Order

Michigan Supreme Court
Lansing, Michigan

July 7, 2023

Elizabeth T. Clement,
Chief Justice

163073

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163073
COA: 351308
Alpena CC: 17-007577-FH
17-007941-FH

TRAVIS MICHAEL JOHNSON,
Defendant-Appellant.

_____/

On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE our order of July 22, 2022. The application for leave to appeal the April 8, 2021 judgment of the Court of Appeals is DENIED, because we are no longer persuaded that the questions presented should be reviewed by this Court.

BOLDEN, J. (*concurring*).

I concur in the Court's order denying leave to appeal and vacating the order of July 22, 2022, which had granted leave to appeal, because I agree that the questions presented should not be reviewed by this Court. However, I write separately to highlight how concerns about the functionality of MCL 769.1k(1)(b)(*iii*) could be addressed.

Criminal sentencing is an arena in which the Legislature and the judiciary have had a long-standing and constitutionally protected power-sharing agreement. Article 4 of the Michigan Constitution vests in the Legislature the power to "provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." Const 1963, art 4, § 45. 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 and to impose that sentence on a convicted defendant. *People v Garza*, 469 Mich 431, 434 (2003) ("[T]he Legislature has chosen to delegate various amounts of sentencing discretion to the judiciary."). There is a history of the Legislature delegating their power to the judiciary. And if the delegation is "limited and specific and does not create encroachment or aggrandizement of one branch

at the expense of the other, a sharing of power may be constitutionally permissible." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 297 (1998).

Though the sharing of power between the Legislature and the judiciary is constitutionally permissible, that does not mean that it is always practical. Defendants and several amici have emphasized some genuine issues with the court costs funding scheme under MCL 769.1k(1)(b)(*iii*). The Michigan District Judges Association (MDJA) submitted an amicus brief that outlined many of their concerns. The MDJA highlights the conflicts of interest that some district court judges believe MCL 769.1k(1)(b)(*iii*) imposes, given that criminal convictions in Michigan are a source of revenue for the courts. The MDJA believes that the statutory scheme has long put pressure on judges.

Former Chief Justice MCCORMACK discussed these same concerns in her concurrence in *People v Cameron*, 504 Mich 927 (2019). *Cameron* asked this Court to answer similar questions regarding the constitutionality of MCL 769.1k(1)(b)(*iii*)—so similar that the MDJA's brief in *Cameron* cited many of the same issues mentioned in its brief here. In her concurrence, Chief Justice MCCORMACK noted that "our coordinate branches have recognized the long-simmering problems" with Michigan trial court funding. *Cameron*, 504 Mich at 928 (MCCORMACK, C.J., concurring). Though she ultimately joined the unanimous Court in *Cameron* in denying leave, she urged the Legislature to consider the recommendations of the Trial Court Funding Commission (TCFC) to address the MDJA's concerns. *Id*. at 928-929. And like Chief Justice MCCORMACK joined the unanimous Court in *Cameron*, I join the majority here because although some of the allegations raised by amici trouble me, I believe it is the Legislature that is best positioned to determine the extent of the problem and impose the necessary fixes.

Like Chief Justice MCCORMACK before me, I see a practical solution to the issues raised concerning funding pressures felt by the MDJA. MCL 769.1k(1)(b)(*iii*) will sunset on May 1, 2024. The sunset provision gives the Legislature a prime opportunity to address the concerns the MDJA raised. In fact, the sunset provision was added for this very purpose. In 2014, the MDJA suggested that the Legislature implement a sunset provision in MCL 769.1k(1)(b)(*iii*). It also recommended that the Legislature instruct the Governor to create a commission to study the issues with court funding and make recommendations. The Legislature adopted the MDJA's recommendations, and the TCFC was created in 2017. The TCFC issued a report in 2019 recommending, among other things, significant legislative changes to the trial court funding scheme. I recommend that the Legislature seriously consider the recommendations of the TCFC and use next year's sunset provision as the prime opportunity to formally reevaluate MCL 769.1k(1)(b)(*iii*) by implementing the TCFC recommendations prior to May 1, 2024.

At bottom, the MDJA and other interested groups and individuals throughout the state have identified anecdotal evidence in support of what they believe to be improper

pressures created by a funding statute. However, the fix to the problem described by these parties and amici is not one that I believe could be implemented by finding, as they would like this Court to do, MCL 769.1k(1)(b)(*iii*) to be facially unconstitutional. To demonstrate that a statute is unconstitutional on its face, a party "must establish that no set of circumstances exists under which the [a]ct would be valid." *Judicial Attorneys Ass'n*, 459 Mich at 303 (quotation marks and citations omitted; alteration in original). I am not convinced that the "heavy burden" of establishing unconstitutionality has been overcome, *id*., or that any party has shown there are *no circumstances* in which the statute, essentially, asserts such pressures that judges imposing court costs cannot set aside these pressures to accomplish the goals of fair and impartial oversight of proceedings. Of course, this does not mean that the judiciary can never consider due-process or other as-applied challenges when funding pressures demonstrably impeded the goals of the judiciary. However, for us to find MCL 769.1k(1)(b)(*iii*) *facially* unconstitutional would require us to find, essentially, that the funding pressures created by this statute make it such that no criminal proceeding resulting in a conviction in which the trial court imposes—or chooses not to impose—discretionary court costs reasonably related to the cost of trial was conducted free of bias. Given the evidence and record before us today, I am not convinced.

Because I believe it is within the reasonable constitutional authority of the Legislature to scrutinize, examine, and, if necessary, fix the issues brought before this Court today, I vote to vacate the order that granted leave and to deny the application for leave to appeal. I hope that the Legislature considers the gravity of the issue and provides the necessary fix before the provision sunsets next May.

CLEMENT, C.J., and BERNSTEIN, J., join the statement of BOLDEN, J.

CAVANAGH, J. (*dissenting*).

I agree with Justice WELCH that MCL 769.1k(1)(b)(*iii*) violates separation-of-powers principles 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). I write separately because I would also hold that 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, 466 (1971). Given that the statute is unconstitutional, I would reverse the lower courts and remand these cases to the trial courts to vacate the costs imposed against these defendants. However, I recognize that the effect of declaring this statute unconstitutional has the potential to cause significant disruption to the funding of our courts and, therefore, substantially affect the operation of our system of justice. In light of this, and in consideration of the effects on the administration of justice in our state, I would hold that MCL 769.1k(1)(b)(*iii*) is unconstitutional effective as of 18

months from the issuance of this decision. See *Shavers v Attorney General*, 402 Mich 554, 608-609 (1978).

