MCL 257.907(3) permitted the following:

If a civil fine is ordered to be paid . . . , the judge, referee, or magistrate shall summarily tax and **determine the costs of the action**, which shall not be limited to the costs taxable in ordinary civil actions, and **may include all expenses, direct and indirect, to which the plaintiff has been put in connection with the civil infraction.** . . . [and] payable to the general fund of the [county].

*Saginaw Public Libraries*, 118 Mich App at 387 (quoting MCL 257.907(3)).

Utilizing this statute, the district judges designed a schedule to support the “day to day operations of the district court,” under the theory that “indirect expenses” authorized by statute included the court’s operational costs. *Id.* at 387. The circuit court concluded that such an action was not authorized by statute because the statute did not permit the “assessment of costs unrelated to the actual costs, but only those expenses, ‘direct and indirect, to which the [county] has been put in connection with

the civil infraction.” *Id.* at 387-388. In sum, the trial court held that “indirect expenses” did not include “unrelated expenses.” *Id.* at 388. The Court of Appeals agreed with this rationale and held that the costs “cannot include the cost of daily operations of the courts or other governmental costs.” *Id.* at 388. The Court of Appeals declined to address the constitutional challenges to the statute since the Court decided that the practices were not authorized by Michigan statute. *Id.* at 386, 391.

In 1985, this Court grappled with the problems created when the Legislature did not fund the operations of the Judiciary. *Employees & Judges of Second Jud’l Dist Ct v Hillsdale Cty*, 423 Mich 705; 378 NW2d 744 (1985). While the precise decision in *Second Judicial District* is not directly relevant, this Court highlighted many of the problems in its majority and dissenting opinions. As this Court noted, a judicial funding crisis began in the late 1960s and early 1970s. *Id.* at 713. The courts struggled to pay court staff and to have their courts appropriately staffed without sufficient funding allocations from the Legislature. *Id.* at 714. This Court noted that “[l]ocal judges who should be independent of the political process finding themselves increasingly involved in the political give-and-take inherent in the appropriation process.” *Id.* at 714. While this Court concluded in *Second Judicial District* that the appropriations were reasonable and that the additional appropriations sought were not “necessary to the performance of its statutorily mandated function,” this Court’s decision was a harbinger of things to come. The crux of the crisis was stated as follows: “Where the Legislature has by statute granted authority or created a duty, the local funding unity may not refuse to provide adequate funding to fulfill the function.” *Id.* at 721. Justice Riley’s dissenting opinion focused on the “genius of our forefathers [in] the creation of a tripartite form of government” and why the Court’s ruling weakened the Judiciary when the Legislature failed to sufficiently fund the courts. *Id.* at 728 (Riley, J., Dissenting). Justice Riley described the interplay between the operational decisions of the Judiciary and the funding of the Legislature, as follows:

One aspect of the administration of district and circuit courts is the determination of the operational needs of the court and the establishment of a budget to provide for these needs. The power to assess these needs and compel funding for payment

of same does not usurp, although it does intrude upon, the power of the legislative branch.

Clearly, however, our constitution has established an independent and coequal judicial branch. It follows, then, that **the cost of operating this coequal branch is a legislative expense of state government, for which taxes must be assessed, and with which coequal branches may not interfere.** Const 1963, art 9, § 1 and art 5, § 20. If an appropriation is reasonable and necessary to the court's operation, the court has the power to declare its need.

*Id.* at 735 (Riley, J., Dissenting) (emphasis added). Justice Riley further espoused the “doctrine of inherent power,” a common law precept created to address “fiscal crises and inadequate funding.” *Id.* at 736 (Riley, J., Dissenting). This doctrine enables the courts to compel funding for necessary judicial functions, and Justice Riley requested guidelines in how the Judiciary should cautiously proceed when faced with inadequate funding. *Id.* at 740 (Riley, J., Dissenting).

As the lack of judicial funding continued to vex government operations, in 2005, the Legislature added to the types of fines that could be assessed against a convicted defendant, including fines and “any cost in addition to the minimum state cost...” MCL 769.1k(1)(b)(ii). One district court judge wrote about the constitutional crisis created by this provision, and in particular as applied to this State’s district courts. Hogg, Hon. David A., “District Court Tax Farming: Are Judges the New Publicans?” Mich B J p. 28 (Feb 2011). Judge Hogg laid out the complex funding structure of the district courts, as it existed at that time. *Id.* at 31. He implored the Legislature to fix the statute, among many reasons, including the “inevitable damage to the stature of the courts... respect for judicial authority will erode as people learn that their court appearance has simply become a taxable event, an opportunity for the government to take their money without regard to their acts or omissions.” *Id.* at 31-32.

