State of Michigan
In the Supreme Court

The People of the State of Michigan	
Plaintiff-Appellee,	MSC No. 163073
v.	COA No. 351308
Travis Michael Johnson	Alpena County Circuit Court
Defendant-Appellant.	Case No. 15-061542 FH

Defendant-Appellant Travis Michael Johnson's Application for Leave to Appeal

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Table of Contents

Index of Authorities

Page(s)

Cases

Statutes

Public Acts

Other Authorities

Statement of the Questions Presented

First Question

Does MCL 769.1k(1)(b)(iii) violate the separation of powers requirement within Michigan's Constitution by turning judges into tax assessors? Is assessing taxes a task more properly accomplished by the Legislature?

Mr. Johnson answers: Yes.

The Court of Appeals gave no answer.

The trial court gave no answer.

Second Question

Does MCL 769.1k(1)(b)(iii) violate due process by creating a potential for bias or an objective risk of actial bias at sentencing?

Mr. Johnson answers: Yes.

The Court of Appeals gave no answer.

The trial court gave no answer.

Third Question

Should this Court sever the statute and order the circuit court to reimburse Mr. Johnson?

Mr. Johnson answers: Yes.

The Court of Appeals gave no answer.

The trial court gave no answer.

Statement of Facts

On May 13, 2022, this Court scheduled oral argument on Travis Johnson's application for leave to appeal the April 8, 2021 judgment of the Court of Appeals, which upheld the constitutional validity of MCL 769.1k(1)(b)(iii). This Court also directed the parties to address: "whether MCL 769.1k(1)(b)(iii) deprives criminal defendants of their right to appear before an impartial judge, see *Tumey v Ohio*, 273 US 510, 532 (1927), or otherwise prevents the judicial branch from 'accomplishing its constitutionally assigned functions,' see *Nixon v Administrator of General Services*, 433 US 425, 443 (1977)."

Following oral argument, on May 13, 2022, this Court issued an order directing the parties to address:

(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],'" *Mistretta v United States*, 488 US 361, 383 (1989), quoting *Morrison v Olson*, 487 US 654, 680-681 (1988); see also *Houseman v Kent Circuit Judge*, 58 Mich 364, 367 (1885);

(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), quoting *Mayberry v Pennsylvania*, 400 US 455, 465-466 (1971); see also, e.g., *Williams v Pennsylvania*, 579 US 1, 8-9 (2016); and

(3) should we find MCL 769.1k(1)(b)(iii) facially unconstitutional under either theory, what remedy follows.

Both parties submitted supplemental briefs addressing these questions on June 6, 2022. On July 22, 2022, this Court granted leave to appeal in Mr. Johnson's case and directed the parties to address the same questions raised in the May 13, 2022 order. The same day, this Court also granted leave in *People v Edwards* (Docket No. 163942) on the same

three questions and directed the Clerk to schedule the oral arguments for *Johnson* and *Edwards* for the same future session.[1]

Arguments

I. MCL 769.1k(1)(b)(iii) violates separation of powers by turning judges into tax assessors. Assessing taxes is a task more properly accomplished by the Legislature.

MCL 769.1k(1)(b)(iii) assigns judges the power to assess a tax—one that raises revenue for the county treasury and, ultimately, the local courts. *People v Cameron*, 319 Mich App 215, 228 (2017); *People v Konopka (After Remand)*, 309 Mich App 345, 369 (2015). Enlisting judges to assess taxes violates separation of powers. The taxing power belongs to the Legislature because tax revenue funds public services for the public welfare. The assessment of taxes to fund state government is a task that the founders of our Constitutional explicitly assigned to the Legislature. Const 1963, art 9, § 1. See also Const 1908, art 10, § 2. Accordingly, assessing taxes is a task "more properly accomplished by [the Legislature]." *Mistretta v United States*, 488 US 361, 383 (1989).

A. MCL 769.1k(1)(b)(iii) tasks county judges with raising tax revenue for the county treasury.

MCL 769.1k(1)(b)(*iii*) levies a tax. *Cameron*, 319 Mich App at 229. A tax raises revenue to benefit the greater good by way of an "exaction[] or involuntary contribution[] of money the collection of which is sanctioned by law and enforceable by the courts." *Dukesherer Farms, Inc v Director of the Department of Agriculture (After Remand)*, 405 Mich 1, 15 (1979); see also *Cameron*, 319 Mich App at 222 (collecting cases). "Undeniably, 'MCL 769.1k(1)(b)(*iii*) is a revenue-generating statute.' " *People v Johnson*, 336 Mich App 688, 699 (2021), quoting *Cameron*, 319 Mich App at 224; see also *Konopka (On Remand)*, 309 Mich App at 370. The

[1] The legal argument in this brief is substantially similar to the argument in the brief on appeal in *People v Edwards* (Docket No. 163942). The questions presented by this Court are the same.

revenue raised ends up in the county treasury, and the county allocates the money to fund the trial courts. MCL 600.571(d); MCL 774.26; MCL 600.591; see also *Cameron*, 319 Mich at 223; *Konopka (On Remand), supra* at 370. The trial courts operate within the penal system and primarily benefit the greater public. *Cameron*, 319 Mich at 227, quoting *State v Medeiros*, 89 Hawai'i 361, 370 (1999).

