STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Douglas B. Shapiro, Jane M. Beckering, and David H. Sawyer

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

TRAVIS MICHAEL JOHNSON,

Defendant-Appellant.

Supreme Court No. 163073

Court of Appeals No. 351308

Alpena Circuit Court Nos. 17-7577-FH
17-7941-FH

The Michigan Senate and the Michigan House of Representatives' Amicus Brief

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STATEMENT OF THE QUESTION INVOLVED

The Michigan House of Representatives and the Michigan Senate submit this amicus brief addressing the following question from this Court's July 22, 2022 orders granting leave to appeal in *People v Edwards* (No. 163942) and *People v Johnson* (No. 163073):

> [W]hether 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 Legislature answers: No.

INTRODUCTION

Justice Antonin Scalia once warned that separation of powers cases often come "clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis." *Morrison v Olson*, 487 US 654, 699 (1988) (dissenting).

As far as separation of powers cases go, these ones came, innocuously enough, as sheep. Travis Johnson and Kelwin Edwards, two criminal defendants, challenged the assessment of court costs under MCL 769.1k(1)(b)(*iii*) because it violated their due process right to a neutral magistrate. They also alleged that it violated the separation of powers for the same reason: because it "interfered with the judiciary's obligation to maintain impartiality."

But after oral argument on Johnson's application, what was once merely a repackaged due process argument became a different separation of powers question altogether: whether the Legislature may assign to courts the task of imposing court costs used to fund judicial operations. This question—which this Court raised on its own initiative, and which bears no resemblance to the defendants' original grievance—poses far greater consequences for the structure of Michigan's constitutional framework, potentially depriving the political branches of the full range of historically available policy options for resolving a complex governance issue.

Concerned that these cases, now clad in sleep's clothing, will distort Michigan's separation of powers doctrine,[1] the Legislature files this amicus brief reiterating its views on the proper approach to separation of powers questions.

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[1] The Legislature also shares the Attorney General's concern about this Court addressing this newfound separation of powers question. (AG Brief, p 5.) Interbranch comity counsels against unnecessarily deciding consequential and potentially disruptive questions of structural constitutional powers, especially when another claim properly raised in the case would provide the same relief.

Under Michigan's doctrine of separation of powers, each branch enjoys a sphere of constitutionally conferred power and the institutional interest to fend off encroachments from the other two branches. But this system of separated powers does not demand, or even desire, perfect exclusivity. Rather, it features what the U.S. Supreme Court describes as a "twilight area" between each branch where their powers and responsibilities may overlap. In this setting, separation of powers questions cannot be resolved by resort to labels and doctrinaire analysis of the challenged function. In the case of a judicially assigned task, courts must look to "precedent and practice" and "analogous . . . functions that . . . judges perform in other contexts" to determine whether the task is "attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Mistretta v United States*, 488 US 361, 390–391 (1989); *Morrison v Olson*, 487 US 654, 680–681 (1988).

Under this nuanced approach, § 1k(1)(b)(*iii*) does not assign to the judicial branch "tasks that are more properly accomplished by the Legislature." *Mistretta*, 488 US at 383 (1989) (cleaned up), quoting *Morrison* , 487 US at 680–681. As long as Michigan has been a state, the Legislature has assigned to trial judges the ability to assess costs and fees that help fund their courts' operations. Trial courts have exercised that function when performing the core judicial role of passing judgment in criminal matters, something this Court has recognized on multiple occasions. *In re Johnson*, 104 Mich 343, 344 (1895); *People v Wallace*, 245 Mich 310, 314 (1929). Given this longstanding "precedent and practice," the authority to assess § 1k(1)(b)(*iii*) costs is "attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Mistretta*, 488 US at 390–391. For this reason, courts across the country reject separation-of-powers challenges to court-cost statutes that help fund the administration of justice. This Court should, too.

