STATE OF MICHIGAN
IN THE SUPREME COURT

Associated Builders and Contractors of Michigan, National Federation of Independent Business, Inc., Senator Edward McBroom in his official capacity, Representative Dale Zorn, in his official capacity, Rodney Davies, Kimberley Davies, Owen Pyle, William Lubaway, Barbara Carter, and Ross VanderKlok

Plaintiffs/Appellants

v.

Treasurer of Michigan, Rachael Eubanks, in her official capacity

Defendant/Appellee

MSC No. _____

COA No. 369314

Case No.: 23-000120-MB

Hon. Elizabeth L. Gleicher

THIS CASE INVOLVES AN INVALID EXECUTIVE ACTION UNDER MCR 7.204(D)(3)(c)

EXPREDITED RELIEF REQUESTED UNDER MCR 7.311(E) BY MARCH 29, 2024

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PLAINTIFFS/APPELLANTS' BRIEF IN SUPPORT OF BYPASS APPLICATION AND FOR EXPEDITED CONSIDERATION

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JURISDICTIONAL STATEMENT

Pursuant to MCL 600.6419(1)(a), the Court of Claims had exclusive jurisdiction over this action as it is a claim for declaratory relief and a demand for the extraordinary writ of mandamus pled against the Treasurer of the State of Michigan in her official capacity as an officer of Michigan. On December 21, 2023, the Court of Claims dismissed the action.

Pursuant to MCR 7.203(A) and MCR 7.204(A), an appeal of right was filed at the Court of Appeals on January 9, 2024.

Pursuant to MCR 7.303(B)(1), MCR 7.305(C)(1), and MCR 7.311(E), Plaintiffs/Appellants filed the instant bypass application and motion for expedited consideration.

STATEMENT OF QUESTIONS INVOLVED

1. Have the Plaintiffs/Appellants legislators and advocacy groups shown a special injury distinct from the general public sufficient to provide them standing?

   Plaintiffs/Appellants' Answer: Yes

   Defendant/Appellee's Answer: No

   Court of Claims' Answer: No

2. Is this matter ripe for adjudication?

   Plaintiffs/Appellants' Answer: Yes

   Defendant/Appellee's Answer: No

   Court of Claims' Answer: No

3. Does MCL 206.51 clearly indicate that the tax year 2023 income tax reduction made pursuant to MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer rate as the income tax rate cap until the formula would cause it to decrease again?

   Plaintiffs/Appellants' Answer: Yes

   Defendant/Appellee's Answer: No

   Court of Claims' Answer: No

4. If MCL 206.51(1) is held to be ambiguous, does the rule of construction that ambiguous tax statutes are to be construed against the taxing authority mean that the tax year 2023 income tax rate reduction made pursuant to MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer rate as the income tax cap until the formula would cause it to decrease again?

   Plaintiffs/Appellants' Answer: Yes

   Defendant/Appellee's Answer: No

   Court of Claims' Answer: Did not answer

5. Does Defendant/Appellee have a clear duty to execute the tax rate set by the Legislature thereby allowing mandamus to be entered?

   Plaintiffs/Appellants' Answer: Yes

   Defendant/Appellee's Answer: No

Court of Claims' Answer: No

6. Does MCL 205.22 deprive this Court of subject matter jurisdiction to hear this case?

Plaintiffs/Appellants' Answer: No

Defendant/Appellee's Answer: Yes

Court of Claims' Answer: No

INTRODUCTION

This matter concerns the construction of MCL 206.51(1), which sets the income tax rate for the state of Michigan. Defendant/Appellee State Treasurer (the Treasurer) has announced that, pursuant to MCL 206.51(1)(c), the rate decreased from 4.25% to 4.05% for tax year 2023. Prior to that announcement, the Attorney General, at the Treasurer's request, issued an opinion that any year the tax rate decreases, it will revert to 4.25% for the next year's analysis under the MCL 206.51(1)(c) formula. Attorney General Opinion 7320 (March 23, 2023), available at Complaint, Exhibit 1.

At issue is whether under MCL 206.51(1) Michigan's approximately 5 million individual income tax filers will have permanent tax-cut relief or instead any rate cut will apply for a single particular year and then revert to 4.25% for a starting point for the MCL 206.51(1)(c) formula. As to state-income-tax collection, the annual difference between a 4.05% income tax rate and a 4.25% income tax rate is around $714 million. This significantly impacts the fiscal year 2023-24 budget approved by the Governor on August 22, 2023, and that budget may need to be adjusted.[1] Two of the ten Plaintiffs/Appellants are state legislators, and they have a state constitutional interest to the

[1] Because the tax year is on a calendar basis and the state's fiscal year runs October 1 to September 30, at the Court of Claims, it was believed the amount fiscal year 2023-24 would be affected by a declaration or writ of mandamus in Plaintiffs' favor is a tax collection reduction of just over $527 million. See Complaint, Exhibit 12. That would have led to a total reduction on a calendar-year basis of $714.2 million. *Id.* That amount is higher than the entire fiscal year 2023-24 judiciary appropriation of $355,928,200. 2023 PA 119 at 209.

"best estimates of revenue" during each budget cycle – including an "itemized statement of estimated revenue by major source."[2]

The Court of Claims dismissed this action. After having filed a Notice of Appeal at the Court of Appeals, Plaintiffs/Appellants have filed the instant bypass application and motion for expedited consideration.

STATEMENT OF FACTS

A. Pertinent Michigan income tax rate legislation.[3]

In 1967, Michigan passed "the income tax act of 1967." 1967 PA 281. It set the rate paid by individuals at 2.6%. *Id*. at § 51. In 1971, the rate was increased to 3.9%. 1971 PA 76.

A tax rate increase was enacted in 1983, which is the most instructive act for the matter at hand. This 1983 public act represents the first use of a complex annual formula to set the income tax rate. 1983 PA 15, available at Complaint, Exhibit 16. The year-by-year formula is not the crucial feature; rather, the key is that this formula started with a numeric constant of 3.9%, which Plaintiffs/Appellants contend aids in the current construction of MCL 206.51(1).

The then-MCL 206.51(1)(a)-(c) remained unchanged. From there, in pertinent part, the legislation stated:

> Sec. 51. (1) . . .
>
> > (d) January 1, 1983 and thereafter, **3.9%** plus the following rates for the specified periods:

---

[2] Plaintiffs/Appellants Associated Builders and Contractors and National Federation of Independent Business, Inc. have institutional interests as entities that engage in lobbying during the budget cycle and associational interests as membership groups with members who pay Michigan's individual income tax.

[3] The information in this subsection will be most relevant to proper construction of MCL 206.51(1).

> (i) Except as provided by subsection (12), 2.2%, as adjusted pursuant to subsection (11), or the following rate for the respective period, whichever is the lesser:
>
> (A) From January 1, 1984 through December 31, 1984: 1.95%.
> (B) From January 1, 1985 and thereafter: 1.2%.[4]

1983 PA 15 (emphasis added). *Id*. Subsection (12) allowed for a rate decrease if the sales-and-use tax were set above 4%. *Id*. Subsection (11) was designed to adjust the 2.2% additional tax rate from subsection (1)(d)(i) based on the "seasonally adjusted average state employment rate for each of the last 2 quarters." *Id.* The subsection was explicit that this meant the income tax rate could "be reduced" or could lead to an "additional rate" if unemployment first decreased, only to subsequently increase. *Id*.

Subsection (9) stated:

> The rates provided in subsection (1), as limited by subsection (12), shall be annualized as necessary by the department for tax years that end after March 31, 1982 and the applicable annualized rate shall be imposed upon the taxable income of every person, other than a corporation, **for those years**.

Id. (emphasis added).

The various amendments between 1983 PA 15 and 2015 PA 180, which created the disputed portion of MCL 206.51(1) are uninteresting as to the statutory analysis.[5]

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[4] Subsection 51(9) allowed the Department of Treasury to "annualize" the rates in subsection (1) in future tax years. 1983 PA 15.

[5] Specifically, 1984 PA 221, 1986 PA 16, 1990 PA 283, 1993 PA 328, 1995 PA 194, 1999 PA 1, 1999 PA 2, 1999 PA 3, 1999 PA 4, 1999 PA 5, 1999 PA 6, 2007 PA 94, 2011 PA 38, and 2012 PA 223, do not materially affect the statutory construction analysis sufficiently to warrant any discussion.

In 2015, the statutory provisions at issue were enacted. Pursuant to 2015 PA 180, MCL 206.51 was amended to read:

> (1) For . . . income from any source . . . there is levied . . . upon the taxable income of every person other than a corporation a tax at the following rates in the following circumstances:
>
> (a) On and after October 1, 2007 and before October 1, 2012, 4.35%.
>
> (b) Except as otherwise provided under subdivision (c), on and after October 1, 2012, 4.25%.
>
> (c) For each tax year beginning on and after January 1, 2023, if the percentage increase in the total general fund/general purpose revenue from the immediately preceding fiscal year is greater than the inflation rate for the same period and the inflation rate is positive, then the **current rate** shall be reduced by an amount determined by multiplying **that rate** by a fraction, the numerator of which is the difference between the total general fund/general purpose revenue from the immediately preceding state fiscal year and the capped general fund/general purpose revenue and the denominator of which is the total revenue collected from this part in the immediately preceding state fiscal year. . . . As used in this subdivision:
>
> (i) "Capped general fund/general purpose revenue" means the total general fund/general purpose revenue from the 2020-2021 state fiscal year multiplied by the sum of 1 plus the product of 1.425 times the difference between a fraction, the numerator of which is the Consumer Price Index for the state fiscal year ending in the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the Consumer Price Index for the 2020-2021 state fiscal year, and 1.
>
> . . .

Id. (emphasis added). The determination on whether there was a revenue increase was to be made by the Treasurer, the Director of the House Fiscal Agency, and the Director of the Senate Fiscal Agency based on the comprehensive annual financial report (commonly known as CAFR).[6] These

[6] Pursuant to MCL 18.1492, an "comprehensive annual financial report of the state" shall be produced. For reasons that are not entirely clear, Treasury titles it "Annual Comprehensive *(Note continued on next page.)*

entities were supposed to make this determination by the January consensus revenue estimating conference (CREC). *Id.*[7]

The House Fiscal Agency analyzed 2015 PA 180 (which started as SB 414 of 2015) as part of what was known as the "road funding package." On November 3, 2015, the same day 2015 PA 180 passed, the House Fiscal Agency indicated:

> Senate Bill 414
> The income tax rate reduction trigger created by this bill would reduce state GF/GP revenues in years in which prior-year GF/GP revenue growth exceeds the rate of inflation beginning with FY 2022-23, assuming GF/GP revenues were above the adjusted FY 2020-21 level. **Those revenue reductions would continue in subsequent years.**
>
> The frequency and magnitude of such revenue reductions would depend on future levels of inflation and economic growth, as well as potential non-economic factors affecting state revenues. (An example of such a non-economic factor is the increase in capital gain and dividend income tax revenue associated with the fiscal cliff in tax year 2011. While this one-time revenue increase was largely offset the following year, the trigger mechanism would have resulted in a **permanent reduction in the income tax rate.**)

See Complaint, Exhibits 3, 4.