Following this statutory amendment, courts began to impose costs on the convicted defendants related to the operation of the courts. *People v Cunningham*, 496 Mich 145, 152 (2014). In *Cunningham*, however, this Court rejected an interpretation of MCL 769.1k(1)(b)(ii) as authorizing

funding of day-to-day court operations as “any cost” and concluded that the phrase could only apply to any cost that was elsewhere authorized by the Legislature. *Id.* at 154. Since court operational costs were not authorized elsewhere in the statute, the courts could not impose those operational costs on convicted defendants under the guise of MCL 769.1k(1)(b)(ii)’s “any cost” provision. *Id.* at 154. In that regard, this Court stated:

Although MCL 769.1k(1)(b)(ii) allows courts to impose “any cost in addition to the minimum state cost,” this provision cannot be read in isolation, but instead must be read reasonably and in context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999). When read “reasonably and in context,” it is evident to us that MCL 769.1k(1)(b)(ii) does not provide courts with the independent authority to impose “any cost.” Rather, MCL 769.1k(1)(b)(ii) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute.

*Cunningham*, 496 Mich at 154.

Following *People v Cunningham*, the Legislature amended the statute to expressly authorize the imposition of operational costs, by adding subsection (b)(iii), as follows:

(iii) Until October 17, 2020, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

- (A) Salaries and benefits for relevant court personnel.
- (B) Goods and services necessary for the operation of the court.
- (C) Necessary expenses for the operation and maintenance of court buildings and facilities.

MCL 769.1k(1)(b)(iii). The Legislature did not, however, address the concerns raised by Judge Hogg in 2011; indeed, the Legislature exacerbated the problem by allowing even more types of costs to be assessed against

defendants, and further increasing the complexity of the district court funding system.

Consistent with the statute, courts around the statute began to impose operational costs on convicted defendants, such as on the convicted defendant in *People v Cameron*. The defendant in *Cameron* challenged the costs on the grounds that the costs were an unconstitutional tax and that the statutory provision thus violated the Michigan Constitution's Distinct Statement provision and the Separation of Powers clause. 319 Mich App 215 (2017). The Court of Appeals agreed that subsection (b)(iii) was a tax, but held that it did not violate the Michigan Constitution. 319 Mich App at 236. The Supreme Court granted oral argument on the application, and asked the parties to address "(1) whether court costs under MCL 769.1k(1)(b)(iii) should be classified as a tax, a fee, or some other category of charge; and (2) if court costs are a tax, whether the statute violates the Separation of Powers Clause, Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32." *People v Cameron*, 501 Mich 986; 907 NW2d 604 (2018).

Various amici participated in the case, including the Michigan District Judges Association. After oral argument, this Court denied leave. 504 Mich 927; 929 NW2d 785 (2019). However, Justice McCormack in her concurring opinion, addressed the constitutional concerns raised by the MDJA – specifically, that MCL 769.1k(1)(b)(iii) violates the Fourteenth Amendment because it creates a conflict of interest, shifts the burden of court funding onto the courts themselves, and incentivizes judges to convict defendants to achieve the court's funding of its operations. *Id.* at 928 (McCormack, concurring).

The instant case was proceeding in the trial court while *Cameron* was making its way up the appellate ladder. The defendant in *Johnson* had been assessed with \$1,200 in court costs under MCL 769.1k(1)(b)(iii). Defendant's Appendix 35a-38a. The defendant had asked the trial court to vacate the imposition of costs; the trial court held the *Johnson* motion in abeyance pending this Court's decision in *Cameron*. After this Court denied leave in *Cameron*, the defendant in *Johnson* filed a motion to vacate court costs, articulating the constitutional deficiency of the statute. The trial court denied the motion. Defendant's Appendix 42a.