ARGUMENT

I. The Legislature may assign to courts the task of imposing court costs used to fund judicial operations.

A. Michigan endorses a pragmatic, flexible approach to separation of powers.

The Court has before it two drastically different conceptions of separation of powers. Defendants and their supporting amici advocate a rigid, impermeable theory of separated powers. (See Johnson Br., p 10 ("Michigan's Constitution explicitly requires that the powers granted to each branch of government be *strictly separated*.") (emphasis added); see also DJC Amicus Br., pp 37–38.) Under this siloed theory of separation of powers, the judicial department can exercise no portion of the revenue-raising function—that task, they say, is "more properly accomplished by the Legislature." (See Edwards Br., pp 12–15; Johnson Br, pp 10–13.)

But Michigan's separation of powers doctrine is not so inflexible. Our constitution divides the "powers of government" into three branches—legislative, executive, and judicial—and instructs 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. This Clause separates the centers of power to prevent all of it from falling into the same hands. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141 (2006).

But divided power does not mean *islands* of power. Michigan's separation of powers doctrine does not require that "the branches must be kept wholly separate," *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 752 (1982), or that there be "no overlap of responsibilities and powers," *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 296 (1998). Instead, Michigan follows James Madison's view of separation of powers: the same hands that hold the "*whole* power" of one department cannot exercise the "*whole* power" of another. *Soap & Detergent Ass'n*, 415 Mich at 752, quoting The Federalist No. 47 (J. Madison).

This nuanced approach to separation of powers recognizes that a healthy government of divided parts must have play in the joints. Experience has taught that "[i]t is simply impossible for a judge to do nothing but judge[, or for] a legislator to do nothing but legislate[.]" *Judges for Third Judicial Circuit v Wayne Co*, 383 Mich 10, 20–21 (1969) *(Wayne County I)*, superseded by 386 Mich 1 (1971) (On Rehearing). In practice, this means the "three great powers of government necessarily include[ ] some ancillary inherent capacity to do things by which are normally done by the other departments." *Id.* at 21. Put another way, each branch has "incidental" powers that can be assigned by another branch or invoked as part of its inherent power. See, e.g., *Anway v Grand Rapids Ry Co*, 211 Mich 592, 626 (1920) ("All powers, however, even though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions, are inherent in the courts.").

B. A pragmatic, flexible separation of powers doctrine allows the judiciary to perform nonjudicial tasks that are appropriate to the central mission of the judiciary.

These well-settled principles inform whether a task assigned to the judiciary is one "more properly accomplished by the Legislature." The operative question is not whether a function is "nonjudicial" or even legislative or administrative in nature, as that would necessarily preclude judges from exercising *any* non-adjudicatory task—something we know is not true under Michigan's pragmatic approach to separated powers. *Wayne County I*, 383 Mich at 20–21; *Anway*, 211 Mich at 626. Instead, the inquiry looks beyond simplistic labels and examines the nature of the assigned task, its relationship to core judicial functions, and the historical practice of the branches.

The two cases identified in this Court's order granting leave—*Mistretta v United States*, 488 US 361 (1989), and *Morrison v Olson*, 487 US 654 (1988)—illustrate the analysis in action.

Mistretta involved Congress' effort to solve a problem as "seemingly intractable" as trial court funding in Michigan: excessive disparity in criminal sentencing. *Mistretta*, 488 US at 384. To that end, Congress created the U.S. Sentencing Commission, housed it within the judicial

branch, and charged it with promulgating sentencing guidelines. *Id*. at 369.

In addressing the separation-of-powers concerns over this power allocation, *Mistretta* endorsed a "flexible understanding" of the separation of powers, no different than the description of Michigan's separation of powers above. See *Id.* at 381 (endorsing James Madison's view in The Federalist No. 47). That understanding envisioned not a "hermetic division" of power, but a "carefully crafted system of checked and balanced power" meant to prevent the allocation to a single branch "powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Id*. at 381–382. In practice, this meant ensuring, among other things,[2] that the judiciary was not "assigned or allowed 'tasks that are more properly accomplished by [other] branches[.]" *Id.* at 383, quoting *Morrison*, 487 US, at 680-681.