The statutory scheme empowers judges to assess the tax at sentencing. MCL 769.1k(1), (1)(b). Legal and lay dictionaries all give "assess" a similar meaning. In legalese, to assess means (1) "to calculate the amount or rate of (a tax, fine, etc.)" or (2) "to impose (a tax, fine, etc.)." Lay dictionaries point in the same direction: to assess is "to impose a tax or other charge on." *Random House Webster's College Dictionary* (1997).

MCL 769.1k(1)(b)(*iii*)'s plain language gives courts the discretion over who to tax and how much tax to assess at every criminal sentencing. To come up with a number, judges may consider the costs "reasonably related to the actual costs incurred by the trial court," but are not obligated to "separately calculat[e] those costs involved in the particular case." MCL 769.1k(1)(b)(*iii*). Judges may factor "[s]alaries and benefits for relevant court personnel[,]" any "[g]oods and services necessary for the operation of the court[,]" and "necessary expenses" for court facility upkeep when deciding the amount to assess in each case. MCL 769.1k(1)(b)(iii)(A)-(C).

Cameron offers an example of a judicial tax assessment. In Cameron, the Court of Appeals addressed a county-wide flat court cost tax. The judges in Washtenaw County Circuit Court assessed a flat $1,611 "per felony case." *Cameron*, 319 Mich App at 219. To reach that number, the circuit court determined the "ten year average annual total budget" for the circuit court and then multiplied that number by the "average annual percentage" of felony filings to arrive at the "average annual budget" for the court's felony prosecutions. *Id*. Dividing the average annual budget by the average number of felony filings over a 6-year period resulted in a rough average cost for each felony prosecution. *Id.* After some subtraction, the circuit court totaled a bottom-line figure of $1,611. *Id.*

The Washtenaw Circuit Court assessed a felony-prosecution tax only on those convicted of felonies. The court raised revenue off convictions based on the circuit court's overall budgetary concerns, *not* to reimburse the court for the actual or even estimated cost of prosecuting the defendant being sentenced and assessed the tax. Whether a flat rate for all defendants of all income levels and all levels of culpability is the most appropriate and equitable manner of funding a local court is a policy determination that should be made by a Legislature, rather than by fiat of a chief judge or a nonbinding agreement by all judges in the county.

B. Our Constitution prevents one branch of government from exercising the powers of another.

Separation of powers prevents the "encroachment and aggrandizement" of power in one branch of government. *Mistretta*, 488 US at 382, 419-420 (cleaned up). Keeping any one branch from accumulating too much power staves off tyranny and safeguards individual liberty. See, e.g., Madison, the Federalist No 47 ("there is no liberty. . . if the power of judging be not separated from the legislative and executive powers").

Michigan's Constitution explicitly requires that the powers granted to each branch of government be strictly separated: "[t]he powers of government are divided into three branches: legislative, executive and judicial." Const 1963, art 3, § 2. The Legislature exercises the "legislative power," the Governor exercises the "executive power," and the judiciary is vested with the "judicial power." Const 1963, art 4, § 1; Const 1963, art 5, § 1; Const 1963, art 6, § 1. "No 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 requirement has long been interwoven into Michigan's constitutional fabric. Every one of our Constitutions has included a similar provision. See Const 1908, art 4, § 1, 2; Const 1850, art 3, § 1, 2; Const 1835, art 3, § 1.

Our Constitution does not define "judicial power." But in his seminal 19th Century treatise on constitutional law, Professor Thomas Cooley termed it the power "to decide private disputes between or concerning persons[.]" 1 Cooley, Constitutional Limitations (2d ed), pp 92. In deciding private disputes, the judiciary exercises its well-established

responsibility: "to say what the law *is*." *Makowski v Governor*, 495 Mich 465, 471 (2014), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

That the judiciary has power to say what the law is in *private* disputes is key because the Constitution gives to the Legislature the power to "regulate *public* concerns, and to make law for the benefit and welfare of the state." Cooley, *supra* at p 92; see also *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 141 (2006). To provide for the public's benefit and welfare, the Legislature has the exclusive power to tax. Const 1963, art 9, § 1. See also *C F Smith Co v Fitzgerald*, 270 Mich 659, 669 (1935) (apart from specified constitutional limits, the Legislature "has full control" over taxation) and *Thompson v Auditor General*, 261 Mich 624, 657 (1933) ("The power of taxation is legislative in character, and the Legislature of this state has plenary power over it").

Vesting taxing power in the Legislature goes back to first principles of democratic government. To effectively provide services for the people, the government requires "officers, agents, and employees." *C F Smith Co*, 270 Mich at 668. To pay those people, the government needs revenue, and to raise revenue, the government must impose taxes on people and property. *Id.* So long as the people taxed have the power to elect their representatives, the people guard against arbitrary and unfair taxation because "in imposing a tax the legislature acts upon its constituents." *Id.* The people's power to elect members of the Legislature is a check on the Legislature's power to tax the people.

