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

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

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
Attorneys for Plaintiffs/Appellants
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax

PLAINTIFFS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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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 a bypass application and motion for expedited consideration. On January 31, 2024, this Court directed the Court of Appeals to issue an expedited briefing schedule and decide this matter by March 11, 2024, and for any application for leave to be filed by 5:00 p.m. March 25, 2024.

That opinion was issued on March 8, 2024. *Assoc Builders and Contractors of Michigan v State Treasurer*, ___ Mich App ___ (2024). Pursuant to MCR 7.303(B) and MCR 7.305, Plaintiffs hereby file the instant Application for Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

1. Does MCL 206.51(1) 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.

   Court of Appeals' Answer: No.

2. 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.

   Court of Appeals' Answer: Did not answer.

3. 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.

   Court of Appeals' Answer: No.

INTRODUCTION

This matter concerns the construction of MCL 206.51(1), which sets Michigan's income tax rate. Defendant/Appellee State Treasurer (the Treasurer) 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. P/A App'x at 43-46. For the tax year 2024, the Treasurer has announced that the tax reverted to 4.25% and no reduction under MCL 206.51(1)(c) occurred. [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 whether any relief automatically reverts to 4.25% as a starting income tax rate under MCL 206.51(1). 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 signed into law by the Governor on August 22, 2023, and that budget may need to be adjusted.[2]

The Court of Claims dismissed this action. Plaintiffs/Appellants filed a bypass application and motion for expedited consideration at this Court. This Court directed an expedited briefing

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[1] https://www.michigan.gov/treasury/news/2024/02/28/calculation-of-state-individual-income-tax-rate-adjustment-for-2024-tax-year (last visited March 24, 2024).

[2] 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/Appellants' favor is a tax collection reduction of just over $527 million. P/A App'x at 88. That would have led to a total reduction on a calendar-year basis of $714.2 million. *Id.* Either amount is higher than the entire fiscal year 2023-24 judiciary appropriation of $355,928,200. 2023 PA 119 at 209.

schedule and decision before the Court of Appeals. That decision has occurred, and this Application for Leave follows.[3]

STATEMENT OF FACTS

A. The text of MCL 206.51(1)(c).

In 2015, the statutory provisions at issue were enacted. Pursuant to 2015 PA 180, MCL 206.51 stated tax rates for certain periods and a formula that could lead to permanent individual income tax rate cuts for tax years 2023 and beyond:

> (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

[3] To date, much of Plaintiffs/Appellants' pleadings and briefing have concerned the machinations of the state budget process as that was a key issue in whether the two Plaintiff state legislators had a special interest that provided them standing to bring this suit. Further, familiarity with the budgetary process was also needed to show the need for expedited consideration of this matter as an adjustment of $714 million a year could significantly alter the fiscal year 2023-2024 budget that has already been enacted and the fiscal year 2024-2025 budget that is currently working its way through the budget process.

The Court of Appeals' decision essentially reduced this case to a matter of statutory construction, and this brief will differ from Plaintiffs/Appellants' bypass application brief in that it will focus most of its attention on that issue. Some budgetary knowledge will still be germane, but much less so than in prior briefs below or at this Court. Justiciability and subject matter discussion will not be addressed as Plaintiffs/Appellants only disagree with the Court of Appeals on its merits analysis.

> 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).

B. 2023 events preceding filing of suit.

In January 2023, the legislative fiscal agencies indicated that an individual income tax rate reduction was likely to occur. 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. P/A App'x at 71-72. The Attorney General issued an opinion the very next day. *Id*. at 43-46. The Attorney General opined that any tax cut pursuant to MCL 206.51(1)(c) was for that particular tax year only and the income tax rate would revert to MCL 206.51(1)(b)'s 4.25% thereafter.

On March 29, 2023, after the closing of the 2021-22 fiscal year via the issuance of the CAFR,[4] the Treasurer announced the reduction of the individual income tax rate to 4.05% for only the 2023 income tax year. P/A App'x at 74-75.

On May 16, 2023, as part of the May CREC process,[5] the Senate Fiscal Agency issued its Michigan's Economic Outlook and Budget Review. P/A App'x at 87. 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,[6] 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 88. 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).

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[4] Pursuant to MCL 18.1492, a "Annual Comprehensive financial report of the state" shall be produced. For reasons that are not entirely clear, Treasury titles it "Annual Comprehensive 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. Citations to a particular CAFR will use the formal State of Michigan Annual Comprehensive Financial Report designation.

[5] In 1991, Michigan created the revenue estimating conference process – i.e. the consensus revenue estimating conference (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 (or state Budget Director) and the House and Senate Fiscal Agency Directors 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).

[6] This is the CAFR.

On May 19, 2023, the Senate Fiscal Agency issued a memo regarding "May Consensus Revenue Year-End Balance Estimates Based on Senate Budgets." P/A App'x at 90-92. This document indicated that the tax rate reduction was only for tax year 2023 due to the Attorney General's Opinion. *Id*. at 91.

The school aid budget – 2023 PA 103 – 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.

C. 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.[7]

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

[7] Previously, much attention was paid to the various standing and ripeness arguments related to these separate sets of Plaintiffs/Appellants. But, Plaintiffs/Appellants agree with the Court of Appeals that at least one set has satisfied standing and ripeness requirements and therefore analysis of the merits is necessary. Slip Opinion at 8-10.

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. P/A App'x at 10, 23-27. For the legislators and the advocacy organizations in that specific role (as opposed to membership organizations that contain individual taxpayers), mandamus was sought. *Id*. at 27-29.

As part of their Complaint, Plaintiffs/Appellants had filed an ex parte motion seeking a particular expedited briefing schedule. *Id*. at 19. That request was denied on September 25, 2023. P/A App'x at 162.[8]

On December 21, 2023, the Court of Claims granted summary disposition to the Treasurer on standing and ripeness grounds. The Court of Claims recognized that the facts underlying its ripeness holding would soon change. As a result, it addressed the merits and indicated that it would have ruled in the Treasurer's favor.

On January 9, 2024, Plaintiffs/Appellants filed a Notice of Appeal with the Court of Appeals.