None of the amendments that postdate 2015 PA 180 impact this matter.[8]

Financial Report," and this same report is occasionally referred to as the State of Michigan Annual Comprehensive Financial Report. We have chosen CAFR as our acronym.

[7] The CREC will be discussed further below.

[8] Specifically, 2016 PA 266, 2018 PA 588, 2020 PA 75, and 2023 PA 4 do not affect the statutory-construction question.

B. General information on income tax and budget process.[9]

There are three documents that help explain the state budgeting process: (1) the House Fiscal Agency's January 2019 report "A Legislator's Guide to Michigan's Budget Process";[10] (2) the Michigan Department of the Treasury's Office of Revenue and Tax Analysis Division's November 2022 report on Michigan's income tax titled "Michigan's Individual Income Tax 2020";[11] and (3) the Senate Fiscal Agency's January 2023 report "Appropriation Process."[12]

The Legislature convenes the second Wednesday of the new year, Const 1963, art 4, § 13, which this year was January 10, 2024. Almost immediately, the state budget process begins.

Const 1963, art 4, § 31 indicates that it is a goal that revenues equal or exceed appropriations throughout the budget process:

> The general appropriation bills for the succeeding fiscal period covering items set forth in the budget shall be passed or rejected in either house of the legislature before that house passes any appropriation bill for items not in the budget except bills supplementing appropriations for the current fiscal year's operation. Any bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill. One of the general appropriation bills as passed by the legislature **shall contain an itemized statement of estimated revenue by major source** in each operating fund for the ensuing fiscal period, the total of which

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[9] The information in this subsection will be most relevant to three matters: (1) whether Plaintiff/Appellant legislators and interest groups in their role as advocacy groups have special injuries that provide them standing to file suit; (2) the importance of the tax-rate question to the budgeting process; and (3) whether the claims of the individual taxpayers and the interest groups in their role as groups with individual taxpayers are ripe.

[10] https://www.house.mi.gov/hfa/PDF/Alpha/approps_process_report.pdf (last visited January 19, 2024).

[11] https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/Uncategorized/2022/ORTA-Tax-Reports/IIT-report_TY2020-data.pdf (last visited January 19, 2024).

[12] At the Court of Claims, Plaintiffs/Appellants only referred to the first two items. It can be found electronically at https://www.senate.michigan.gov/sfa/budgetprocess/appropshandbook.pdf (last visited January 19, 2024).

> shall not be less than the total of all appropriations made from each fund in the general appropriation bills as passed.

Id. (emphasis added).

Const 1963, art 4, § 31 originated from Committee Report 46b at the 1961 Constitutional Convention. 2 Official Record, Constitutional Convention 1961, p 3436. The item had been assigned to the "committee on executive branch." 1 Official Record, Constitutional Convention 1961, p 1635. When introduced to the convention delegation, the following was set forth to explain the provision:

> Sec. b. The second provision is intended to accomplish 2 major points: (a) to focus legislative attention on the general appropriation bill or bills to the exclusion of any other appropriation bills, except those supplementing appropriations for the current year's operation; (b) to require the legislature (as well as the governor, by section a) to set forth by major item **its own best estimates of revenue**. The legislature frequently differs from executive revenue estimates. It seems only proper to require that such differences as exist be specifically set forth for public understanding and future judgment as to the validity of each.

Id. at 1636 (emphasis added).

Regarding Const 1963, art 4, § 31, the Notice of Address to the People stated:

> This is a new section designed to accomplish two major purposes:
>
> 1. To focus legislative attention on the general appropriation bill or bills to the exclusion of any other appropriation bills, except those supplementing appropriations for the current year's operation.
>
> 2. To require the legislature (as well as the governor by subsequent provision) to set forth by major item its own **best estimates** of revenue.

2 Official Record, Constitutional Convention 1961, p 3375 (emphasis added).

Note that the Constitution requires an "itemized statement of estimated revenue by major source in each operating fund." Michigan's income tax is a major source of revenue: "For tax year 2020, Michigan's personal income tax generated $9.4 billion in state revenues after all credits and refunds were paid." Michigan's Individual Income Tax 2020 at 1. In that year, there were 4,952,798

MI-1040s filed. *Id*. at 11. Historically, income tax collections have provided over 30% of the state's general fund/general purpose spending. See Senate Fiscal Agency, A History of the Individual Michigan Income Tax Rate at 2, available at Complaint, Exhibit 15.

As noted earlier, Michigan's tax year and fiscal year are different. Michigan's fiscal year runs from October 1 to September 30. MCL 18.1491. The income tax year runs on a calendar basis. MCL 206.24. At the time of filing this document, we are in the 2023-24 fiscal year for the state and the 2024 tax year for income tax filers.

In 1991, Michigan created the revenue estimating conference process – i.e. the CREC process. 1991 PA 72. The CRECs involve both the executive branch and the two chambers of the legislative branch. The process requires the state Treasurer and the House and Senate Fiscal Agency Directors three entities to come to a consensus on "a forecast of anticipated state revenues" including "State income tax collections." MCL 18.1367b(3). There are two conferences required by statute. MCL 18.1367b(1). The first occurs in the second week of January (this year's occurred on January 12, 2024), and the second occurs in the third week of May. *Id*. The conference is to "determine its official forecast of economic and revenue variables by consensus among the principals" for "the fiscal year in which the conference is being held and the next 2 ensuing fiscal years." MCL 18.1367b(4)-(5). Further, the conference "shall also forecast general fund/general purpose revenue trend line projections and school aid fund revenue trend line projections for the next 2 ensuing fiscal years." MCL 18.1367b(5).

Before the second CREC, other budget activities occur. "At the beginning of each [legislative] session," the Governor shall "communicate by message to the legislature . . . information as to the affairs of the state and recommend measures [s]he considers necessary or

desirable." Const 1963, art 5, § 17. This will be done via the State of the State address, which will occur on January 24, 2024. Budget and tax matters are almost always discussed in such speeches.

The Governor is required to submit a balanced budget with accompanying appropriation bills to the legislature:

> The governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state. Proposed expenditures from any fund shall not exceed the estimated revenue thereof. On the same date, the governor shall submit to the legislature general appropriation bills to embody the proposed expenditures and any necessary bill or bills to provide new or additional revenues to meet proposed expenditures. . . .

Const 1963, art 5, § 18. Pursuant to the Management and Budget Act, this budget must be submitted within 30 days of the legislature convening for the year. MCL 18.1363(1). Thus, it should be submitted by February 10, 2024.

This budget must include estimates "of anticipated revenues by state funds." MCL 18.1363(2). In presenting this budget, "[r]ecommendations for expenditures from each state operating fund shall not exceed the estimated beginning balance of such fund plus the fund's estimated revenue." MCL 18.1348.

The Legislature's Appropriations subcommittees typically deliberate on the proposed budget in February and March. A Legislator's Guide at 8. The subcommittees then report their initial budget recommendations to their respective full Appropriations Committees at the end of March or in early April.

Const 1963, art 9, § 21 requires an "annual accounting for all public moneys, state and local." MCL 18.1494 states the Director of Treasury "shall publish a comprehensive annual financial report" (the CAFR) within 6 months of the end of the fiscal year. MCL 18.1494. Thus,

the CAFR is to be issued by or before March 31st of each year (fiscal year end plus six months). This is the closing of the books for the previous fiscal year.

The Appropriations committees usually report out their general budget bills in April. A Legislator's Guide at 8. The House and Senate then vote on the initial versions of their budgets typically in late April or early May. *Id*.

The second CREC report is issued in the third week of May. The House Fiscal Agency states: "January consensus revenue estimates become the basis for the executive budget proposal that is presented to the Legislature in February. May consensus revenue estimates become the basis for the final legislative appropriation bills presented to the Governor in June." A Legislator's Guide at 10.

In June, there are final floor votes. *Id*. at 8.

General appropriation bills are required to be presented to the Governor by July 1. MCL 18.1365. At this point, the Governor may line-item veto particular expenditures. Const 1963, art 5, § 19. The budget bills are then signed into law and become effective on the first day of the new fiscal year.

Should there be a need to reduce expenditures to balance the budget that cannot be addressed during the traditional budget process, cuts can be implemented through negative supplemental appropriation bill passed by the Legislature and signed into law by the Governor. Or, cuts can be implemented through an executive order with the approval of the House and Senate Appropriation Committees: "The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based." Const 1963, art 5, § 20.

C. 2023 events preceding filing of suit

In January 2023, as part of the January CREC, the Senate and House fiscal agencies indicated that a tax-rate reduction was likely to occur. Senate Fiscal stated: "Because preliminary GF/GP revenue is forecasted to increase in FY 2021-22 by an amount greater than 1.425 times the rate of inflation, Public Act 180 of 2015 is predicted to require a **permanent reduction in the IIT rate**." (emphasis added). Senate Fiscal Agency, Michigan's Economic Outlook and Budgetary Review FY 2021-22, FY 2022-23, FY 2023-24, and FY 2024-25 (Jan 11, 2023) available at Complaint, Exhibit 5 at pp. 29, 37. The House Fiscal Agency agreed a tax-rate reduction was likely, but took no position on its permanence (in contrast to its November 2015 legislative analysis). House Fiscal Agency, Economic Outlook and Revenue Estimates for Michigan FY 2022-23 through FY 2024-25 (Jan. 12, 2023), available at Complaint, Exhibit 6 at p. 14.

Executive and legislative negotiations and debate over the tax rate reduction and its permanence took place and no legislative solution occurred.

On March 22, 2023, the Treasurer sought an Attorney General Opinion on the tax-reduction-permanence question. Complaint, Exhibit 7. The Attorney General issued an opinion the very next day. Attorney General Opinion 7320 (March 23, 2023), available at Complaint, Exhibit 1. Three rationales were provided to support the opinion that MCL 206.51(1) does not lead to permanent income tax cuts: (1) a dictionary definition; (2) lack of explicit legislative language to the contrary; and (3) a policy argument. See Complaint, Exhibit 1.

