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	**Case No.: 23-000120-MB**
	Hon. Elizabeth L. Gleicher

Plaintiffs,

v.

Treasurer of Michigan, Rachael Eubanks, in her official capacity

Defendant.

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PLAINTIFFS' 10/17/2023 BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY DISPOSITION

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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 205.22 deprive this Court of subject matter jurisdiction to hear this case?

   Defendant's Answer: Yes

   Plaintiffs' Answer: No

2. Have the plaintiff legislators and advocacy groups shown a special injury distinct from the general public sufficient to provide them standing?

   Defendant's Answer: No

   Plaintiffs' Answer: Yes

3. Is this matter ripe for adjudication?

   Defendant's Answer: No

   Plaintiffs' Answer: Yes

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

   Defendant's Answer: No

   Plaintiffs' Answer: Yes

5. 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?

   Defendant's Answer: Does not answer.

   Plaintiffs' Answer: Yes

6. Does defendant have a clear duty to execute the tax rate set by the Legislature thereby allowing mandamus to be entered?

   Defendant's Answer: No

   Plaintiffs' Answer: Yes

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, the Attorney General, at defendant's request, 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]

Defendant has moved for summary disposition. Plaintiffs agree that there are no genuine issues of material fact and seek summary disposition under MCR 2.116(C)(9) and (10).

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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 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*.

Subsection (9) stated:

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

Id. (emphasis added).

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

[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.

> that rate by a fraction, the numerator of which is the difference between the total general fund/general purpose revenue from the immediately preceding state fiscal year and the capped general fund/general purpose revenue and the denominator of which is the total revenue collected from this part in the immediately preceding state fiscal year. . . . As used in this subdivision:
>
> > (i) "Capped general fund/general purpose revenue" means the total general fund/general purpose revenue from the 2020-2021 state fiscal year multiplied by the sum of 1 plus the product of 1.425 times the difference between a fraction, the numerator of which is the Consumer Price Index for the state fiscal year ending in the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the Consumer Price Index for the 2020-2021 state fiscal year, and 1.
> >
> > . . .

Id. (emphasis added). The determination on whether there was a revenue increase was to be made by the State Treasurer, the House Fiscal Agency, and the Senate Fiscal Agency based on the annual comprehensive 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.**

[5] The CREC will be discussed further below.

> The frequency and magnitude of such revenue reductions would depend on future levels of inflation and economic growth, as well as potential non-economic factors affecting state revenues. (An example of such a non-economic factor is the increase in capital gain and dividend income tax revenue associated with the fiscal cliff in tax year 2011. While this one-time revenue increase was largely offset the following year, the trigger mechanism would have resulted in a **permanent reduction in the income tax rate.**)

See Complaint, Exhibits 3, 4.

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

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 2023-2024 fiscal year, which will end September 30, 2024. 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

[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.

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 introduced and debated (February to May); (4) May revenue estimating conference, MCL 18.1367b(1); and (5) eventual passage of the 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 analysis). 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.

[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.

[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 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.

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 solely because of 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.

Court filings

Plaintiffs filed the instant matter on August 25, 2023. Plaintiffs are made up of three groups: (1) two advocacy groups whose membership includes business owners that are taxed through their owners' Michigan individual income tax filings; (2) two legislators – one in the Michigan Senate and one in the Michigan House; and (3) six individual Michigan income taxpayers. The plaintiffs filed suit against the Treasurer of Michigan, Rachel Eubanks, in her official capacity. Defendant announced on March 29, 2023, that the income tax rate would be 4.05% in 2023 (plaintiffs agree with this). The next day, relying on the erroneous Attorney General Opinion, OAG No. 7320 (March 23, 2023), defendant indicated in a Treasury Notice that for tax year 2024, the tax rate would revert to 4.25% for a new analysis under MCL 206.51(1)(c). Complaint, Exhibit 9. Plaintiffs disagree that the "current rate" under MCL 206.51(1)(c) reverts to 4.25% each year. Instead, plaintiffs believe that any reduction under MCL 206.51(1)(c) is permanent and becomes the new "current rate" for future MCL 206.51(1)(c) calculations.

Plaintiffs' complaint set out two claims. For the advocacy groups as membership organizations that have individual taxpayer members and for the named individual taxpayers, a declaratory ruling was sought. Complaint at ¶¶ 69-90. For the legislators and the advocacy

organizations in that specific role (as opposed to membership organizations that contain individual taxpayers), mandamus was sought. Complaint ¶¶ 90-105.[10]

Defendant filed a motion for summary disposition on October 3, 2023.

