

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

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v.

TRAVIS MICHAEL JOHNSON,

Defendant-Appellant.

Supreme Court No. 163073

Court of Appeals No. 351308

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

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

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TABLE OF CONTENTS

Table of Contents	2
Index of Authorities	3
Statement of the Question Involved.....	7
Introduction.....	8
Argument.....	9
I. Imposing court costs is a judicial task.....	9
A. Michigan’s system of separated powers permits the branches to perform tasks that are necessarily incident to their core functions.....	9
B. The Legislature has historically assigned to trial courts the task of imposing costs to help fund court operations.....	10
C. Courts do not become “tax gathers” in violation of separation of powers by imposing costs that fund court operations.....	12
Conclusion and Relief Requested	19
Certificate of Compliance.....	20

INDEX OF AUTHORITIES

Cases

<i>46th Circuit Trial Court v Crawford Co,</i> 476 Mich 131 (2006).....	2, 9
<i>Airlines Parking, Inc v Wayne Co,</i> 452 Mich 527 (1996).....	6
<i>Ali v Danaher,</i> 265 NE2d 103 (Ill, 1970).....	8
<i>Anway v Grand Rapids Ry Co,</i> 211 Mich 592 (1920).....	2
<i>Crocker v Finley,</i> 459 NE2d 1346 (Ill, 1984).....	8
<i>Dukesherer Farms, Inc v Ball,</i> 73 Mich App 212 (1977).....	11
<i>Grand Traverse Co v State,</i> 450 Mich 457 (1995).....	3, 9
<i>Houseman v Kent Circuit Judge,</i> 58 Mich 364 (1885).....	10
<i>Huron-Clinton Metro Auth v Boards of Sup’rs of Wayne, Washtenaw, Livingston, Oakland & Macomb Cos,</i> 300 Mich 1 (1942).....	11
<i>In re Johnson,</i> 104 Mich 343 (1895).....	5
<i>Judges for Third Judicial Circuit v Wayne Co,</i> 383 Mich 10 (1969).....	3, 5
<i>Judicial Attorneys Ass’n v Michigan,</i> 459 Mich 291 (1998).....	2
<i>People v Cameron,</i> 319 Mich App 215 (2017).....	6
<i>People v Wallace,</i> 245 Mich 310 (1929).....	5

<i>Peraza v State</i> , 467 SW3d 508 (Tex Crim App, 2015).....	7
<i>Ranke v Mich Corp & Sec Comm</i> , 317 Mich 304 (1947).....	11
<i>Safety Net for Abused Persons v Segura</i> , 692 So 2d 1038 (La, 1997)	8
<i>Salinas v State</i> , 523 SW3d 103 (Tex Crim App, 2017).....	7, 8
<i>Soap & Detergent Ass’n v Natural Resources Comm</i> , 415 Mich 728 (1982).....	2, 10
<i>State v Ballard</i> , 868 P2d 738 (Okla Crim App, 1994)	7, 8
<i>State v Claborn</i> , 870 P2d 169 (Okla Crim App, 1994)	7, 8
<i>State v Johnson</i> , 478 SE2d 16 (NC Ct App, 1996).....	8
<i>State v Lane</i> , 649 A2d 1112 (Me, 1994)	8
<i>State v Smith</i> , 576 P2d 533 (Ariz App, 1978).....	8
<i>State v Young</i> , 238 So 2d 589 (Fla 1970)	8
<i>Taxpayers of Michigan Against Casinos v State of Michigan</i> , 478 Mich 99 (2007).....	2
<i>Taylor v Smithkline Beecham Corp</i> , 468 Mich 1 (2003).....	11
<i>Union Tr Co v Durfee</i> , 125 Mich 487 (1901).....	5, 10
<i>Wenger v Finley</i> , 541 NE2d 1220 (Ill App Ct, 1989).....	8