At the outset, *Mistretta* acknowledged the "general principle" that judges ought not perform "executive or administrative duties of a nonjudicial nature." *Id.* at 385. But in a system of separated powers that "contemplates the integration of dispersed powers into a workable Government," that general principle had "significant exceptions." *Id*. at 386. There is a "twilight area" in which the activities of the branches merge and in which each branch may "exercise, in some respects, functions in their nature executive, legislative and judicial." *Id*.

That constitutional "twilight area" included nonadjudicatory functions assigned to the judiciary that "do not trench upon the

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[2] The U.S. Supreme Court identified two other, distinct separation of powers concerns: (1) whether a branch is "prevent[ed] . . . from accomplishing its constitutionally assigned functions" and (2) whether "the institutional integrity of the Judicial Branch" is "impermissibly threaten[ed]." *Mistretta*, 488 US at 383. Defendants' separation-of-powers argument at the application stage relied exclusively on the first concern, but this Court has not directed further briefing on this argument, presumably because it overlaps with their primary complaint about § 1k(1)(b)(*iii*): that it deprives them of a neutral arbiter in violation of due process. (But see Edwards Br., pp 16–17, 21 (raising other separation of powers arguments).)

prerogatives of another branch and are appropriate to the central mission of the judiciary." *Id.* at 388. Judicial rulemaking, the power assigned to the Sentencing Commission, fell within that "twilight area" because it was neither "inherently nonjudicial" nor exclusively an executive function, as illustrated by the several instances in which the Court had approved of judicial rulemaking. *Id.* at 386–387. "In light of this precedent and practice," the Court found there was "no separation of powers impediment to the placement of the Sentencing Commission within the Judicial Branch." *Id.* at 390. Not only was sentencing a shared responsibility among the branches, but judges historically played a key role in carrying out that diffused power. *Id.* Thus, the allocated power was "clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Id.* at 391.

Mistretta's analysis drew on the Court's decision the year before in *Morrison*. There, Congress allocated to the judicial branch "various powers and duties" relating to an independent counsel appointed to investigate high-level government officials.[3] *Morrison*, 487 US at 680. Like in *Mistretta*, the Court acknowledged that, "[a]s a general rule," Congress may not assign to judges "executive or administrative duties of a nonjudicial nature." *Id.* at 677. That general rule was intended to "ensur[e] that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Id.* at 680–681. Judged by this metric, the functions assigned in *Morrison* did not "trespass upon the authority of the Executive Branch" because they were "not inherently 'Executive'; indeed

[3] These duties included "granting extensions for the Attorney General's preliminary investigation, receiving the report of the Attorney General at the conclusion of his preliminary investigation, referring matters to the counsel upon request, receiving reports from the counsel regarding expenses incurred, receiving a report from the Attorney General following the removal of an independent counsel, granting attorney's fees upon request to individuals who were investigated but not indicted by an independent counsel, receiving a final report from the counsel, deciding whether to release the counsel's final report to Congress or the public and determining whether any protective orders should be issued, and terminating an independent counsel when his or her task is completed[.]" *Morrison*, 487 US at 680 (statutory citations omitted).

they [were] directly analogous to functions that federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before a grand jury, deciding to extend a grand jury investigation, or awarding attorney's fees[.]" *Id.* at 681 (citations omitted); see also *id*. at 681 n 20 (listing other comparable functions performed by judges outside adversarial proceedings); cf. *supra* n 3.

* * *

To ask whether a task assigned to the judiciary is one "more properly accomplished by the Legislature," then, is to ask whether it is "inherently nonjudicial" or a function that belongs exclusively to another branch. That inquiry does not judge the wisdom, or even fairness, of the Legislature's policy decision—that assessment belongs to the Legislature. Instead, heeding *Mistretta*'s admonition of judicial restraint,[4] this Court must look to "precedent and practice" and "analogous . . . functions that . . . judges perform in other contexts" to determine whether the allocated function is "attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Mistretta*, 488 US at 390–391; *Morrison*, 487 US at 681.