In that motion, defendant contends: (1) this Court lacks jurisdiction because this case was not filed timely under MCL 205.22; (2) the legislator and advocacy groups lack standing "because they do not advance any specialized injury," Defendant's Motion at 1; (3) contrary to defendant's first argument (timeliness under MCL 205.22), the action is not ripe; (4) mandamus is improper because plaintiffs identified the wrong duty; and (5) on the merits, the Attorney General is correct that each year the MCL 206.51(1)(c) analysis requires the "current rate" to be 4.25%.[11]

ARGUMENT

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

Defendant contends MCL 205.22 is the operable statute of limitations, and suit was not timely filed under it. It reads:

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

Id.

[10] As part of their Complaint, plaintiffs filed an ex parte motion seeking a particular expedited briefing schedule. See Complaint ¶ 41. This Court denied the ex parte motion on September 25, 2023.

[11] In its discussion, defendant flips arguments 4 and 5. Plaintiffs generally follow the course of the argument in the discussion of defendant's Motion.

Citing to *Prime Time International Distributing, Inc v Department of Treasury*, 322 Mich App 46 (2017), a case concerning from the proper venue to appeal when a litigant seeks and receives an administrative hearing and subsequent decision (Circuit Court or Court of Claims), defendant contends that plaintiffs despite having not sought a hearing at the Tax Tribunal or the Department of Treasury are in effect appealing from a hearing decision of one of those entities. Thus, the argument goes, they must appeal via MCL 205.22 and that time has passed.[12]

The Department of Treasury has the power to issue tax bulletins "that index and explain current department interpretations of current state laws." MCL 205.3(f). These bulletins are advisory: "A [revenue administrative bulletin (RAB)] is issued under MCL 205.3(f), which allows defendant to issue bulletins that index and explain current department interpretations of current state tax laws. . . . [A]n RAB is only an interpretation of a statute and does not have the force of law." *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 100 (2012).

Even assuming the March 30, 2023 Notice rises to the level of a bulletin, it would be a non-binding interpretation of a tax statute and not "an assessment, decision, or order of the department." As explained by the Court of Appeals: "The plain language of the statute states that taxpayers aggrieved by 'an assessment, decision, or order' of the Department of Treasury may appeal. Thus, only assessments, decisions, or orders are appealable." *PIC Maint, Inc v Dep't of Treasury*, 293 Mich App 403, 411-12 (2011).

As to the individual taxpayers, defendant admits the statute of limitations from MCL 205.22 has not run: "The Revenue Act provides that "[a] taxpayer aggrieved by an assessment, decision, or order of the department" may appeal the same. MCL 205.22(1). As to individual

[12] Defendant contends that the period of limitations began to run on either March 29 or March 30, 2023, and this suit was filed on August 25, 2023. Defendant's Motion at 8-9.

taxpayers, these actions include issuing assessments, denying refund claims and the like." Defendant's Motion at 17.

If there is a separate subject-matter jurisdiction argument related to the legislators or the advocacy organizations, defendant has not made it. What is clear is that defendant has taken action in reliance on Attorney General Opinion, OAG No. 7320 (March 23, 2023), and indicated that the incorrect "current rate" (4.25% instead of the required 4.05%) will be used to calculate whether a further reduction is required under MCL 205.51(1)(c). Whether that violates the Income Tax Act, MCL 206.1-206.847, or the "State income tax collections" forecast required under MCL 18.1367b, defendant has not shown that there is a statute of limitations that deprives this Court of jurisdiction.

MCL 600.6431(1) states:

> Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.

Id. As defendant noted, plaintiffs' Complaint at ¶ 47 states "it is at least arguable" that plaintiffs' claim accrued as early as March 29, 2023. It also may be that the legislators (and advocacy groups as advocates) have an earlier accrual date than individual taxpayers. Regardless, all plaintiffs have filed suit within a year of the earliest possible accrual date – March 29, 2023 – and this matter was timely filed.[13]

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

Defendant makes two justiciability arguments: (1) standing related to the legislative and advocacy plaintiffs; and (2) ripeness. Thus, defendant apparently cedes that the individual

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

taxpayers have standing, and can only avoid a determination on the merits if this Court agrees with defendant's above statute-of-limitations argument and/or defendant's ripeness argument since only one plaintiff with standing needs have a ripe claim for a merits determination to be proper. *House Speaker v State Admin Bd*, 441 Mich 547, 561-62 (1993).

