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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TRAVIS MICHAEL JOHNSON,

Defendant-Appellant.

Supreme Court No. 163073

Court of Appeal No. 351308

Lower Court No. 16-39732 FC

ORAL ARGUMENT REQUESTED

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

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

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

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

IJ is the nationwide leader in litigating against unconstitutional financial interests and abusive fines and fees. See, e.g., *Timbs v Indiana*, 139 S Ct 682 (2019); *Brucker v City of Doraville*, No. 21-10122 (CA 11, argued Dec. 16, 2021); *Harjo v City of Albuquerque*, 326 F Supp 3d 1145 (DNM 2018). It regularly files *amicus curiae* briefs in federal and state cases involving fines and fees abuse. See, e.g., *Nelson v Colorado*, 137 S Ct 1249 (2017); *Harper v Pro Prob Servs, Inc*, 976 F3d 1236 (CA 11, 2020); *Cain v White*, 937 F3d 446 (CA 5, 2019); *Caliste v Cantrell*, 937 F3d 525, 532 (CA 5, 2019); *Beck v Elmore Cnty Magistrate Ct*, 168 Idaho 909, 489 P3d 820 (2021); *City of Seattle v Long*, 198 Wash 2d 136, 493 P3d 94 (2021).

Given IJ's expertise in fines and fees litigation, it files this brief to apprise this Court of how other jurisdictions have addressed the constitutionality of using fines and fees to generate revenues. This brief further examines whether Michigan's court costs statute is constitutional under the Due Process Clause of the Fourteenth Amendment.

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[1] No counsel for a party authored this brief, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. All parties consented to the filing of this brief.

STATEMENT OF THE QUESTIONS PRESENTED

1. 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).

2. Whether MCL 769.1k(1)(b)(iii) prevents the judicial branch from "accomplishing its constitutionally assigned functions." See *Nixon v Adm'r of Gen Servs*, 433 US 425, 443 (1977).

The court of appeals answered, "No and no."

Plaintiff-Appellee answers, "Yes and yes."

Defendant-Appellant answers, "No and no."

Amicus Institute for Justice answers, "Yes as to Question 1 only."

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SUMMARY OF THE ARGUMENT

> *All revenues from fines, penalties, and forfeitures levied by a court should be transferred to the state general fund, and should not be appropriated to the court receiving them or by a local unit of government that supports such a court.*

Brown v Vance, 637 F2d 272, 277 (CA 5, 1981) (quoting American Bar Association, *Standards Relating to Court Organization* § 1.53 (1974)).

Michigan trial courts depend on convictions for, on average, at least a quarter of their funding. That gives those courts an unconstitutional financial interest in convicting defendants.

Under the Due Process Clause of the Fourteenth Amendment, judges may not have a financial interest in the cases that come before them. Due process also prohibits judges from having an *institutional* financial interest in those cases, where the judge's institution—whether a court, board, or even a private company performing judicial functions—benefits from the adjudications. A judge can have an unconstitutional institutional interest even if he or she does not have executive responsibility for the institution's budget. The question is simply whether the judge has a desire to drive more revenue to the institution's accounts. And importantly, due process is also violated if there is an objective appearance of a financial interest. That's because due process does not simply require a neutral, non-financially-interested judge; it also requires a judge who appears neutral.

Michigan's trial-court financing scheme does not satisfy due process. When a defendant is convicted, MCL 769.1k(1)(b)(iii) lets a trial court order the defendant to pay costs that directly fund the trial court. Some court costs—on average about a quarter of trial courts' funding—remain in the courts' accounts. Other costs are remitted to the state, which then redistributes them back to the trial courts' accounts. State funding, which comes mostly from these court-imposed fines and fees, makes up nearly another quarter of trial courts' revenue on average. This funding scheme gives trial courts a substantial financial interest in convictions. Trial courts know that they must

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convict defendants to keep the lights on, pay their staff, or purchase supplies. That creates, or appears to create, a financial interest in guilty convictions. And that financial interest violates due process.

