**STATE OF MICHIGAN**
**COURT OF CLAIMS**

**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,**

**v.**

**Treasurer of Michigan, Rachael Eubanks, in her official capacity**

**Defendant.**

**Case No.: 23-_____-MB**

**Hon. _____**

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**PLAINTIFFS' BRIEF ON THEIR *EX PARTE* MOTION TO SHOW CAUSE UNDER MCR 3.305(C)**

*****DECISION REQUESTED BY DECEMBER 15, 2023*****

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## JURISDICTIONAL STATEMENT

Pursuant to MCL 600.6419(1)(a), the Court of Claims has 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.

## 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 decrease again?

   Plaintiffs' Answer: Yes

   Defendant's 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 rate cap until the formula would cause it to decrease again?

   Plaintiffs' Answer: Yes

   Defendant's 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 State Treasurer has announced that, pursuant to MCL 206.51(1)(c), the rate will decrease from 4.25% to 4.05% for tax year 2023. Prior to that announcement, at Defendant's request, the Attorney General issued an opinion that any year the tax rate decreases, it will revert to 4.25% for a new analysis under MCL 206.51(1)(c). AG Opinion 7320 (March 23, 2023), available at Complaint, Exhibit 1.

At issue is whether Michigan's approximately 5 million individual income tax filers will have permanent tax-cut relief or whether any rate cut will generally revert to 4.25%. 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 impacted the fiscal year 2023-24 budget that recently passed and may need to be adjusted.[1] The Plaintiff state legislators have a state constitutional right to accurate revenue projection estimates during each budget cycle.[2]

Plaintiffs request a final resolution by December 15, 2023, so that Michigan's 5 million individual income taxpayers will know their rights and will not overwhelm the Department of Treasury, this Court, and/or the Tax Tribunal with individual challenges to the income tax rate.

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[1] Because the tax year is on a calendar basis and the state's fiscal year runs October 1 to September 30, 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. The total the reduction on a calendar-year basis is $714.2 million. *Id.* That amount is higher than the entire fiscal year 2022-23 judiciary budget of around $483 million – a figure that included a one-time appropriation of $151 million. 2022 PA 166 at 256, 259.

[2] Plaintiffs 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.

## STATEMENT OF FACTS

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

In 1975, the legislature created its first mechanism for a conditional tax rate: "For receiving, earning, or otherwise acquiring income from any source whatsoever, there is levied and imposed a tax of 4.6% upon the taxable income of every person, other than a corporation, except that effective July 1, 1977, the tax shall be 4.4%." 1975 PA 19.

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 yearly 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%.

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%.[3]

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

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*.

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.[4]

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

[4] 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 sufficiently to warrant any discussion.

> 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 State Treasurer, the House Fiscal Agency, and the Senate Fiscal Agency based on the comprehensive annual financial report (commonly known as SOMACFR or ACFR). These entities were supposed to make this determination so as to coincide with the January consensus revenue estimating conference (CREC). *Id.*[5]

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.**)

[5] The CREC will be discussed further below.

See Complaint, Exhibits 3, 4.

None of the amendments that postdate 2015 PA 180 impact this matter.[6]

**General information on income tax and budget process**

Before discussing recent events related to this matter, some background on the income tax and the budget cycle is useful.

Defendant Michigan Department of the Treasury's Office of Revenue and Tax Analysis authored a December 2020 report on Michigan's income tax. Michigan's Individual Income Tax 2020, available at Complaint, Exhibit 14. According to that report, in 2020, there were 4,952,798 MI-1040s filed, which led to $9,424,548,300 in income taxes being levied. *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.

Michigan's fiscal year runs from October 1 to September 30. MCL 18.1491. We are currently in the 2022-2023 fiscal year. The income tax year runs on a calendar basis. MCL 206.24.

The House Fiscal Agency has prepared a primer for legislators on the budget process, most recently issued in 2019. 2019 Legislator's Guide to Michigan's Budget Process, available at Complaint, Exhibit 11. The typical steps in a budget cycle are: (1) a revenue estimating conference in January (9 months before the fiscal year begins), MCL 18.1367b(1);[7] (2) Governor presents executive budget, Const 1963, art 5, § 18 (generally in February)[8]; (3) budget legislation

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

[7] This is commonly referred to as the January CREC.