Statutes

1846 RS, ch 168, § 2 4

1846 RS, ch 169, § 11 4

1846 RS, ch 169, § 2 3

1846 RS, ch 92, § 58 3

1846 RS, ch 94, § 17 4

1897 CL 334.2..... 4

1897 CL 36.16..... 4

1897 CL 36.17..... 4

1929 CL 270.14..... 4

1929 CL 271.23..... 4

1929 CL 287.22..... 4

1929 CL 287.23..... 4

1929 CL 287.3..... 4

MCL 169.217 9

MCL 286.857 9

MCL 290.610a 10

MCL 600.181 6

MCL 600.571 6

MCL 600.591 4, 6

MCL 769.1j..... 6

MCL 769.3 4

MCL 774.22 4

MCL 774.23 4

Other Authorities

Maura D. Corrigan, *Finding Revenue in Hard Times: The Michigan Judiciary’s Approach*, Judges’ J 24, 25 (2004)..... 9

OAG, 1952–1954, No. 1,789, p 349 (June 15, 1954) 3

Oral Argument, *People v Johnson*, No. 163073 (Apr 22, 2022),
available at <https://www.youtube.com/watch?v=qP1MiB4rfyI>..... 7

Susan Ekstrom, *Court Organization and Funding in Michigan:
An Issue Paper* (House Leg Analysis Section, July 1996) 12

Constitutional Provisions

Const 1963, art 3, § 2 2

Const 1963, art 9, § 1 3

STATEMENT OF THE QUESTION INVOLVED

The Michigan House of Representatives and the Michigan Senate submit this amicus brief addressing the following question from this Court's May 13, 2022 supplemental briefing order:

[W]hether MCL 769.1k(1)(b)(iii) violates separation of powers by assigning the judicial branch tasks that are more properly accomplished by the Legislature.

The Legislature answers: No.

INTRODUCTION

Imposing court costs is, and has always been, a judicial task. As long as Michigan has been a state, the Legislature has assigned to trial judges the duty to assess costs and fees that help fund their courts' operations. Guided by that history, in 2014 the Legislature enacted MCL 769.1k(1)(b)(iii), authorizing trial courts to impose certain court costs when rendering judgment in a criminal case, and designating the funds to counties responsible for funding trial courts in Michigan.

There has been no shortage of legal challenges to § 1k(1)(b)(iii), all of which have failed. In this latest challenge, this Court has asked (among other questions) “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.” (Cleaned up).

Defendant argues that imposing § 1k(1)(b)(iii) costs is a task improperly assigned to the judiciary because the costs are a “tax” funneled through a variety of restricted treasury funds dispersed for trial court funding purposes. But Defendant misunderstands how § 1k(1)(b)(iii) costs are used—they are *not* credited to any fund within the Department of Treasury. They are instead turned over directly to the county treasurer for use by the court's local funding unit. And what Defendant sees as the central vice of § 1k(1)(b)(iii) is actually its saving grace. Courts across the country reject separation-of-powers challenges to judiciaries collecting court costs precisely because the costs fund the administration of justice. Those decisions align with Michigan's approach to separation of powers, which recognizes that each branch has the power to perform tasks necessarily incident to their core functions.

It makes no difference that trial courts have discretion to impose § 1k(1)(b)(iii) costs and in what amount. Exercising discretion is a not an exclusively legislative function. Courts have always had discretion to impose costs in criminal cases, and the discretion afforded here tracks that tradition. It is no different than the guided leeway courts have in meting out punishment.

For these reasons, the Legislature asks this Court to reject Defendant's claim that § 1k(1)(b)(iii) violates the separation of powers.

ARGUMENT

I. Imposing court costs is a judicial task.

A. Michigan’s system of separated powers permits the branches to perform tasks that are necessarily incident to their core functions.

Our constitution divides the “powers of government” into three branches—legislative, executive, and judicial—and instructs that “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const 1963, art 3, § 2.

This Clause wisely separates the centers of power to prevent all of it from falling into the same hands. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141 (2006). But divided power does not mean *islands* of power. Michigan’s separation of powers doctrine does not require that “the branches must be kept wholly separate,” *Soap & Detergent Ass’n v Natural Resources Comm*, 415 Mich 728, 752 (1982), or that there be “no overlap of responsibilities and powers,” *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 296 (1998).