The Court of Appeals affirmed, with a dissenting opinion by Judge Shapiro. The majority questioned whether the constitutional challenge could even apply in a case like this, where the defendant had entered a guilty plea. *People v Johnson*, 336 Mich App 688, 695-696; 971 NW2d 692 (2021). The Court of Appeals largely reached its conclusion that MCL 769.1k(1)(b)(iii) does not violate the Constitution because the statute requires the trial court to “have a factual basis” for the costs and that those costs are “reasonably related to the actual costs incurred by the court.” *Johnson*, 336 Mich App at 701. The Court of Appeals failed to see the nexus between the costs imposed and how the jurist benefitted from a portion of the revenue generated by the imposition of costs. *Id.*

In his dissenting opinion, Judge Douglas Shapiro stated that he would find MCL 769.1k(1)(b)(iii) unconstitutional. *Johnson*, 971 NW2d at 702 (Shapiro, J, dissenting). “It is either naïve or insincere to suggest that local judges are not pressured by local government officials to increase their ‘contribution’ to the general fund and that this has no effect on a judge’s decision regarding whether to assess costs and in what amount.” *Johnson*, 971 NW2d at 703 (Shapiro, J, dissenting). Judge Shapiro observed that when court costs were initially imposed by statute, those costs were *de minimis* (such as a \$5 judgment fee) but those costs had skyrocketed with the enactment of MCL 769.1k(1)(b)(iii). *Johnson*, 971 NW2d at 704 (Shapiro, J, dissenting). Even though the judges do not directly benefit from the imposition of costs, Judge Shapiro noted the financial interests of institutions “become the concern of the individuals assigned the task of assessing and collecting the necessary funds...Making judges impose and collect taxes from those who appear before them exposes them to the ‘temptation to ... not hold the balance nice, clear and true between the state and the accused.’” *Johnson*, 971 NW2d at 705 (Shapiro, J, dissenting), quoting *Tumey v Ohio*, 273 US 510, 532 (1927).

The Michigan District Judges Association weighs in on the constitutional infirmity presented by MCL 769.1k(1)(b)(iii) in that it violates due process under the Fourteenth Amendment of the United States Constitution, for the reasons discussed below.



**B. The United States Supreme Court has on multiple occasions denounced the practice of allowing jurists to sit in judgment of a defendant while at the same time having the responsibility of funding the court system.**

It is well established that the Due Process clause of the Fourteenth Amendment guarantees a defendant a fair trial in a fair tribunal. *Caperton v A T Massey Coal Co*, 556 US 868, 876; 129 S Ct 2252; 173 L Ed 1208 (2009). While most issues relating to judicial disqualification do not implicate constitutional concerns, those instances where the judge has a financial interest in the outcome of a case—even an impersonal or indirect interest—are constitutionally intolerable. *Id.* at 876-77. In these instances, actual bias on the part of the judge is not required: the possibility for partiality can be sufficient to raise due process concerns. *Id.* at 886.

The United States Supreme Court has consistently overturned convictions when the presiding judge had any form of a pecuniary interest in a defendant's conviction. For example, in *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927), the "Liquor Court" judge, who was also the town's mayor, convicted the defendant of the unlawful possession of alcohol. *Id.* at 516. Under the then-existing statutory scheme, the judge/mayor's compensation for adjudicating liquor trafficking cases derived from the fees and costs paid by the defendant. *Id.* at 520. However, the defendant was not required to pay any fees or costs unless he was convicted—meaning that the judge/mayor would only receive payment for his judicial services if he found the defendant guilty. *Id.* The fees and costs paid by a convicted defendant would also go towards financing the village, and the mayor was the chief executive of the village. *Id.* at 520-21; 533.

The Supreme Court overturned the defendant's conviction. *Id.* at 535. It held:

[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

*Id.* at 523. The trier of fact should not have the prospect of monetary gain weighing on his mind when he engages in the careful consideration of the defendant's guilt or innocence. *Id.* at 532. "**Every procedure** which would offer a **possible temptation** to the average man as a judge" to convict the defendant based on a lower burden of proof or "which might lead him not to **hold the balance nice, clear and true** between the State and the accused" denies the defendant of due process of law. *Id.* at 532 (emphasis added). Thus, the United States Supreme Court overturned the defendant's conviction in *Tumey* because the apportionment of the convicted defendant's fees and costs gave the judge/mayor a direct pecuniary interest in the outcome of the case in two ways: (1) the judge/mayor would only receive compensation for presiding over the Liquor Court if he convicted the defendant; and (2) a portion of the convicted defendant's fees and costs would go to financing the village, and the mayor had a direct interest in meeting the financial needs of the village. *Id.*

Similarly, in *Ward v Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 267 (1972), a state statute authorized mayors to sit as judges in cases involving ordinance violations and certain traffic offenses. *Id.* at 58. A substantial portion of the village's income came from fines, fees, and costs imposed against defendants by the mayor in his judicial capacity. *Id.* The Supreme Court overturned the defendants' traffic convictions. *Id.* at 62. Relying on *Tumey*, the Supreme Court reasoned that the mayor's executive responsibilities for the village's finances presented a "possible temptation" for the mayor to consider the potential income for the village when adjudicating the defendants before him in court. *Id.* at 60. Even though the mayor in that case did not receive any compensation from the convicted defendants' fees and costs, the Supreme Court still found that the defendants were deprived of a neutral and detached magistrate. *Id.* at 60; 61-62.