On March 29, 2023, after the closing of the 2021-22 fiscal year via the issuance the CAFR, the Treasurer announced the reduction of the individual income tax rate to 4.05% for only the 2023 income tax year. Complaint, Exhibit 8 (stating, "Now, because of strong economic growth and robust state revenues, the state income tax will decrease to 4.05% for one year."). On March 30,

2023, an official taxpayer notice was issued by Treasury. In this notice, Treasury indicated that it would not be modifying the tax withholding tables: "Treasury's withholding rate tables for the 2023 tax year will not be updated to accommodate the revised rate." March 30, 2023 Taxpayer Notice, available at Complaint, Exhibit 9.

On May 16, 2023, as part of the May CREC process, the Senate Fiscal Agency issued its Michigan's Economic Outlook and Budget Review, available at Complaint, Exhibit 12. Note that this document refers to the tax-rate reduction being one year solely because of the Attorney General Opinion:

> Based on the FY 2021-22 Annual Comprehensive Financial Report,[13] the [individual income tax] rate for tax year 2023 is 4.05%, which will reduce General Fund revenue by $527.6 million in FY 2022-23 and $186.6 million in FY 2023-24. Based on an opinion from the Attorney General, the rate reduction is a temporary rate reduction for tax year 2023, although the reduction will affect both FY 2022-23 and 2023-24.

Id. at 36. Thus, Senate Fiscal estimated the cost of the income tax rate reduction for tax year 2023 to be $714.2 million ($527.6 million plus $186.6 million).

On May 19, 2023, the Senate Fiscal Agency issued a 5-page memo regarding "May Consensus Revenue Year-End Balance Estimates Based on Senate Budgets." May 19, 2023 SFA Income Tax Reduction Trigger Notice, available at Complaint, Exhibit 13. This document indicated that the tax-rate reduction was only for tax year 2023 due to the Attorney General's Opinion. *Id*. at 4.

Neither the House Fiscal Agency nor Treasury referred to the Attorney General Opinion in their May 2023 CREC documents.

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[13] This is the CAFR.

The school aid budget – 2023 PA 173 – was passed by the Legislature on June 29, 2023, was then approved by the Governor, and was filed with the Secretary of State on July 21, 2023. The general budget – 2023 PA 119 – was passed by the Legislature on June 28, 2023, was approved (with some line-item vetoes) by the Governor on July 31, 2023, and was filed with the Secretary of State on August 1, 2023.

D. Court filings

Plaintiffs/Appellants filed the instant matter on August 25, 2023. They are made up of three groups: (1) two advocacy organizations whose membership includes business owners that are taxed through their owners' Michigan individual income tax filings (advocacy groups); (2) two legislators – one in the Michigan Senate and one in the Michigan House (legislators); and (3) six individual Michigan income taxpayers (individual taxpayers). They filed suit against the Treasurer in her official capacity.

Plaintiffs/Appellants disagree that the "current rate" under MCL 206.51(1)(c) reverts to 4.25% each year. Instead, they believe that any reduction under MCL 206.51(1)(c) is permanent and becomes the new "current rate" (and in effect a ceiling) for future MCL 206.51(1)(c) calculations until such time as that formula leads to a new, lower "current rate."

The Complaint contained two claims. For the advocacy groups as membership organizations that have individual taxpayer members and for the individual taxpayers, a declaratory ruling was sought. Complaint at ¶¶ 69-90. For the legislators and the advocacy organizations in that specific role (as opposed to membership organizations that contain individual taxpayers), mandamus was sought. Complaint ¶¶ 90-105.

As part of their Complaint, Plaintiffs/Appellants had filed an ex parte motion seeking a particular expedited briefing schedule. See Complaint ¶ 41. The Court of Claims denied the ex parte motion on September 25, 2023.[14]

The Treasurer filed a motion for summary disposition on October 2, 2023. Plaintiffs/Appellants filed a cross-motion for summary disposition on October 17, 2023. The Treasurer responded on November 6, 2023. Plaintiffs/Appellants closed out the briefing on November 17, 2023.

On December 21, 2023, the Court of Claims granted summary disposition to the Treasurer. The Court of Claim' holdings, which will be reordered here for clarity, were: (1) the legislators and advocacy groups as lobbyists do not have a special interest that provides them standing; (2) the claims of the individual taxpayers and the advocacy groups as associations are not ripe; (3) on the merits, MCL 206.51(1) requires the "current rate" to revert back to a baseline of 4.25% after every year there is an income tax rate cut; (4) mandamus relief and/or declaratory relief is improper; and (5) MCL 205.22 does not require a dismissal for lack of jurisdiction.

Plaintiffs/Appellants disagree with the first four holdings listed above and agree with the fifth.

[14] In its December 21, 2023 Opinion and Order, the Court of Claims contended this show-cause matter was still pending. *Id*. at 1, 7, 9, 33. Also, the Court of Claims implied that Plaintiffs/Appellants had sought a decision of the Court of Claims by December 15, 2023. That is incorrect. Rather, in their Complaint, Plaintiffs/Appellants laid out an expedited schedule to have the Court of Claims, the Court of Appeals, and this Court to have the matter decided before December 15, 2023. Complaint at ¶ 41. Further, the September 25, 2023 Order mentions a "mutually agreed-upon scheduling order." That "agreement" only occurred after a September 18, 2023 scheduling conference wherein the Court of Claims informed the parties it was going to deny the expedited scheduling request presented by Plaintiffs/Appellants.

ARGUMENT

I. Justiciability doctrines should not operate to prevent a decision on the merits.

A. Standard of Review

Whether a party has standing is a question of law that is reviewed de novo. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212 (2019). Questions of ripeness are reviewed de novo. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 542 (2017).

B. Justiciability doctrines do not prevent a decision on the merits.

In federal court, a plaintiff "must have standing for each claim pursued," but "only one plaintiff needs to have standing for the suit to move forward." *Parsons v US Dep't of Justice*, 801 F 3d 701, 710 (6th Cir 2015). Michigan courts agree. *House Speaker v State Admin Bd*, 441 Mich 547, 561-62 (1993) ("Having determined that at least one of the plaintiffs have standing" this Court addressed the merits).

Here, the three groups of plaintiffs all seek to have this Court determine whether the "current rate" for the MCL 206.51(1)(c) income-tax-rate computation for tax year 2024 starts at 4.05% as a carryover from the 2023 rate determination (Plaintiffs/Appellants view) or reverts to 4.25% (the Treasurer's view). Two types of relief were pled to accomplish this: (1) mandamus and (2) declaratory relief. As to justiciability,[15] it is only if the Treasurer can show that there is not a single Plaintiff/Appellant with both standing and a ripe claim that the Treasurer can prevent a ruling on the merits.

[15] The Treasurer's jurisdictional argument will be addressed below.

The Treasurer makes two justiciability arguments: (1) standing related to the legislators and advocacy groups; and (2) ripeness as to all Plaintiffs/Appellants. Thus, the Treasurer apparently concedes that the individual taxpayers have standing.

While Plaintiffs/Appellants contend that all of them have standing and that their claims are all ripe, it may be that this Court may differentiate holdings on the various groups. Thus, the legislators and advocacy groups will show that they have standing and the individual taxpayers will then show why their respective claim is ripe.

C. The legislators and advocacy groups have a special injury distinct from the general public and therefore have standing.

The Treasurer claimed that the legislators and advocacy groups do not have standing to maintain suit. Specifically, while the Treasurer admits that Const 1963, art 4, § 31 entitles "the Legislature . . . to revenue *estimates*" that "does not mean that a permanent tax rate is mandated." Defendant's Motion at 9.[16] According to the Treasurer, the legislators and advocacy groups' remedy "is the legislative process, not the courts." *Id.*

More specifically, it was claimed that: (1) legislators do not have a right to a "precise" revenue estimate and are presenting a "generalized grievance" and therefore cannot meet the standing test; (2) the advocacy group claim fails for the same reasons.

In *League of Women Voters v Secretary of State*, 506 Mich 561 (2020), this Court set out the current standing test:

> [W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a

[16] The formal title of the document containing the Treasurer's substantive arguments at the Court of Claims was "Defendant's Motion for Summary Disposition in Lieu of Answer to Complaint." It will be referred to as Defendant's Motion.

> declaratory judgment, whether or not other relief is or could be sought or granted." An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though a court is not precluded from reaching issues before actual injuries or losses have occurred, there still must be a present legal controversy, not one that is merely hypothetical or anticipated in the future.

Id. at 585-86. In *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010), this Court indicated that a plaintiff could bring a suit if a special injury could be shown, even if the statute did not explicitly provide for that suit:

> Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a **special injury** or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Id. at 372 (emphasis added).

This Court set out two points when looking at the statutes that were silent on a cause of action: (1) a plaintiff need not show that there is an implied cause of action for monetary damages if the plaintiff is seeking other remedies "such as declaratory relief," *id*. at 374 n 23; and (2) it is more appropriate to look at legislative history in regard to standing than when construing the statute. *Id*. and n 24.

Turning to the specific question of standing for legislators, the Treasurer cites to *League of Women Voters* wherein this Court avoided the "thorny matter" of whether the Legislature itself had standing to defend the constitutionality of a statute that the Attorney General believed to be unconstitutional and refused to defend. 506 Mich at 595. Discussion of two earlier cases will provide some context to the majority opinion from *League of Women Voters*, Justice Clement's concurrence and dissent, and the two dissents.

In *Killeen v Wayne County Road Commission*, 137 Mich App 178 (1984), a state Senator that had voted to allow Wayne County to create a home rule charter, two members of the commission that drafted the charter, and a Wayne County Commissioner brought suit to challenge the unionization of the road commission that they believed was being done to "insulate certain personnel in high paying positions" from being effected by potential administrative and personnel changes. *Id*. at 181.

The state Senator was originally just listed as a taxpayer of the county, but after a trial court dismissal, the state Senate entered a resolution indicating that he had permission to file suit on behalf of the state Senate itself. The Michigan Court of Appeals treated his status as that of an individual legislator and held that once his vote on allowing Wayne County to create a home rule charter had been counted, his "special interest" as a lawmaker had "ceased." *Id*. at 189.

In *House Speaker*, this Court addressed the standing claims of four individual legislators suing about a 1991 executive transfer of funds within a department. The opinion began: "Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *House Speaker*, 441 Mich at 554. This Court recognized "the standing of legislators to challenge allegedly unlawful executive actions has been recognized," but "a legislator must overcome a heavy burden." *Id*. at 555.

More specifically, it was stated:

> It would be imprudent and violative of the doctrine of separation of powers to confer standing upon a legislator simply for failing in the political process. For these reasons, plaintiffs who sue as legislators must assert more than "a generalized grievance that the law is not being followed." Instead, they must establish that they have been deprived of a "personal and legally cognizable interest peculiar to them."