C. The Legislature has historically assigned to trial courts the task of imposing costs to help fund court operations.

In Michigan, the power to raise funds for the expenses of state government, including the operation of the judiciary, is a legislative power. Const 1963, art 9, § 1. But the Legislature has never worked alone in carrying out this responsibility. It has historically relied on counties to fund trial court operations. See *Grand Traverse Co v State*, 450 Mich 457, 474 (1995) ("An unbroken line of cases stretching back 130 years recognizes the practice of imposing the costs of operating the courts on local funding units."). And to help counties, the Legislature

[4] *Mistretta* emphasized that when a court is asked to invalidate a duly enacted law, "particularly [one] that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." 488 US at 384, quoting *Bowsher v Synar,* 478 US 714, 736 (1986).

has assigned to courts the authority to impose costs and fees as an ancillary task to their core judicial functions.

In the early years of statehood, for instance, the Legislature authorized trial courts to assess fees for certain judicial services, chargeable to the county and taxable as a cost of prosecution.[5] The Legislature also authorized trial courts to impose the costs of prosecution, payable to the county.[6]

Since then, the Legislature has continued to assign to courts the responsibility of imposing costs as part of their judicial functions.[7] Today, the Legislature continues to rely on counties to fund trial court operations. See MCL 600.591. And it calls on the judicial branch to exercise its incidental power to impose court costs used to fund trial court operations.

This brief historical review shows that Michigan's system of separated powers has always featured a judicial system funded in part

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[5] See 1846 RS, ch 92, § 58 ("The compensation of the county judge shall be such fees for his services as shall be provided by law, and shall be taxed as costs of suit."); 1846 RS, ch 169, § 2 (fee schedule); see also OAG, 1952–1954, No. 1,789, p 349 (June 15, 1954) ("Fees of justices of the peace, of course, are taxed as items of cost of prosecution[.]").

[6] See, e.g., 1846 RS, ch 168, § 2 (for a conviction "punishable at the discretion of the court, . . . the court may award against such offender a conditional sentence, and order him to pay a fine, *with or without the costs of prosecution*" (emphasis added)); 1846 RS, ch 94, § 17 (for an acquittal, "if the court . . . certif[ies] . . . that the complaint was willful and malicious, and without probable cause, *it shall be the duty of the complainant to pay all costs that shall have accrued to the court*" (emphasis added)); 1846 RS, ch 169, § 11 (authorizing counties to recover costs of prosecution against criminal defendants).

[7] See, e.g., 1897 CL 36.16 (authorizing justices of the peace to "inflict such punishment, either by fine or imprisonment or both, as the nature of the case may require, *together with such costs of prosecution as the justice of the peace shall order*[.]" (emphasis added)); 1929 CL 270.14 (authorizing Police Court of Grand Rapids to render "judgment for costs accruing in the case against the defendant"); 1929 CL 271.23 (authorizing Justice of the Peace in Saginaw to render "judgment for costs accruing in the case" against the defendant).

by court costs.[8] And for more than a century, this Court has explicitly approved assigning the task of imposing those costs to judicial officers. In *In re Johnson*, this Court rejected the contention that court costs in a criminal proceeding "should have been taxed by the clerk[.]" 104 Mich 343, 344 (1895). "The common practice–in criminal cases the better practice," this Court said, "is for *the court* to determine the amount of costs which the respondent will be required to pay, and state the amount of costs in the judgment." *Id.* (emphasis added). This Court reaffirmed that holding years later in *People v Wallace*, 245 Mich 310, 314 (1929) ("It is not necessary that these costs shall be taxed by the clerk as in civil cases. The better practice is for the *court* to determine the amount and state it in the judgment." (emphasis added)).

The longevity of court costs in our legal system—and longstanding approval of them by Michigan courts—shows how closely connected they are to the exercise of core judicial functions. Section 1k(1)(b)(*iii*) costs, which are used to fund trial court operations, see MCL 600.571(d), (e); MCL 774.26; MCL 600.591,[9] share the same key features as these historical examples.[10] Section 1k(1)(b)(*iii*) falls neatly within the

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[8] None of the distinctions that Edwards draws between these historical examples and § 1k(1)(b)(*iii*) addresses the commonality that matters: assessment by a judge for the purpose of generating revenue to help fund court services. Edwards' suggestion that "[c]ost collection in criminal cases has never been a vehicle to fund the day-to-day operations of the courts," begs the question: where do these costs go, then? (Edwards Br., p 21.) To the local funding unit for use in funding trial court operations, of course.