The rule that "[n]o one ought to be a judge in his own cause" is both "inflexible" and "manifestly just." Cooley, Constitutional Limitations (1st ed), p 410. When a judge has an interest in a case, he is "equally excluded as if he were the party named." *Id*. at 411. There is some threshold quantity of interest necessary to invoke the rule. Clearly, a judge is not excluded by an interest which is "so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual." *Id*. at 412. But exclusion may be required even if there is no assertion that any particular judge is *actually* biased; a systematic interest in a decision that objectively creates a possible temptation for a judge to be biased is sufficient.

The United States Supreme Court has provided a standard against which to weigh judicial interests: "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, denies the latter due process of law." *Tumey v Ohio*, 273 US 510, 532 (1927). The question before us is, considering the weight of the judiciary's interest in imposing costs under the statute, whether there is a "possible temptation" to fail to "hold the balance nice, clear and true between the State and the accused[.]" That question is answered not by subjectively scrutinizing an individual judge, but by objectively asking, "under a realistic appraisal of psychological tendencies and human weakness," "whether there is an unconstitutional potential for bias." *Caperton*, 556 US at 881, 883 (quotation marks and citations omitted). Where the statute is *designed* to incentivize courts to impose costs based on their own budgetary interests rather than the merits of any particular case, there is quite obviously more than "a possible temptation." If there were any doubt, our state's judges have removed it by explicitly telling us about the pressure the statute creates.

The United States Supreme Court has had multiple occasions to employ this rule. In *Tumey*, the Ohio statute and local ordinances at issue provided that the village mayor could conduct trials for violations of the Prohibition Act and receive the legal fees taxed in addition to his regular salary. *Id*. at 516-519. The *Tumey* Court held that this violated due process. Critical in the Court's analysis were the incentives created by the statutory scheme:

> The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. . . . It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public

> money and expending it, in the pecuniarily successful conduct of such a court. [*Id*. at 532-533.]

The mayor's office gave him both the ability and responsibility to respond to these incentives: "The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village." *Id*. at 533. While local sentiment about the practice was divided, the mayor took the position that the existence of "liquor courts" would depend on the financial need of the village.[1] Having observed these incentives, the Court concluded that due process could not be satisfied by counting on individuals to resist them:

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. [*Id*. at 532.]

Shortly thereafter, the Court considered a similar situation in *Dugan v Ohio*, 277 US 61 (1928). The same state statute prohibiting possession of liquor was involved, but the local ordinances and duties of local officials were different. While the official trying the violations in *Dugan* also held the title of mayor, his office seemed to have nothing else in common with the mayor's office from *Tumey*:

> The mayor has no executive, and exercises only judicial, functions. The commission exercises all the legislative power of the city, and together with the manager exercises all its executive powers. The manager is the active executive. The mayor's salary is fixed by the votes of the members of the commission other than the mayor, he having no vote therein. He receives no fees. [*Dugan*, 277 US at 63.]

The *Dugan* mayor's salary did not vary with respect to possession convictions. In *Dugan*, the mayor did not have a personal interest in the cases he was trying, nor did his office oversee units of government funded by convictions. There was no discernible incentive to convict other than the merits of the cases before the mayor, and so there was no "possible

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[1] As the Court explained:

> [T]here was a division of public sentiment in the village as to whether the ordinance should continue in effect. A petition opposing it and signed by a majority of the voters was presented to Mayor Pugh. To this the Mayor answered with the declaration that, if the village was in need of finances, he was in favor of and would carry on "the Liquor Court," as it was popularly called, but that if the court was not needed for village financial reasons, he would not do so. [*Id*. at 521.]

temptation" to fail to "hold the balance nice, clear and true between the State and the accused." There was no due process violation.

In *Ward v Village of Monroeville, Ohio*, 409 US 57 (1972), the Court applied the same principles. There, an Ohio statute authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses. The mayor of the village of Monroeville was also responsible for managing many aspects of local government. He "account[ed] annually to the council respecting village finances . . . and [had] general overall supervision of village affairs," in addition to other duties. *Id*. at 58. The revenue generated by the mayor's sentences was critical to the village.[2] The *Ward* Court saw the village's dependence on the revenue and the mayor's responsibility for the village as a set of incentives that was dispositive:

> Conceding that "the revenue produced from a mayor's court provides a substantial portion of a municipality's funds," the Supreme Court of Ohio held nonetheless that "such fact does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity." [*Village of Monroeville v Ward*, 27 Ohio St 2d, 179, 185 (1971).] We disagree with that conclusion. [*Ward*, 409 US at 59.]

The Court reiterated that *Tumey* was about more than the direct payments: "The fact that the mayor there shared directly in the fees and costs did not define the limits of the principle." *Id*. at 60. And directly applying *Tumey*'s rule, the Court stated: "Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id*.

As in *Tumey*, MCL 769.1k(1)(b)(*iii*) provides a "possible temptation" for judges to be partisan when imposing costs that are intended to fund the institution in which they serve. MCL 769.1k(1)(b)(*iii*) authorizes courts to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case," and it specifies that costs can include, but are not limited to, "[s]alaries and benefits for relevant court personnel," "[g]oods and services necessary for the operation of the court," and "[n]ecessary expenses for the operation and maintenance of court buildings and facilities." The plain text of the statute authorizes courts to fund any expense or portion of a court's overhead through MCL 769.1k(1)(b)(*iii*).

If the text was not clear enough, the history of MCL 769.1k makes the incentive it creates clear. Under a previous version of the statute, this Court considered the phrasing

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[2] "[I]n 1964 this income contributed $23,589.50 of total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in 1966 it was $16,085 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95." *Id*.

"[a]ny cost in addition to the minimum state cost" and held that the legislative intent was to provide authority for courts to collect costs separately enumerated in other places. *People v Cunningham*, 496 Mich 145, 154 (2014). The Court noted that to hold otherwise would have rendered the specific enumerations nugatory. *Id*. Following *Cunningham*, the Legislature quickly amended MCL 769.1k and explained its intent: "This amendatory act is a curative measure that addresses the authority of courts to impose costs," and then cited *Cunningham*. 2014 PA 352, enacting § 2. The swift amendment of MCL 769.1k in response to *Cunningham* to expand circumstances under which court costs could be imposed indicates that the statute plays a central role in the funding of Michigan courts.