C. Judges cannot be assigned the duties of a tax assessor.

The separation of powers clause in Michigan's Constitution has long prohibited the judiciary from making decisions about who to tax and how much tax to assess. *School District of City of Pontiac v City of Pontiac*, 262 Mich 338, 353 (1933) (judges interpret the law, not make it, which is why the power to tax belongs to the legislature because determining revenue sources and allocating tax revenue require lawmaking), rev'd on other grounds by *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 81 (2018).

In *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885), the Court invalidated a statute assigning judges the power to levy taxes to replace

taxes they had invalidated. *Houseman*'s conception of the separation of powers requirements of Michigan's Constitution was reincorporated into our 1963 Constitution and has been reaffirmed by this Court. Its analysis is sound and controls the outcome of this case.

Houseman involved a state law that provided for "the drainage of swamps, marshes, and other low lands." 1881 PA 269, enacting §1. The county drain law aimed at providing a "benefit for the public health." *Id*. It allowed counties and townships to elect or appoint a drain commissioner and assigned that commissioner considerable authority to plan for, finance, and carry out local drain construction. 1881 PA 269, §4, 6.

Functionally, the drain commissioner operated as a tax assessor. The commissioner could map out where a drain would go, determine which towns and lands benefited from the drain, and then apportion the drain's construction costs among the benefiting townships and landowners. 1881 PA 269, §16-21. Once the commissioner sent out the bills, either the towns levied a drain tax or landowners paid the drain tax directly. 1881 PA 269 §21. For landowners, failing to pay drain taxes carried the same consequences as failing to pay other taxes—the government could take your property and sell it at public auction or by private sale. *Id*.

A portion of the drain law created a distinct cause of action for landowners to challenge the drain commissioner's tax assessment. 1881 PA 269, §40. Section 40 provided that once the drain commissioner levied the drain tax, if a landowner identified a "manifest error" in the drain commissioner's work, the landowner could petition a court to appoint a third-party or surveyor to cross-check the drain commissioner's work. *Id.* If the surveyor's findings demonstrated the commissioner erred, the court could, among other options, "relevy" the drain tax according to the surveyor's findings. *Id*.

Houseman arose out of a local dispute over drain taxes. Relying on Section 40, some landowners challenged a tax assessment, and a circuit court urged the parties to seek the appointment of a surveyor so the court could determine "what, if any, portion" of the drain tax was valid against the landowners. *Id.* at 366.

This Court invalidated Section 40 as violative of separation of powers, holding that "each of the three branches of government shall be

kept, so far as practicable, separate," and the judicial branch "shall not exercise the powers confided by [the Constitution] to either of the others." *Id.* at 367. Section 40 assigned to the judiciary the power to "send[] out surveyors or other persons to" find the facts the judge needed "to relevy taxes in place of invalid ones," powers "not pertain[ing] to the judicial branch of the government." *Id.* Turning judges into tax assessors doomed Section 40. *Id.*

To conclude MCL 769.1k(1)(b)(*iii*) violates separation of powers, this Court need only apply *Houseman*. Separation of powers bars the Legislature from assigning to the judiciary powers that are constitutionally assigned to another branch. As *Houseman* recognized, the power to levy taxes "do[es] not pertain to the judicial branch of government." *Houseman*, supra at 367. Just as Section 40 impermissibly turned judges into tax assessors, so, too, does MCL 769.1k(1)(b)(*iii*).

D. Prohibiting judges from assessing taxes preserves the judiciary's independence and apolitical character.

Invalidating MCL 769.1k(1)(b(*iii*) is necessary to maintain separation of powers. Judges may not assess taxes because the judiciary may not be assigned powers belonging to the partisan branches. *Buback v Romney*, 380 Mich 209 (1968); *Dearborn Township v Dail*, 334 Mich 673, 682-683 (1952) (citing *Houseman* in favor of strict separation of powers); *Local 170, Transport Workers Union of America, CIO v Gadola*, 322 Mich 332 (1948). Keeping the judiciary independent of the partisan branches preserves the judiciary's nonpartisan character. Two twentieth century cases deftly illustrate this point.

In the 1940's, this Court examined a state law mandating arbitration for labor-management disputes within public utilities. See *Local 170, Transport Workers Union of America, CIO v Gadola*, 322 Mich 332, 333-334 (1948). The compulsory arbitration law required a judge to serve as chairperson of an arbitration board, but the board functioned like a court. *Id.* at 334. The board could subpoena witnesses, administer oaths, take testimony, compel attendance, and receive evidence. *Id.* Eventually, the board issued a binding decision—ordering the adoption of a new employment contract—to resolve the employment dispute. *Id.*

This Court struck down much of the compulsory arbitration law because it "ignore[d] the plain constitutional language that 'no person

belonging to one department shall exercise the powers properly belonging to another.' " *Id.* at 345, quoting Const 1908, art 4, § 2. Citing *Houseman*, the majority concluded that the law turned judges into executive branch administrators, tasked with making "difficult and far reaching inquiries into economic and social policies." *Id.* at 347. The law compelled the judge "to fix wages, hours of labor and working conditions, or, on the other hand, arbitrate as to fair returns on invested capital[.]" *Id.* Turning judges into executive-branch policy makers impaired the judiciary's independence, a critical component of democratic government: "the absolute independence of the judiciary from executive or legislative control is of transcendent import. Our form of government cannot be maintained without an independent judiciary." *Id.* at 346.