Id. at 556 (cleaned up). This Court held that the Chair of the House Appropriation Committee had standing to challenge the executive transfer because if the plaintiffs in that matter were correct,

then that legislator would have had a right to approve or disapprove the transfer. Because a legislator in the Senate who was on that chamber's Appropriation Committee was allowed to vote on whether to approve the transfer, that legislator did not have standing as the loser of "a political battle." *Id*. at 561. This Court rejected the standing of the House Speaker and the Senate Minority leader since their interests – that of "the Governor's line-item veto authority" and "the power of members of the Legislature to override such a veto" were "not persuas[ive]." *Id*.

Returning to *League of Women Voters*, there, the Attorney General issued an opinion that legislation regarding petition gathering was unconstitutional and refused to defend it. Having vacated the lower court's ruling on the merits, this Court held that the "thorny matter" of whether "an executive officer's actual or threatened nondefense of legislation in a private lawsuit gives the Legislature a sufficient interest to bring its own action against those officers" was now moot. *League of Women Voters*, 506 Mich at 595. But the majority did make clear that it rejected the argument the Legislature has standing to seek a declaratory judgment "any time the Attorney General issues a formal opinion concluding that an act is unconstitutional." *Id*. at 596-98.

In her concurrence and dissent, Justice Clement stated: "I do not believe a legislative declaratory judgment action against an executive officer is justiciable when the Legislature seeks nothing more than a judicial declaration that the executive must implement a law as the Legislature prefers." *Id*. at 605. According to Justice Clement, this is more of a justiciability concern: "[O]ur standing analysis and our justiciability analysis are distinct questions," and while the Legislature would have provided "vigorous advocacy" to the petition gathering question "its claims are nonjusticiable." *Id*. at 607. She explained:

> The purported injury suffered by the Legislature—the practical nullification through executive nonimplementation of a law the Legislature has enacted—is not one that the judiciary has recognized in the past. We have not done so for good reason: it would threaten the separation of powers and risk injecting this Court into

> political disputes between the Legislature and executive despite the fact that those coordinate branches of government are capable of resolving their disputes through the political process. When private litigants without access to the constitutional levers of power assert that their rights are being violated . . . it is generally the judiciary's duty to resolve such disputes, but if no such litigant steps forward, I would not set this Court up as the arbiter of disputes solely between branches of government to which we are coequal, not superior.

Id. at 607-08.[17]

In his dissent, Justice Markman indicated that in "these unique circumstances" he would hold the Legislature as an institution had standing. *Id*. at 626. He distinguished *House Speaker* by noting that case had involved individual legislators, not the institution, and further that it was not "a situation in which a legislator is 'suing to reverse the outcome of a political battle that he lost,' as was the case with one of the legislators in *House Speaker*." *League of Women Voters*, 506 Mich at 626, n 6. Justice Zahra joined this opinion.

Here, the interest the legislators claim comes from Const 1963, art 4, § 31 – the framers wanted revenue forecasts to be early in the budgeting process and as accurate as possible.

Buttressing this claim are other Constitutional Convention activities related to the budget process. Committee Report 46a was the basis for Const 1963, art 5, § 18, which states in pertinent part: "The governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state. Proposed expenditures from any fund shall not exceed the estimated revenue thereof. . . ." *Id*. (emphasis added).

While ostensibly discussing Committee Report 46a, Delegate Rajkovich stated:

> The budgeting system that we propose in this section does clarify the responsibilities of government, whether the range of this government shall be wide or whether it shall be narrow. It makes those provisions. Also, we set in this section

[17] There are private litigants in this action – the individual taxpayers.

> very sound budgeting procedures, . . . which state that the budget should be prepared by the executive and that he shall present this program of work for the fiscal period, whatever that might be. **Also, it should include all estimated receipts and expenditures. This means all. This is very important. Not just part of the receipts or expenditures should be included.**
>
> Further, we propose that the expenditures should not exceed estimated revenues. That is a must in any good budget; the two should balance. . . .

1 Official Record, Constitutional Convention 1961, p 1639 (emphasis added).

An amendment was proffered to eliminate what would become Const 1963, art 4, § 31 entirely. It was defeated by voice vote. 1 Official Record, Constitutional Convention 1961, p 1653. In arguing against that amendment, Delegate Martin stated:

> The fundamental purpose of this section is to get the attention of the legislature to the main business of appropriations, that is, the general appropriation bills before it acts on so called special bills for this, that, or the other thing, which are thrown in by individual legislators and which do not come from a consideration of the total needs of the state government and **the total revenue.**

Id. A second amendment proposal would have eliminated this provision (and made other changes to other provisions). It failed 29-74. 2 Official Record, Constitutional Convention 1961, p 2768.

The Plaintiff/Appellant legislators need to know how much is going to be collected in tax-collection revenue to fix the budget hole in the 2023-24 fiscal year, which still has over 8 months to go, and in future years so that they can properly engage in budget discussion and voting for fiscal year 2024-25 and beyond. The state constitution guarantees all legislators a best estimate of revenue for budgeting including an "itemized statement of estimated revenue by major source." Const 1963, art 4, § 31. Similarly, although they are not constitutionally entitled to accurate budgetary information, the advocacy groups are well-known organizations that often lobby during the budget process on behalf of their members. They too require accurate information to effectively engage in that process. For these two groups of plaintiffs, the issue of whether the state will have

$527.6 million less than projected for fiscal 2023-24 and approximately $714.2 million less in future years will influence what legislation they seek to support and when.

The goal of the Const 1963, art 4, § 31 is that the budgeting process has revenue meet or exceed expenditures. What the Constitutional Convention delegates rejected was the idea that the executive and the legislature would budget with wildly divergent revenue projections, which would invariably lead to more spending than there is revenue.

At the Court of Claims, Plaintiffs/Appellants used the term "precise revenue estimate" as opposed to the "best estimates of revenue" language from the Notice of Address to the People. The Treasurer highlighted tension between the words "precise" and "estimate," and the Court of Claims based its rejection of the legislators' standing on this:

> Plaintiffs do not support their claim that they are entitled to "precise revenue estimates" for budgeting. As defendant notes, the very concept of a precise estimate is oxymoronic considering that an estimate is by its very nature imprecise.[7] Article 4, § 31 does not contain such a requirement. Rather, the Constitution simply requires that the Legislature estimate revenues and refrain from passing an appropriations bill that exceeds the estimates. See Const 1963, art 4, § 31. Nor does the Address to the People support plaintiff's position. That document simply referred to a "best estimate" of revenue. The other historical documentation plaintiffs cite do not support that the Legislature is entitled to any precision in the revenue estimate. As defendant notes, the budget process involves numerous steps, including the revenue estimating conference [sic – should be conferences] and estimates are provided throughout the year. See MCL 18.1342 (requiring the state budget director or treasurer to "establish and maintain an economic analysis, revenue estimating, and monitoring activity," which must "include the preparation of current estimates of all revenue by source for state operating funds for the initial executive budget proposal to the legislature and thereafter through final closing of the state's accounts"). Plaintiffs cite no source that would entitle them to a "precise" revenue estimate.
>
> [7] The Merriam-Webster Online Dictionary, a source cited by both parties, defines the term "estimate," in relevant part, as "a rough or approximate calculation." Considering this definition, the Court agrees with defendant that a concept that is rough or approximate is not reasonably understood to also require precision.

Opinion and Order at 20-21 (online citation to dictionary omitted).

The Court of Claims consulted the dictionary for a form of the word "estimated" that is in Const 1963, art 4, § 31, but in its analysis failed to note that word is in the phrase "an itemized statement of estimated revenue by major source." That same online dictionary defines "itemize" as "to set down in detail or by particulars."[18]

It is certainly true that it is unlikely even the best economic forecasters are going to hit revenue projections to the penny. But that does not mean the Treasurer's misconstruction of MCL 206.51(1)(c), which leads to an around $714.2 million annualized overstatement in the revenue projection, satisfies the Constitutional requirement of Const 1963, art 4, § 31 (or for that matter MCL 18.1367b). Section 31 does not permit an anything goes revenue projection so long as adjustments can be made to expenditures later in the process (a process rejected twice by the Constitutional Convention delegates). Rather, it seeks to have an orderly budget process where expenditures and revenue align as early and as consistently as possible. This is an interest that is "distinct from that of the general public." Plaintiff/Appellant legislators have the stronger argument in that they can cite to the Constitution, but the advocacy groups also participate in the budget process in a manner different from that of the general public. If the Treasurer's argument were accepted, it would reduce Const 1963, art 4, § 31 and Const 1963, art 5, § 18, to mere suggestions from a bygone era that can be ignored by any governor or legislator that decides to do so.

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[18] The Court of Claims should have used a contemporaneous dictionary for "estimate" and Plaintiffs/Appellants should do so as well for "itemize." *Sanford v State*, 506 Mich 10, 21 n 23 (2020). Webster's New American Dictionary Deluxe Edition (1965) defines "estimate" as "An appraisal, a calculation of probable cost; a judgment or opinion," "itemize" as "To set down by items; to enter as an item," and "item" as "A separate unit in a list; . . .; a sum entered in an account." *Id*. at 330, 518.

While both of the Plaintiff/Appellant legislators were serving and voted when 2015 PA 180 passed,[19] neither has brought suit here as voting members of the 2015 Legislature. Rather, their claim is that as 2023 members of the Legislature they are being provided a $714.2 million revenue estimating error due to the actions of the Treasurer (and the future annual errors of around that size will continue until the statute is interpreted properly). That error affects their ability to perform their current legislative duty to create and vote for a budget where expenditures and revenues match as nearly as possible – a process so important it was constitutionalized. Their status is not that of legislators upset at having lost a vote. If Plaintiff/Appellant legislators are correct about the proper interpretation of MCL 206.51(1)(c), this Court should say so.[20]

D. This matter is ripe for adjudication.

Both the legislators and advocacy organizations have been, and will continue to be, injured by the Treasurer's application of MCL 206.51(1)(c). The fiscal 2023-24 budget has been passed and priorities were set with what these two groups (as well as the individual taxpayers) believe to be bad information – that the individual income tax rate will revert to 4.25% for the 2024 tax year. A $527.6 million shortfall for fiscal year 2023-34 has wide-ranging policy impacts. See generally Const 1963, art 5, § 20 (discussing appropriations and reduction of expenditures due to improper revenue estimates).

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[19] At the time, Senator McBroom was Representative McBroom and Representative Zorn was Senator Zorn. Senator Zorn voted yes on SB 414, which became 2015 PA 180. 2015 Senate Journal 1772 (Nov. 3, 2015). Representative McBroom voted yes on the bill. 2015 House Journal 1958 (Nov. 3, 2015).