This impression was reinforced in 2017 when the Legislature created the Trial Court Funding Commission (the Commission). The Commission acknowledged that the amendments of MCL 769.1k were a direct response to *Cunningham*. At the outset, the Commission found that 26.2% of trial court funding was generated by trial courts through assessments on criminal defendants at sentencing. *Trial Court Funding Commission Final Report* (September 6, 2019), p 7.[3] In gross terms, the Commission estimated that this percentage amounted to approximately $291 million annually. *Id*. After 14 months of research, surveys, and engagement with experts and stakeholders, the Commission specifically found "[a] real or perceived conflict of interest between a judge's impartiality and the obligation to use the courts to generate operating revenue[.]" *Id*. at 8.

The Court of Appeals has previously considered MCL 769.1k and reached the unremarkable conclusion that its intent is to fund courts. In considering an ex post facto challenge to the imposition of court costs for an offense committed before the amendment of the statute, the Court of Appeals stated, "MCL 769.1k(1)(b)(*iii*) has the nonpunitive purpose of providing funding for court operations. . . . [T]he purpose is to fund the court's operation rather than to punish convicted defendants." *People v Konopka (On Remand)*, 309 Mich App 345, 373 (2015).

The Court of Appeals revisited MCL 769.1k in *People v Cameron*, 319 Mich App 215, 223 (2017), this time considering whether it ran afoul of the requirement in Const 1963, art 4, § 32 that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." As a necessary aspect of upholding the statute, the Court of Appeals held that "MCL 769.1k(1)(b)(*iii*) was an effort by the Legislature to allow trial courts to impose costs on a convicted defendant in amounts reflecting the court's actual operational costs in connection with criminal cases." *Id*. at 231. Relatedly, the Court discerned "no evidence indicating that the Legislature did not intend MCL 769.1k(1)(b)(*iii*) to raise revenue for the

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[3] This report is available at <https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/Reports/TCFC_Final_Report_962019_9-30-2019.pdf?rev=d95b86f27aa743208115548135 0132fb&hash=0069CA920A5ACFBC927427D80875F457> (accessed June 5, 2023) [https://perma.cc/5FJW-6Z73].

courts or that the court costs collected are directed to a use unintended by the Legislature." *Id*.

In both *Konopka* and *Cameron*, MCL 769.1k(1)(b)(*iii*) was held constitutional *only because* the Legislature relied on it to fund courts. By denying leave to appeal here, the Court seems to be reading MCL 769.1k(1)(b)(*iii*) inconsistently with how the *Konopka* and *Cameron* panels understood the statute, leaving the continued viability of those cases unclear.

The defendant in *Cameron* sought leave to appeal in this Court, and while we ultimately denied leave to appeal, it was not without the following observations about what the Michigan District Judges Association (MDJA) had argued in its amicus brief:

> They describe the pressures they face as district judges to ensure their courts are well-funded. For example, one city threatened to evict a district court from its courthouse because it was unable to generate enough revenue. Another judge noted that the same city suggested that judges eliminate personnel if they could not generate enough revenue to cover the operational costs. A third judge recounted that his local funding unit referred to the district court as "the cash cow of our local government."
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> The MDJA contends that MCL 769.1k(b)(*iii*) creates a conflict of interest by shifting the burden of court funding onto the courts themselves. In the MDJA's telling, MCL 769.1k(1)(b)(*iii*) incentivizes courts to convict as many defendants as possible. The "constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge." MDJA Brief, p 16. They believe that the statute thus violates the Fourteenth Amendment, because the "possible temptation," *Tumey v Ohio*, 273 US 510, 532 (1927), of raising more revenue by increasing the number of convictions infringes defendants' due-process rights. [*People v Cameron*, 504 Mich 927, 928 (2019) (MCCORMACK, C.J., concurring).]

Then Chief Justice MCCORMACK observed:

> No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units (and perhaps even from the electorate), could create at least the appearance of impropriety. Assigning judges to play tax collector erodes confidence in the judiciary and may seriously jeopardize a defendant's right to a neutral and detached magistrate. [*Id*.]

Then Chief Justice MCCORMACK described these concerns as "long-simmering problems," and she urged legislative action "before the pressure placed on local courts causes the

system to boil over." *Id*. at 928-929. That has not happened, thus necessitating our resolution of this issue.

In this case, the MDJA has again argued in its amicus brief that the statute is unconstitutional, saying unequivocally, "MCL 769.1k(1)(b)(*iii*) gives Michigan's judges a pecuniary interest in the outcome of their criminal cases." The MDJA said that "district court judges have been pressured to raise revenues not only for their courts, but for the whole county in some instances." The MDJA has reiterated in this case some of the examples that then Chief Justice MCCORMACK discussed in her *Cameron* concurrence. The MDJA has also discussed one city where the district court's funding was tied directly to "revenue" generated through fines and costs, with quarterly reviews triggering budget reductions if projections are not met.

The prosecution mainly relies on *Dugan* in response to these arguments, and in particular the following:

> The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive but only judicial duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. [*Dugan*, 277 US at 65.]

The prosecution says there is no meaningful distinction between *Dugan* and the plight of Michigan courts. That ostrich-like argument refuses to acknowledge the absence here of a key point *Dugan* relied on—the Xenia mayor's relation to the "financial policy of the city" is "remote." *Id*. As has been discussed at length, the purpose of MCL 769.1k(1)(b)(*iii*) is to fund courts. The enacting legislation explicitly said as much, and the Court of Appeals has relied on that proposition to uphold the statute's constitutionality. The judges authorized to collect costs under the statute have repeatedly argued that "MCL 769.1k(1)(b)(*iii*) gives Michigan's judges a pecuniary interest in the outcome of their criminal cases."

Given all of this, it is befuddling how anyone could conclude that there is no "possible temptation" "not to hold the balance nice, clear and true between the State and the accused," *Tumey*, 273 US at 532, or that there is no "potential for bias," *Caperton*, 556 US at 881.

The prosecution points out that no judge has come forward and admitted being biased to unjustly collect court costs. While true, this observation is unhelpful. No judge made any such admission in *Tumey* or *Ward* either, but the due-process protections were clearly violated in those cases. In any event, the United States Supreme Court has specifically held that no actual bias is required to trigger a due process violation. *Rippo v Baker*, 580 US 285, 287 (2017).[4] To be fair, the prosecution admits that such an example is not required. Its point is that MCL 769.1k(1)(b)(*iii*) is used so often that if there were a risk of bias, in the hundreds of thousands of applications of the statute, at least one example of bias would be apparent. The prosecution analogizes to shark attacks and lightning strikes, pointing out that while those things are rare, the examples of them happening are obvious.