Instead, Michigan follows James Madison’s view of separation of powers: the same hands that hold the “*whole* power” of one department cannot exercise the “*whole* power” of another. *Soap & Detergent Ass’n*, 415 Mich at 752, quoting The Federalist No. 47 (J. Madison). The branches may perform tasks outside their wheelhouse of power if it “is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other.” *Taxpayers of Michigan Against Casinos v State of Michigan*, 478 Mich 99, 105–106 (2007). Put another way, each branch has “incidental” powers that can be assigned by another branch or invoked as part of its inherent power. See, e.g., *Anway v Grand Rapids Ry Co*, 211 Mich 592, 626 (1920) (“All powers, however, even though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions, are inherent in the courts.”).

This nuanced approach to separation of powers recognizes that a healthy government of divided parts must have play in the joints. Experience has taught that “[i]t is simply impossible for a judge to do

nothing but judge[, or for] a legislator to do nothing but legislate[.]” *Judges for Third Judicial Circuit v Wayne Co*, 383 Mich 10, 20–21 (1969) (*Wayne County I*), superseded by 386 Mich 1 (1971) (On Rehearing). In practice, this means the “three great powers of government necessarily include[] some ancillary inherent capacity to do things by which are normally done by the other departments.” *Id.* at 21.

To ask whether a task assigned to the judiciary is one “more properly accomplished by the Legislature,” then, is *not* to ask whether this Court agrees with wisdom, or even fairness, of the Legislature’s policy decision. That assessment belongs exclusively to the Legislature. This Court’s role is limited to testing the constitutionality of the statute against well-settled principles of separation of powers. Those well-settled principles allow the Legislature to assign to courts tasks that are necessarily incident to their judicial functions and do not amount to the exercise of the whole power of another branch.

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

The power to raise and appropriate funds for the expenses of state government, including the operation of the judiciary, is a legislative power. Const 1963, art 9, § 1. But the Legislature has never worked alone in carrying out this responsibility. It has historically relied on counties to fund trial court operations. See *Grand Traverse Co v State*, 450 Mich 457, 474 (1995) (“An unbroken line of cases stretching back 130 years recognizes the practice of imposing the costs of operating the courts on local funding units.”). And to help counties, the Legislature has assigned to courts the authority to impose costs and fees as an ancillary task to their core judicial functions.

In the early years of statehood, for instance, the Legislature authorized trial courts to assess fees for certain judicial services, chargeable to the county and taxable as a cost of prosecution.¹ The

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

Legislature also authorized trial courts to impose the costs of prosecution, payable to the county.²

Since then, the Legislature has continued to assign to courts the responsibility of imposing costs as part of their judicial functions.³ Today, the Legislature continues to rely on counties to fund trial court operations. See MCL 600.591. And it calls on the judicial branch to exercise its incidental power to impose court costs used to fund trial court operations.⁴

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

³ See, e.g., 1897 CL 36.16 (authorizing justices of the peace to “inflict such punishment, either by fine or imprisonment or both, as the nature of the case may require, *together with such costs of prosecution as the justice of the peace shall order[.]*” (emphasis added)); 1929 CL 270.14 (authorizing Police Court of Grand Rapids to render “judgment for costs accruing in the case against the defendant”); 1929 CL 271.23 (authorizing Justice of the Peace in Saginaw to render “judgment for costs accruing in the case” against the defendant).

⁴ See MCL 769.3 (for a conviction “punishable at the discretion of the court, . . . the court may award against such offender a conditional sentence, and order him to pay a fine, *with or without the costs of prosecution[.]*” (emphasis added)); 1897 CL 334.2 (same); 1929 CL 287.3 (same). See also MCL 774.23 (for an acquittal, “if the court . . . certif[ies] . . . that the complaint was wilful and malicious, and without probable cause, *it shall be the duty of the complainant to pay all costs that shall have accrued to the court . . .*”); 1897 CL 36.17 (same); 1929 CL 287.23 (same). See also MCL 774.22 (authorizing justices of the peace to “inflict such punishment, either by fine or imprisonment or both, as the nature of the case may require, *together with such costs of prosecution as the justice of the peace shall order[.]*” (emphasis added)); 1929 CL 287.22 (same).