On January 23, 2024, Plaintiffs/Appellants filed a bypass motion with this Court. On January 31, 2024, this Court directed the matter to the Court of Appeals for an expedited briefing

[8] In its December 21, 2023, Opinion and Order, the Court of Claims contended this show-cause matter was still pending. P/A App'x at 115, 121, 123, and 147. 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. *Id*. at 10, 19.

schedule and directed a decision by March 11, 2024. Further, any application for leave was to be filed by March 25, 2024.

On February 28, 2024, the Treasurer indicated that the individual income tax rate for 2024 was 4.25%.[9]

On March 8, 2024, the Court of Appeals entered its published decision. *Assoc Builders and Contractors of Michigan v State Treasurer*, ___ Mich App ___ (2024). That decision rejected all justiciability defenses presented by the Treasurer, held that the Court of Appeals had subject matter jurisdiction over the controversy, and agreed with the Treasurer that the statute was unambiguous. This determination meant the Court of Appeals did not have to examine any ambiguity arguments and denied declaratory and mandamus relief.

Plaintiffs Appellants contend that the clarity analysis was erroneous, and if the issue of ambiguity needs to be reached their construction would prevail. If Plaintiffs/Appellants are correct, declaratory and/or mandamus relief is proper.

ARGUMENT

I. MCL 206.51(1) clearly requires 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.

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).

[9]https://www.michigan.gov/treasury/news/2024/02/28/calculation-of-state-individual-income-tax-rate-adjustment-for-2024-tax-year (last visited March 24, 2024).

B. 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) (emphasis added). 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*.[10]

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[10] While neither the Court of Claims nor the Court of Appeals indicated that they were applying a weighted clarity analysis, Plaintiffs/Appellants note that despite this case concerning 5 million taxpayers and around $714 million annually (including overspending in the 2023-2024 fiscal year that will require budget cuts), this is not one of the instances where this Court has indicated that the Legislature must be extra clear.

Some examples of weighted analysis include the following. In *Sunrise Resort Association, Inc v Cheboygan County Road Commission*, 511 Mich 325 (2023), this Court stated: "We will not lightly presume that the Legislature has abrogated the common law [and] the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." *Id*. at 341-42 (cleaned up). In *People v Propp*, 508 Mich 374 (2021), this Court indicated that it would not "lightly presume that the Legislature intended a conflict" between statutes and court rules. *Id*. at 386 n 5. In *Sole v Michigan Economic Development Corporation*, 509 Mich 406 (2022), this Court noted: "under the constitutional-doubt canon, courts reasonably presume that the Legislature did

(Note continued on next page.)

C. The Court of Appeals' clarity analysis.

The Court of Appeals considered MCL 206.51(1)(b) key to its analysis. That provision states: "Except as otherwise provided under subdivision (c), on and after October 1, 2012, 4.25%." The beginning of subdivision (c) states:

> 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 . . .

MCL 206.51(1)(c).

The Court of Appeals began application of its clarity analysis by noting that MCL 206.51(1)(b) "has no end date." Slip Opinion at 11. It also noted while MCL 206.51(1)(c) is to be "evaluat[ed]" each year, it is only "'if' certain economic conditions are satisfied, then the 'current rate' will be reduced pursuant to the stated formula." Slip Opinion at 11.

The key question presented here, is once the contingency from MCL 206.51(1)(c) has been triggered, and the income tax rate reduced like it was in 2023 to 4.05%, is that reduction permanent? The Court of Appeals held it is not. In support, it implied that the condition from MCL 206.51(1)(c) might never have been triggered and "[t]his . . . supports the view that 4.25% remains the default rate subject to reduction only if the triggering conditions are met." Slip Opinion at 11. Further, it twice noted the lack of explicit statutory language making any tax cut pursuant to MCL

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not intend to enact a statute that 'raises serious constitutional doubts.'" *Id.* at 419-20 (citation to quotation omitted).

Here, under normal clarity analysis, this Court must determine whether Plaintiffs/Appellants or the Treasurer has a better reading of the statute. As will be discussed below, just slightly better will suffice.

206.51(1)(c) permanent: "There is no language in Subsection (1)(b) indicating that the 4.25% rate permanently expires when the exception in Subsection (1)(c) is triggered for a particular year" and "there is no language in Subsection (1)(c) to suggest that, when the exception is triggered, the reduced rate calculated pursuant to the statutory formula becomes a new permanent default rate that supersedes the default rate of 4.25% set forth in Subsection (1)(b)." Slip Opinion at 11.

The Court of Appeals rejected the argument that the term "current rate" from Subsection (1)(c) supports the contention that any income tax rate cut is meant to be permanent. As that term is not defined in statute, the parties provided competing definitions of "current," with the Treasurer suggesting "occurring or existing at the present time" and Plaintiffs/Appellants suggesting "most recent." Adopting word for word the Court of Claims analysis of this issue, the Court of Appeals stated:

> 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).

Slip Opinion at 12.

Plaintiffs/Appellants had argued that such a reading makes the term "current" superfluous in that "then the statute could have simply referred to 'the rate' rather than 'the current rate.'" *Id*. The Court of Appeals again adopted the Court of Claims' analysis, which seems to create a new statutory construction canon:

> [P]laintiffs' argument overlooks that the income tax rate has changed over time. For example, before 2012, the tax rate was set at 4.35%. MCL 206.51(1)(a). The Legislature may amend the statute at any time to set a new "current rate." 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% [rate] would become the "current rate" for purposes of Subsection (1)(c).

Slip Opinion at 12. Thus, this new canon appears to be that an existing statutory provision that would otherwise be construed to render a key word nugatory can be saved if a court can imagine an amendment a future Legislature might enact to provide meaning to the presently nugatory word.

Further discussing "current rate," the Court of Appeals made a variant of its no specific-language-of-permanence explanation. The Court of Appeals stated that the only way to reach "current rate" in any particular year is if the economic conditions of MCL 206.51(1)(c) are met in that particular tax year:

> That phrase is used in Subsection (1)(c) when referring to the reduction that occurs if the triggering conditions are satisfied. But if the triggering conditions are not satisfied, then the reduction of the "current rate" does not occur, and there is no reason to consider that phrase. For example, as explained earlier, the Department of Treasury has determined that the triggering conditions have not been satisfied for the 2024 tax year. Given that determination, there will be no reduction of the "current rate" under Subsection (1)(c) for the 2024 tax year. The default rate of 4.25% thus applies regardless of what is meant by the phrase "current rate" because that phrase appears in Subsection (1)(c) in connection with the reduction that occurs only if the triggering conditions are met.