In the 1960's, this Court again confronted a threat to the judiciary's independence. Faced with the decidedly political task of removing an elected official from office, a power constitutionally assigned to the executive, Governor Romney selected a probate judge to handle the actual removal proceedings. *Buback v Romney*, 380 Mich 209, 225-228 (1968). This Court rejected the attempted assignment. *Id.* at 228.

The lead opinion in *Buback* relied on and reaffirmed *Houseman*'s unyielding conception of separation of powers. *Buback*, 380 Mich at 220-221. When a "power is assigned to one branch of government, that power must be exercised within that branch if the doctrine of separation of powers is to be meaningful." *Id.* at 227. This Court prohibited the executive from "pick[ing] and choos[ing] statewide among the probate judges" to vest a member of the judiciary with a power assigned to the executive. *Id.* at 228.

Houseman, *Romney*, and *Local 170* all stand for the same principle: the separation of powers clause in Michigan's Constitution insulates the judiciary from any obligation to exercise powers assigned to the partisan branches. Enlisting the judiciary to assess taxes, set economic and social policy, or remove elected officials jeopardizes confidence in courts as independent arbiters of the law.

Independence from the Legislature and the executive guarantees the judiciary's nonpartisan character. *Mistretta*, 488 US at 407. Assessing taxes appears partisan: it is a normative policy decision about who pays, how much, and for what. Few issues are as polarizing along party lines.

Candidates for office in the partisan branches routinely mud-wrestle over who has raised, will raise, or wants to raise taxes. But citizens ought to vote for a judge because the person has qualities amenable to resolving controversies—not based on approval or disapproval of a judge's tax policy.

MCL 769.1k(1)(b)(*iii*) erodes a meaningful separation between the political branches and the powers assigned to the judiciary. Enlisting judges to assess taxes threatens the judiciary's independence and constitutionally enshrined nonpartisan character. Const 1963, art VI, § 2, § 8, § 12.

E. That the judicial tax assessment occurs at sentencing does not fix the separation of powers violation

The state argues that MCL 769.1k(1)(b)(*iii*) is a constitutional exercise in judicial sentencing discretion. *People v Johnson* (Docket No. 163073), Appellee's Second Supplemental Brief on Appeal, filed June 3, 2022, p 2-3. The state points out that the Legislature has the power to "define the scope of permissible sentences, and the Judiciary has the power to choose a sentence from within the scope the Legislature has defined . . . ." *Id.* at 2; see also Const 1963, art 4, § 45. Because MCL 769.1k(1)(b)(*iii*) permits judges to assess a tax at sentencing, the state asserts the statute does not violate separation of powers, it merely instructs the judiciary on "how to sentence those convicted of a crime." Appellee's Second Supplemental Brief, 3.

That a judicial tax assessment occurs at sentencing does not turn an unlawful exercise of the taxing power into a lawful act of judicial sentencing discretion. Even though sentencing for criminal offenses is an area where the legislative and judicial branches share responsibility, see, e.g., Const 1963, art 4, § 45, judges do not have the power to assess taxes at any time.

Revenue generation is unlike any of the judge's responsibilities at sentencing. While tax assessment is a consequential decision that should require thoughtful deliberation, determining how much revenue to raise for the county treasury has nothing to do with an individual's culpability or capacity for change. See *People v Snow*, 586 Mich 586 (1972). MCL 769.1k(1)(b)(*iii*) does not provide for the imposition of an individualized tax or financial penalty—that is, the monies assessed do

not reflect the actual cost of an individual's exercise of their constitutional rights. Nor does the statute permit individualized consideration of a person's ability to pay or culpability.

Mistretta does not suggest a different result. *Mistretta* found the federal Constitution's requirement of separation of powers did not prohibit federal judges from voluntarily participating in a sentencing commission tasked with promulgating federal sentencing guidelines. 488 US at 412. Judges sitting on a sentencing commission did not unite the judicial and political branches because the sentencing commission set guidelines to help bring uniformity to criminal sentencing, but Congress determined the statutory maximum sentences and the guidelines promulgated by the commission were not mandatory. Judicial participation on a sentencing commission stands in sharp contrast to MCL 769.1k(1)(b)(*iii*), which empowers judges to exercise legislative power by setting tax policy and raising revenue at sentencing.

This Court, not the Supreme Court, has the final say on Michigan law. See *Bauserman v Unemployment Ins Agency*, _Mich_ (2022) (Docket No 160813); slip op at 18, quoting *Mays v Governor*, 506 Mich 157, 215 (2020) (MCCORMACK, C.J., concurring) (regardless of what federal precedent may say, "this Court is ultimately responsible for enforcing our State's Constitution"). MCL 769.1k(1)(b)(*iii*) violates the Michigan Constitution, which explicitly provides for separated powers, and, as this Court has previously held, prohibits the judiciary from assessing taxes.