For those reasons, as detailed below, Amicus Institute for Justice asks this Court to reverse the judgement of the court of appeals.

ARGUMENT

I. Due Process Prohibits Courts from Having a Financial Interest in Guilty Convictions.

Due process prohibits a court from having a financial interest in the cases that come before it. This rule comes from the centuries-old principle that "[n]o man can be judge in his own case." *Caliste v Cantrell*, 937 F3d 525, 525 (CA 5, 2019) (quoting Edward Coke, *Institutes of the Laws of England*, § 212, at 141 (1628)); see also *Williams v Pennsylvania*, 579 US 1, 9–10 (2016) ("[N]o man is permitted to try cases where he has an interest in the outcome." (quotation marks omitted)). It is presumed that judges can remain neutral despite many influences, including family ties, friendships, or politics. See *Caperton v A.T. Massey Coal Co*, 556 US 868, 876 (2009) (stating "[p]ersonal bias or prejudice alone would not" violate due process (quotation marks omitted)). But financial influences are categorically different. A financially interested court always implicates due process. See *id.*

So when does a court's financial interest violate due process? Due process is violated when a court's financial interest in revenue conflicts with its duty "to hold the balance nice, clear, and true between the state and the accused." *Ward v Village of Monroeville*, 409 US 57, 60 (1972). When there's a "possible temptation," *Caperton*, 556 US at 878, to convict defendants in order to raise revenue, that's an unconstitutional financial interest.

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Yet in this case, the court of appeals demanded something more than a "possible temptation." It held there must be a specific "nexus between the courts and the costs they impose," and that nexus must be "control over the administration of revenue." Appellant's Appendix (AA) 56a. Although it recognized that Michigan trial courts benefit from the costs they impose, it ruled that without "control" there can be no due process violation. See AA 56a.

The court of appeals was wrong to require proof that courts "control" the funds. The actual rule does not ask whether a court has control over the revenue it derives from guilty convictions. Instead, the rule asks simply whether the court has a financial incentive (for any number of possible reasons) to collect more revenue by convicting more people.

This section further explains the rule against unconstitutional financial interests.[2] *Section A* shows that a financial interest exists when a decisionmaker—or the institution the decisionmaker serves—*benefits* from convicting defendants. Focusing on the benefit makes sense: If a court must convict defendants to keep the lights on, that court has a financial interest to convict, even if the court didn't set that budget policy in the first place. *Section B* explains that decisionmakers have an unconstitutional institutional interest when they have a reason to care about the institution's finances. A decisionmaker having responsibility for his institution's budget might be one reason he cares about the institution's finances, but it is not the only possible reason. For instance, decisionmakers could also just want the institution to keep running, and thereby keep themselves employed. *Section C* then explains that, to be constitutionally significant, a financial interest must more than *de minimis*. Again, when a decisionmaker has a long list of roles to play in the institution, including executive budgetary functions, that may be relevant to establishing she has a

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[2] This brief focuses on federal due process law. Michigan's due process guarantees must be at least as protective as the federal Due Process Clause.

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substantial interest in the institution's finances. But it is not the only relevant factor. If a decisionmaker's institution existentially depends on the decisionmaker generating revenues, that can also show the decisionmaker's institutional interests are substantially large. And finally, *Section D* shows that courts may not have even the appearance of a financial interest. When defendants enter a courtroom, it's important that they perceive the court is neutral and does not financially benefit from their conviction.

A. Courts violate due process when they institutionally benefit from obtaining convictions.

Everyone knows judges can't take bribes to rule a certain way. And they can't have their paychecks conditioned on ruling one way or the other. Such "a direct personal pecuniary interest" was held unconstitutional in in *Tumey v Ohio*, where the judge was paid $12 from each conviction he imposed.[3] *Tumey*, 273 US at 523, 531.