[9] In its previous amicus brief, the Legislature clarified an important misunderstanding about the destination of § 1k(1)(b)(*iii*) costs, explaining that they are *not* funneled to the general fund or state treasury. (Michigan Legislature Amicus Br., p. 13.)

[10] See MCL 769.3 (for a conviction "punishable at the discretion of the court, . . . the court may award against such offender a conditional sentence, and order him to pay a fine, *with or without the costs of prosecution*[.]" (emphasis added)); 1897 CL 334.2 (same); 1929 CL 287.3 (same). See also MCL 774.23 (for an acquittal, "if the court . . . certif[ies] . . . that the complaint was wilful and malicious, and without probable cause, *it shall be the duty of the complainant to pay all costs that shall have accrued to the court* . . . ."); 1897 CL 36.17 (same); 1929 CL 287.23

historical "precedent and practice" of allowing trial courts to assess court costs for the purpose of funding court operations. It is, as this Court put it, the "better practice." *In re Johnson*, 104 Mich at 344; *Wallace*, 245 Mich at 314; cf. *Mistretta*, 488 US at 390 (citing the Court's "precedent and practice" of approving judicial rulemaking). Just as the assignment of sentencing policy-making authority in *Mistretta* fell within the "twilight area" that had long permitted judicial rulemaking, assessing court costs, especially as part of passing judgment in a criminal case, is "attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Mistretta*, 488 US at 391. Simply put, imposing court costs is, and always has been, a judicial task.

D. Courts do not become "tax gathers" in violation of separation of powers by imposing costs that fund court operations.

Defendant insists that § 1k(1)(b)(*iii*) costs are different because they are a "tax." Courts are not tax gatherers, the argument goes, so if § 1k(1)(b)(*iii*) costs are a tax, then it stands to reason that courts may not assess them.

But merely labeling something a "tax" does not answer whether the Legislature cannot assign to the judiciary the task of imposing it. The label here comes from *People v Cameron*, which held that § 1k(1)(b)(*iii*) costs are a "tax" for purposes of the Distinct Statement Clause because their purpose and effect is to raise revenue. 319 Mich App 215, 223 (2017). But *Cameron* did not ask *where* that revenue goes. For good reason: the identity of the recipient is irrelevant under the "tax" analysis. See *Airlines Parking, Inc v Wayne Co*, 452 Mich 527, 544 (1996) (holding that the levying entity, rather than the recipient of the tax proceeds, determines whether something is state tax). But that fact *is* relevant—dispositive, even—for the separation of powers analysis, as shown above. Uncritically importing *Cameron*'s tax conclusion into the separation of powers analysis, as defendants do, overlooks an important

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(same). See also MCL 774.22 (authorizing justices of the peace to "inflict such punishment, either by fine or imprisonment or both, as the nature of the case may require, *together with such costs of prosecution as the justice of the peace shall order*[.]" (emphasis added)); 1929 CL 287.22 (same).

nuance in *Mistretta*'s analysis. Cf. *Morrison*, 487 US at 699 (Scalia, J., dissenting) (calling for "careful and perceptive analysis" in separation of powers cases because they often come "clad, so to speak, in sheep's clothing").

Defendants' position also enjoys no support from the consensus of courts across the country that have addressed this issue. Texas courts, for example, recognize that courts do *not* become "tax gatherers in violation of the separation of powers clause" if "the statute under which court costs are assessed (or an interconnected statute)" allocates the funds "for legitimate criminal justice purposes." *Peraza v State*, 467 SW3d 508, 517–518 (Tex Crim App, 2015); see also *Salinas v State*, 523 SW3d 103, 106–107 (Tex Crim App, 2017).