Alternatively, the state says MCL 769.1k(1)(b)(*iii*) operates much like legislation authorizing courts to order restitution. Appellee's Second Supplemental Brief, 3. But restitution attempts to fairly compensate victims "for their suffering at the hands of convicted offenders." *People v Peters*, 449 Mich 515, 526 (1995). Restitution orders resolve a discrete dispute between a crime victim and the person convicted of committing the crime. In entering a restitution order, the judge must carefully tailor the amount to losses sustained by the victim resulting from the course of criminal conduct. *People v McKinley*, 496 Mich 410, 419 (2014), citing MCL 780.766(2). A judge's authority to enter a restitution order, intended to right a private wrong, does not also permit the judge to raise revenue for the public good or the county treasury.

F. Michigan has no historical practice or precedent permitting judges to assess taxes.

In an amicus brief supporting the state's position, the Legislature insists our system of separated powers has always permitted the judiciary to fund itself. *People v Johnson* (Docket No. 163073), Amicus Brief of the Michigan Senate and the Michigan House of Representatives, filed June 30, 2022. But amici's argument conflates county funding of county courts with county *judges* generating revenue for county courts. The former, although ill-advised, is constitutionally permissible. See *Grand Traverse Co v State*, 450 Mich 457, 474 (1995) (finding no constitutional obstacle to the Legislature enlisting counties to fund the courts but noting that "numerous cases addressing conflicts about court funding . . . demonstrate the need for continuing efforts by the judicial, legislative, and executive branches" to reform court funding). County funding for county courts is permissible because those responsible for making funding and taxing decisions are still political actors working for the political branches who are ultimately (and appropriately) politically accountable for their funding decisions.

By contrast, the Michigan Legislature does not cite a single case in which county judges have been permitted to assess taxes. The Legislature comes closest with *Union Trust Co v Durfee*, 125 Mich 487, 494 (1901). House and Senate Amicus, 12. However, *Durfee* did not involve the delegation of tax policy to judges and does not support the state's decision.

Durfee involved a dispute over an inheritance tax. In 1899, the Legislature imposed a five percent levy on the "transfer of any property, real or personal" valued at more than $500 (about $18,000 in today's dollars). 1899 PA 188, §1. Calculating the value of the estate turned on an appraiser's assessment of the estate's "clear market value." *Id.* The county treasurer handled the administration and collection of the tax. 1899 PA 188, §3. The treasurer collected the monies and sent them to the state treasury. 1899 PA 188, §3, 20. If an estate ended up in probate court, the judge could settle any factual disputes about the estate's value and determine how much of the estate was subject to the five percent inheritance tax, which enabled the court to calculate the estate's tax bill based on the Legislatively imposed flat five percent tax rate. 1899 PA 188, §10, 13.

There was no issue with the powers assigned to the probate court. *Durfee*, 125 Mich at 494. The law empowered probate judges to perform their constitutionally assigned function of resolving factual and legal disputes between adverse parties. The statute directed judges to determine the value of a particular estate and apply a legislatively determined flat tax imposed by law to determine the estate's tax obligation. *Id.* at 495. The *Durfee* Court did not approve of the judiciary exercising discretion over who to tax and how much to assess. Nor did the inheritance tax permit the county courts to raise revenue to fund their own operations or for the county treasury.

The inheritance tax law did not instruct the circuit court to determine how much money would need to be raised to cover certain municipal expenses or to determine how much tax money should be raised to cover those expenses. MCL 769.1k(1)(b)(*iii*) does. Nor did the inheritance tax law give courts discretion to decide whether to impose the tax at all, as courts are permitted to do by Section 769.1k. Instead, courts made necessary factual determinations about an estate's value in individual cases in order to determine its tax liability, as required by law.

G. MCL 769.1k(1)(b)(iii) is not a permissible delegation of Legislative power.

Amici Legislature wrongly asserts MCL 769.1k(1)(b)(*iii*) is a proper delegation of the taxing power to the judiciary. House and Senate Amicus, 18. The Legislature can only delegate to the judiciary functions "that do not trench upon prerogatives of another branch and are appropriate to the central mission of the judiciary." *Mistretta*, 488 US at 388. The judiciary's central mission is dispute resolution, not revenue generation; it is the Legislature's prerogative and responsibility to assess taxes. *Pontiac*, 262 Mich at 353; *Houseman,* 58 Mich at 367; *Barber*, 14 Mich App at 403 ("Courts are not tax gatherers").

MCL 769.1k(1)(b)(*iii*) is unconstitutional. Empowering county judges to assess taxes to raise revenue for the county treasury assigns to the judiciary powers explicitly assigned to the Legislature and threatens the judiciary's nonpartisan character. *Mistretta, supra.* Because tax assessment is a task more properly accomplished by the political branches, MCL 769.1k(1)(b)(*iii*) violates the Michigan Constitution's separation of powers clause. This Court should invalidate the statute

and order the circuit court to vacate the assessment of court costs in Mr. Johnson's judgment of sentence.

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

MCL 769.1k(1)(b)(*iii*) places every sentencing judge in an untenable position. The law permits sentencing courts to assess a tax upon those found guilty of a crime. Making the guilty pay appears to give judges discretion to assess a punitive tax in order to raise revenue, which creates the potential for bias or an objective risk of actual bias. Sentencing courts assess taxes arbitrarily or based on the financial circumstances of the county and court, not the circumstances of the individual before the court. Such a scheme creates a "possible temptation" for the average person as judge to elevate court budgetary concerns over an individualized, proportionate punishment. MCL 769.1k(1)(b)(iii) thus violates the due process right to a neutral arbiter.