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

The longevity of court costs in our legal system—and longstanding approval of them by Michigan courts—shows how closely connected they are to the exercise of core judicial functions. It is precisely the kind of task that has always fallen within courts’ “ancillary inherent capacity.” *Judges for Third Judicial Circuit*, 383 Mich at 21.

C. Courts do not become “tax gathers” in violation of separation of powers by imposing costs that fund court operations.

Defendant insists that § 1k(1)(b)(iii) costs are different because they are a “tax.” Courts are not tax gathers, the argument goes, so if § 1k(1)(b)(iii) costs are a tax, then it stands to reason that courts may not assess them, regardless of the pedigree of other court costs.

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

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

* * *

Before delving into that, it is important to first clarify a misunderstanding about § 1k(1)(b)(iii) costs. Defendant claims that § 1k(1)(b)(iii) costs are credited to the Justice System Fund, routed through various Department of Treasury funds, and then finally apportioned out to counties. (Def’s 1st Supp Br, pp 6–7.) Defendant cites MCL 600.181, which instructs the State Treasurer to credit to the Justice System Fund “revenue from court assessments and costs *designated by law* for deposit in the fund.” MCL 600.181(2) (emphasis added). But the law that Defendant says designates § 1k(1)(b)(iii) costs to the Justice System Fund refers only to the “state minimum cost” of MCL 769.1j(1). See MCL 769.1j(2) (“[T]he clerk shall pay to the justice system fund . . . the applicable amount specified as a minimum cost under [MCL 769.1j(1).]”). Neither that statute, nor any other statute, designates § 1k(1)(b)(iii) costs to the Justice System Fund.

The real path of § 1k(1)(b)(iii) costs is much simpler. The circuit court clerk collects the costs and sends them to the county treasurer. See MCL 600.571(d), (e); see also MCL 774.26. Counties then use that revenue to fund trial court operations. See MCL 600.591.

* * *

That clarification aside, it is still true that § 1k(1)(b)(iii) costs are used to fund trial court operations. And this, according to Defendant, is the fatal defect of § 1k(1)(b)(iii). (See, e.g., Def’s 2d Supp Br, pp 8–11.)

He argues, for example, that “[i]n enacting MCL 769.1k(1)(b)(iii), our Legislature effectively created a funding system for trial courts that interferes with the Judiciary’s obligation and ability to maintain impartiality in criminal proceedings.” (Def’s 1st Supp Br, p 23.) His counsel reiterated the point at oral argument, contending that “[t]he main problem with this statute is . . . the use of the courts to generate revenue for their very own courts.” Oral Argument at 6:11–6:21, *People v Johnson*, No. 163073 (Apr 22, 2022), available at <https://www.youtube.com/watch?v=qP1MiB4rfyI>.

But Defendant has it backwards. It is *precisely because* § 1k(1)(b)(iii) costs are designated for judicial purposes that there is no separation of powers problem—at least according to the consensus of courts that have addressed the issue. Texas courts, for example, recognize that courts do not become “tax gatherers in violation of the separation of powers clause” if “the statute under which court costs are assessed (or an interconnected statute)” allocates the funds “for legitimate criminal justice purposes.” *Peraza v State*, 467 SW3d 508, 517–518 (Tex Crim App, 2015); see also *Salinas v State*, 523 SW3d 103, 106–107 (Tex Crim App, 2017).

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

The Court of Appeals of North Carolina followed Texas and Oklahoma’s approach when it addressed a separation-of-powers challenge to a criminal restitution statute that generated funding for the state’s drug analysis program. In *State v Johnson*, the court rejected the challenge because the assessment was “‘clearly incidental to the primary function of the trial court sitting in a criminal matter’ . . . [and]

‘reasonably related to the costs of administering the criminal justice system.’ ” 478 SE2d 16, 24 (NC Ct App, 1996), quoting *Ballard*, 868 P2d at 742, and *Claborn*, 870 P2d at 171; see also *id.* at 23 (noting that “[o]ther states have also examined separation of powers arguments regarding costs and rejected them,” citing *State v Lane*, 649 A2d 1112 (Me, 1994); *State v Smith*, 576 P2d 533 (Ariz App, 1978); *State v Young*, 238 So 2d 589 (Fla, 1970).