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

In *Tumey*, the Supreme Court held this institutional interest to be a second, independent reason for invalidating the $12 fee. The personal interest of the mayor-judge was "not the only reason for holding that due process of law is denied." *Tumey*, 273 US at 532. There was also the

[3] That's just under $200 in today's dollars, according to the US Bureau of Labor Statistics, Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

court's institutional interest: "The statutes were drawn to stimulate small municipalities" and the mayor-judge had an institutional interest "in the financial condition of the village." *Id.* at 532–33. In that case, "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?" *Id.*

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

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

Cain v White involved a challenge to a municipal court's fines and fees collections. 937 F3d at 450. Fines and fees were deposited into the Judicial Expense Fund, which was part of the court budget. *Id.* at 448–49. A quarter of the Judicial Expense Fund came from these fines and fees, and the Fund was about 10% of the court budget. *Cain v City of New Orleans*, 281 F Supp 3d 624, 657 (ED La 2017), aff'd sub nom *Cain v White*, 937 F3d 446 (CA 5, 2019). That 10% was

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used to pay for court expenses, including supplies, staff salaries, and staff benefits—although it did not pay for judge's salaries. *Cain*, 937 F3d at 449, 454. The Fifth Circuit held that, even though the judges did not benefit personally, this funding scheme gave the judges an "institutional interest in the [Judicial Expense Fund]." *Id.* at 454. That interest deprived plaintiffs of due process at their ability-to-pay hearings, because those hearings should be held before a neutral, financially disinterested court. See *id.* at 450–51, 454 (affirming district court judgment that "failure to provide a neutral forum for determination of . . . ability to pay is unconstitutional.").

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

Many other federal and state courts have invalidated funding systems where, even though judges did not personally benefit, the institutions those judges served stood to benefit. See *DePiero v City of Macedonia*, 180 F3d 770, 782 (CA 6, 1999) (holding a mayor's court system, similar to that in *Ward*, violated due process); *United Church of the Med Ctr v Med Ctr Comm'n*, 689 F2d 693, 699 (CA 7, 1982) (striking down a development commission's property-use adjudications, where the commission benefited by receiving real property from certain rulings); *Harper v Pro Prob Servs Inc*, 976 F3d 1236, 1243 (CA 11, 2020) (holding private probation system violated due process where the probation company institutionally benefited from keeping probationers on

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probation); *Harjo v City of Albuquerque*, 326 F Supp 3d 1145, 1196 (DNM 2018) (finding "an unconstitutional institutional incentive" where a city forfeiture program could fund itself through forfeiture prosecutions); *Meyer v Niles Twp*, 477 F Supp 357, 362 (ND Ill 1979) (holding that township funds benefited by denying claims under state medical care program); *In re Ross*, 99 Nev 1, 9, 656 P2d 832, 837 (1983) (holding state bar adjudications violated due process, where state bar institutionally benefited from findings of misconduct).

In sum, an institutional financial interest exists where a decisionmaker's institution stands to benefit from guilty convictions and the decisionmaker wants the institution to benefit. In that case, the decisionmaker faces a "possible temptation . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Ward*, 409 US at 60.

B. A decisionmaker can have an institutional financial interest even if he or she does not have executive or budgetary responsibilities in the institution.

The court of appeals reviewed many of the same cases discussed above, as does the People's brief. But both the court and the People incorrectly interpret those cases. The court of appeals held that, unless court-costs revenues remain under the control of the convicting court, there is no institutional financial interest. AA 56a. "[D]efendant [has not] provided any evidence that 'the costs imposed under MCL 769.1k(1)(b)(*iii*) are funneled into a special or specific fund to be administered by judges, analogous to the Judicial Expense Fund at issue in *Caliste* and *Cain*.'" AA 56a. It also analogized this case to *Dugan v Ohio*, 277 US 61 (1928), which upheld court fines similar to those in *Tumey*. *Dugan* is apposite, the court of appeals said, because "the entity exercising the judicial role benefitted from a portion of the revenue generated by court assessments, but did not have control over administration of the revenue." AA 56a.