[8] All the months are taken from Figure 1 of the Legislator's Guide to Michigan's Budget Process.

introduced and debated (February to May); (4) May revenue estimating conference, MCL 18.1367b(1); and (5) eventual passage of budget.[9]

**2023 events**

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 analyses). House Fiscal Agency, Economic Outlook and Revenue Estimates for Michigan FY 2022-23 through FY 2024-25 (January 12, 2023), available at Complaint, Exhibit 6 at p. 14.

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

On March 22, 2023, Treasurer Rachael Eubanks sought an Attorney General Opinion on the tax-reduction-permanence question. Complaint, Exhibit 7. The AG issued an opinion the very next day. AG 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.

[9] By law, it is required to be done by July 1, preceding the fiscal year (i.e. with 3 months to spare). MCL 18.1365.

On March 29, 2023, after the closing of the 2021-22 fiscal year via the issuance of the State of Michigan Annual Comprehensive Financial Reports, Treasurer Eubanks 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, 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, Senate Fiscal 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 only due to the AG Opinion:

> Based on the FY 2021-22 Annual Comprehensive Financial Report, 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.

On May 19, 2023, Senate Fiscal 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 1. 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 CREC documents.

## ARGUMENT

### I. 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. Statutory analysis

#### 1. Clear meaning

In *American Civil Liberties Union of Michigan v Calhoun County Sherriff's Office*, 509 Mich 1, 8 (2022), the Michigan Supreme 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). 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 are: (1) a dictionary definition of "current" (the Attorney General claims 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 then 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 and cited to by the Michigan Supreme Court in *Detroit News v Independent Citizens Redistricting Commission*, 508 Mich 399, 421 (2021)) lists three definitions for "current" as an adjective:[10] (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).[11] Using dictionary.com, which a majority of the Michigan Supreme 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."[12]

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[10] https://www.merriam-webster.com/dictionary/current (accessed August 21, 2023).
[11] Even the AG'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.
[12] https://www.dictionary.com/browse/current (accessed August 21, 2023). The example given with this fourth definition is "the current issue of a publication."

In *Honigman Miller Schwartz and Cohn LLP v Detroit,* 505 Mich 284 (2020), the Michigan Supreme 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 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)).

Although both the Attorney General and Plaintiffs have a plausible dictionary definition, Plaintiffs' definition is superior both standing alone and contextually.

**b. An easily available legislative alternative clearly indicates Plaintiff's 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.[13] 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

[13] 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).

replaced with "4.25" in MCL 206.51(1)(c). 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* at 310-11 (footnote omitted).

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. This shows, having not chosen to follow its past proven method from 1983 that the 2015 Legislature meant "current" to mean "most recent." 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." 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.[14]

**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.

To the extent that the Attorney General's policy argument is an attempt to identify "absurd results," it will be addressed here in the clear meaning section.

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[14] 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 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.

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 policy belief is that where there is an extraordinary revenue event it can sustain multiple years of an income tax reduction.

Take the current situation Michigan faces. 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,[15] 1975,[16] 1977,[17] 1982,[18] the previously discussed 1983,[19] 2007,[20] and 2011.[21] 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.

Although there can be a reasoned policy disagreement about whether the income-tax-rate cap should be reduced annually, or permanently, the Michigan Supreme Court has indicated that disagreement based on policy is largely irrelevant:

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[15] 1971 PA 76.
[16] 1975 PA 19.
[17] 1977 PA 44.
[18] 1982 PA 155.
[19] 1983 PA 15.
[20] 2007 PA 94.
[21] 2011 PA 38.

> 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' reading of the statute is superior. Their dictionary definition is better given the text and context of the statute. Plaintiffs 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. 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. Ambiguity**

As noted above, "ambiguities 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 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' 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.

The Attorney General's policy argument can be interpreted as an argument that MCL 206.51(1)(c) is ambiguous. But, even if that is the case, such 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' favor.

## II. Justiciability doctrines will not operate to prevent a decision on the merits

### A. Standing

Const 1963, art 4, § 31 states:

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

*Id*.

"[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgement." *League of Women Voters v Sec'y of State,* 506 Mich 561, 585-86 (2020) (citation omitted).

The Plaintiff legislators need to know how much is going to be collected in tax-collection revenue for the 2023-24 fiscal year and beyond so that they can properly engage in budget discussion and voting. The state constitution guarantees all legislators a precise revenue estimate for budgeting. Const 1963, art 4, § 31. Similarly, although they are not constitutionally entitled to accurate budgetary information, Plaintiffs ABC and NFIB 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 both 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. Also, Michigan's 5 million individual income tax filers all are potentially being charged higher taxes.