The Prosecutor here criticizes Defendant for not addressing *Dugan v Ohio*, 277 US 61; 48 S Ct 439; 72 L Ed 784 (1928), which it asserts is binding on this Court. To assist this Court's understanding of where *Dugan* fits into the analysis, the MDJA addresses it here. The United States Supreme Court decided *Dugan* one year after *Tumey*. The case involved another mayor's court – where the mayor of the city sat as the jurist on certain criminal cases. *Dugan*, 277 US at 62. Half of the fines assessed by the mayor's court were

paid to the city treasury into a general fund. *Id.* at 62-63. The mayor sat as one of five commissioners who decided the appropriation of funds from the city treasury. *Id.* The mayor's salary was paid from the general fund. *Id.* at 63. The Supreme Court distinguished *Tumey* on the factual ground that the mayor's salary was not dependent on how many convictions he secured as he receives a salary from the general fund whether he acquits or convicts. *Id.* at 65.

Forty-four years later, the United States Supreme Court decided *Ward v Monroeville*, as described above. Significantly, the Supreme Court in *Ward* distinguished the case from *Dugan* because, in *Dugan*, the commission of five (which included the mayor) "exercised all the legislative powers," while the city manager and the commission, "exercised all the executive powers." *Ward*, 409 US at 60. In that context, the "Mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge." *Id.* at 60-61. The *Ward* Court, however, reversed the conviction when the mayor's executive function of ensuring village financing denied the defendant a "neutral and detached judge."

The funding system in Michigan places our district court judges in a position that is more akin to *Tumey* and *Ward*, where the controlling entities (such as county commission) look to the district courts to secure a significant portion of their operational funding from the imposition of court costs. This is even more true today than when Judge Hogg wrote about "tax farming" in 2011. Hogg, Hon. David A., "District Court Tax Farming: Are Judges the New Publicans?" Mich B J pp. 28-32 (Feb 2011).

**C. MCL 769.1k(1)(b)(iii) creates a conflict of interest for every judge in this State who has to report to the court's funding unit about the revenues generated to operate the court and the county.**

MCL 769.1k(1)(b)(iii) gives Michigan's judges a pecuniary interest in the outcome of their criminal cases. While the facts in *Caperton* are extreme, the temptation to district court judges to convict and sentence based on an anticipated election cycle is no less concerning. In *Caperton*, a

justice of the Supreme Court of Appeals of West Virginia received roughly \$3 million dollars in indirect support from a litigant and refused to disqualify himself from the appeal. However, the analogous situation exists in Michigan's trial courts. Most district court judges run unopposed. For example, in 2018, among the 76 district court seats up for reelection, only 8 were contested. The single largest factor in a challenger filing against an incumbent is perceived vulnerability. Courts which are well run and properly staffed make fewer mistakes and project strength. Poorly run and understaffed courts are much more likely to make mistakes. In other words, public perception of a judge's performance is affected by overall court operations. Judges understand this reality: "there is a direct relationship between maintaining court funding and a judge's reelection." (Judge Boyd Letter, attached at **Tab C**).

Furthermore, the imposition of costs under MCL769.1k(1)(b)(iii) creates a conflict of interest even for judges who are not contemplating an election. As in *Tumey* and *Monroeville*, criminal convictions in Michigan are a source of revenue for the courts. One district judge sounded the alarm in 2011 in an article in the Michigan Bar Journal. Once this Court overturned the 2005 legislative fundings provision contained in MCL 769.1k(1)(b)(ii), the district court judges – through the MDJA – voiced their concerns about the constitutional infirmities of MCL 769.1k(1)(b)(iii) during the legislative hearings in 2014. (09/11/14 Transcript of the House Judiciary Committee Meeting on HB 5785, attached at **Tab D**). The Michigan Constitution was designed to avoid placing judges in the position of raising funds for the operation of the courts when it directed all penal fines to the public libraries. (09/11/14 Transcript, p. 48).