There are two problems with this argument. First, as the prosecution admits, defendant need not show actual bias, only the risk of it. In this context, that means the "possible temptation" of a judge to use MCL 769.1k(1)(b)(*iii*) in response to pressure to fund courts rather than because of the merits of a case. Given that, it's not clear how a court could use MCL 769.1k(1)(b)(*iii*) in a way *other than* in response to funding pressures. Fines are set by statute. Restitution is measured by financial loss of victims. The only guidance MCL 769.1k(1)(b)(*iii*) gives about how much to charge criminal defendants *is the need of the court*. Arguably, every application of the statute is an example. Second, if the situations described by the MDJA don't satisfy the prosecution, it's not clear what exactly the prosecution is looking for. Does it expect a judge to announce on the record that they are invoking MCL 769.1k(1)(b)(*iii*) because of their bias? Judges normally assess costs under MCL 769.1k(1)(b)(*iii*) without any explanation. The pressures and considerations that led a judge to a particular decision might never be uttered aloud, if they are even contemplated by the judicial decisionmaker. Biased decisions do not look like lightning strikes.

Justice BOLDEN concurs in the Court's decision to deny leave to appeal, noting that defendants have not met their burden to show the statute is facially unconstitutional. She points out that the burden a party bears in a facial challenge to the constitutionality of a statute is to "establish that no set of circumstances exists under which the [a]ct would be valid." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303 (1998) (quotation marks and citations omitted; alteration in original). This is correct. She says that in this context that means defendants need to show "that the funding pressures created by this statute make it such that no criminal proceeding resulting in a conviction in which the trial court imposes—or chooses not to impose—discretionary court costs reasonably related to the

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[4] "[T]he Due Process Clause may sometimes demand recusal even when a judge has no actual bias. Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo*, 580 US at 287 (quotation marks, citations, and brackets omitted).

cost of trial was conducted free of bias." *Ante* at 3. While this is the standard for many facial challenges, *Caperton* established that a 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." *Caperton*, 556 US at 881. Defendants are not required to show actual bias in any particular case. If they were, I would agree they have not met their burden here. But that is not their burden. In this context, defendants are required to show that "no set of circumstances exists under which," *Judicial Attorneys Ass'n*, 459 Mich at 303, "there is an unconstitutional potential for bias," *Caperton*, 556 US at 881. The only guidance provided by the statute on how to assess costs is the need of the court. The state has never attempted to articulate how judges are supposed to assess costs except for in response to lack of adequate funding. There is no way for MCL 769.1k(1)(b)(*iii*) to operate free from the potential for bias and without violating due process.

The appropriate remedy for these due-process violations is to vacate costs assessed under MCL 769.1k(1)(b)(*iii*). However, as discussed at length, trial courts across the entire state rely on these assessments. Therefore, "for purposes of the general jurisprudence, the general welfare of the public, and the administration of justice," I would hold MCL 769.1k(1)(b)(*iii*) unconstitutional effective as of eighteen months from the issuance of such an opinion. *Shavers*, 402 Mich at 609. That would allow appropriate time to remedy the due-process deficiencies. *Id*.

One final point. I agree with Justice BOLDEN that the May 1, 2024 sunset provision provides an opportunity for a practical solution to this problem of court funding and join her in urging the Legislature to fix the problem before then. As Justice BOLDEN points out, the MDJA voiced these concerns almost a decade ago. The Commission was formed in 2017 and it completed its work in 2019. Despite its knowledge of these concerns and recommendations, the Legislature has to date failed to take action and has chosen to extend the sunset provision in MCL 769.1k(1)(b)(*iii*) once already. The constitutionality of MCL 769.1k(1)(b)(*iii*) is before this Court, and we should address it *now*.[5] Because we are not doing so, our system of justice—including all those who work within it, rely upon it, and are affected by it—are left to hope that the adage is true: the wheels of justice turn slowly, but they grind exceedingly fine. My hope is that our decision today does not cause those wheels to stop turning altogether.

WELCH, J. (*dissenting*).

The judiciary, like the other two branches of government, relies on tax revenue to fund a significant portion of its operations. Courthouses, judges, bailiffs, court reporters,

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[5] At some point our refusal to correct the unconstitutional statute may well lead litigants to stop challenging it.

clerks, security, and countless other critical court employees all serve our communities and are compensated largely from our tax dollars. Likewise, essential technology and equipment inside our courthouses also are funded by taxes. Faced with less revenue and deep budget cuts, in the mid-2000s the Legislature partially resolved the judiciary's funding deficiency by passing legislation allowing trial courts to generate more revenue. 2005 PA 316. Specifically, the version of the statute at issue allows trial court judges to assess general court operating costs upon convicted defendants in criminal cases without calculating the actual costs incurred by the government in a particular case. These additional costs have been used to defray the identical costs that the Legislature and county governments previously funded primarily through their usual taxation process at the state and local level.

The defendants have presented to us compelling arguments that, through MCL 769.1k(1)(b)(*iii*), the Legislature has foisted its constitutional obligation to fund the judiciary, Const 1963, art 9, § 1, onto the state's trial courts in violation of separation of powers principles. This has effectively turned Michigan's trial courts into self-funding tax assessors and collectors by requiring the courts, and the courts alone, to decide which convicted individuals pay a tax and how much they must pay to help fund the judiciary's operations. I believe that such a broad surrender of authority violates Michigan's separation of powers principles, Const 1963, art 3, § 2, because it requires state trial courts to exercise the Legislature's exclusive power of taxation in a discretionary manner and this power is wholly unrelated to the courts' exercise of the judicial power under Const 1963, art 5, § 1. See *Houseman v Kent Circuit Judge*, 58 Mich 364 (1885); *Mistretta v United States*, 488 US 361, 383 (1989).

Additionally, I have grave concerns about the constitutionality of a system that allows the assessment of judiciary operation costs against convicted individuals, costs that are unrelated to their punishment for a crime, without first assessing their ability to pay. While the criminally convicted can no longer be incarcerated for a legitimate inability to pay fines, fees, or costs imposed by the court, see MCR 6.425(D)(3), saddling these individuals with paying for the operational costs of the courts without first assessing their ability to pay seems to resemble a punitive fine without proper constitutional protections.