Slip Opinion at 12-13.

Another rationale for the Court of Appeals' construction was a concern that the interpretation that would "make each reduction permanent and allow compounding reductions . . . could ultimately result in no income tax." If this theoretical end point were ever reached it "would render nugatory the statutory language providing for an income tax. See MCL 206.51(1)." Slip Opinion at 13. This was not a "policy consideration[]," but "based on statutory text" as "the statute contains language providing for an income tax and that plaintiffs' interpretation has the potential to render this language nugatory." *Id*.

The Court of Appeals did not adopt the Court of Claims' argument about the logic of tax cuts, wherein the lower court stated:

> When the percentage increase in state revenue in the previous fiscal year is greater than the inflation rate, and the inflation rate is positive, then the Legislature has determined that the state can provide relief to taxpayers. *Id*. That situation is temporary. Logically, it would make little sense to provide a permanent tax cut based on economic circumstances in one calendar year.

P/A App'x at 28.[11] Thus, the Court of Appeals did not reach its decision based on whether one might think tax cuts would be affordable in a particular year and instead based its decision solely on its understanding of what statutory construction required.

Finally, the Court of Appeals rejected "plaintiffs' reliance on previous legislation," specifically 1983 PA 15. In that statute, the Legislature had used a fixed numeric rate to start an income-tax-rate formula and made it clear it knew how to limit tax rates to certain years. The Court of Appeals stated: "1983 PA 15 is not useful in interpreting the current statute because the meaning of the current statutory language is clear and unambiguous." Slip Opinion at 13.

D. MCL 206.51(1) clearly requires any income tax cut required by MCL 206.51(1)(c) to remain in place unless and until the formula from that subsection requires a further income tax cut.

1. This Court's use of the surplusage canon.

Because the Court of Appeals uses it twice (the "except as otherwise" language from MCL 206.51(1)(b) and the general-purpose language of MCL 206.51(1)), and Plaintiffs/Appellants seek to use it once (in construing "current rate" and "that rate" in MCL 206.51(1)(c)), the parameters of the surplusage canon are important to this case.

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[11] The Attorney General had made a similar policy argument in her opinion stating a temporary tax cut "makes sense" because it is only triggered in those years when "the State can afford relief to taxpayers." P/A App'x at 45.

This Court discussed the canon in *People v Pinkney*, 501 Mich 259 (2018). This Court noted: "we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. at 282. It was recognized that there was some tension in the caselaw regarding whether this canon is absolute, but this Court made clear it was not. *Id*. at 283 and n 59. In *Pinkney*, this Court held a penalty provision related to election forgery was surplusage as it was "a penalty provision without a crime," and did not recognize a crime so as to give that penalty provision meaning. *Id*. at 282.

In *People v Arnold*, 508 Mich 1 (2021), this Court again refused to construe a statute to avoid surplusage. *Arnold* involved a conflict between the sentencing guidelines (which were held not to apply) and the "1 day to life penalty" for those convicted of being a sexually delinquent person. This Court recognized the general rule against interpretations rendering a part of statute surplusage or nugatory, but held "this principle is not absolute, and here must give way to the unmistakable meaning of the statutes." *Id*. at 23.

Since *Pinkney*, most of the time the canon has been used is in statutory analysis boilerplate with various members of this Court then indicating that it either does or does not apply in particular statutory construction circumstances. *Pinkney* was cited in *Sole v Michigan Economic Development Corporation*, 509 Mich 406 (2022), wherein this Court held that the Michigan Economic Development Corporation must disclose "financial or proprietary information" related to a corporate subsidy program, because failing to do so would make a statutory exemption limiting the definition of such information in certain circumstances nugatory. *Sole* is typical in that usually when this canon is employed, it is meant to refute a particular construction. With the two exceptions from above noted, a holding that a construction causes a surplusage or makes part of a statute nugatory generally prevents that construction from being adopted.

2. Proper sequencing and process in statutory clarity analysis.

This Court has held statutes are "clear" and not "ambiguous" when one interpretation is even slightly better than another. The case typically cited for this point is *Lansing Mayor v Michigan Public Service Commission*, 470 Mich 154 (2004). There, this Court stated:

> The law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is "ambiguous," and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is ambiguous only if it "irreconcilably conflict[s]" with another provision or when it is equally susceptible to more than a single meaning.

Id. at 166 (citation to quotation omitted).[12] Theoretically then, if either Plaintiffs/Appellants or the Treasurer can demonstrate the statute should be construed 51% to 49% in their favor they should win under a clarity analysis. Not surprisingly, both parties here claim theirs is the clear reading (i.e. over 51%). Typically, both sides of a litigation would also claim they win if there is ambiguity as well.[13]

It is rare that a law will be considered 100% clear and still be litigated. But whereas here, both sides make at least surface level claims that their reading of the statute is the better one (again, 51% clarity and over), what process is required?

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[12] Justice Viviano has questioned whether this absolute-tie requirement is "too stringent." *Griffin v Swartz Ambulance Serv*, 947 NW2d 826, Supreme Court No 159205 (Sept. 11, 2020). But see, *Peterson v Magna Corp*, 484 Mich 300, 378 (2009) (Markman, J., dissenting) ("That is, if a judge is 51% or 61% or 71% persuaded that some interpretation of the law is the better, or the 'most reasonable,' interpretation, what is the rationale for allowing a judge to interpret the law in some different fashion?").

[13] Here, as will be seen below, the Treasurer makes only a half-hearted attempt because there is a general ambiguity presumption against taxing authorities. *Honigman*, 505 Mich at 291 n 3.