Oklahoma courts agree. In *State v Ballard*, the Oklahoma Court of Criminal Appeals (the state's high court for criminal appeals) rejected a separation-of-powers challenge to a discretionary assessment used to fund drug abuse education and prevention services because it was "clearly incidental to the primary function of the trial court sitting in a criminal matter." 868 P2d 738, 742 (Okla Crim App, 1994). The same day, the same court upheld a separate set of assessments against a separation-of-powers challenge because they were "reasonably related to the costs of administering the criminal justice system and are not simply an executive branch 'tax.'" *State v Claborn*, 870 P2d 169, 171 (Okla Crim App, 1994).

The Court of Appeals of North Carolina followed Texas and Oklahoma's approach when it addressed a separation-of-powers challenge to a criminal restitution statute that generated funding for the state's drug analysis program. In *State v Johnson*, the court rejected the challenge because the assessment was " 'clearly incidental to the primary function of the trial court sitting in a criminal matter' . . . [and] 'reasonably related to the costs of administering the criminal justice system.' " 478 SE2d 16, 24 (NC Ct App, 1996), quoting *Ballard,* 868 P2d at 742, and *Claborn,* 870 P2d at 171; see also *id*. at 23 (noting that "[o]ther states have also examined separation of powers arguments regarding costs and rejected them," citing *State v Lane,* 649 A2d 1112 (Me, 1994); *State v Smith,* 576 P2d 533 (Ariz App, 1978); *State v Young,* 238 So 2d 589 (Fla 1970).

"Following the trend," the Supreme Court of Louisiana in *Safety Net for Abused Persons v Segura* held that courts may impose court fees "where they fund functions of the judicial system[.]" 692 So 2d 1038, 1042 (La, 1997), citing *Ali v Danaher*, 265 NE2d 103 (Ill, 1970), and *Wenger v Finley*, 541 NE2d 1220 (Ill App Ct, 1989); see also *Crocker v Finley*, 459 NE2d 1346, 1355 (Ill, 1984) ("[W]e now conclude that court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts.").

This Court should also "follow[] the trend" of courts across the country that have rejected separation of powers challenges when the court-generated revenue goes to fund court administration—precisely what happens with § 1k(1)(b)(*iii*) costs. These courts deal in the same general separation of powers doctrine, including the same concept of "incidental powers" that is a feature of Michigan's separation of powers doctrine. See, e.g., *Ballard*, 868 P2d at 742 (upholding a cost because it was "clearly incidental to the primary function of the trial court sitting in a criminal matter."); *Salinas*, 523 SW3d at 106–107 ("One way [Texas'] Separation of Powers provision is violated is when one branch of government assumes or is delegated a power 'more properly attached' to another branch.").

Drawing the line at court administration also dovetails with Michigan's traditional practice of permitting courts to impose costs that go to local funding units. And it provides an intelligible principle for distinguishing financial assessments that are "incidental" to a court's core functions from those that are not.

Not only do these decisions provide a sound rule of decision that is consistent with *Mistretta*, *Morrison*, and Michigan's separation of powers doctrine, they also expose the critical flaw in defendants' argument: labeling something a "tax" because it generates revenue may suffice for the Distinct Statement Clause, but it is not contextualized enough for the pragmatic, flexible separation of powers analysis. Under that analysis, if a law raises revenue *for the purpose of funding functions of the judicial system*, assigning that function to the judiciary poses no separation of powers concerns.

Ignoring the consensus of courts and instead accepting the defendants' view would have staggering consequences for the court's—

and the state's—budget. If the judiciary could no longer rely on court-generated money to fund court operations, local funding units will have to look elsewhere for the missing revenue or—most likely—reexamine their current funding levels. That, in turn, would spawn a new wave of court funding disputes, reigniting interbranch tensions that the current funding policy helped quell. See, e.g., *46th Circuit Trial Court v Crawford Co*, 476 Mich 131 (2006); *Grand Traverse Co v State*, 450 Mich 457 (1995).