A. Objective indicia of judicial bias violates the due process right to a neutral arbiter.

The constitutional guarantee of due process secures a right to "a fair trial in a fair tribunal." *In re Murchison*, 349 US 133, 136 (1955). The guarantee of a fair tribunal safeguards against a biased decisionmaker. *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 887 (2009). Judicial bias violates fundamental fairness in two distinct ways. *Caperton*, 556 US at 883. First, evidence of a judge's actual, subjective bias is sufficient to violate due process and relief is required. *Id*. Second, the "imperatives of due process" require an objective inquiry in all cases, "whether or not actual bias exists or can be proved." *Caperton*, 556 US at 886. The objective inquiry into judicial bias asks whether a given arrangement, be it personal or pecuniary, creates a " 'potential for bias' " or an "objective risk of actual bias." *Id.* at 881, 886.

Although the objective inquiry into judicial bias stems from *Caperton*, its roots extend much deeper. In *Tumey v Ohio*, 273 US 510 (1927), a Prohibition-era state law empowered certain mayors to preside over certain criminal trials for unlawful possession of alcohol. 273 US at

516-519. If the mayor-judge convicted the liquor possessor, the statute allowed the mayor-judge to impose a host of monetary penalties, with some of the money going to the mayor as a salary bump. *Id.* at 519-522. The remainder of the money collected went into the town coffers. *Id.* at 520-522.

The mayor-judge's interest in raising money for the village violated Tumey's right to a neutral arbiter at sentencing. *Tumey*, 273 US at 533-534. The Court found it "very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving the subject-matter which he was to decide, rendered the decision voidable." *Tumey*, , citing *Bonham's Case*, 8 Coke, 118a (1610). Fundamental fairness prohibited the deprivation of liberty or property at the hands of an arbiter with a "direct, personal, substantial pecuniary interest" in the outcome of a proceeding. *Id.* at 523.

A due process violation based on a judge's "direct, personal, substantial pecuniary interest" did not also require evidence of actual bias. *Tumey*, 273 US at 524. No conception of a fair trial or fair tribunal would allow someone to preside over a criminal proceeding and benefit financially from the outcome. *Id.* at 532. The statute gave rise to a risk of bias across the board, and that risk alone implicated due process: "Every procedure which would offer a *possible temptation to the average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused" renders the criminal process fundamentally unfair. *Id.* at 532 (emphasis added).

What mattered in *Tumey* was not the subjective motivations of the actual mayor-judge, but the "possible temptation," meaning the potential for bias, a point the Supreme Court clarified in *In re Murchison*, 349 US 133 (1955).

Murchison arose out of Michigan's one-man grand jury statute. The one-man grand jury turned judges into prosecutors, and to investigate crime, the judge-as-prosecutor could subpoena witnesses. *Murchison*, 349 US at 134-135. A judge interrogated Murchison about possible bribery, and after hearing Murchison's answers, the judge convicted Murchison of criminal contempt. *Id.*

Permitting a judge to act as both accuser and adjudicator violated the right to a neutral arbiter. Ensuring the "appearance of justice" "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 136. That is so because due process "has always endeavored to prevent even the *probability of unfairness*." *Id.*

The Court acknowledged the lack of precise criteria to determine a "probability of unfairness," but demanded consideration of the circumstances, including relevant relationships. *Id.* at 136. Having been Murchison's accuser, the judge could not be, "in the very nature of things, wholly disinterested" in the outcome of the contempt proceeding. *Id.* at 137. Thus, the adjudicator could too easily fall victim to the "possible temptation" not to hold the balance fairly. *Id.*

Fifteen years after *Murchison*, the Supreme Court again confronted a state law permitting a mayor-judge to raise revenue. *Ward v Village of Monroeville*, 409 US 57 (1972). An Ohio law turned small-town mayors into judges, allowing them to adjudicate minor infractions, with the monetary penalties assessed upon conviction raising revenue for their town. *Ward*, 409 US at 58-59.

Unlike in *Tumey,* Monroeville's mayor-judge did not personally profit from the revenue raised in mayor's court. *Ward*, 409 US at 60. Still, the scheme violated due process because the mayor-as-executive bore responsibility for the town's finances, and the revenue raised in mayor's court went to the town treasury, so the statute created a "possible temptation" for any mayor-as-judge not to hold the balance nice, clear, and true" at sentencing. *Ward*¸ 409 US at 60 (cleaned up). The mayor's interest in the village finances risked a situation where the mayor-judge became "partisan to maintain the high level of contribution [of money] from the mayor's court." *Id.*

Ward both applied and extended *Tumey*. *Ward* identified a "possible temptation" outside of a scenario where the judge personally profited. See also *Gibson v Berryhill*, 411 US 564, 579 (1973) (an adjudicator's pecuniary interest in a given outcome "need not be as direct or positive as it appeared to be in *Tumey")*. *Ward* focused on the apparent unfairness of statutes that blend judicial power with revenue generation. The dual roles "necessarily involve[d] a lack of due process

of law" because one person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial[.]" *Ward*, 409 US at 60, quoting *Tumey*, 273 US at 534.