Yet instead, district court judges have been pressured to raise revenues not only for their courts, but for the whole county in some instances. (09/11/14 Transcript, p. 49). District court funding is different and more complex than circuit court funding. The Legislature has created three classes of district courts, and the funding unit for each of the district courts in this State vary depending on their classification. MCL 600.8103, MCL 600.8104. For example, 77 district courts are designated first-class districts, in which the entire county is contained within the district, and the district court's funding derives from the county. There are 5 district courts designated as second-class districts, which are county-funded, but where

the district court does not represent the entire county. A district court of the third class receives its funding from the political subdivision or subdivisions within their district (such as multiple cities within the county). *See City of Huntington Woods v City of Oak Park*, 311 Mich App 96, 99 (2015), vacated for reconsideration in light of expanded record in 500 Mich 885 (2016). That is, each of the cities in the county that are served by the third-class district court must contribute to the operations of the district court, even in those instances where the district court does not physically sit within the confines of that particular city. MCL 600.8621; *City of Huntington Woods*, 311 Mich App at 114. Only 6 counties contain district courts designated as third-class districts (Wayne, Oakland, Macomb, Washtenaw, Kent, and Ingham).

Back in 2014, the MDJA suggested that the Legislature implement a sunset provision for Section (b)(iii) and to instruct the governor to create a commission to study the problem and make recommendations. (09/11/14 Transcript, p. 50). Although both of these suggestions were adopted, they have not eliminated the constitutional infirmities that concerned the MDJA in 2014. The Legislature created the Trial Court Funding Commission (TCFC) in 2017, MCL 600.11103, just prior to the expiration of this sunset provision. The TCFC issued its report on September 6, 2019. (TCFC Report). The TCFC recommended a massive overhaul of the trial court funding system. And while its goals are laudable, that does not change the fact that defendants and trial court judges have to live under the statutory system that is currently in place – until the Legislature gets around to fixing the funding system, or until an appellate court (such as this Court or the United States Supreme Court) holds that the imposition of court costs for operational expenses violates the Constitution. Meanwhile, the Legislature extended the sunset provision once again until October 1, 2022. Then, while this case was before this Court – after much briefing and oral argument on the application – the Legislature another time extended the sunset provision until such that the current version of the statute remains in effect until May 1, 2024. MCL 769.1k(1)(b)(iii).

The concerns raised by the MDJA in 2014 have certainly come to pass. Members of the MDJA throughout the state have reported that their local funding units have pressured them to ensure that their courts are sources of revenue for both the court's operations and the county's

operation. (See, e.g., Judge Hoopes Letter, attached at **Tab E**; Judge Johnson Letter, attached at **Tab F**; Judge Boyd Letter; Judge Moiseev Affidavit, attached at **Tab G**; Judge Appel Letter, attached at **Tab H**; Anonymous District Court Judge Letter, attached at **Tab I**).

For example, the City of Southfield threatened former Judge Susan Moiseev of the 46th District Court with eviction, suggesting that the judge will have to hold her court in a less costly location due to her court's inability to generate more revenue. (Judge Moiseev Affidavit, p.1). Judge Shelia Johnson, serving on the 46th District Court and a former President of the MDJA, confirmed that the district court has been under continuous pressure from the City to act as its own source of funding. (Judge Johnson Letter, p.1). The City has even gone so far as to suggest that the judges should eliminate personnel if they could not generate enough revenue to cover the operational costs. (Judge Johnson Letter, p. 1). Many district court judges are told by their funding units that they have to cut hundreds of thousands of dollars from their budget if the court does not generate more revenue. (Judge Hoopes Letter, p. 1).

As Judge Maria Hoopes commented, the practice of forcing district courts to raise revenue to fund themselves is "insidious" and creates an "unconstitutional pressure to create revenue by charging higher fines and costs to the defendants we are constitutionally-required to impose a fair and unbiased sentence to." (Judge Hoopes Letter, p. 1). This is akin to the problem revealed by the U.S. Department of Justice in Ferguson, Missouri, where the "judges were under such incredible pressure to fund the courts that impossible-to-pay fines were imposed, bench warrants were issued, and the poor rather than the average citizen were constantly arrested. (Judge Hoopes Letter, citing 03/04/15 U.S. DOJ Report, pp. 42-54).