I therefore respectfully dissent from this Court's decision to find that leave was improvidently granted in this case.

I. FACTUAL BACKGROUND

There are two cases before the Court that raise the same questions about the facial constitutionality of MCL 769.1k(1)(b)(*iii*)—*People v Johnson* (Docket No. 163073) and *People v Edwards* (Docket No. 163942). In *Johnson*, the defendant, Travis Johnson, pleaded guilty to charges in two separate cases and received prison sentences for both. In each case, the judgment of sentence indicates that the court assessed $600 in court costs

against Johnson under § 1k(1)(b)(*iii*). In *Edwards*, the defendant, Kelwin Edwards, was convicted by a jury and received a prison sentence. The judgment of sentence reflects that the court assessed $1,300 in court costs under § 1k(1)(b)(*iii*).

In separate appeals, each defendant argued that § 1k(1)(b)(*iii*) is facially unconstitutional and requested that the assessed costs be vacated and any money previously paid be refunded. The Court of Appeals rejected the defendants' arguments in two separate decisions. *People v Johnson*, 336 Mich App 688 (2021); *People v Edwards*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 354647). Each defendant sought leave to appeal in this Court, and after some delays, this Court granted leave in each case. Of particular relevance here, this Court asked "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*[, 488 US at 383], quoting *Morrison v Olson*, 487 US 654, 680-681 (1988); see also *Houseman*[, 58 Mich at 367][.]" *People v Johnson*, 509 Mich 1094, 1094-1095 (2022); *People v Edwards*, 509 Mich 1095, 1095 (2022).

II. A BRIEF HISTORY OF COURT FUNDING AND MCL 769.1k

Debate about funding for the judiciary is not new. Early debates often focused on courts' authority and control over spending and their ability to demand funding as a coequal branch of government. See Martin, *Law, Money, People: Insights From a Brief History of Court Funding Concerns*, 4 UCLA Crim Just L Rev 213, 216-217 (2020). The eventual consensus in this country was that the judiciary can spend money within its discretion, but the Legislature controlled the purse strings through its appropriations powers. *Id*. at 216-217. Various court funding systems have been adopted by state legislatures across the country.

Like the federal government, Michigan's government is divided into three coequal branches that are subject to separation of powers principles. "The powers of government are divided into three branches: legislative, executive and judicial. 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. The Michigan Constitution requires that the "legislature shall impose taxes sufficient with other resources to pay the expenses of state government," Const 1963, art 9, § 1, and that "[t]he power of taxation shall never be surrendered, suspended or contracted away," Const 1963, art 9, § 2. Relevant to judiciary funding concerns, the Constitution mandates that "all fees and perquisites collected by the court staff" must be "turned over" and "credited to the general fund," Const 1963, art 6, § 7. While, in practice, assessed court costs (which are different than fees) have been treated as exempt from Article 6, § 7, and thus can be directly

allocated to other funds serving the judiciary, the Michigan Constitution is surprisingly vague as to the specifics of funding of the judiciary.[6]

One might assume that pursuant to Const 1963, art 9, § 1, the Legislature is solely responsible for funding state courts through its powers of taxation and appropriation. However, in *Grand Traverse Co v Michigan*, 450 Mich 457 (1995), this Court held that neither Const 1963 art 6, § 1, nor art 9 §§ 1 or 3, require the state to pay the entire cost of circuit and district court operations. The Legislature has since relied on counties and local funding units to make up the difference between what the Legislature appropriates and what trial courts need. MCL 600.591(1); MCL 600.8104(2). According to the Trial Court Funding Commission's 2019 report, while state government funds the entirety of the Michigan Supreme Court and Court of Appeals from the general fund budget, municipal and county governments receive reimbursement from the general fund only for trial court judges' salaries and a minor portion of their benefits. State of Michigan, Trial Court Funding Commission, *Trial Court Funding Commission Final Report* (September 6, 2019), p 13, available at <https://www.michigan.gov/-/media/Project/Websites/treasury/Reports/TCFC_Final_Report_962019_9-16-2019.pdf?rev=1fedbe221d224bf5978880216acbb06d> (accessed May 3, 2023) [https://perma.cc/38FJ-7E2G]. Michigan's current funding system "is dependent upon court assessments (fees, fines, and costs) to generate substantial revenues to fund roughly one-third of court operations. The balance comes primarily from local general operating funds with the remaining portions from state and federal payments and grants." *Id*. at 15.

Most relevant to this case is the state treasury's Justice System Fund (JSF). MCL 600.181(1). This is where all "proceeds from the *collection of revenue from court assessments and costs* designated by law for deposit in the fund" must be credited, MCL 600.181(2) (emphasis added), and thus it includes court costs imposed pursuant to MCL 769.1k(1)(b)(*iii*). A portion of the money from the JSF is then allocated to the State Court Fund (SCF) and the Court Equity Fund (CEF). MCL 600.181(3)(b)(*vii*) and (*viii*). Much of the money credited to the SCF and the CEF is then distributed to counties and local funding units to fund trial court operations, see MCL 600.151a(7) and (8); MCL 600.151b(1) and (2), which is then allocated to the relevant courts through the applicable budget process. As stated by the Trial Court Funding Commission:

> While a significant portion of the court assessments are sent to state government, very little is ultimately appropriated from the state's general

[6] The state Constitution does contain clear limitations. For example, it prohibits judges and justices from being "paid from the fees of [their] office" and having their salary "measured by fees, other moneys received or the amount of judicial activity" of their office. Const 1963, art 6, § 17.

> fund to actually fund the trial court system. Tens of millions of dollars are transferred to other state functions that do not directly support courts. . . .
>
> [As of September 2019,] [s]tate support to the courts is 26.2 percent of all funding. Of this amount, a considerable portion is made up of court assessments that are from local courts. Courts and local funding units remit back to the state $127 million. When removing the $127 million that is sent back to the state from local court assessments, the state share of funding is greatly reduced. Local government units are the largest source of funding for trial courts. . . .
>
> While these percentages are in total across the state, it should be noted that the range of percentage contributions varies greatly. Each local unit varies in its percentages based upon what courts the unit may house. For example, most counties have circuit, district, and probate courts. In six Michigan counties (Ingham, Kent, Macomb, Oakland, Wayne, and Washtenaw), local municipalities (cities, townships) provide for a district court. Given that most user fee revenues are collected in district courts, those local units only housing a district court will have a greater portion of their expenses covered by court assessments instead of the local funding unit. [*Trial Court Funding Commission Final Report*, p 15.]