A risk of or potential for bias violates due process in civil cases, as well. In *Aetna Life Insurance Co v Lavoie,* 475 US 813 (1986), a state supreme court justice voted to uphold a damages award against an insurer. *Lavoie*, 475 US at 823-824. But at the time, the justice was also a plaintiff in a separate case against the same insurance companies involving a materially similar issue. *Id.* Because the state supreme court justice voted in a way that advanced his position as plaintiff in similar litigation, "the appearance of justice" required the court to vacate the state supreme court decision and remand for further proceedings. *Id.* at 828.

As the law leading up to *Caperton* demonstrates, the "possible temptation" giving rise to a due process violation can occur at various decision points based on different factual scenarios. *Caperton* and *Lavoie* located a risk or potential for bias when state supreme court justices cast votes in civil cases. *Tumey* and *Ward* confronted similar statutory schemes turning mayor-judges into revenue generators. Because the mayor-judges had a financial incentive to generate more revenue, the statutes risked a biased decisionmaker at conviction and again at sentencing, when the judicial officer imposed the monetary penalties. And *Murchison* had nothing to do with pecuniary interests, but the judge's dual role risked the probability of unfairness. Factual variations aside, all the cases involved the appearance of impropriety and the potential denial of a fair and neutral arbiter.

Due process requires the reviewing court to ask whether a certain pecuniary or personal arrangement creates an "objective risk of actual bias" or a "potential for bias," an inquiry measured "by objective and reasonable perceptions." *Id.* In every case, a "possible temptation" for the "average man" as judge not to hold the balance fairly violates the right to a fair trial in a fair tribunal. *Caperton*, 556 US at 878-886.

Caperton found additional support for an objective inquiry in judicial codes of conduct. *Caperton*, 556 US at 888-889. Many state codes incorporated the American Bar Association's objective test: " '[a] judge shall avoid impropriety and the *appearance* of impropriety.' " *Id.* at 888,

quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004). Avoiding even the appearance of impropriety "maintain[s] the integrity of the judiciary and the rule of law." *Caperton*, 556 US at 889. The rule of law depends on public respect for judicial judgments, and public respect for judgments turns on the "issuing court's *absolute probity*." *Id.* (emphasis added).

B. By appearing to impose a tax as punishment, MCL 769.1k(1)(b)(iii) creates an objective risk of bias at sentencing.

Objectively, MCL 769.1k(1)(b)(iii) creates a potential for or risk of bias at sentencing. The statute allows sentencing courts to raise revenue for the court system and conditions any monetary payment on a finding of guilt. MCL 769.1k(1). The monetary penalty becomes a part of a person's sentence. *Jackson*, 483 Mich at 283. Because only the guilty pay, and the payment becomes a part of a criminal sentence, the tax assessed is punishment. See *United States v Bajakajian,* 524 US 321, 327-328 (1998) (the Court had "little trouble" concluding that a forfeiture statute imposed a punishment where the monetary penalty was assessed at sentencing and only upon the guilty) and *Austin v United States*, 509 US 602, 609 (1993) (a cash penalty can be a punishment even if it "also compensates the government for services").

Appearing to raise revenue as a punishment creates a "possible temptation" for any sentencing court not to hold the balance fairly when deciding whether to deprive a person of their property. The discretionary decision to tax is based on court budgetary concerns—considerations wholly inconsistent with individualized, proportionate punishment. See MCL 769.1k(1)(b)(iii)(A)-(C). The statute does not require a court to make individualized findings, and some circuits' websites indicate that all those convicted will pay the same amount. See, e.g., 36th Circuit Court, Notice Regarding Court Costs, 36 Circuit, available at https://bit.ly/3RUm4dm (accessed October 13, 2022) (explaining that if a defendant is convicted in Van Buren County Circuit Court by plea, jury, or judge, the court "may impose $700 in costs to the defendant as reasonably related to the actual costs incurred by the trial court."). Nowhere does the statute ask courts to determine a person's ability to pay. Instead, once the court decides to assess the tax, the payor has no ability to *avoid* payment. *Cameron*, 319 Mich App at 229. Paying late

risks late fees and interest. MCL 600.4803. Failing to pay may lead to incarceration. MCL 769.1k(10). And judges may assess the tax even if the individual is indigent.

Sentencing is an "intensely human" process, which touches upon "the most fundamental human rights: life and liberty." *People v Heller*, 316 Mich App 314, 318 (2016) (cleaned up). A sentencing court imposes punishment only after careful, individualized consideration of a person's background and circumstances, their moral culpability, and their capacity for change. *People v Parks*, __Mich__ (2022) (Docket No. 162086); slip op at 32, quoting *People v Bullock*, 440 Mich 15, 33-34 (1992) (identifying rehabilitation as "the only penological goal enshrined in our proportionality test 'as a criterion rooted in Michigan's legal traditions.' "); *People v Snow*, 586 Mich 586 (1972).