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The court of appeals' reading of the law is wrong. A decisionmaker can have an institutional financial interest even if they have no "executive" responsibility for, or control over, that budget. A responsibility for finances might be one reason why a decisionmaker cares to maintain a revenue stream. That was the case in *Ward*, where the mayor-judge had mayoral responsibility to maintain the city's budget. But other cases hold that decisionmakers might have other motives for producing revenues, such as the continued running of the institution on which their employment depends. What counts is whether the decisionmaker's institution benefits from the fines and fees that they impose, even if the decisionmaker's motives for benefitting the institution may differ.

Consider again *Cain* and *Caliste*. As the Fifth Circuit recognized, those cases concerned two different, independent reasons that decisionmakers might be financially interested: in *Cain* it was the judges' executive or administrative responsibilities, but in *Caliste* it was the judge's judicial responsibilities. See *Caliste*, 937 F3d at 526 n.2 (stating *Cain* concerned "a separate conflict of interest"). The judges in *Cain* had an interest in maintaining the court's finances via fines and fees because they had "administrative" responsibility for the Judicial Expense Fund. *Cain*, 937 F3d at 451. Administering the budget was their responsibility, and to do that well they needed revenue. But in *Caliste*, the Fifth Circuit held there was an altogether different interest: The judge wanted his court to keep operating. To perform his judicial responsibilities well, indeed to perform them at all, the court needed money from fines and fees:

> Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff. Judge Cantrell cannot simultaneously preside as judge and court reporter (he employs two). Office supplies also promote efficiency. . . . And if an elected judge is unable to perform the duties of the job, the job may be at risk.

937 F3d at 530. Thus, a decisionmaker's institutional financial interest can come from either an interest in successfully performing one's executive roles (as in *Cain*) *or* having an interest in

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successfully performing one's judicial roles (as in *Caliste*). Each is a sufficient reason to find the decisionmaker has an institutional interest to generate revenue.

Like *Caliste*, other courts have held that a decisionmaker's interest in its continued operation creates an institutional financial interest. In *Alpha Epsilon Phi Tau Chapter Housing Ass'n v City of Berkeley* ("*AEP*"), the district court had ruled for the decision-making board because it found there was no financial interest in adjudications. 114 F3d at 844. But the Ninth Circuit disagreed with that ruling, because every adjudication gave the board the opportunity to increase its budget: If the board determined that a property had to pay a fee, that fee was increased revenue to the board's annual budget. This budgetary incentive created a financial interest because, the Ninth Circuit held, "[i]t is reasonable to assume that *institutions generally desire to meet their budgets*." *Id.* (emphasis added). Thus, it "assume[d] that the Board had *some* financial interest in its coverage decisions." *Id*. (emphasis in original). Ultimately, the Ninth Circuit held that the financial interest was merely *de minimis*. *Id.* at 848. Yet the point stands that even decisionmakers without "executive" roles can have a financial interest in the health of their institutions.

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

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nevertheless had an interest in pursuing forfeitures because, under city policy, forfeiture proceeds financially benefited the prosecutors' office. See *Harjo*, 326 F Supp 3d at 1194–95 (stating "the City Council—a detached authority—by law, has the authority to appropriate funds to the forfeiture program" and "the forfeiture program prosecutors' judgment will be distorted, because in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend").