Plaintiffs/Appellants sought to present several rationales for why their reading of MCL 206.51(1) was better. As noted above, they discussed the surplusage canon in relation to "current rate" and "that rate," and the Court of Appeals recognized that Plaintiffs/Appellants had proffered a dictionary definition for "current rate." But the Court of Appeals was reticent to consider Plaintiffs/Appellants reliance on past legislation – specifically 1983 PA 15. It did note the argument that Plaintiffs/Appellants were attempting to make:

> Plaintiffs note that in 1983 PA 15, the Legislature used a specific numeric rate as the starting point for a formula for setting the income tax for certain years. Plaintiffs say that this sheds light on the Legislature's intent when enacting the current income tax statute in 2015 because the Legislature referred to the "current rate" rather than a specific numeric rate as it did in 1983 PA 15. Plaintiffs further assert that 1983 PA 15 shows that the Legislature knows how to limit a rate adjustment to a particular tax year.

Slip Opinion at 13. But the Court of Appeals held: "1983 PA 15 is not useful in interpreting the current statute because the meaning of the current statute is clear and unambiguous." *Id*. This is a methodological error and is amplified by the fact that it occurred in a published case affecting five million Michigan taxpayers and concerns over $700 million annually.

MCL 206.51(1) is not a 100% clear statutory provision. Plaintiffs/Appellants had made a sufficiently reasonable claim that while their view might not be 100%, it was higher than 51%. The methods they used were the three identified above, but the Court of Appeals seemed to hold that it would not consider the last one (past legislative practice) because it claimed as a matter of law the statute was unambiguous. But that is the legal question that was being analyzed – is this statute clear or is it ambiguous? Once a realistic claim of 51% or more clarity is made by a party, then all the typical statutory construction tools related to clarity must be used. Just in the past year,

this Court has three times indicated that past legislative practice is relevant in making a clarity determination.[14]

In *Christie v Wayne State University*, 511 Mich 39 (2023), while analyzing whether a notice provision of Court of Claims Act applied to suits filed in the various circuit courts, this Court stated: "The Legislature knows how to limit the effect of a provision of the [Court of Claims Act] to the Court of Claims when it wished to do so." *Id*. at 54. In *Ottgen v Katranji*, 511 Mich 223 (2023), this Court considered whether an affidavit-of-merit requirement related to medical malpractice actions operated as a statute of limitations. In interpreting the affidavit provision, MCL 600.2912d(1), this Court stated: "§ 2912d(1) is silent about the limitations period and tolling. The silence in § 2912d(1) is particularly meaningful here. That is because the Legislature has shown it 'knows how to tweak the limitations period in the medical malpractice context,' but did not do so for [affidavits of merit]." *Id*. at 234 (citation to quotation omitted). In *Andary v USAA Casualty Ins Co*, 512 Mich 207 (2023), this Court considered the retroactivity of the 2019 amendments to the no-fault act. In analyzing whether certain individuals retained their lifetime benefits from injuries occurring before the 2019 amendments, this Court stated: "We have long acknowledged that 'the Legislature . . . knows how to make clear its intention that a statute apply retroactively." *Id*. at 248 (citation to quotation omitted and ellipsis in original).

Thus, the Court of Appeals should have considered 1983 PA 15 in making its clarity decision and made a methodological error in not doing so. It may be that if it had considered all of the proper clarity factors the Court of Appeals might have come to the same conclusion – that the Treasurer's reading of MCL 206.51(1) is clearer. Had it done so, that would be an analysis error

[14] It is only where there has been a finding of ambiguity that certain other canons can be applied (construing tax legislation against the taxing authority, rule of lenity, etc.).

for the reasons that immediately follow, because under the proper test, Plaintiffs/Appellants reading of MCL 206.51(1) is clearer.

3. Response to Court of Appeals' MCL 206.51(1) layout analysis.

Plaintiffs/Appellants agree with the Court of Appeals, that the term "current rate," could only have been reached if the condition from MCL 206.51(1)(c) is satisfied. That condition was satisfied in 2023. This led to the income tax rate for 2023 to be reduced from 4.25% to 4.05%. The "current rate" having been reduced for that tax year, the question arises as to what happens for the 2024 tax year.

The Court of Appeals claims that the income tax rate from MCL 206.51(1)(b) "continues in effect subject to the exception in Subsection (1)(c)," presumably meaning that the rate reverts to 4.25% and a new 206.51(1)(c) analysis with 4.25% as the starting rate occurs. Slip Opinion at 11. The Court of Appeals noted: "There is no language in Subsection 1(b) indicating that the 4.25% rate permanently expires when the exception in Subsection (1)(c) is triggered for a particular year." Slip Opinion at 11.

Plaintiffs/Appellants do not contend that the 4.25% rate permanently expires. Rather, they contend that rate covers the time period between October 1, 2012, to January 1, 2023 (the first year of the 2023 tax year) similar in the manner to which the 4.35% rate covered October 1, 2007, to September 20, 2012, under MCL 206.51(1)(a).

The Court of Appeals then turns to MCL 206.51(1)(c):

> Subsection (1)(c) begins by stating, "For each tax year beginning on and after January 1, 2023, ..." MCL 206.51(1)(c). This language indicates that an evaluation of whether the exception set forth in Subsection (1)(c) is triggered must be made each year, beginning on January 1, 2023. Subsection (1)(c) then continues by stating that "if" certain economic conditions are satisfied, then the "current rate" will be reduced pursuant to a formula specified in the statute. MCL 206.51(1)(c). That is, only when those conditions are satisfied will the "current rate" be reduced pursuant to the stated formula. See *In re Casey Estate*, 306 Mich App 252, 260; 856

> NW2d 556 (2014) (consulting a dictionary to define "if" as "in case that; granting or supposing that; on condition that") (citation omitted). This further supports the view that 4.25% remains the default rate subject to reduction only if the triggering conditions are met.

Slip Opinion at 11. Plaintiffs/Appellants agree with every sentence in that paragraph except for the last one. Plaintiffs/Appellants agree that the MCL 206.51(1)(c) evaluation needs to occur each year, but they believe that if a rate reduction has already occurred (like for the 2023 income tax year) that any future rate reduction builds on the prior one.

The Court of Appeals makes two additional arguments related to the text of MCL 206.51(1)(c): "there is no language in Subsection (1)(c) to suggest that, when the exception is triggered, the reduced rate calculation pursuant to the statutory formula becomes a new permanent default rate that supersedes the default rate of 4.25% set forth in Subsection (1)(b)"; and (2) any such interpretation "would render nugatory the language of Subsection(1)(b) setting a rate of 4.25% subject to the exception in Subsection (1)(c)."