Raising revenue at sentencing parallels the due process violation in *Tumey* and *Ward*. There, as here, the judges' dual roles "necessarily involve a lack of due process of law" because one person occupies "two practically and seriously inconsistent positions, one partisan and the other judicial[.]" *Ward*, 409 US at 60, quoting *Tumey*, 273 US at 534. There, as here, the arbiters' interest in the local funding unit's budget risked a situation where the judicial officer became "partisan to maintain the high level of contribution [of money] from the" court. *Id.* There, as here, the judges' partisan interest in revenue generation risked a deprivation of property, at sentencing, by a biased arbiter. *Ward*, 409 US at 60; *Tumey*, 273 US at 532-534.

Just as in *Murchison*, the exercise of judicial discretion creates a "probability of unfairness." *Murchison*, 349 US at 136. There, the judge's circumstances and relationships risked bias. Here, the circuit courts have relationships with court staff and personnel, people whose "salaries and benefits" factor into the discretionary decision to tax. MCL 769.1k(1)(b)(iii)(A). In deciding how much to charge, the judge-as-tax-assessor considers circumstances like the cost of "goods and services" necessary to operate the court and costs associated with maintaining the court building. Given this, "in the very nature of things," the sentencing court cannot appear to be "wholly disinterested" in deciding whether to assess the tax or not. *Murchison*, 349 US at 136. The "probability of unfairness" exists.

Just as in *Lavoie*, the appearance of unfairness is present. The judge-as-tax-assessor appears to advance their own interest, over the interests of justice. A vote in favor of raising tax revenue appears to prioritize the individual concerns of the court, not the individual circumstances of the person being deprived of their property upon a finding of guilt.

The court funding system MCL 769.1k(1)(b)(*iii*) pays for would prevent the average person from holding the balance "nice, clear, and true" at sentencing. The discretionary decision to tax, imposed as a punishment, appears to elevate county's and court's financial needs over the individual defendant's rights. The potential for bias, or objective risk of actual bias violates the due process right to a neutral arbiter.

III. On its face, MCL 769.1k(1)(b)(iii) violates both separation of powers and due process. This Court should sever the statute and order the circuit court to reimburse Mr. Johnson.

Mr. Johnson raises facial challenges to MCL 769.1k(1)(b)(*iii*). "To sustain a facial challenge, [Mr. Johnson] must establish that no set of circumstances exists under which the statute would be valid." *Johnson v Vanderkooi*, __Mich__ (2022) (Docket No. 160959); slip op at 10; 2022 WL2903868.

On its face, MCL 769.1k(1)(b)(*iii*) violates separation of powers. The statute assigns to the judiciary the powers of a tax assessor, which is impermissible. *Houseman*, 58 US at 367. Any law "conferring upon the judiciary the exercise of powers belonging to either of the others[] cannot be regarded as valid." *Id.*

Facially, MCL 769.1k(1)(b)(iii) also violates due process. The statute appears to impose a tax as punishment. Raising revenue as retribution creates an objective risk of, or potential for, bias. This is especially true here because the money generated through the punitive tax does not go to the state's general fund, but to the court where the tax was assessed. Every sentencing court faces a "possible temptation" to elevate budgetary concerns over proportionate punishment.

MCL 769.1k(1)(b)(*iii*)'s facial invalidity on both due process and separation-of-powers grounds requires this Court to sever it. The

unconstitutional provision can be, and has been, precisely identified—MCL 769.1k(1)(b)(*iii*)—and what remains leaves "a complete and operable statute in place." *People v Betts*, 507 Mich 527, 580 (2021) (VIVIANO, J., concurring in part).

Caliste, *supra*, offers a useful example. There, a judge was assigned dual roles—adjudicator and court administrator. As adjudicator, the judge made pretrial release decisions, and a state law required a portion of bail bond sales be returned to the courts. *Caliste*, 937 F3d at 526. More grants of bond secured by bail bonds led to more bail bond sales, which meant more money for the courts. *Id.* As an administrator, the judge had a say in where the court's money went. *Id.*

The state law created a "direct link" between the criminal court's revenue generation and the court's operating expenses, which the Fifth Circuit rightly found created an objective risk of a biased arbiter at the bond hearing. *Id.* at 533. In suggesting ways to remedy the constitutional violation, the Fifth Circuit suggested enjoining the statute, which would "sever the direct link" between judicial revenue generation and lower court's budgetary concerns. *Id.*

MCL 769.1k(1)(b)(*iii*) must be invalidated in order to cut the direct link between judicial tax assessment and local county and court budgetary concerns.

Mr. Johnson is entitled to reimbursement of the money he paid towards his court costs. Just as in *Tumey* and *Ward,* at sentencing Mr. Johnson was deprived of his property by an arbiter whose decision was clouded by the objective risk of bias. *Ward*, 409 US at 60; *Tumey*, 273 US at 532-534. To remedy the unconstitutional monetary payment, this Court should order Alpena County to vacate the tax and reimburse Mr. Johnson.

Conclusion and Relief Requested

For the reasons stated above, Travis Michael Johnson respectfully requests that this Honorable Court reverse the Court of Appeals, grant remand, and order the trial court to vacate the assessment of court costs from his sentence.

Respectfully submitted,

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