Both the court of appeals and the People suggest that, under *Dugan v Ohio*, there is no institutional financial interest unless a decisionmaker has some amount of executive responsibility for the institution's finances. And sure enough, in *Dugan* the judge "ha[d] himself as such no executive, but only judicial, duties." 266 US at 65. But this portion of *Dugan*'s reasoning does not fully encapsulate the rule. Other factors were relevant as well. The Court noted, for instance, that there was no evidence the judge's pay depended on convictions. And, more relevant to this case, *Dugan* did not involve "a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced." *Dugan*, 277 US at 65. Given that neither the judge's pay nor the city's finances were in jeopardy, and given that the judge was an elected official with "only judicial[] duties," the judge simply had no reason to consider the city's finances when making decisions. *Id.*

But, again, that the *Dugan* judge didn't have a reason to care for his institution's finances doesn't mean that another judge, in a different institutional set-up, would also lack concern for her institution's finances. Indeed, in *Caliste* the Fifth Circuit held the judge "ha[d] . . . even less influen[ce]" over "spending decisions" than the judge in *Dugan*. 937 F3d at 531. Yet he still had an "interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate." *Id.* That institutional interest came from his need to

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"manage his chambers to perform the judicial tasks the voters elected him to do," and the portion of court funding from fees was "sizeable enough that it makes a meaningful difference in the staffing and supplies judges receive." *Id.*

Thus, *Dugan*'s reasoning that a judge may have a financial interest if he has executive budgetary responsibilities does not define the universe of possible financial interests. As one federal court recognized, "executive-judicial comingling is [not] categorically required in these types of cases. Certainly, the blending of governmental responsibilities is relevant, but it is not . . . dispositive." *Brucker v City of Doraville*, 391 F Supp 3d 1207, 1213 (ND Ga 2019) (denying motion to dismiss). The court of appeals thus erred in holding that institutional interests only exist where a decisionmaker also has executive "control over administration of the revenue." AA 56a. Instead, courts should consider such control just one factor among many that show a decisionmaker's interest in the financial well-being of her institution.

C. Either control over funds or the amount of those funds can demonstrate that a financial interest is not *de minimis*.

As demonstrated above, a decisionmaker's executive responsibilities for revenues does not itself determine whether a financial interest exists; plenty of other factors might prove the existence of a financial interest. Likewise, executive responsibility is just one factor that may determine the *size* of a financial interest. But other factors exist as well.

A financial interest's extent is relevant because not all institutional financial interests are unconstitutional. Courts have allowed *de minimis* financial interests—financial interests "so small that they may be properly ignored as within the maxim *de minimis non curat lex*." *Tumey*, 273 US at 531. For instance, the Ninth Circuit held that a local "Board had *some* financial interest" in the disputes it adjudicated. *AEP*, 114 F3d at 844 (emphasis in original). But that financial interest was not "strong" enough to rise above a *de minimis* violation. *Id.* at 845, 847. The Supreme Court has

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likewise held that a prosecutor's financial interest was constitutionally insignificant where "the civil penalties collected" by the prosecuting agency "represent[ed] substantially less than 1% of the [agency's] budget." *Marshall v Jerrico*, *Inc*, 446 US 238, 250 (1980).

When is a financial interest more than *de minimis*? Courts have applied both quantitative and qualitative factors. The Ninth Circuit's decision in *AEP* examined both: Quantitatively, the amount of revenue from adjudications was small, "about two to five percent of the entire budget." *AEP*, 114 F3d at 846–47. Qualitatively, the board did not adjudicate many disputes, and it had other sources of revenue if collections fell short. *Id.* Likewise, in *DePiero* the Sixth Circuit considered both (a) that 2–9% of mayor's court fines imposed went to the mayor's municipality, and (b) that the mayor-judge had extensive budgetary and executive authority. 180 F3d at 780. *DePiero* held that, even though the quantitative factors were less significant, the qualitative factors loomed large: "We see no need to split hairs over what is a 'substantial' figure, however, if the mayor's executive authority and administrative responsibilities preclude him from serving as a neutral and detached decision maker." *Id.*

Weighing these quantitative and qualitative factors "is obviously a matter of degree." *AEP*, 114 F3d at 845. Yet two basic principles emerge: *First*, when a large percentage of revenues comes from guilty convictions, that is not a *de minimis* financial interest: "Certainly, any person suddenly deprived of 10% or more of his income would find the loss 'substantial.'" *Rose v Village of Peninsula*, 875 F Supp 442, 451 (ND Ohio 1995) (holding court had unconstitutional financial interest in speeding violations). And *second*, even if revenues are low, a strong connection between a decisionmaker's executive responsibilities and the institution's budgetary needs may create a substantial financial interest: When the decisionmaker's "level of executive authority . . . is broad"—such as by including authority over the institution's budget, organization, and even law