[20] As will be shown below, the individual taxpayers have standing and their claims are ripe. Therefore, even if this Court were not to agree with Plaintiffs/Appellants on this point, it should still decide the proper construction of MCL 206.51(1).

The Court of Claims did not analyze the legislative and advocacy groups for ripeness as it held "these groups lack standing." Opinion and Order at 23.

The Court of Claims did analyze ripeness as to the individual taxpayers and the advocacy groups as associational groups that contain individual taxpayers. That analysis was flawed.

The individual taxpayers have to make decisions whether to challenge an income-tax rate using the following procedures: (1) informal dispute resolution with the Department of Treasury; (2) filing a claim in the Tax Tribunal; or (3) filing a suit with the Court of Claims. MCL 205.21; MCL 205.22. These provisions have tight timelines. See MCL 205.22(1) (60 days). Just 2-3% of taxpayers filing suit would lead to well over 100,000 cases, which is more than all the circuit court actions filed in a typical year. Complaint at ¶ p. 11, n 6.

At the Court of Claims, the Treasurer had argued that that an interpretation of MCL 206.51(1)(c) is contingent upon a future event occurring (the January 2024 formulaic calculation) and the Legislature may change the statute before then.

As a primary matter, it seems unlikely that the current majority in the Legislature would amend MCL 206.51(1)(c) as the House Appropriations Chair, Representative Angela Witwer, intimated that any attempt to have eliminated the tax cut from that provision would be "political suicide."[21] But it is always the case that the Legislature has the power to amend laws and to grant immediate effect. Yet declaratory judgments still occur.

This is not surprising. In *Taxpayers Allied*, this Court indicated that plaintiffs challenging improper taxes could generally get prospective relief. There, taxpayers sought a refund for taxes improperly implemented due to the Headlee Amendment. This Court held that refunds were

[21] https://www.bridgemi.com/michigan-government/michigan-tax-cuts-could-total-16b-democrats-wont-block-income-tax-rollback (last visited Jan. 20, 2024).

foreclosed as being past the statute of limitations. *Taxpayers Allied for Const Tax'n v Wayne Cnty*, 450 Mich 119, 125-26 (1995).

But, regarding an injunction request as to future tax years, this Court noted: "Because a suit for injunctive relief may seek to prevent a future wrong, the cause of action necessarily arises before the wrong occurs." *Id*. at 127. Further, it was indicated that the statute of limitations would not bar future relief and that plaintiffs' declaratory relief request could proceed. *Id*. at 129. This Court held that a contrary ruling would unnecessarily burden the court system: "It would present the judicial system with numerous individual and class actions for refunds each year, without any offsetting benefit in terms of enhancing the fiscal integrity of the [taxing authority]." *Id*. at 128. Contrary to what the Treasurer argued below, this Court did not indicate that the case was not ripe because Wayne County might have fixed its allegedly problematic tax statute before the next round of taxes were due.

The Court of Claims based its holding on "one key fact: the tax rate for the 2024 tax year has not been determined yet." Opinion and Order at 23. The Court of Claims explained:

> So, at this stage, we do not know if the 2024 tax rate will be 4.25%, 4.05% or some other rate. The rate may even be lower than 4.05%. Therefore, it is not clear whether (and to what extent) the 2024 tax rate will impact the 2023-2024 fiscal year budget. And no individual taxpayer-plaintiff has paid income tax, had any income tax withheld, or received a tax assessment based on the 2024 rate. As even plaintiffs acknowledge, defendant's interpretation of the 2024 tax rate will not begin to affect Michigan taxpayers until at least January 1, 2024. Thus, while plaintiffs argue that they can request forward-looking relief, this Court cannot craft a remedy without knowledge of what the 2024 tax rate will be.

Id. at 23-24. This led the Court of Claims to distinguish *Taxpayers Allied* as in that case "the increased rate was certain." *Id*. at 24 n 8.

The Court of Claims is wrong. The determination that the income tax was 4.05% for the tax year 2023 makes that rate the "current rate" for the 2024 MCL 206.51(1)(c) formula and 4.05%

is thereby a ceiling for the income tax rate for 2024 even before the formula is computed. The Treasurer refused to change its tax withholding tables for the tax year 2023 – thus, most taxpayers had taxes wrongly withheld at the higher 4.25% rate. That overwithholding is continuing to this day. The relief that Plaintiffs/Appellants sought was to have 4.05% be designated the "current rate" when the MCL 206.51(1)(c) formula is run.[22]

Thus, the claims are ripe for all Plaintiffs/Appellants.

II. Under MCL 206.51(1), the tax year 2023 income tax reduction made pursuant to MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer rate as the income tax rate cap until the formula would cause it to decrease again.

A. Standard of review

Questions of statutory interpretation are reviewed de novo. *Honigman Miller Schwartz and Cohn LLP v Detroit*, 505 Mich 284, 294. (2020)

B. Both clarity and ambiguity analyses favors Plaintiffs/Appellants.

Somewhat surprisingly, at the Court of Claims, the Treasurer only cited to the Attorney General's Opinion in the facts section of its motion and not when arguing the merits of MCL 206.51(1)(c)'s meaning. Because judicial notice of that opinion is possible, Plaintiffs/Appellants will use the Attorney General Opinion as a framework and will address the arguments made within it. While doing so, they will discuss any overlap and augmentation from the Treasurer's lower-court motion as they occur. They will then address the Court of Claims decision.

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[22] Note that the CAFR is due "[w]ithin 6 months after the end of the fiscal year," MCL 18.1494. But, MCL 206.51(1)(c) appears to move that deadline up to the January CREC as the fiscal spending numbers are needed to make the computation and that provision requires the tax rate formula to be run "no later than the . . . date of each January revenue estimating conference conducted each year thereafter." *Id*. Thus, we should already know (but do not as of time of filing) what the 2024 tax rate computation is supposed to be as the January CREC occurred on the 12th.

1. Clear meaning.

In *American Civil Liberties Union of Michigan v Calhoun County Sheriff's Office*, 509 Mich 1, 8 (2022), this Court explained:

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed by the words it chose.

Id. "A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning." *People v Hall*, 499 Mich 446, 454 (2016). In performing this review of the statute, "courts must give effect to **every word**, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *2 Crooked Creek, LLC v Cass Cnty Treasurer*, 507 Mich 1, 9 (2021) (emphasis added). Further, "[u]nless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id*.

With those general principles of statutory construction in mind, the Attorney General's opinion fares poorly.

As a reminder, the bases for the Attorney General's construction were: (1) a dictionary definition of "current" (the Attorney General claimed her preferred definition is "the common meaning of the word," but there is at least one other meaning that works better); (2) a lack of specific legislative language to the contrary ("Had the Legislature intended the phrase 'current rate' in subsection (1)(c) to require a permanent change to the rate specifically set out in subsection (1)(b), it could have easily, and clearly, done so[.]"); and (3) a policy argument that a rate reduction should only be temporary since the state might not be able to "afford to provide relief to taxpayers"

unless state tax collections and other revenue outpace inflation. The Attorney General did not make an explicit ambiguity argument in her opinion (although the policy argument may constitute an implicit one).

a. Dictionary definition.

The online version of Merriam-Webster's Dictionary (the same source used by the Attorney General Opinion and cited to by this Court in *Detroit News v Independent Citizens Redistricting Commission*, 508 Mich 399, 421 (2021)) lists three definitions for "current" as an adjective:[23] (1) "occurring in or existing at the present time"; (2) "presently elapsing"; and (3) "most recent." The Attorney General chose the first definition, but the best one is the third (a definition not mentioned in the opinion).[24] Using dictionary.com, which a majority of this Court referred to in 2019, *Drouillard v American Alternative Insurance Corporation*, 504 Mich 919 (2019), there are four relevant definitions when "current" is used as an adjective: (1) "passing in time; belonging to the time actually passing"; (2) "prevalent; customary"; (3) "popular; in vogue"; and (4) "new; present; most recent."[25]

In *Honigman Miller*, this Court explained what occurs when both sides "appear to articulate plausible interpretations of the statute." *Id*. at 307. Specifically:

> [I]n order to determine the most reasonable meaning of statutory language, such language cannot be read in isolation or in a manner disregardful of context; this Court will not extract words and phrases from within their context or otherwise defeat their import as drawn from such context. A statute should be interpreted in

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[23] https://www.merriam-webster.com/dictionary/current (last visited Jan. 20, 2024).

[24] Even the Attorney General's chosen definition could be used to argue that the rate cuts are permanent. The "present time" could be when the statute was passed, or it could be when the statute is read from the date of passage to any date thereafter.

[25] https://www.dictionary.com/browse/current (last visited Jan. 20, 2024). The example given with this fourth definition is "the current issue of a publication."

> light of the overall statutory scheme, and "[a]lthough a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context."

Id. (citations omitted). Further, "language in a statute 'must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense.'" *Id*. at 313 (quoting *Sweatt v Dep't of Corr*, 468 Mich 172, 179 (2003)).

At the Court of Claims, the Treasurer contended "existing at the present time" is the correct meaning of "current." But most of the Treasurer's argument related to the overall structure and the purported "context" of MCL 206.51.

The Treasurer's argument began by discussing MCL 206.51(1)(a), (b), and (c).[26] It noted that the income tax rate was 4.35% "[o]n and after October 1, 2007 and before October 1, 2012." MCL 206.51(a). On this, Plaintiffs/Appellants agreed.

The parties' disagreement began on the construction of MCL 206.51(1)(b) and (c).

MCL 206.51(1)(b) reads: "Except as otherwise provided under subdivision (c), on and after October 1, 2012, 4.25%." The Treasurer claimed it "is now effective and must be read as the beginning point of the statute every year." Defendant's Motion at 19. The argument continued: "Subsection(1)(b) remains the operative tax rate unless the conditions in Subsection (1)(c) apply for that tax year." *Id*. at 20. The Treasurer contended the beginning of the first sentence of MCL 206.51(1)(c) is key:

> This is evident by the phrase "[f]or each tax year beginning on and after January 1, 2023" – a dependent clause – [being] followed by the conditional term "if." "If" means "in the event that." . . . "If" is a conjunction that joins a conditional (or antecedent) clause and a dependent (consequent) clause, and, thereby, sets forth a contingency that may or may not be triggered in any given tax year.

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[26] All of these came from 2015 PA 180 and remain to the date of filing.

Defendant's Motion at 20. The Treasurer concluded:

> [T]he tax rate in Subsection (1)(b) is examined "[f]or each year" to determine if the rate reduction in Subsection (1)(c) applies based on the conditions articulated in Subsection (1)(c). If those conditions are satisfied, Subsection (1)(c) contains a formula to calculate the adjustment from the default rate set in Subsection (1)(b) and is not itself a new permanent rate. This is the most natural reading that gives effect to every term in the statute.