The Court of Appeals is correct that there is no explicit language making it 100% clear that the tax cut is meant to be permanent. There is also no explicit language making it 100% clear that any income tax rate cut would be for the tax year in question only. Such language might look like MCL 206.635(f) and (g) (another portion of the income tax statute dealing with the tax on insurance companies):

> (f) Calculate the **rate reduction for the current calendar year** by dividing the amount determined under subdivision (e) by the amount of prior year gross direct premiums attributable to qualified health insurance policies written by taxpayers with no liability under section 476a of the insurance code of 1956, 1956 PA 218, MCL 500.476a, for the prior calendar year.
>
> (g) Calculate **the tax rate for the current calendar year** by subtracting the amount determined under subdivision (f) from 0.0125.

Id. (emphasis added).[15]

But while there is not absolutely definitive language, there is the term "current rate," which Plaintiffs/Appellants contend, due to the surplusage canon, must mean the "most recent rate." But before turning to Plaintiffs/Appellants' invocation of the surplusage canon, the Court of Appeals' first invocation of that canon fails. The introductory clause to MCL 206.51(1)(b) is not superfluous. It established to a condition that either could or could not be met in the future. When the MCL 206.51(1)(c) analysis led to a tax cut in 2023, that introductory clause language had performed its duty.

4. Plaintiffs/Appellants' definition of "current" as "most recent" prevents "current rate" and "that rate" from being superfluous.

In *Detroit News v Independent Citizens Redistricting Commission*, 508 Mich 399, 421 (2021), this Court cited the online version of Merriam-Webster's Dictionary. The Court of Appeals analyzed the Merriam-Webster's definitions of "current," of which Plaintiffs/Appellants contend "most recent" applies and the Treasurer contends "occurring in or existing at the present time" applies.[16]

The Treasurer's 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

[15] These provisions were enacted as part of 2018 PA 222, which obviously postdates 2015 PA 180. Act 180 created the tax rate formula process at issue in this case.

[16] https://www.merriam-webster.com/dictionary/current (last visited March 24, 2024).

income tax rate was 4.25%. January 1, 2023, was 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."[17] "The rate" would be sufficient to indicate an immutable 4.25% rate, and 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,

[17] merriam-webster.com/dictionary/the (last visited March 24, 2024).

meanwhile, makes the statute read "then the [most recent] rate shall be reduced." This allows "current" to add 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."[18] 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 Court of Appeals rejected Plaintiffs/Appellants' reading for three reasons. It held that: (1) a future Legislature might change the rate listed in MCL 206.51(1)(b) from 4.25% to another rate (it used an example of 4.15%); (2) the term "current rate" can only be reached if the economic-conditions test of MCL 206.51(1)(c) is triggered; and (3) Plaintiffs/Appellants' interpretation could lead to the income tax rate going to zero, which would make all of MCL 206.51 superfluous. These will be addressed in turn.

5. Statutes are analyzed as they are written in the present time, not as some future Legislature might write them.

The Court of Appeals did not cite another instance where the surplusage canon was circumvented by a court imagining future legislation that might give what is now surplusage meaning in the future. It is difficult to conceptualize how the surplusage canon could continue if it becomes the duty of the courts to imagine future legislation that might save the statute under review. The Court of Appeals made this significant mistake about a long-standing and often used

[18] merriam-webster.com/dictionary/that (last visited March 24, 2024).

canon in a published decision affecting millions of taxpayers where over $700 million annually is at stake.[19]

The Court of Appeals did not indicate what current litigants would need to anticipate about the future litigation. Is it the future version proffered by the losing party? The winning party? Are the parties responsible for predicting what the courts would consider the most likely future legislation? Litigation about existing statutes keeps Michigan courts busy enough. There is no need or benefit to litigate, analyze, and debate future imaginary statutes and amendments.

Even if one were to accept this future looking canon, it is not as simple as the Court of Appeals asserts. It overlooks the likely manner in which an amendment to change the rate to its hypothetical 4.15% income tax rate would occur. A future Legislature would just change "current rate" to replace it with "4.15%" in Subsection(1)(c) instead of doing so indirectly through MCL 206.51(1)(b).

Further, there would be a complication that would prevent the Legislature from changing the rate from 4.25% in MCL 206.51(1)(b) and merely replacing it with 4.15%. Doing so would create a potential retroactivity problem. A delineation of the time periods of what rates would apply when would be required or else the future Legislature would be creating uncertainty about the tax rate from October 1, 2012, the date the 4.25% took effect to the effective date of this hypothetical 4.15% rate. To support its holding about the income tax rate in this case, the Court of Appeals would likely also need this future Legislature to set off the 4.05% rate for the 2023 tax year.

[19] A simple Westlaw search performed on March 24, 2024, in the Michigan database (not including federal decisions) for the word "surplusage" indicated there were 431 cases that postdate this Court's 2018 decision in *Pinkney*.

As MCL 206.51(1) now reads, Plaintiffs/Appellants construction of "current rate" is the only one that prevents that term and "that rate" from being surplusage.

6. The triggering of the term "current rate" occurred when the individual income 2023 tax rate was lowered to 4.05% from 4.25%.

This point from the Court of Appeals is just a rephrasing of the point that for the term "current rate" to have been triggered certain economic conditions needed to have been met. For the tax year 2023, those conditions were met. As noted in the above discussion of MCL 206.635(f) and (g), unlike with those provisions, there is no explicit language in MCL 206.51(1) indicating that a rate reduction is for a single year. Plaintiffs/Appellants agree with the Court of Appeals "that the triggering conditions have not been satisfied for the 2024 tax year." Slip Opinion at 13. But the question of whether the 2023 income tax rate of 4.05% remains locked in until a future MCL 206.51(1)(c) analysis requires it to be lowered again remains. Plaintiffs/Appellants contend that it does, and the Court of Appeals' point here is largely begs the question.

7. The 2015 Legislature that passed 2015 PA 180 would have known there was no chance the income tax rate would go to zero and Plaintiffs/Appellants' construction of MCL 206.51(1) would not make that statutory provision nugatory.