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enforcement—"it becomes reasonable to question [his] impartiality even if he collects a fairly small amount of general fund revenue." *DePiero*, 180 F3d at 780. Still, that executive responsibility can be relevant to the analysis does not mean it is dispositive.

D. Even without an actual financial interest, courts may not appear to have a financial interest in convictions.

Due process does not demand merely that a court be free from any non-*de minimis* financial interests. It also prohibits courts from having the appearance of a financial interest.

The Supreme Court has repeatedly held that only a "probability" of a financial interest is necessary to violate due process. As it stated in *Caperton v A.T. Massey Coal Co*, the Supreme Court "asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" 556 US 868, 881 (2009). The Court reiterated that rule in *Williams v Pennsylvania*, stating it is "an objective standard that, in the usual case, avoids having to determine whether actual bias is present." 579 US 1, 8 (2016). A judge violates due process where there is "an unconstitutional *potential* for bias" or an "objective *risk* of bias" that would "endanger[] the *appearance* of neutrality." *Id.* at 14 (emphases added). The Supreme Court restated this rule again in 2017, when reversing a Nevada Supreme Court decision that had "applied the wrong legal standard" by requiring evidence that the "judge was actually biased" in a particular case. *Rippo v Baker*, 137 S Ct 905, 907 (2017) (per curiam). The correct standard is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.*

Other federal circuits have likewise held that litigants do not need to show that a financial interest actually impacted their case. In the words of the Sixth Circuit, "[t]he mere *possibility* of temptation to ignore the burden of proof is all that is required." *DePiero*, 180 F3d at 782 (emphasis in original); See also *Gacho v Wills*, 986 F3d 1067, 1068 (7th Cir 2021) ("Evidence that the

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presiding judge was actually biased is . . . not necessary."); *Echavarria v Filson*, 896 F3d 1118, 1130 (9th Cir 2018) ("A showing of a constitutionally intolerable risk of bias does not require proof of actual bias.").

And state supreme courts, too, have held that litigants do not need to prove a financial interest affected their cases. Due process is violated where a system creates potential for a financial interest to influence a court's decisions. See, e.g., *Haas v County of San Bernardino*, 27 Cal 4th 1017, 1033, 45 P3d 280, 292 (2002) (stating "the rule mandated by due process" is that "actual bias need not be shown when the alleged bias is due to a financial interest in the outcome of the dispute" (quotation omitted)); *State v Daigle*, 241 So 3d 999, 1000 (La 2018) ("[T]here has been no allegation or showing that the trial judge harbors any actual bias or that he is not a diligent district court judge. However . . . the standard . . . dictates recusal on this matter."); *In re Ross*, 99 Nev at 9, 656 P2d at 837 ("[I]t should be stressed that we are dealing here not with a charge of actual bias, but with a challenge to a procedure as presenting a constitutionally unacceptable potential for bias . . . ."); *In re Paternity of B.J.M.*, 392 Wis 2d 49, 62, 944 NW2d 542, 548 (2020) (holding judge was "objectively biased due to the probability of actual bias"), cert denied sub nom *Carroll v Miller*, 141 S Ct 557 (2020).

Thus, the question here is not whether Michigan's court-funding scheme actually influences trial courts, or actually influenced the judge in Defendant-Appellant Johnson's case. Instead, the question is whether the court-funding scheme objectively creates the "appearance" of a financial interest or "the mere *possibility*," *DePiero*, 180 F3d at 782 (emphasis in original), of a financially interested court. In other words, do Michigan circuit courts appear financially interested in obtaining convictions to raise revenue?