Id. at 21.

The Treasurer's problem is that its reading does not give effect to every term in the statute. As noted above, the parties agree that due to MCL 206.51(1)(a) the income tax rate for the time period between October 1, 2007, and October 1, 2012 is 4.35%. The parties also agree that in the time period between MCL 206.51(1)(b)'s "October 1, 2012" and MCL 206.51(1)(c)'s January 1, 2023, the income tax rate was 4.25%. While not specifically discussed by the Treasurer, January 1, 2023, is the first time that the formula from MCL 206.51(1)(c) was applied.

Here is the pertinent language from the first sentence of that provision:

> For each tax year beginning on and after January 1, 2023, if the percentage increase in the total general fund/general purpose revenue from the immediately preceding fiscal year is greater than the inflation rate for the same period and the inflation rate is positive, then the **current rate** shall be reduced by an amount determined by multiplying **that rate** by a fraction.

Id. (emphasis added).

If the Treasurer is correct, then the word "current" is entirely superfluous and the term "that rate" should have been "the rate." The Treasurer's reading is that the MCL 206.51(1)(c) test begins each year with 4.25%. As passed in 2015, there was only one rate that could exist on December 31, 2022 – 4.25%. It is only on January 1, 2023, that a new rate could take effect – up until that point, the MCL 206.51(1)(c) test was not calculated. Thus, the first time that test was run, there could only be one possible rate – 4.25%. According to Merriam-Webster, "the" is "used as a

function word to indicate that a following noun or noun equivalent is a unique or a particular member of its class."[27] "The rate" would be sufficient to indicate an immutable 4.25% rate, the word "current" would add nothing.

Inserting the parties' respective dictionary definitions for "current" in MCL 206.51(1)(c) further illustrates this point. The Treasurer would have the statute read "then the [existing at the present time] rate shall be reduced." But, according to the Treasurer, there is only one rate that it could be – 4.25%. The Treasurer's insertion accomplishes nothing. Plaintiffs/Appellants' insertion, meanwhile, makes the statute read "then the [most recent] rate shall be reduced." This adds something to the sentence.

A similar problem arises with "that rate." According to Merriam-Webster, "that" as an adjective means "being the person, thing, or idea specified, mentioned, or understood."[28] If the Treasurer is correct, there is no need to use "that rate" (i.e. a reference back to the "current rate") as there is only one rate possible – the 4.25% rate. Thus, "the rate" should be used as only one unique rate is possible.

The Treasurer claimed that Plaintiffs/Appellants interpretation of "current rate" as "most recent" would render MCL 205.61(1)(b) "nugatory." But, properly construed, MCL 205.61(1)(b) would be no more nugatory than MCL 205.61(1)(a). The income tax rate of 4.25% would apply for the time between October 1, 2012, and January 1, 2023. Anyone filing late, amending their returns, etc., would use MCL 206.51(1)(b) for the relevant income earning time period just as MCL 206.51(1)(a) is used for its time period. That is not nugatory.

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[27] https://www.merriam-webster.com/dictionary/the (last visited Jan. 20, 2024).

[28] https://www.merriam-webster.com/dictionary/that (last visited Jan. 20, 2024).

Plaintiffs/Appellants definition of "current rate" is superior.

b. An easily available legislative alternative clearly indicates Plaintiffs/Appellants' construction of MCL 206.51 is superior.

Consider the Attorney General's second point that the Legislature could have made it clear if it was choosing "most recent" instead of the Attorney General's preferred "existing at the present time" since "it could have easily, and clearly done so, in subsection (10) (or in subsection (1)(c))." OAG 7320 at 4.[29] But, the Attorney General's preferred definition could have been clearly or easily included as well. All that would have been required is for the word "current" to be stricken and replaced with "4.25%" in MCL 206.51(1)(c) (or as discussed above, "current" could be stricken and not replaced). The fact the Legislature did not do so is telling, as they have previously employed specific rates to accomplish a temporary tax rate reduction.

The courts may look at past legislative practice to guide analysis of a disputed term. *Honigman Miller,* 505 Mich at 310-11.

The Legislature did use a particular, identified, numeric income tax rate in 1983 PA 15. There, for the first time, it created a formula for setting the income tax. In section 51(1)(d) it set the formula for "January 1, 1983, and thereafter," which matches up with the "For each tax year beginning on or after January 1, 2023," at issue here. In 1983 PA 15, the Legislature used a specific rate – 3.9% – as its starting point. This indicates that, in 2015, there was legislative experience in setting a particular numerically identified rate (1983's 3.9%) as a starting point for a year-by-year formulaic determination of the applicable income tax rate. This shows, having not chosen to follow its past proven method from 1983 that the 2015 Legislature meant "current" to mean "most recent."

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[29] In other words, the Attorney General believed the Legislature needed to **explicitly** state that the income tax did not revert to 4.25% in either MCL 206.51(1)(c) or MCL 206.51(10) (the definition section).

The Legislature intentionally chose a definition with the flexibility to handle a rate, which could be lower each and every year after the formulaic rate setting process was applied. Thus, the Legislature knew it would not need to use the indirect-MCL 206.51(1)(c)-as-interpreted-by-reference-to-MCL 206.51(1)(b) method in order to accomplish a temporary rate reduction since it could have just used "4.25%" instead of "current rate" or as discussed above just used "the rate." There is no point in doing indirectly what so clearly could have been done directly. The Legislature's 2015 choice not to use its past method of a fixed constant in a tax-rate-computation formula is evidence that "current" means "most recent" for purposes of MCL 206.51(1)(c). There is no such support for the Attorney General's definition.[30]

Further, consider subsection 9 of 1983 PA 15, which stated:

> The rates provided in subsection (1), as limited by subsection (12), shall be annualized as necessary by the department for tax years that end after March 31, 1982 and the applicable annualized rate shall be imposed upon the taxable income of every person . . . **for those tax years**.

Id. (emphasis added). Thus, there is also evidence that when the Legislature wants to limit a rate adjustment to a particular tax year it knows how to do it.

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[30] Section 51(1)(d) is not the only place 1983 PA 15 uses a constant specific number for the rate analysis. In Section 51(11) of that public act, there is another identified constant – 14.5% – used for each and every year's computation.

It should be noted that 1983 PA 15 contained specific language indicating that the tax rate could increase on a year-by-year basis. The last sentence of 1983 PA 115's Section 11 states:

> An additional tax rate imposed pursuant to subsection (1)(d)(i) for a tax year commencing in 1984 or any calendar year thereafter shall not exceed the additional tax rate imposed pursuant to subsection (1)(d)(i) for a tax year commencing in the immediately preceding calendar year, or .7%, whichever is the greater rate.

The Attorney General did not point to any portion of MCL 206.51 where there was an explicit recognition by the Legislature that the income tax rate could increase as opposed to just decreasing or remaining constant on a year-to-year basis.

The Treasurer's motion did not specifically address or augment the Attorney General Opinion's easily-and-clearly-done-so argument.

c. Policy considerations as an interpretative guide.

The Attorney General's third point related to policy:

> In particular, the triggering event is based on temporary, impermanent, circumstances that change, and are reviewed, every year. Essentially, the Legislature has determined that if a situation exists where a percentage increase in state revenue in the immediately preceding fiscal year is greater than the rate of inflation for that same year and the inflation rate is positive, then the State can afford to provide relief to taxpayers. But because that situation is only temporary, **it makes sense that**, rather than provide a permanent tax reduction based on the (perhaps unusual) economic circumstances of a single fiscal year, the Legislature intended the relief to taxpayers to be only temporary as well. Simply put, the statute provides temporary relief based on temporary circumstances.

OAG No 7320 at 4-5, available at Complaint, Exhibit 1 (emphasis added).

The Treasurer's Motion echoed and then extended the policy argument:

> The reduction in the rate is premised on a single event, not a continuing one, so the statute's context indicates that the rate reduction should be a single year event. An interpretation of "current" that carries the previous reductions forward would transform a single-year windfall into a permanent reduction and even eliminate the tax in its entirety if there were consecutive windfall years.

Defendant's Court of Claims Motion at 23.

To the extent that the Attorney General's and the Treasurer's policy arguments are an attempt to identify "absurd results," they will be addressed here in the clear meaning section.

That tax collection should remain at a certain floor unless and until it is absolutely clear an extraordinary revenue event has occurred that would allow for some temporary relief is a reasonable policy belief. But another reasonable policy belief is, in the Attorney General's words "it makes sense that," where there is an extraordinary revenue event it can sustain multiple years of an income tax reduction.

Take the situation Michigan recently faced. On July 31, 2023, the Governor signed an $81.7 billion dollar budget, the largest in state history. That budget contained over a billion dollars in earmarks. 2023 PA 119 and 2023 PA 103. Earlier in the year, the Legislature passed almost $2 billion dollars in targeted tax relief. House Fiscal Agency, Legislative Analysis of House Bill 4001 (February 8, 2023), available at Complaint, Exhibit 17 at 6. Taken together, this spending could have sustained a 4-year reduction in the income tax rate at $714.2 million per year. Further, the 2015 Legislature could have presumed that if the "permanent" tax cut became unsustainable, a future legislature could raise the rate like it did in 1971,[31] 1975,[32] 1977,[33] 1982,[34] the previously discussed 1983,[35] 2007,[36] and 2011.[37] It may also have assumed that future legislatures could eliminate programs to reduce spending to account for decreased revenue. This policy belief is at least as rational as the one posited by the Attorney General and the Treasurer and was not considered or analyzed by either of them.

The Treasurer's concern that the income-tax rate could go to zero is hyperbolic. In a post-passage analysis of 2015 PA 180, the Senate Fiscal Agency stated:

> The potential for the rate reduction to be triggered can be viewed from a historical perspective, considering what would have occurred if the bill had been in effect in prior years. General Fund revenue has grown or is forecasted to grow more

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[31] 1971 PA 76.

[32] 1975 PA 19.

[33] 1977 PA 44.

[34] 1982 PA 155.

[35] 1983 PA 15.

[36] 2007 PA 94.

[37] 2011 PA 38.

> rapidly than 1.425 times the rate of inflation, as defined by the bill, in 20 of the 50 years between FY 1967-68, the first year in which Michigan levied the individual income tax, and FY 2016-17, as forecast, and in seven of the 25 years since FY 1992-93. However, had the provisions of the bill been in effect beginning in some prior fiscal year, rate reductions would not have been triggered in all of these years because a rate reduction in an earlier year would potentially result in revenue not growing at a faster rate than inflation in later years. Similarly, in some years, such as FY 1999-2000, the scheduled rate reduction from 4.40% to 4.25% was greater than the rate reduction that would have been required by the provisions in the bill.