Stated differently, Michigan's trial courts are funded through a complex web of state and local taxes as well as the redistribution of fines, fees, and court costs imposed on litigants, which are transferred to the state treasury and then redistributed to counties and local funding units before eventually reaching district and circuit courts. Once the money returns to the trial courts, a court's chief judge manages the court's finances. See MCR 8.110(C)(3)(f).

It is well established that courts have no constitutional right or directive to impose court costs against the criminally accused in Michigan. Rather, "[t]he right of the court to impose costs in a criminal case is statutory." *People v Wallace*, 245 Mich 310, 313 (1929). Therefore, courts may impose costs in criminal cases only where such costs are authorized by statute. *Id*. In 2005, the Legislature first enacted MCL 769.1k as a means of authorizing the assessment of certain fines, costs, and other assessments against convicted defendants in criminal cases. 2005 PA 316. But § 1k has been challenged on numerous occasions. In *People v Cunningham*, 496 Mich 145, 154-157 (2014), this Court unanimously held that an amendment that added § 1k(1)(b)(*ii*), which granted general permission to assess "[a]ny cost in addition to the minimum state cost set forth in subdivision (a)" against a convicted defendant, did not provide the independent statutory basis necessary for courts to assess a portion of the court's general operational costs in every case. 2005 PA 316, as amended by 2006 PA 655. Instead, we determined that this version of § 1k(b)(*ii*) granted "authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham*, 496 Mich at 158. Accordingly, the Court vacated the assessment of "$1,000 in court costs" against the defendant and remanded for further proceedings. *Id*. at 160.

In response to *Cunningham*, the Legislature amended § 1k(1) as a curative measure to explicitly authorize the assessment of certain costs against convicted individuals at sentencing. As amended by 2014 PA 352, § 1k, concerning operational costs, provides in part:

> If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, . . .
>
> * * *
>
> (b) The court may impose any or all of the following:
>
> * * *
>
> (*iii*) Until [May 1, 2024],[7] any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities.

After 2014 PA 352 was implemented, the validity of § 1k(1)(b)(*iii*) was again presented to the courts after this Court remanded a pending case for reconsideration under *Cunningham*. See *People v Konopka*, 497 Mich 863 (2014). On remand, the Court of Appeals held that the new § 1k(1)(b)(*iii*) retrospectively cured the problem identified in *Cunningham*. *People v Konopka (On Remand)*, 309 Mich App 345, 357-358 (2015). *Konopka* also addressed and rejected several constitutional arguments, including a separation of powers claim, a due process claim, an equal protection claim, and an ex post facto claim. *Id*. at 361-376. As to the separation of powers argument, *Konopka* merely held that the Legislature did not violate Const 1963, art 3, § 2, by retroactively amending § 1k to cure *Cunningham*'s invalidation of the statute. *Id*. at 365. *Konopka* never addressed whether the nature of the power granted to the courts by § 1k(1)(b)(*iii*) raised separation of powers concerns.

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[7] 2014 PA 352 originally prefaced § 1k(1)(b)(*iii*) with a sunset provision of "[u]ntil 36 months after the date the amendatory act that added subsection (7) is enacted into law . . . ." This sunset provision has been extended numerous times. See 2017 PA 64, 2020 PA 151, and 2022 PA 199. The most recent amendment extended the sunset to the current date of May 4, 2024. MCL 769.1k(1)(b)(*iii*), as amended by 2022 PA 199. Notably, the Legislature did not pass (or even report out of committee) 2022 HB 5957, which would have provided a curative measure in the event that this Court held that § 1k(1)(b)(*iii*) was unconstitutional in full or part.

A few years later, the validity of § 1k(1)(b)(*iii*) was challenged again. See *People v Cameron*, 319 Mich App 215 (2017). In *Cameron*, the defendant argued that the court costs provision in § 1k(1)(b)(*iii*) "constitutes a tax, as opposed to a fee, because it raises revenue and criminal defendants do not pay court costs voluntarily." *Id*. at 219. The defendant further argued that the court costs could not "be considered a proportionate fee for services because criminal defendants are not being provided a service when they are subjected to prosecution in a court of law." *Id*. The Court of Appeals unanimously agreed that under the test from *Westlake Transp, Inc v Pub Serv Comm*, 255 Mich App 589, 612-613 (2003),[8] "[c]onsidering the factors 'in their totality,' the costs [permitted by § 1k(1)(b)(*iii*)] should be considered a tax, not a fee." *Cameron*, 319 Mich App at 228, quoting *Westlake Transp*, 255 Mich App at 612. However, the Court of Appeals went on to hold that the tax nonetheless satisfied the requirements of the Distinct Statement Clause, Const 1963, art 4, § 32, *Cameron*, 319 Mich App at 229-231, and did not violate Michigan's nondelegation doctrine under the separations of powers clause, *id*. at 231-235. As to the latter theory, the defendant had argued, without citing any supporting authority, that § 1k(1)(b)(*iii*) was unconstitutional because it " 'delegates to the trial court the authority to determine the amount of the tax' when 'the power to tax rests solely with the Legislature.' " *Id*. at 232.

The *Cameron* court emphasized that the separation of powers doctrine did not require absolute separation of the branches of government,[9] see *id*. at 233, citing *Makowski*

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[8] As articulated in *Cameron*:

> A tax is an exaction[] or involuntary contribution[] of money the collection of which is sanctioned by law and enforceable by the courts. Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. Taxes are designed to raise revenue for the general public, while a fee confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.
>
> When determining whether a charge constitutes a fee or a tax, a court must consider three questions: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue, (2) whether the charge is proportionate to the necessary costs of the service to which it is related, and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. [*Cameron*, 319 Mich App at 222 (quotation marks and citations omitted).]

[9] " 'The true meaning [of the separation-of-powers doctrine] is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert

v Governor, 495 Mich 465, 482 (2014), and *Hopkins v Parole Bd*, 237 Mich App 629, 636 (1999), and it held that the delegation of the taxing power would be permissible if the Legislature had provided standards that were "as reasonably precise as the subject matter requires or permits," *Cameron*, 319 Mich App at 233 (quotation marks and citation omitted). Relying on a previous unpublished decision, the panel analogized the delegation of the taxing authority in § 1k(1)(b)(*iii*) to the legislative delegation of sentencing discretion to trial courts, and it determined that the delegated taxing power was controlled by "adequate guidance to the circuit courts by instructing them to impose 'any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case . . . .' " *Id*. at 235, quoting MCL 769.1k(1)(b)(*iii*). *Cameron* further concluded that this guidance was necessarily broad "in order to accommodate the varying costs incurred by the circuit courts," *id*., and that this was permissible because *Konopka* required an adequate factual basis for assessing costs in a particular case.