In analyzing statutes, Michigan courts make a number of presumptions about the Legislature having perfect knowledge of case law, the state of the law, court rules, and other matters. This Court should presume that the Legislature has similar knowledge about tax and budget matters and particularly tax and budget history. With that knowledge, the 2015 Legislature would have known that the income tax rate could not go to zero and would have seen no need to include that fact in 2015 PA 180.

In *People v Parkinson*, ___ Mich App ___, 2023 WL 6763692 (Oct. 12, 2023), the Court of Appeals stated: "When an undefined statutory term has been the subject of judicial

interpretation, this Court presumes that the Legislature used the particular term in a manner consistent with the prior construction." *Id*. at *4. In *Rodriquez v Hirshberg Acceptance Corp*, 341 Mich App 349 (2022), the Court of Appeals presumed the Legislature was aware of the Michigan Court Rules. *Id*. at 361. In *People v Clark*, 315 Mich App 219 (2016), the Court of Appeals presumed that the Legislature was aware of the federal supervised release statutory scheme. *Id*. at 233. In *In re Bail Bond Forfeiture*, 496 Mich 320 (2014), this Court held that it must "presume the Legislature of this state is familiar with the principles of statutory construction." *Id*. at 329. In *East Lansing v Thompson*, 291 Mich App 34 (2010), the Court of Appeals held that it "presumes the Legislature knows the rules of grammar." *Id*. at 38.

Turning more specifically to tax and budget matters, Michigan's Constitution gives the Legislature great influence over them. Const 1963, art 4, §§ 30-32. In *46th Circuit Trial Court v County of Crawford*, 476 Mich 131 (2006), while holding that the Legislature must adequately fund the courts, this Court recognized tax and appropriation powers are primarily legislative:

> The "legislative power" has been defined as the power "to regulate public concerns, and to make law for the benefit and welfare of the state." Cooley, Treatise on the Constitutional Limitations (Little, Brown & Co., 1886), at 92. Perhaps the most fundamental aspect of the "legislative power," authorized by the opening sentence of U.S. Const., art. I, § 8, which defines the powers of the legislative branch, is the power to tax and to appropriate for specified purposes. See also Const. 1963, art. 4. The power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to appropriate defines the priorities of government. Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of government to exercise these powers should be that branch which is closest to, and most representative of, the people.

Id. at 141-42.

This Court explained why tax and budget matters are more appropriately left to the Legislature rather than the judiciary:

> In contrast with the judiciary, for example, the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise positions after negotiation and bargaining, it is more regularly and directly accountable to the people, and its membership is more broadly representative of society and its various interests.

Id. at 142.

Plaintiffs/Appellants would add that every year the Legislature (in conjunction with the Governor) has to put out a balanced budget. The Legislature has agencies – the House Fiscal Agency and the Senate Fiscal Agency - built to assist them in this process. Vis-à-vis the judiciary, the Legislature knows a lot more about this subject.

To the list of presumptions addressed above, the Court of Appeals has stated that it will "presume that the Legislature understood the nature of the program that it was funding." *Detroit v Dep't of Soc Serv*, 197 Mich App 146, 157 (1992).

With the Legislature's awareness of tax and budget matters established, the Court of Appeals contention that the income tax rate might go to zero and thereby improperly make that part of MCL 206.51(1), which states: "For receiving, earning, or otherwise acquiring income from any source whatsoever, there is levied and imposed under this part upon the taxable income of every person . . . a tax at the following rates in the following circumstances:" surplusage fails.

The Court of Appeals held that "Plaintiffs' interpretation would make each reduction permanent and allow compounding reductions that could ultimately result in no income tax. This would render nugatory the statutory language providing for an income tax." Slip Opinion at 13. The Court of Claims had made a similar argument in its opinion. P/A App'x at 141.

In their Court of Appeals briefing on this subject, the Plaintiffs/Appellants cited to a Senate Fiscal Agency analysis released a couple of months after 2015 PA 180 passed. That report 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 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.[20] Plaintiffs/Appellants also put forth a basic economic proposition. They had previously noted that in 2020 that income taxes made up around $9.4 billion in revenue (only some of which goes to the general fund).[21] They argued to the Court of Appeals: "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."

As neither of the above points were sufficient to convince the Court of Appeals, Plaintiffs/Appellants will more fully show through data and math that despite partisan rhetoric during debates, the 2015 Legislature would not have envisioned an income tax rate of zero as a

[20] https://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0414-N.pdf (last visited March 24, 2024).

[21] "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. https://www.michigan.gov/treasury/-/media/Project/Websites/treasury/Uncategorized/2022/ORTA-Tax-Reports/IIT-report_TY2020-data.pdf (last visited March 25, 2004).

consequence of 2015 PA 180 and with this taxing-and-budgeting knowledge the 2015 Legislature would have seen no reason to add a failsafe in the statute to prevent a zero percent rate.

The reasons why a zero percent is not realistic is that income tax revenue makes up over 60% of the general fund/general purpose revenue. Each subsequent reduction in income tax rate would lead to a decrease in that particular revenue stream. If not offset by other revenue sources, it would become increasingly unlikely that additional rate cuts would occur.

To highlight the matter, consider the amount of revenue that would have been necessary for the 2024 individual income tax rate to go to zero.[22] The state would have needed to collect around $27.9 billion in General Fund/General Purpose revenue [plus earmarked transportation funds] in fiscal year 2022-23.[23] The state collected $12.9 billion. State of Michigan Annual

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[22] Plaintiffs/Appellants focused their analysis on tax year 2024 because there no unknown variables. At this point, an analysis of future years would require some assumptions about other revenue streams. But this 2024 analysis will be sufficient to show that without a restructuring of Michigan tax systems in general, there is no realistic possibility of the individual income tax rate going to zero.

[23] To make this calculation, one must first compute that baseline that will be used to measure inflation against. That is the "total general fund/general purpose revenue from the 2020-2021 state fiscal year." MCL 206.51(1)(c)(i). That number is $12,112,452,000. State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2021 at 339. To that, MCL 206.51(1)(c)(ii) requires the addition of any "distribution made pursuant to [MCL 206.51d]." That amount is $600,000,000. MCL 206.51d(c). Thus, the 2020-2021 revenue baseline is $12,712,452,000.