Senate Fiscal Agency, Road Funding; Income Tax (November 23, 2015) at 15.[38] Remember that income taxes generally made up around $9.4 billion of the state's revenue in 2020. As tax rates decrease, it will mean less revenue will be collected through income taxes, but less revenue will make it less likely there are future cuts since rate cuts are based on revenue exceeding inflation.

But even if it were realistically possible that MCL 206.51(1)(c) could zero out the tax rate, it would not be an absurd result or unreasonable policy. Until 1967, this state did not have a broad-based income tax. Before the 1963 Constitution, the electors rejected attempts to constitutionally permit income taxes in 1922, 1924, 1934, and 1936. 1961-1962 Michigan Manual at 77 and 79. Const 1963, art 9, § 7 prohibits a graduated income tax and thereby implicitly permits a flat-rate income tax. Thus, Michigan existed for decades without an income tax. Further, these states do not have income taxes: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.[39] The idea of a state without an income tax is not beyond the pale.

Although there can be a reasoned policy disagreement about whether the income-tax-rate cap should be reduced annually or permanently (or perhaps whether the income tax should be

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[38] https://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0414-N.pdf (last visited Jan. 20, 2024).

[39] https://www.cnbc.com/select/states-with-no-income-tax/ (last visited Jan. 20, 2024).

eliminated entirely), this Court has indicated that disagreement based on policy is largely irrelevant:

> Our task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

Mayor of City of Lansing v Mich Pub Serv Comm'n, 470 Mich 154, 161 (2004). Thus, the competing policy positions are largely irrelevant—only the Legislature's policy selection, as indicated by the text and the context of the statute, matters.

Under the traditional clarity analysis, Plaintiffs/Appellants' reading of the statute is superior. Their dictionary definition is better given the text and context of the statute. They have also shown the Legislature's past practice of using a fixed numeric starting point (1983's 3.9%) when adopting a formula to determine the income tax rate and a past practice limiting a formulaic rate change to a particular year (1983 PA 15's subsection (9)). Further, the Legislature made the policy decision in 2015 to enact a continuing income-tax reduction. That policy decision is exclusively the prerogative of the Legislature, and the Court should uphold that decision regardless of any other parties' policy preference.

2. Court of Claims clarity analysis.

The Court of Claims agreed with the Attorney General and Treasurer about the construction of MCL 206.51(1)(c). The bases for its holding included: the word "except" in MCL 205.61(b) "suggest[s] that the 4.25% is the default rate unless the triggering conditions in Subsection (1)(c) are met" and lowering of the rate only occurs "if" the "specified conditions are met, further

supporting defendant's interpretation that the rate defaults to 4.25% each year." Opinion and Order at 25.

The Court of Claims held the Treasurer's dictionary definition was better:

> Reading the term "current" as "existing at the present time," it becomes clear that Subsection (1)(b) sets the default rate on or after October 1, 2012, which remains in effect each year unless the triggering events in Subsection (1)(c) occur. Reading the statute sequentially, Subsection (1)(a) is a rate with a definite start and end date. Subsection (1)(b) outlines the current tax rate of 4.25% unless the conditions in Subsection (1)(c) trigger a reduction. Subsection (1)(c) then provides for a reduction of the rate that exists at the present time (4.25%) if certain conditions are met. The reference to "that rate" in Subsection (1)(c) refers to the "current" rate, which is the 4.25% rate outlined in Subsection (1)(b).

Id. at 26-27.

In response to Plaintiffs/Appellants' argument that "current" is made superfluous, the Court of Claims contended it "overlooks that the income tax rate has changed over time." *Id*. at 27. It continued: "As a hypothetical example, in 2024, the Legislature could amend the statute to set a new income tax rate of 4.15%. If that were the case, then the 4.15% would become the 'current rate' for purposes of Subsection (1)(c)." *Id*.

The Court of Claims agreed with the Treasurer's argument that Plaintiffs/Appellants' argument "could ultimately reduce the income tax to zero." *Id*. at 27. Further explaining, the Court of Claims stated: "Logically, it would make little sense to provide a permanent tax cut based on economic circumstances that would exist in one calendar year. The Legislature did not indicate in the language of MCL 206.51 that it intended a continuous reduction in the income tax rate." *Id*. at 27-28. The Court of Claims also noted "there is no indication in the language of MCL 206.51 (or the Income Tax Act) as a whole that the Legislature sanctioned the prospect of no income tax. The language of the statute merely suggested that, for tax years 2023 and beyond, when certain

economic conditions are met, a lower tax rate may be warranted on those economic conditions." *Id*. at 28.

Turning to 1983 PA 15, the Court of Claims rejected the argument that the use of a fixed amount (3.9%) instead of a term like "current rate" that requires reference to another part of the statute should provide any guidance: "The only thing that can be determined from the language of 1983 PA 15 is the fact that the Legislature intended for specific rates to apply for specific time periods." *Id*. at 29. Further, the Court of Claims noted that past practices cannot overcome unambiguous language in a statute. *Id*. at 29-30.

3. Errors in Court of Claims clarity analysis.

Addressing the Court of Claims' arguments serially, the use of "if" means the "current rate" is lowered if the contingencies of MCL 206.51(1)(c) are met. It does not mean that "current rate" means 4.25% from Subsection (1)(b). That discussion about Subsections (1)(a), (1)(b), and (1)(c) merely sets the questions of what "current rate" and "that rate" mean, it does not answer them.

The Court of Claims argument related to the its reading making "current" superfluous fails. If a future Legislature wanted to change the starting point of the MCL 205.51(1)(c) formula to 4.15%, it would just change "current rate" to "current 4.15% rate" or even more simply "4.15%" in that Subsection instead of doing so indirectly through MCL 206.51(1)(b).

In regard to the "context" of "current," the Court of Claims compares the one-year-only tax cut solely to total abolishment of an income tax (only a theoretical possibility) and skips over the fact that fiscal year 2023-24 spending on targeted tax cuts and earmarks could have supported four years of cost for the income tax cut. There is no explanation why a rational legislator could not have presumed that if there was an extraordinary revenue event that multiyear tax relief could

be afforded. Further, there is no explanation why, if a Legislature felt the permanent tax cut was resulting in too little revenue, it could not raise taxes like it did in 1971, 1975, 1977, 1982, 1983, 2007, and 2011. The sole choices are not one-year temporary relief or an irreversible march to no income tax. Rather, permanent relief with the knowledge that the income tax could be revisited if necessary is a logical course of action. In fact, it was precisely the course of action chosen by the Legislature in 2015.

The Court of Claims' rejection of the use of 1983 PA 15 for guidance in construing MCL 206.51(1) is largely based on the faulty foundation of its context/policy analysis. Once it becomes clear that a permanent tax cut is a rational choice, the Legislature's past practice becomes more important because the Court of Claims cannot foreclose it by contending it would violate its clarity analysis. Without its unsound policy discussion, there is no basis for the Court of Claims to hold that MCL 206.51(1)'s 2023 tax rate cut was temporary rather than permanent.

Plaintiffs/Appellants have a better dictionary definition, past legislative practice, and a policy argument that comports with the dictionary definition, past legislative practice, and does not make "current rate" superfluous. Plaintiffs/Appellants reading of MCL 206.51(1)(c) is better and clear.

4. Ambiguity

Having determined that MCL 206.51(1) is clear, the Court of Claims did not perform an ambiguity analysis. Opinion and Order at 30-31. Should one be necessary, it would favor Plaintiffs/Appellants.

"[A]mbiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Honigman,* 505 Mich at 291 n 3. Thus, Plaintiffs/Appellants do not need to use any of the staff reports that this Court has generally declared to be less useful. See *People v Gardner*, 482 Mich

41, 58 (2008). But, while such reports are generally disfavored, they support Plaintiffs/Appellants' interpretation, not the Attorney General's.

As previously noted, when preparing for the January 11, 2023 CREC, the Senate Fiscal Agency indicated it was likely that the MCL 206.51(1)(c) formula would result in a permanent reduction in the income tax rate. January 11, 2023 SFA Consensus Revenue Estimating Conference Document, available at Complaint, Exhibit 5. The House Fiscal Agency reached a similar conclusion in its version of the CREC preparatory document. January 11, 2023 HFA Consensus Revenue Estimating Conference Document, available at Complaint, Exhibit 6. This is consistent with the House Fiscal Agency's 2015 interpretation of MCL 206.51(1)(c). See Complaint, Exhibits 3-4. Neither the House Fiscal Agency nor the Senate Fiscal Agency adopted any alternative conclusion prior to the Attorney General's opinion of March 23, 2023.

As noted above there are dueling beliefs as to whether a permanent tax cut is a good idea or not when there is an event that brings in a large amount of revenue. Because both the Attorney General and the Treasurer relied on policy arguments, Plaintiffs/Appellants obtained the recorded legislative debates. These debates further show that Plaintiffs/Appellants have the better reading of MCL 206.51(1)(c).

The very policy arguments the Treasurer and Attorney General advanced were placed before the 2015 House and Senate and rejected. The income tax bill, 2015 PA 180, started as SB 414 and was part of a six-bill road funding package.

The House passed the (H-3) version of SB 414[40] on October 21, 2015. That version contained the "current rate" and "that rate" language but set the beginning tax year as 2019. The

[40] https://perma.cc/DDT2-LT8Z (last visited January 20, 2024).

computation of the triggering event differed somewhat, but the same policy question as to the wisdom of a permanent tax cut was present.

Representative Townsend (D-26) argued against passage on the House Floor.[41] He called SB 414 a "fiscal time bomb." Further, he noted that after a tax cut was put in place there could be future drops in revenue: "We can have a significant drop, and yet we will be continuing to lock in that cut in the income tax. Now, some people are sitting in this room going 'yes, exactly, that's what I want.' Be careful what you wish for." He continued:

> The House Fiscal Agency estimates that if this income tax rollback had been in place this year, the general fund would've been cut by §680 million. And the problem is there's no floor. That's $680 million in year one. And if there's another growth in revenue above inflation, there's another cut. Well, you don't have to have—you don't have to cut—you don't have to have too many years in a row like that before the general fund is dramatically depleted, the income tax has been cut so far that we're reaching the point where we can actually begin to affect the school aid fund.

Voting began 10 minutes later. The H-3 version, which included the "current rate" and "that rate" language passed on a 61-45 roll call vote. 86 Michigan House Journal at 1864-65 (Oct. 21, 2015).