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

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

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

Any other rule of decision will sweep too broadly. Indeed, following Defendant’s argument to its logical conclusion would have staggering consequences for the court’s—and the state’s—budget. If the judiciary

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

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

Nothing limits the logic of Defendant’s argument to the judicial context, either. Our statutory code has many examples of governmental departments charging users costs to help fund the unit’s operations.⁵

⁵ See, e.g., MCL 169.217(2) (fees collected under Campaign Finance Act “must be retained by and for the use of the filing officials collecting the fees or charges to cover their expenses in administering this act”); MCL 286.857(4) (“Any administrative fine, investigation costs, or recovery of economic benefit associated with a violation that is collected under this section [of the Industrial Hemp Research and Development Act] shall be paid to the state treasury and deposited into the licensing

These provisions—and the revenue they generate for state government—are at risk if this Court adopts Defendant’s position on the separation of powers question.

Houseman v Kent Circuit Judge, 58 Mich 364 (1885)—the case that appears to have prompted the Court’s supplemental briefing order—does not support a different result. In that case, the trial court was exercising judicial review of a tax levy. If the court found the tax levy unlawful, the governing statute authorized it to carry out the taxing authority’s duties by conducting a new land survey and levying a new tax. *Id.* at 366. Those other actions were not incidental or ancillary to the court’s exercise of judicial review. The court could have simply declared the tax levy invalid and left it to the taxing authority to conduct another survey and levy a tax consistent with its decision. Instead, the statute lodged “the whole power of one department” (surveying and levying the tax) in “the same hands which possess the whole power of another department” (judicial review of the levy). *Soap and Detergent Ass’n*, 415 Mich at 752. *Houseman*, in other words, fits neatly within the Legislature’s understanding of separation of powers as described above.

Here, courts are not being asked to re-do another department’s or branch’s work as part of their judicial review. The Legislature exercised the whole of the legislative power by assigning the responsibility to impose costs to the judiciary in the first instance. That task is incidental to the court’s core power to preside over criminal proceedings culminating in criminal punishment. It is no different than a probate court assessing and imposing an inheritance tax on estates under their jurisdiction. *Durfee*, 125 Mich at 494.

Nor does it matter, as Defendant suggests in his latest supplemental brief, that courts have discretion to impose § 1k(1)(b)(iii) costs and in what amount. (See Def’s 2d Supp Br, pp 3–8.) Discretion is not an inherently legislative attribute. If it were, then the Legislature could *never* assign *any* discretionary authority to executive or judicial officials,

and registration fund.”); MCL 290.610a(2) (“Money collected by the department for special services, fees, and civil fines [under the Weights and Measures Act] shall be paid into the general fund and credited to the department for weights and measures programs.”).

which cannot true. See, *supra*, nn 2–4; *Dukesherer Farms, Inc v Ball*, 73 Mich App 212, 221 (1977) (“[T]he prohibition against the legislature’s delegation of its lawmaking powers does not mean that it cannot confer a power of discretion in the administration of the law itself.”).

Defendant appears to be making a twisted version of a non-delegation argument. The Legislature, of course, “cannot delegate its power to make a law.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 9 n 7 (2003) (cleaned up). But that does not mean the Legislature cannot “confer authority on an administrative officer . . . to find facts, and to exercise some discretion, in the administration of a statute.” *Ranke v Mich Corp & Sec Comm*, 317 Mich 304, 309 (1947). Here, the Legislature exhausted its legislative power by enacting § 1k(1)(b)(iii) and authorizing courts “to determine within a fixed limitation” the amount of costs to impose in each case. *Huron-Clinton Metro Auth v Boards of Sup’rs of Wayne, Washtenaw, Livingston, Oakland & Macomb Cos*, 300 Mich 1, 18 (1942). Judges are not creating new public policy by administering § 1k(1)(b)(iii). They are exercising limited discretionary authority within the appropriate parameters defined by law—not unlike when they impose punishment. That is not the exercise of “legislative” power in any meaningful sense.

CONCLUSION AND RELIEF REQUESTED

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

The Legislature urges this Court to hold that MCL 769.1k(1)(b)(iii) does not violate the separation of powers. Imposing costs is, and always has been, a judicial task.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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