For the tax year 2024, MCL 206.51(1)(c)(i) requires use of the Consumer Price Index for the 2020-2021 fiscal year and the Consumer Price Index for the 2022-23 fiscal year ("the state fiscal year ending in the tax year prior to the tax year for which the adjustment is being made"). Michigan's fiscal year runs from October 1 to September 30. MCL 18.1491. Thus, the CPI data from October 2020 to September 2021 is necessary as is the CPI data from October 2020 to September 2023. To retrieve this, go to https://www.bls.gov/cpi/ and then click the pull-down menu titled "CPI Data." On that pull-down menu, click on "Databases." Click on the green "One Screen" button for the "All Urban Consumers (Current Series)" row. The resulting page requires three selections. For

(Note continued on next page.)

Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2023 at 347. Thus, a 230% increase in revenue would have been required for the income tax to be zeroed out in tax year 2024.

"Select an Area" choose "U.S. city average." For "Select one or more items" choose "All items." For "Select Seasonal Adjustment" choose "Not seasonally adjusted." Then click on the "Get Data" button. This will lead to a table with a data set dating back to 2014. That would work and provide the necessary information, but there is also an input box titled "Change Output Options" that allows the range to be altered. The easiest way to limit the data set and still get the relevant numbers is to change the "From:" box to "2020."

For fiscal year 2020-2021, the CPI numbers in order are 260.388, 260.229, 260.474, 261.582, 263.014, 264.877, 267.054, 269.195, 271.696, 273.003, 273.567, and 274.310. Adding these together (3199.389) and dividing by 12 leads to a **CPI for fiscal 2020-2021 of 266.616**. For fiscal year 2022-2023, the CPI numbers in order are 298.012, 297.711, 296.797, 299.170, 300.840, 301.836, 303.363, 304.127, 305.109, 305.691, 307.026, and 307.789. Adding these together (3627.471) and dividing by 12 leads to a **CPI for fiscal 2022-2023 of 302.289.**

To determine what amount of revenue would trigger a tax cut for tax year 2024, pursuant to MCL 206.51(1)(c)(i), we need the change in inflation index (determined from the CPI numbers) 302.289/266.616 x 1.425. (This has the effect of increasing the inflationary change by 42.5%). It leads to a product of 19.1%. Taking that and multiplying time our 2020-21 base year amount of $12,712,452,000, for a tax cut to be triggered the total general fund/general purpose revenue necessary would be $15,136,256,658. [This is practically the process from MCL 206.51(1)(c)(i), but has been simplified to make the math more understandable on a step-by-step basis].

To determine the amount of total general purpose/general fund revenue necessary to have driven the 2024 income tax rate to 0, take the income tax revenue from fiscal year 2022-23 and add it to the capped total for fiscal 2022-2023 from the previous paragraph. According to the House Fiscal Agency's September 2023 "Revenue State Source and Distribution," Michigan collected an estimated $12,727,400,000 in income tax. Thus, to have the income be at 0 for tax 2024, the state would have needed to have collected $27,863,656,658 in revenue.

As will be shown in a table below, the state actually had $12,940,741,000, to which we would need to add the $600,000,000 from MCL 206.51d(c) for a total of $13,540,741,000.

The following chart is what the general fund/general purpose was in the years before 2015:

year	GF/GP revenue
2005[24]	$8,717,742,000
2006[25]	$8,708,888,000
2007[26]	$8,827,021,000
2008[27]	$9,861,035,000
2009[28]	$7,957,900,000
2010[29]	$7,511,033,000
2011[30]	$8,594,470,000
2012[31]	$8,853,637,000
2013[32]	$9,018,422,000
2014[33]	$8,606,827,000

[24] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2005 at 207.

[25] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2006 at 257.

[26] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2007 at 253.

[27] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2008 at 257.

[28] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2009 at 259.

[29] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2010 at 267.

[30] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2011 at 269.

[31] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2012 at 271.

[32] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2013 at 271.

(Note continued on next page.)

Here is a chart of what the general fund/general purpose revenue has been since 2015:

year	GF/GP revenue
2015[34]	$9,805,438,000
2016[35]	$9,816,732,000
2017[36]	$9,674,629,000
2018[37]	$10,309,741,000
2019[38]	$10,410,989,000
2020[39]	$10,205,866,000
2021[40]	$12,112,452,000
2022[41]	$14,236,828,000
2023[42]	$12,940,741,000

[33] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2014 at 275.

[34] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2015 at 275.

[35] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2016 at 301.

[36] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2017 at 299.

[37] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2018 at 319.

[38] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2019 at 321.

[39] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2020 at 331.

[40] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2021 at 339.

[41] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2022 at 341.

[42] State of Michigan Annual Comprehensive Financial Report: Fiscal Year Ended Sept. 30, 2023 at 347.

Here is a table laying out the General Fund/General Purpose revenue sources for recent fiscal years:

GENERAL FUND/ GENERAL PURPOSE TAX REVENUE BY SOURCE

FY 2021-22 through FY 2023-24

(MILLIONS OF DOLLARS)

	Final FY 2021-22	% of Total	CREC FY 2022-23	% of Total	CREC FY 2023-24	% of Total
Individual Income Tax	$9,199.0	*60.5%*	$8,219.5	*62.3%*	$7,780.1	*61.6%*
Sales Tax	$1,696.0	*11.2%*	$1,679.3	*12.7%*	$1,665.9	*13.2%*
Net Business Taxes	$1,194.9	*7.9%*	$1,156.0	*8.8%*	$1,136.7	*9.0%*
Use Tax	$1,950.5	*12.8%*	$873.0	*6.6%*	$840.3	*6.6%*
Non-Tax Revenue	$675.8	*4.4%*	$793.1	*6.0%*	$740.1	*5.9%*
Other GF/GP Taxes	$220.8	*1.5%*	$205.0	*1.6%*	$214.0	*1.7%*
Tobacco Taxes	$158.8	*1.0%*	$148.1	*1.1%*	$145.8	*1.2%*
Liquor, Beer, and Wine Taxes	$114.5	*0.8%*	$114.0	*0.9%*	$115.3	*0.9%*
TOTAL	$15,210.3		$13,188.0		$12,638.2	

Note: Totals may not add due to rounding.

House Fiscal Agency, State of Michigan Revenue State Source and Distribution September 2023 at 8. Note that the income tax makes up more than 60% of general fund/general purpose revenue consistently.