Importantly, § 1k(1)(b)(*iii*) is not the only statute that asks trial courts to collect court-generated revenue to fund trial court operations. Indeed, it was *this Court's* idea to use restricted funds from other court-generated revenue to help fund court operations: "[W]e proposed," the Chief Justice explained shortly after the Court's proposal became law, "and strongly supported, legislation that created several new categories of 'restricted funds': the justice system fund, the judicial technology improvement fund, the drug treatment court fund, and the civil filing fee fund." Maura D. Corrigan, *Finding Revenue in Hard Times: The Michigan Judiciary's Approach*, Judges' J 24, 25 (2004). This Court lobbied for restricted-use funds from court-generated revenue to ensure that court funding, which at the time was suffering drastic cuts from severe statewide budget deficits, "would not be affected if [a] tax revenue shortfall forced further reductions to general fund appropriations[.]" *Id.* In other words, this Court understood that court-generated revenue made good policy sense precisely because it was incidental to the exercise of the court's every-day responsibilities and thus insulated from outside influences. If this Court adopts defendants' view of separation of powers, it will foreclose that and many other policy choices otherwise available to the political branches trying to resolve the "seemingly intractable" dilemma of trial court funding. *Mistretta*, 488 US at 384.

Finally, *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885)—the case introduced by an amicus that appears to have prompted the Court's supplemental briefing order—does not support a different result.

In that case, the trial court was exercising judicial review of a tax levy. If the court found the tax levy unlawful, the governing statute authorized it to carry out the taxing authority's duties by conducting a new land survey and levying a new tax. *Id.* at 366. Those other actions

were not incidental or ancillary to the court's exercise of judicial review. The court could have simply declared the tax levy invalid and left it to the taxing authority to conduct another survey and levy a tax consistent with its decision. Instead, the statute lodged "the whole power of one department" (surveying and levying the tax) in "the same hands which possess the whole power of another department" (judicial review of the levy). *Soap and Detergent Ass'n*, 415 Mich at 752. *Houseman*, in other words, fits neatly within Michigan's general separation of powers framework described above.

Here, courts are not being asked to re-do another branch's work as part of their judicial review, as was true in *Houseman*. The Legislature exhausted its legislative power by enacting § 1k(1)(b)(*iii*) and authorizing courts "to determine within a fixed limitation" the amount of costs to impose in each case. *Huron-Clinton Metro Auth v Boards of Sup'rs of Wayne, Washtenaw, Livingston, Oakland & Macomb Cos*, 300 Mich 1, 18 (1942).

Moreover, that task is incidental to the court's core power to preside over criminal proceedings culminating in criminal punishment.[11] Judges are not creating new public policy by administering § 1k(1)(b)(*iii*). They are exercising limited discretionary authority within the appropriate parameters defined by law. And unlike the statute in *Houseman*, § 1k(1)(b)(*iii*) enjoys a long pedigree of historical support—imposing court costs is, and always has been, a judicial task.

[11] In this respect, this case is more like *Union Tr Co v Durfee*, where this Court found "no force" in a separation-of-powers challenge to a statute that assigned to probate courts the responsibility of imposing an inheritance tax on estates they were administering. 125 Mich 487, 494 (1901). That task, this Court said, was "necessarily incident to the settlement of estates, and may be performed by the judge of probate." *Id*. If nothing else, *Durfee* shows that there is nothing inherently wrong with courts imposing a "tax" as part of their constitutionally prescribed duties.

CONCLUSION AND RELIEF REQUESTED

Like the issue of sentencing disparities in *Mistretta*, trial court funding is a notoriously complicated public-policy issue that has bedeviled all three branches for years. See, e.g., Susan Ekstrom, *Court Organization and Funding in Michigan: An Issue Paper* (House Leg Analysis Section, July 1996) (detailing the history of court funding policies). The Legislature is committed to working with its constitutional counterparts, as it has in the past, to find an enduring policy solution to this perennial problem. But eliminating § 1k(1)(b)(*iii*) using an unduly restrictive approach to separation of powers will hinder that effort by narrowing the range of policy options at the branches' disposal, causing profound consequences for trial courts, local units of government, and beyond.

The Legislature urges this Court to refrain from reaching the newfound separation of powers question or, if it must, hold that MCL 769.1k(1)(b)(*iii*) does not violate the separation of powers.

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CERTIFICATE OF COMPLIANCE

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