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A court has a financial interest when it financially benefits from convicting defendants. Even if no single decisionmaker benefits, there is an *institutional* financial interest if the decisionmaker's institution benefits from convictions. See Part I.A., *supra*. And, contra the court of appeals, a decisionmaker can have an institutional financial interest even if he or she does not control the institution's budgets—the financial interest exists merely because the court benefits from, and perhaps depends on, convicting defendants. See Part I.B., *supra*. That institutional financial interest, so long as it's not *de minimis*, violates due process. See Part I.C., *supra*. In fact, even if there is no actual financial interest, the *appearance* of a financial interest is sufficient to violate due process. See Part I.D., *supra*.

II. Michigan Trial Courts Have, or Appear to Have, an Unconstitutional Financial Interest in Guilty Convictions.

Michigan trial courts not only benefit from guilty convictions, they depend on them: "The current [funding] system is dependent upon court assessments (fees, fines, and costs) to generate substantial revenues . . . ." AA 99a. Michigan trial courts *must convict defendants to maintain at least a quarter of their revenues*. Those defendants do not appear before financially neutral courts. At the very least, those courts do not appear neutral. That violates due process.

When a defendant is convicted, MCL 769.1k(1)(b)(iii) lets a trial court order the defendant to pay costs "reasonably related to the actual costs incurred by the trial court," including "[s]alaries and benefits for relevant court personnel," "goods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities." Court costs, along with fines and fees, pay on average for nearly half the expenses of Michigan's trial courts. Twenty-six percent of trial court resources are paid for by fines, fees, and costs imposed and retained by the courts. AA 91a. Another 23% comes from the State, but most

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of that money in fact comes from costs imposed by trial courts and remitted to the State. AA 99a. Those remittances are then pooled and redistributed back to the trial courts. Only 2.24% of trial court funding comes from the State's general fund. AA 100a.

Michigan trial courts' financial dependence on convictions places this case squarely within the bounds of *Ward*, *Cain*, and *Caliste*. In each of those cases, the courts found that a municipality's or court's financial dependence on fines and fees violated due process. If a court's finances depend on convicting a defendant, that defendant is not appearing before a neutral, disinterested court. And given that trial courts so heavily depend on these costs—for at least a quarter, and perhaps up to one-half, of their incomes—there can be no suggestion their financial interest is *de minimis*. "[C]ertainly, any person suddenly deprived of 10% or more of his income would find the loss substantial." *DePiero*, 180 F3d at 780 (quotation marks omitted).

Michigan trial courts receive a substantial financial benefit from the court costs imposed alongside guilty convictions. Yet the court of appeals held that trial courts do not have a financial interest because there must be evidence that court costs were deposited "into a special or specific fund." AA 56a. This was error. As demonstrated in Part I.B., *supra*, the Judicial Expense Fund in *Cain*, and the judges' responsibility for it, was just one reason those judges cared to generate court revenues. But, as the *Caliste*, *AEP*, and *Harper* cases show, other reasons may similarly give decisionmakers an interest in generating revenue. What matters is whether the decisionmaker's institution is going to benefit financially from an adjudication, and whether that decisionmaker has a reason to care for her institution's finances.

Michigan's court-funding scheme certainly gives judges a reason to care about imposing costs. This case concerns more than just a special fund: 26% of revenues are from costs imposed by trial courts and then retained in their own accounts. AA 91a. Those costs pay for the courts'

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operations. MCL 769.1k(1)(b)(iii).[4] This means that, as in *Caliste*, court costs "help fund critical pieces of a well-functioning chambers. And if an elected judge is unable to perform the duties of the job, the job may be at risk." 937 F3d at 530. The City of Southfield threatened its court with eviction when revenues dried up, leaving the court "left to find its own resources to rent space to carry out its duties." AA 229a. One judge recalled that "her court's budget is not predicated on the needs of the court's operation but is tied exactly to the amount of revenue we generate through fines and costs." AA 46a (quotation marks omitted). And when trial courts do produce much needed revenue, local governments view the courts as the "cash cow of local government." AA 190a. As the dissent below noted, "MCL 769.1k(1)(b)(*iii*) requires courts to do exactly what our several constitutions have all barred—take money from convicted defendants and use it to fund its operations." AA 45a. A court so dependent on these convictions is "not impartial because its revenue depend[s] directly and materially on . . . sentencing decisions." *Harper*, 976 F3d at 1244. Michigan trial courts are unconstitutionally dependent on court costs.