Following an appeal, this Court conducted an oral argument on the application, *People v Cameron*, 501 Mich 986 (2018), but the Court ultimately denied leave to appeal, *People v Cameron*, 504 Mich 927 (2019). Chief Justice MCCORMACK penned a concurring statement, in which she questioned whether § 1k(1)(b)(*iii*) prevents the judiciary "from 'accomplishing its constitutionally assigned functions.' " *Id*. at 928 (MCCORMACK, C.J., concurring), quoting *Nixon v Administrator of Gen Servs*, 433 US 425, 443 (1977). The concurrence further expressed concern about whether the statute creates a conflict of interest "by shifting the burden of court funding onto the courts themselves." *Cameron*, 504 Mich at 928 (MCCORMACK, C.J., concurring).

The validity of the trial court funding system yet again is before us in the current cases. This time, the two defendants raise both due process and separation of powers arguments to challenge the constitutional validity of § 1k(1)(b)(*iii*). I believe that at least the latter argument is meritorious and should be resolved by this Court.

III. ANALYSIS

Defendants have specifically raised a *facial* constitutional challenge to § 1k(1)(b)(*iii*) under Michigan's separation of powers clause. Const 1963, art 3, § 2. "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the act would be valid." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 (2007) (quotation marks, citations, and brackets omitted). Moreover, statutes are presumed to be constitutional and must be construed as such unless it is clearly apparent that the statute is unconstitutional. *AFT Mich v Michigan*, 497 Mich 197, 214

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the principles of a free Constitution.' " *Makowski*, 495 Mich at 482 (citation omitted; alteration in original).

(2015). "[T]he burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion*, 479 Mich at 11.

Johnson's and Edwards's separation of powers arguments are far better developed than those presented in *Cameron* and directly attack the presumption of constitutionality as to § 1k(1)(b)(*iii*). While I agree with *Cameron*'s holding that the court costs authorized by § 1k(1)(b)(*iii*) are more akin to a tax than a user fee, I disagree with the holding in *Cameron* and the Court of Appeals' holding in these cases that the statute does not violate the separation of powers provision in Const 1963, art 3, § 2.

The separation of the principal powers of government into three separate branches is a cornerstone of the checks and balances built into the Michigan and United States Constitutions. It is indisputable that the judiciary holds and exercises "the judicial power of the state," Const 1963, art 6, § 1, and that the Legislature holds and exercises "the legislative power," Const 1963, art 4, § 1.

Michigan's Constitution also mandates that the "[t]he legislature shall impose taxes sufficient with other resources to pay the expenses of state government." Const 1963, art 9, § 1. The cost of operating the judiciary is an expense of state government, given that the state's judicial power is "vested exclusively in one court of justice," Const 1963, art 6, § 1. This is true even though the Legislature has exercised its authority to delegate to counties and municipal governments some oversight and funding responsibilities for trial courts. Nearly a century ago, this Court recognized that

> [g]overnments may effectively function only through officers, agents and employees. If these devote their time, energy and services to the affairs of government they are entitled to compensation; and, to pay compensation to the officers, agents and employees of government, and enable the State to perform its functions, revenue is necessary. The most general method of raising revenue is by taxation. [*C F Smith Co v Fitzgerald*, 270 Mich 659, 668 (1935).]

Our state Constitution further instructs that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax," Const 1963, art 4, § 32, and that "[t]he power of taxation shall never be surrendered, suspended or contracted away," Const 1963, art 9, § 2. "The whole subject of finance and taxation is placed by the Constitution of this State under the control of the legislature." *C F Smith Co*, 270 Mich at 670.

In *Houseman*, 58 Mich at 367, this Court struck down as unconstitutional a legislative attempt to foist onto the judiciary an aspect of the Legislature's taxing power that was "not judicial in nature . . . ." The statute at issue provided that if a drainage tax assessment was successfully challenged in court, then it was the court's duty to appoint someone to examine or survey the property at issue and to relevy the tax in an amount that

was "just and equitable," to enjoin the tax, or to order a refund. *Id*. at 366. *Houseman* noted that "sending out surveyors or other persons to make examination or surveys to re-levy taxes in place of invalid ones, are each and all acts which do not pertain to the judicial branch of the government." *Id*. at 367. "The design of the Constitution is that each of the three branches of the government shall be kept, so far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others." *Id*. The Court struck down the statute as an invasion of the separation of powers because "authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the other [branches of government], cannot be regarded as valid."[10] *Id*.

Similarly, in *Mistretta*, 488 US at 380, the United States Supreme Court explained that it "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." The *Mistretta* Court acknowledged that the three branches of government did not need to be "entirely separate and distinct," *id*. at 380, and this Court has likewise recognized that the "boundaries between these branches need not be 'airtight,' " *Makowski*, 495 Mich at 482 (citation omitted). See also *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 20-21 (1969) ("The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments."), superseded on other grounds by *Wayne Circuit Judges v Wayne Co (On Rehearing)*, 386 Mich 1 (1971). But the fact that the separation of powers does not need to be airtight does not mean that the Legislature can foist or surrender a core aspect of its constitutional authority onto a coequal branch, especially if exercise of the power at issue clashes with the constitutional duties of the other branch.