One anonymous district court judge recounted the pervasive negative impact MCL 769.1k(1)(b)(iii) has on the entire courthouse, including the district court staff members whose salaries are at least partially funded by the imposition of operational costs on convicted defendants. In fact, the staff in one district judge's courthouse, while well-intended, are hyper-focused on the need for the district judges to increase the costs imposed on defendants, knowing that their jobs could be at stake if the district court does not achieve the necessary funding. This problem was even more pronounced during a recent funding crisis when the district court faced a

budget shortfall, which including at least one employee being temporarily laid off. The connection between costs imposed on defendants and their job security certainly has not been lost on court employees, as evidenced by the numerous examples one anonymous judge shared in his letter. As that anonymous judge concluded, “the overemphasis on cash-collection within our courts placed the perceived integrity, if not the actual integrity, of the justice system at risk.” (Anonymous District Court Judge Letter).

District court judges are under constant pressure to explain why they have a decrease in revenues, and these judges have also attempted to explain to their funding units that the courts “cannot simply raise revenue, that it cannot process criminal cases that are not written by the police department, that the Court must operate regardless of income...” (Judge Johnson Letter, p. 1). It appears to many district court judges that the funding units are “oblivious to the fact that the Court’s role is simply to mete out justice and collect a fine where warranted, as opposed to simply raising capital to fund itself and/or to support City operations.” (Judge Johnson Letter, p.1).

Former Judge Thomas Boyd in Mason, Michigan recounted that his funding unit referred to the district court as the “cash cow of our local government” and that the funding unit expected the district courts to raise revenue through imposing fines and costs on criminal defendants. (Tom Boyd Affidavit, p. 1). Tom Boyd described the pressure placed on the district courts to fund themselves and their counties as “a corrupting presence in each and every criminal case.” (Tom Boyd Affidavit, p. 1). Judge Michelle Appel of the 45th District Court in Oak Park, Michigan, noted that it “has been the position of the City of Oak Park that our budget allocation is not predicated on the needs of the Court, but is tied exactly to the amount of revenue we generate through fines and costs.” (Judge Appel Letter, p. 1). In fact, the district court provides quarterly reviews and quarterly budget reductions to the City if the district court fails to meet their projected revenues. (Judge Appel Letter, p. 1).

Through MCL 769.1k(1)(b)(iii), municipalities throughout the state have another way to pressure district courts into raising their own revenue. Because the statute only affords the courts a portion of revenue if the court

convicts a defendant,<sup>1</sup> the court will have a direct incentive to find as many defendants guilty as possible. This will be the only way for judges to alleviate the relentless pressure they are under from their municipalities to raise more revenue. While the vast majority of judges throughout the state possess enough integrity to refrain from intentionally convicting a defendant of a crime merely to collect fees and costs, the constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge. This creates the "possible temptation" of raising more revenue through increasing the number of criminal convictions and thus infringes upon defendants' due process rights guaranteed to them under the Fourteenth Amendment, rendering MCL 769.1k(1)(b)(iii) unconstitutional.

### CONCLUSION AND RELIEF REQUESTED

MCL 769.1k(1)(b)(iii) is constitutionally infirm. It places judges – and especially district court judges whose courts rely more heavily on the imposition of courts costs than do the circuit courts – in an untenable and unethical position. It forces the judges to have a financial stake in the cases on their docket. It forces the trial courts in this State to raise revenue for the operation of their courts and their counties by imposing costs and fines on convicted defendants. It forces district court judges to fund their courts' operations to ensure they can keep their jobs on Election Day.

In enacting MCL 769.1k(1)(b)(iii), the Legislature has created an inherent conflict of interest. The statute violates a defendant's due process under the Fourteenth Amendment of the United States Constitution, because even the most honorable judges will be pressured to convict and impose fines and costs to ensure the operation of their courts. The letters and statements from various district court judges around the State highlight the constitutional problem the Legislature has created when it enacted MCL 769.1k(1)(b)(iii). Because the statute places the judges in the position of

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<sup>1</sup> See Judge Hogg's 2011 chart for a partial view of where the revenues generated by district courts assessment of fines and costs are being spent. Hogg, Hon. David A., "District Court Tax Farming: Are Judges the New Publicans?" Mich B J p. 31 (Feb 2011) (attached at **Tab J**).



deciding guilt or innocence, and then further grants them the discretion to determine the amount of costs to impose for the general operation of the courts, the statute must be stricken as unconstitutional.

Amicus Curiae MDJA respectfully requests that this Court reverse the decision of the Court of Appeals and hold that MCL769.1k(1)(b)(iii) is unconstitutional.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this document complies with the formatting rules in MCR 7.212(B). I certify that this document contains 6,231 countable words. The document is set in Georgia Pro, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

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