Finally, even if trial courts are not actually influenced by the revenue they obtain from costs, using those costs to fund the courts creates the appearance of a financial interest. The court of appeals in fact recognized this appearance of bias, saying it "agree[s] that use of the funds generated pursuant to MCL 769.1k(1)(b)(*iii*) to finance the operations of the sentencing judge's court, coupled with intense pressure placed on that court by its local funding unit, *could create at*

[4] The court of appeals held that MCL 769.1k(1)(b)(iii)'s requirement that certain costs be used to directly fund the court's operations in fact supports its constitutionality. Trial courts, it stated, do not have "unconstrained" discretion to impose costs because these costs are "reasonably related to the actual costs incurred." AA 56a. But the court's reasoning looks at the wrong use of discretion. It's not the amount of the cost that is unconstitutionally influenced by the trial court's financial needs; it's the decision to convict the defendant in the first place. Costs can only be imposed on defendants who are guilty. Thus, when deciding whether to convict, a court may be unconstitutionally interested in convicting to generate much needed court revenues.

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a minimum an appearance of impropriety." AA 57a (emphasis added). That appearance of a financial interest, as explained in Part I.D. *supra*, violates due process.[5]

The very fact that the statute "might operate unconstitutionally" by financially incentivizing some trial courts to convict makes the statute unconstitutional in all applications, under any set of circumstances. It is the objective possibility or appearance of bias that matters, not whether a trial court is actually biased in its decision-making. When defendants enter the court, they do not see a disinterested judge. Instead what appears is a judge that must convict them to fund a quarter or more of the court's budget. So even if a court is not financially interested, Michigan's funding scheme objectively tempts trial courts to be interested. That makes Michigan's funding scheme unconstitutional. What matters is that there is an unconstitutional "appearance of impropriety." AA 48a.[6]

[5] It's possible the court did not properly apply the "appearance of bias" standard because it confused the merits of this case with the "facial" versus "as-applied" distinction. The court of appeals held that the mere potential for bias here was not enough to meet the legal standards applicable to a facial challenge, which require "no set of circumstances under which MCL 769.1k(1)(b)(*iii*) would be valid." AA 57a. It therefore rejected Defendant-Appellant's arguments that the statute "might operate unconstitutionally." *Id.* But the facial standard should not be confused with the merits. The merits question is whether there was an appearance or possibility of a financial interest. That means that MCL 769.1k(1)(b)(iii) is unconstitutional if it creates a mere potential for bias, even if certain judges do not succumb to that financial temptation.

[6] The court of appeals questioned whether financial interests are still unconstitutional where, as here, the defendant enters a plea. AA 53a. They are. The decision to plea is not fairly made if the defendant suspects the court is biased. When the defendant enters a plea, he must consider his chances of prevailing at trial, and those chances look drastically different when the court appears to have a financial interest against the defendant.

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CONCLUSION

MCL 769.1k(1)(b)(iii) enables Michigan trial courts to financially depend on convicting defendants. That dependence violates due process, because those defendants do not have their cases heard in neutral, financially disinterested courts. To end that due process violation, Amicus respectfully requests that this Court reverse the court of appeals and rule that MCL 769.1k(1)(b)(iii) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2022, I electronically filed the foregoing Amicus Curiae Brief of the Institute for Justice in Support of Defendant-Appellant, which was served on all Parties by the MiFILE system of the Michigan Supreme Court.

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