Defendant may invoke the concept of taxpayer standing to avoid a decision on the merits. The Court of Appeals has noted that individual taxpayers who allege "that their taxes will increase or decrease a specific amount depending on the outcome of . . . litigation" have standing. *Grosse Ile Comm for Legal Tax'n v Twp of Grosse Ile*, 129 Mich App 477, 488 (1983). More importantly, a ruling precluding suit would produce absurd results. Such a ruling would permit Defendant to take a hypothetical 5% income tax rate set by the Legislature and double or triple it, without the taxpayer having any opportunity to challenge that action. If Defendant seeks to contend that at some point there is an amount in controversy of sufficient magnitude needed for each taxpayer to have a sufficient interest to bring suit, it should be noted that Defendant's interpretation of MCL 206.51(1)(c) causes an ongoing injury to taxpayers in perpetuity. Presently, there is $500 million at stake and around 5 million taxpayers. On average, that is a $100/taxpayer, but obviously some taxpayers will be disproportionally affected. Those whose business income is taxed via the individual tax returns, like many individual members of ABC and NFIB, may be more significantly

impacted. Again, this is a continuing injury, so even the average or below average income earner will have accumulated harm.

**B. Ripeness**

In *Van Buren Charter Township v Visteon Corporation*, 503 Mich 960 (2019), the Michigan Supreme Court stated:

> Regarding the purpose of the declaratory judgment rule, our Court has stated, "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." "One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds ..."

*Id*. at 269 (footnotes omitted). The court continued:

> Like in an ordinary action, ripeness in the declaratory judgment context requires a present legal controversy, not one that is merely hypothetical or anticipated in the future. Unlike an ordinary action, however, in a declaratory action "a court is not precluded from reaching issues before actual injuries or losses have occurred." Indeed, "the basic purpose of a declaratory judgment act is to provide for declaratory judgments without awaiting a breach of existing rights."

*Id*. at 270 (footnotes omitted).

Both the Plaintiff legislators and Plaintiffs ABC and NFIB (as advocacy organizations), have been, and will continue to be, injured by Defendant's application of MCL 206.51(1)(c). The fiscal 2023-24 budget has been passed and priorities were set with what Plaintiffs believe to be bad information – that the individual income tax rate will revert to 4.25% for the 2024 tax year. A $526.7 million shortfall would have wide-ranging policy impacts. See generally Const 1963, art 5, § 20 (discussing appropriations and reduction of expenditures due to improper revenue estimates).

In about 4 months or less, 5 million taxpayers (including ABC and NFIB members) will have to make decisions whether to challenge an income tax assessment 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 of the circuit court actions filed in a typical year. Complaint at ¶ p. 11, n 6.

Further, there is the question of accrual under MCL 600.6431(1). A reasonable argument can be made that March 29, 2024, is the last date for a plaintiff to file under that statute, based on the Treasurer's Eubanks announcement of the income tax rate reduction on March 29, 2023.[22]

Plaintiffs have provided a schedule of briefing and decisions that could allow this matter to be finally resolved (at all levels of court) by December 15, 2023, so that the state's 5 million individual income tax filers will have legal certainty about their individual tax rate.

## III. Types of relief

### A. 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. This Court also has the authority to order a speedy hearing of this action and advance it on the calendar pursuant to MCR 2.605(D). It should do so.

### B. Mandamus

Mandamus would only be appropriate relief for Plaintiff legislators and Plaintiffs ABC and NFIB as advocacy organizations. Those Plaintiffs have a clear legal right to correct information as

[22] See Complaint, Exhibit 8 ("Now, because of strong economic growth and robust state revenues, the state income tax will decrease to 4.05% for one year.")

to the amount the state will garner in tax revenue for the fiscal 2023-24 year 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).

Const 1963, art 4, § 31, tasks legislators with the duty to vote on general appropriations bills, which must contain an "itemized statement of estimated revenue by major source." In voting, Plaintiff legislators necessarily need accurate information to fulfil their constitutional duties. Plaintiffs McBroom and Zorn are legislators, and like every member of the Legislature, have the clear legal right to accurate information during the budgeting and appropriations process. 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 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. 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 Plaintiffs.

## RELIEF REQUESTED

For the reasons stated above, this Court should adopt the schedule recommended by Plaintiffs and 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.

Respectfully Submitted,

Dated: August 24, 2023

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