As a revenue-generating tax designed to fund trial court operations, § 1k(1)(b)(*iii*) violates the separation of powers by foisting onto the judiciary the Legislature's exclusive authority and duties concerning taxation—duties that do not pertain to the exercise of the

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[10] This Court has invalidated other legislative and executive actions that infringed the separation of powers between the branches of government. In *Local 170 Transport Workers Union of America, CIO v Genesee Circuit Judge*, 322 Mich 332, 333-334 (1948), this Court struck much of a statute mandating that arbitration be used in public utility labor disputes because the law required a judge to serve as chairperson of an arbitration board. The judge was required to exercise quasi-judicial powers and could issue binding decisions, which "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. The Court also rejected an attempt by a Governor to appoint a sitting probate judge to preside over proceedings to remove an elected official from office. See *Buback v Governor*, 380 Mich 209, 225-228 (1968).

judicial power. *Mistretta* explained that under the flexible approach that Court endorsed, separation of powers principles are violated when the judicial branch is "assigned [or] allowed 'tasks that are more properly accomplished by [other] branches,' " *id.* at 383, quoting *Morrison*, 487 US at 680-681 (second alteration in original), or if a law "impermissibly threatens the institutional integrity of the Judicial Branch," *Mistretta*, 488 US at 383, quoting *Commodity Future Trading Comm v Schor*, 478 US 833, 851 (1986). As already noted, it has long since been settled that "[t]he whole subject of finance and taxation is placed by the Constitution of this State under the control of the legislature," *C F Smith Co*, 270 Mich at 670, and the Constitution explicitly prohibits the Legislature from surrendering its power of taxation, Const 1963, art 9, § 2.[11]

This Court found improper the foisting of the taxation power in a case involving taxes of far less consequence in *Houseman*, 58 Mich at 367, where the Court invalidated a statute that required the judiciary to relevy a drainage assessment tax if the court found the challenged amount to be improper. As previously noted, *Houseman* held that "[a]ny legislation . . . authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the other[] [branches], cannot be regarded as valid." *Id.*

Like the statute in *Houseman*, § 1k(1)(b)(*iii*) requires courts to act as a tax assessor. But the assessment is actually more egregious under § 1k(1)(b)(*iii*) than the one at issue in *Houseman* because the Court is the actual assessor at the outset. When implementing § 1k(1)(b)(*iii*), trial courts are required to independently determine against whom and in what amount the tax will be assessed.

The only limitation or guidance offered to courts in the assessment of costs offered in § 1k(1)(b)(*iii*) is that the costs being taxed are to be "reasonably related to the actual costs incurred by the trial court," but this is hardly much of a limitation or guidance given

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[11] Although *Mistretta* held that the process for creating the federal sentencing guidelines promulgated by the United States Sentencing Commission, staffed in part by federal judges, did not violate separation of powers principles, that case is distinguishable. *Mistretta* asked whether, by creating the Sentencing Commission, Congress had improperly assigned its *sentencing* authority to a different branch of government. In holding that the statute did not unconstitutionally assign tasks more properly accomplished by another branch, the Court reasoned that "the sentencing function long has been a peculiarly shared responsibility among the Branches of Government . . . ." *Mistretta*, 488 US at 390. That is, the judiciary has always had a significant role in sentencing. Thus, I agree with the concurrence that sentencing has always been a uniquely shared responsibility between the Legislature and judiciary. But the taxation power is different. It is expressly assigned to our Legislature in the Michigan Constitution and has consistently been held to fall within the Legislature's exclusive purview.

that courts do not have to "separately calculat[e] those costs involved in the particular case . . . ." MCL 769.1k(1)(b)(*iii*). While the discretionary authority to determine whom to tax for government expenses and in what amount is supposed to be a purely legislative power, the Legislature instead has turned Michigan's trial courts into both tax assessors and tax collectors for purposes of funding their own operations. This foisting of a discretionary and purely legislative power onto the judiciary is a violation of the separation of powers, and this Court has consistently "struck down attempts by the legislature to give nonjudicial powers to courts," as well as other areas of infringement by one branch of government on another. *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 682-683 (1952) (collecting cases).[12] The majority today has, yet again, declined to inform the Legislature that it has the constitutional obligation to fund court operations and that it cannot constitutionally foist its taxation duty—however unpopular—upon the judiciary.

Although this Court has entertained and resolved numerous challenges to the specific amount of court costs assessed in a particular case under a variety of statutes, see, e.g., *Wallace*, 245 Mich at 314, the arguments in such cases have concerned whether the costs imposed were reflective of the expenses incurred. Courts have consistently held that assessed court costs cannot be upheld if they are not reasonably and directly related to the actual cost of prosecution. See *id*.; *People v Barber*, 14 Mich App 395, 403 (1968) (striking a law funding police academies with a 10% assessment imposed at sentencing because the assessment had no "reasonably direct relation to actual costs"); *Saginaw Pub Libraries Bd of Library Comm'rs v Judges of the 70th Dist Court*, 118 Mich App 379, 388 (1982) ("Costs imposed must reasonably relate to the costs of the prosecution of a civil infraction violation *and cannot include the costs of the daily operation of the courts or other governmental units*."). But this Court has never held that the Legislature can foist its taxing

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[12] Our Court has not been alone in seeking to limit the infringement by one branch of government on another. In *State ex rel Bray v Russell*, 89 Ohio St 3d 132, 136 (2000), the Ohio Supreme Court struck a "bad time" statute on separation of powers grounds because it allowed prisons, part of the executive branch, to try, convict, and add "bad time" to criminal sentences posttrial, without a charge and prosecution through the judiciary. In *In re Golinski*, 587 F3d 956, 961 (CA 9, 2009), the court invalidated an executive branch decision to withhold benefits from a judicial employee, finding that the executive branch had no authority to disregard a prior judicial construction of the relevant statute. In *Free Enterprise Fund v Pub Co Accounting Oversight Bd*, 561 US 477, 492 (2010), the Court held that the "dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers" because they infringed the President's unilateral authority concerning board members.

authority onto the judiciary in a vague or discretionary manner such that it is the judiciary, rather than the Legislature, making the policy decisions of whom to tax and in what amount.[13]

IV. CONCLUSION

How to fund government operations, whether to assess taxes, and how much to tax have always been contentious policy decisions that must be made by the Legislature. I believe the Legislature's attempt to foist its core taxation powers onto the judiciary in the manner at issue violates separation of powers principles. Accordingly, I respectfully dissent from the decision to find that leave was improvidently granted. Like Justices CAVANAGH and BOLDEN, I urge the Legislature to take action to find a practical solution prior to the May 1, 2024, sunset of MCL 769.1k(1)(b)(*iii*).

CAVANAGH, J., joins the statement of WELCH, J.

[13] The Legislature's reliance on *Union Trust Co v Wayne Probate Judge*, 125 Mich 487 (1901), in its amicus brief is unavailing. That decision merely recognized that it does not violate separation of powers principles for a probate court to apply a precise, legislatively prescribed taxation formula to disputed facts in a case for purposes of determining the amount of money an estate must pay. *Id*. at 494-495. *Durfee* did not hold that courts have the power to calculate the amount of a tax, in the absence of a legislative formula, and assess it selectively against litigants to raise revenue for the court or the county treasury.