The H-3 version was amended in the Senate to have the formula begin in tax year 2023 instead of 2019 and to increase the amount of excess revenue needed to trigger a tax cut. Its final passage in the Senate occurred on November 3, 2015. After other bills in the package were voted on, then-Senator Gregory (D-11) offered his no-vote explanation.[42] He addressed the other bills, but also the upcoming vote on SB 414:

> Colleagues, I rise today to offer my "no" vote explanation on the current roads package. This plan would deplete the General Fund by providing income tax

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[41] His full remarks are available at https://www.house.mi.gov/VideoArchivePlayer?video=Session-102115.mp4 (last visited January 19, 2024) at time stamp 7:08:41 to 7:17:10.

[42] See Const 1963, art 4, § 18.

> rate cuts whenever the General Fund revenues grow faster than inflation, a loss of $230 million per 1/10 of a point. In my view, this is fiscally irresponsible and is not designed to fix a real problem.
>
> Currently in Michigan, we have a regressive tax system that penalizes low- and middle-income families. Cutting or repealing the personal income tax would primarily benefit the wealthy individuals who already enjoy some of the lowest state and local tax rates. This is unfair to the vast majority of Michigan residents.
>
> Unfortunately, the consumer price index does not take medical care, education, or infrastructure costs into account—all items that routinely eclipse inflation. This will result in a tax cut tied to a hugely unrealistic indicator of our state's fiscal success. **In addition, a House Fiscal Agency analysis noted that a one-time revenue increase caused by an unpredictable or unusual economic event could permanently reduce the income tax rate.**
>
> I'll say it again: This has the potential to diminish the General Fund and make it harder for the state to provide the educational, correctional, and medical services our middle-class families need. It also makes it harder to recoup funding for—you guessed it—road maintenance. This is a tax nightmare that our successors will have to untangle years from now as they search for their own solutions to fix our still-crumbling infrastructure.
>
> This package of bills doesn't make good fiscal sense for anyone and will not fix our roads. These bills should be vetoed by the Governor, and I urge my colleagues to vote against this legislation.

100 Michigan Senate Journal at 1771 (Nov. 3, 2015) (emphasis added).[43] About 15 minutes later, the Senate passed SB 414.[44]

That same day, the bill went back to the House where it was concurred in without any relevant speeches. The roll call vote was 61-46 in favor. 86 Michigan House Journal at 1957-58 (Nov. 3, 2015).

Plaintiffs/Appellants have made it clear throughout this litigation that policy arguments do not affect the legal question of whether a statute is clear. Unfortunately, the Attorney General, the

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[43] Senator Gregory's remarks on SB 414 begin at 33:34 of the November 3, 2015, Senate session. https://www.mackinac.org/media/video/2023/2015-11-03_Mich_Senate_Session.mp4 (last visited January 19, 2024).

[44] The consideration and vote occurred at 47:00 to 48:32. There is no record roll call vote in the Senate Journal, but the video shows the final version was adopted 24-2.

Treasurer, and Court of Claims used policy considerations in their analysis of MCL 206.51(1)(c). These very policy considerations – be they general fiscal "irresponsibility" or dramatic depletion of the income tax – were considered by the 2015 Legislature and did not prevent passage of MCL 206.51(1)(c). The Treasurer may consider the passage of that provision to have "adverse implications," but the 2015 Legislature did not. "The dispute over the wisdom of a law . . . cannot give warrant to a court to overrule the people's Legislature." *Mayor of City of Lansing v Mich Pub Serv Comm'n*, 470 Mich 154, 161 (2004).

These policy arguments can be interpreted as an argument that MCL 206.51(1)(c) is ambiguous. But, even if that is the case, such an argument cannot overcome the rule that ambiguities in tax statutes are resolved in favor of the taxpayers. Even if that rule is not dispositive, all available evidence shows the ambiguity should be resolved in Plaintiffs/Appellants favor.

III. Plaintiffs/Appellants are entitled to declaratory relief and/or a writ of mandamus.

A. Standard of review

To the extent a writ of mandamus involves questions of law, this Court reviews it de novo. *Citizens Protecting Michigan's Const v Sec'y of State*, 503 Mich 42, 59 (2018). Questions of law related to a declaratory judgment request are reviewed de novo. *Equity Funding Inc, v Village of Milford*, 342 Mich App 342, 347 (2022).

B. Declaratory Relief

This Court can issue declaratory relief pursuant to MCL 600.6419(1) and MCR 2.605(A)(1). Declaratory relief is appropriate here, as it "is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *League of Women Voters*, 506 Mich at 586.

C. Mandamus

Mandamus would only be appropriate relief for plaintiff legislators and plaintiff advocacy organizations. Those two groups have a clear legal right to correct information as to the amount the state will likely garner in tax revenue for the fiscal 2023-24 year (and the years that follow) and defendant has a clear legal duty to charge the proper tax rate.

"Mandamus is the appropriate remedy for a party seeking to compel action by 'state officers.'" *Taxpayers for Mich Const Gov't v Dep't of Tech*, ___ Mich App ___; 2022 WL 17865554 at *7 (Dec 22, 2022). To obtain a writ of mandamus, a plaintiff must meet four elements: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgement, and (4) the plaintiff has no other adequate legal or equitable remedy." *Wilcoxon v City of Detroit Election Comm'n*, 301 Mich App 619, 632-33 (2013); *Deleeuw v State Bd of Canvassers*, 263 Mich App 496, 500 (2004). "A clear legal right is a right 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal questions to be decided.'" *Att'y Gen Bd of State Canvassers*, 318 Mich App 242, 249 (2016) (citation omitted).

Furthermore, doubt about a statute's meaning does not preclude a mandamus action:

> [T]he requirement that a duty be clearly defined to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of a controlling statute is in doubt. As long as the statute, once interpreted, creates a preemptory obligation for the officer to act, a mandamus action will lie.

Berdy v Buffa, 504 Mich 876 (2019).

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 884, 885 (2016) (citation omitted). The application of a proper tax

rate is a ministerial act, as defendant has no discretion to apply an income tax rate other than the one specified by law, namely, MCL 206.51.

Plaintiffs McBroom and Zorn have no adequate remedy other than a writ of mandamus. Without accurate information regarding the proper tax rate, Plaintiff/Appellant legislators (and indeed all legislators) would be required to vote on future appropriations bills or supplementals without knowing whether the revenue available accurately reflects proper taxation. Similarly, ABC and NFIB have no adequate remedy for their inability to effectively engage in the budgeting process through advocacy.[45]

The Treasurer's first argument related to mandamus is that it does not have a clear duty. It contends that it does not set the tax rate, but the Legislature does. This is true, but the Treasurer in executing and enforcing MCL 206.51(1)(c) wants to use the wrong rate – 4.25% instead of 4.05% (or perhaps lower if the formula calls for it) for tax year 2024. As a branch of the executive, Const 1963, art 5, § 3, basic separation of powers, Const 1963, art 3, § 2, indicate the Treasurer is the entity that executes the income tax rate. When, as here, it executes the wrong rate, mandamus will lie. Further, there is the fact that the Treasurer sought the Attorney General Opinion and the Legislature did not seek it. Why would the Treasure be seeking guidance if it did not have a duty to apply the correct rate?

The Treasurer's second argument is that the statement from *Berdy v Buffa*, 504 Mich 876 (2019) that mandamus can be issued "where the interpretation of the controlling statute is in doubt"

[45] As to ABC and NFIB as membership organizations with individual taxpayer members, the proper remedy is declaratory relief. While the other remedies seem likely to create institutional overload and sow confusion throughout the state, they do exist, and thus mandamus is not proper for these plaintiffs in the context of representing their individual members. Declaratory relief is also the proper remedy for the individual taxpayers.

must be cabined to cases where the duty is extraordinarily clear: "*Berdy* . . . involved specific duties to be performed in a ministerial way, i.e., removal of ineligible candidates from ballots for patent candidacy defects." Defendant's Motion at 26-27. The Treasurer is wrong about *Berdy;* this Court gave no indication the general proposition was limited factually.

Assuming the courts hold that Plaintiffs/Appellants' interpretation of MCL 206.51(1)(c) is correct, the root cause of any likely adjustment would be that the Attorney General misinterpreted the rate and the Treasurer relied on that. With proper parties who have standing and whose claims are ripe, it is the province and duty of the courts to say what the law is, just as it is the Executive's duty to execute laws passed by the Legislature. The Treasurer counters: "[I]f this Court determines [Plaintiffs legislators and lobbyists] have standing, the power to change a law lies with the Legislative Branch under Michigan's Constitution." Defendant's Motion at 29. Here, the Treasurer makes a fundamental error – Plaintiffs/Appellants do not want to change MCL 206.51(1)(c); rather, they want it to be interpreted correctly. That is what courts do.

This Court can – and should – require the Treasurer to interpret and execute the statute properly.

IV. This Court has subject matter jurisdiction and MCL 205.22 is inapplicable.

A. Standard of review

Whether a cause of action is barred by a statute of limitations is a de novo question. *Magee v DaimlerChrysler Corp*, 472 Mich 108, 111 (2005).

B. This matter was filed in a timely manner.

The Treasurer contends MCL 205.22 is the operable statute of limitations, and suit was not timely filed under it. The Court of Claims properly rejected this argument. Opinion and Order at 11-14.

The provision reads:

> (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 60 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. However, an action shall be commenced in the court of claims within 6 months after payment of the tax or an adverse determination of the taxpayer's claim for refund, whichever is later, if the payment of the tax or adverse determination of the claim for refund occurred under the former single business tax act, 1975 PA 228, and before May 1, 1986.

Id.

The Court of Claims correctly recognized: "Plaintiffs lawsuit is an original action before the Court, rather than an appeal of an agency's order or decision." Opinion and Order at 13. Thus, "plaintiffs were not subject to the time restrictions outlined in that statute." *Id*. at 14.

Further, it is quite clear that the individual taxpayers' claim would accrue "at the time the tax is due." *Taxpayers Allied for Const Tax'n v Wayne Cnty*, 450 Mich 119, 123 (1995).

Therefore, this Court has jurisdiction to decide this matter.

RELIEF REQUESTED

For the reasons stated above, this Court should grant the bypass and, on an expedited basis, hold that the income tax rate cut from MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer lower rate as the income tax rate cap until the formula would cause it to go lower again.

Alternatively, it should remand this matter to the Court of Appeals for consideration on an expedited basis.

Respectfully Submitted,

Dated: January 23, 2024

/s/ Patrick J. Wright
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STATEMENT OF COMPLIANCE WITH MCR 7.212(B)

I hereby certify that this brief is compliant with the word count requirement of MCR 7.212(B)(1). This brief contains 15,916 words in the sections specified by MCR 7.212(B)(2).

Respectfully Submitted,

Dated: January 23, 2024

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