Order

Michigan Supreme Court
Lansing, Michigan

July 7, 2023

Elizabeth T. Clement,
Chief Justice

163942

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: 163942
COA: 354647
Wayne CC: 13-000329-FC

KELWIN DWAYNE EDWARDS,
Defendant-Appellant.

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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 November 18, 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

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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.]

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 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*).

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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*.

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 "[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

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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=d95b86f27aa743208115548135013 2fb&hash=0069CA920A5ACFBC927427D80875F457> (accessed June 5, 2023) [https://perma.cc/5FJW-6Z73].

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 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

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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).

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 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

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

wheels to stop turning altogether.

WELCH, J. (*dissenting*).

For the reasons given in my dissenting statement in *People v Johnson*, 511 Mich ___, ___ (2023) (Docket No. 163073), I respectfully dissent from this Court's decision holding that leave was improvidently granted in this case.

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