Looking at the pre-2015 chart, many 2015 legislators may have doubted there would ever be any rate reduction due to MCL 206.51(1)(c). It is only the extraordinary revenue year in 2022 (see the second chart) that allowed for the .2% rate cut. Remember, in order to have a rate cut, inflation not only needs to be exceeded, but it must be exceeded by 42.5%. MCL 206.51(1)(c) will not drive the income tax to zero. The 2023 table makes this point even more clearly. The state income tax is the primary driver of general fund/general purpose revenue. As the state income tax revenue would be going down due to theoretical future income tax rate reductions, the remaining revenue sources would have to have explosive growth. Indeed, based on the 2023-2024 CREC numbers from the table immediately above, the other revenue streams total around $4.5 billion and thus would need to grow six to seven times their current amounts.

The Legislature, with its superior tax and budgeting knowledge vis-à-vis the judiciary, knew this in 2015. Thus, there is no concern about MCL 206.51(1), which provides for an income tax, becoming surplusage or nugatory.

8. Past legislative practice supports Plaintiffs/Appellants' construction of MCL 206.51(1).

An income tax rate increase was enacted in 1983, which is the most instructive historical 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. P/A App'x at 100-06. 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).

In 1983 PA 15, 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:
>
> (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%.[43]

[43] Subsection 51(9) allowed the Department of Treasury to "annualize" the rates in subsection (1) in future tax years. P/A App'x at 102.

P/A App'x at 101 (emphasis added). Subsection (12) allowed for a rate decrease if the sales-and-use tax were set above 4%. *Id*. at 102. 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 these tax years**.

Id. (emphasis added).

Plaintiffs/Appellants have focused on 1983 PA 15, because it was most like 2015 PA 180 in that both used complex formulas to set the income tax rate. But there have been other instances where like in 1983 PA 15, the Legislature has used a fixed constant when discussion conditional matters related to the income tax rate. In 1977 PA 44, the income tax rate was set at 4.6%, but could drop to 4.4% if a budget stabilization fund (i.e. rainy-day fund) was not created. In 1982, there was a fixed constant (4.6%) with a six-month surcharge. 1982 PA 155. 1993 PA 328 used a fixed constant (4.6%) plus two potential surcharges depending on whether the sales tax was at 6% or 4%.

At no point in Michigan's income tax history, has the concept of an indirect reference been used. 2015 PA 180 also did not have one. It created a 4.25% rate that would be superseded once the conditions of MCL 206.51(1)(c) were met. That occurred as of January 1, 2023, and at the point 4.05% became the current rate and 4.05% will remain the income tax rate unless future MCL 206.51(1)(c) analyses lead to a lower rate.

9. Conclusion as to clarity analysis.

Plaintiffs/Appellants have the better analysis of MCL 206.51(1). Under clear meaning analysis, Plaintiffs/Appellants have the better reading of MCL 206.51(1)(c). All the words have meaning, and it aligns with past legislative practice. Nothing in their reading renders any portion of MCL 206.51(1) surplusage or nugatory, but the Treasurer's reading does. The clarity test is not whether there was a better or clearer way to accomplish a permanent tax cut; rather, the test is whether the way chosen provides the clearest reading. Plaintiffs/Appellants' construction does.

II. If MCL 206.51(1) is held to be ambiguous, the rule of construction that ambiguous tax statutes are to be construed against the taxing authority means 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.

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. If MCL 206.51(1) is held to be ambiguous, then that provision has to be construed against the Treasurer and in favor of Plaintiffs/Appellants.

Having determined that MCL 206.51(1) was clear in favor of the Treasurer, the Court of Appeals did not perform an ambiguity analysis. Should one be necessary, the statute would have to be construed in favor of 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 fiscal staff reports that the Michigan Supreme 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 Treasurer's.

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. P/A App'x at 65-66. This is consistent with the House Fiscal Agency's 2015 interpretation of MCL 206.51(1)(c). P/A App'x at 52, 55. 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.

The Court of Appeals has also indicated that statements of individual legislators are not useful. *Gillette Com Operations v Dep't of Treasury*, 312 Mich 394 (2015). To the extent that they are, here they favor Plaintiffs/Appellants. Plaintiffs/Appellants had sought out these televised statements in their attempt to refute the policy considerations being made by the Attorney General and Court of Claims about when Michigan could afford a tax cut.

In each legislative chamber, speeches against the idea of a permanent tax cut were made right before the vote that led to the passage of 2015 PA 180. At the Court of Claims and Court of Appeals, Plaintiffs/Appellants focused on the arguments of Representative Townsend (D-26),[44] and Senator Gregory (D-11) who both argued against a permanent individual income tax cut.[45]

Again, while Plaintiffs/Appellants have staff reports and legislative statements, they do not need them. This Court has made clear that ambiguous tax statutes are construed against the taxing authority. In this case, that is the Treasurer.

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

[44] His full remarks are available at https://www.house.mi.gov/VideoArchivePlayer?video=Session-102115.mp4 (last visited March 25, 2024) at time stamp 7:08:41 to 7:17:10.

[45] 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 March 25, 2024).

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 Milford*, 342 Mich App 342, 347 (2022).

B. Declaratory relief.

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 561, 586 (2020). The individual taxpayers are being overcharged, as the proper ceiling for the 2024 tax rate is 4.05% and the Treasurer has not updated its tax tables that are still based on a tax rate of 4.25%.

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 the Treasurer 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*, 345 Mich App 1, 23 (2022).

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). Here, Plaintiffs/Appellants seek to compel the Treasure to apply the individual income tax rate required by MCL 206.51(1)(c).

RELIEF REQUESTED

For the reasons stated above, this Court should hold that the individual 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.

Respectfully Submitted,

Dated: March 25, 2024

/s/ Patrick J. Wright
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiffs/Appellants

STATEMENT OF COMPLIANCE WITH MCR 7.312(A) and MCR 7.212(B)

I hereby certify that this brief is compliant with MCR 7.212(B)(1). The brief contains 13,374 words in the sections specified by MCR 7.212(B)(2).

Dated: March 25, 2024

/s/ Patrick J. Wright
Mackinac Center Legal Foundation
Attorney for Plaintiffs/Appellants