While plaintiffs contend that all of them have standing and that their claims are all ripe, it may be that this Court may differentiate holdings on the various groups. Thus, the plaintiff legislators and advocacy groups (in that role) will show that they have standing and the various plaintiff groups will then show why their respective claims are ripe.

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

Defendant's second argument is that the legislators and advocacy groups do not have standing to maintain suit. Specifically, while they admit that Const 1963, art 4, § 31 entitles "the Legislature . . . to revenue *estimates*" that "does not mean that a permanent tax rate is mandated." Defendant's Motion at 9. According to defendant, the legislator and advocacy groups remedy "is the legislative process, not the courts." *Id*.

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

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

> [W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though a court

> is not precluded from reaching issues before actual injuries or losses have occurred, there still must be a present legal controversy, not one that is merely hypothetical or anticipated in the future.

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

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

Id. at 372.

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

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

In *Killeen v Wayne County Road Commission*, 137 Mich App 178 (1984), a State Senator that had voted to allow Wayne County to create a home rule charter, two members of the commission that drafted the charter, and a Wayne County Commissioner brought suit to challenge the unionization of the road commission that they believed was being done to "insulate certain

personnel in high paying positions" from being effected by potential administrative and personnel changes. *Id*. at 181.

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

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

More specifically, the Michigan Supreme Court stated:

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

Id. at 556 (cleaned up). The Michigan Supreme Court held that the Chair of the House Appropriation Committee had standing to challenge the executive transfer because if the plaintiffs in that matter were correct, then that legislator would have had a right to approve or disapprove the transfer. Because a legislator in the Senate who was on that chamber's Appropriation Committee was allowed to vote in 1991 on whether to approve the transfer, that legislator did not have standing as the loser of "a political battle." *Id*. at 561. The Michigan Supreme Court rejected

the standing of the House Speaker and the Senate Minority leader as the interests they put forth – that of "the Governor's line-item veto authority" and "the power of members of the Legislature to override such a veto" were "not persuas[ive]." *Id*.

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

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

> The purported injury suffered by the Legislature—the practical nullification through executive nonimplementation of a law the Legislature has enacted—is not one that the judiciary has recognized in the past. We have not done so for good reason: it would threaten the separation of powers and risk injecting this Court into political disputes between the Legislature and executive despite the fact that those coordinate branches of government are capable of resolving their disputes through the political process. When private litigants without access to the constitutional levers of power assert that their rights are being violated . . . it is generally the

> judiciary's duty to resolve such disputes, but if no such litigant steps forward, I would not set this Court up as the arbiter of disputes solely between branches of government to which we are coequal, not superior.

Id. at 607-08.

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

The interest the plaintiff legislators claim comes from Const 1963, art 4, § 31, which 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. This provision was not in the 1835, 1850, or 1908 Constitutions. It originated from Committee Report 46b at the 1961 Constitutional Convention. 2 Official Record, Constitutional Convention 1961, p 3436. The item had been assigned to the "committee on executive branch." 1 Official Record, Constitutional Convention 1961, p 1635. When introduced to the convention delegation, the following was set forth to explain the provision:

> Sec. b. The second provision is intended to accomplish 2 major points: (a) to focus legislative attention on the general appropriation bill or bills to the exclusion of any other appropriation bills, except those supplementing appropriations for the current year's operation; (b) to require the legislature (as well as the governor, by section a) to set forth by major item its own best estimates of

> revenue. The legislature frequently differs from executive revenue estimates. It seems only proper to require that such differences as exist be specifically set forth for public understanding and future judgment as to the validity of each.

Id. at 1636. Committee Report 46a was the basis for Const 1963, art 5, § 18, which states in pertinent part: "The governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state. Proposed expenditures from any fund shall not exceed the estimated revenue thereof. . . ." *Id*. (emphasis added).

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

> The budgeting system that we propose in this section does clarify the responsibilities of government, whether the range of this government shall be wide or whether it shall be narrow. It makes those provisions. Also, we set in this section very sound budgeting procedures, . . . which state that the budget should be prepared by the executive and that he shall present this program of work for the fiscal period, whatever that might be. Also, it should include all estimated receipts and expenditures. This means all. This is very important. Not just part of the receipts or expenditures should be included.
>
> Further, we propose that the expenditures should not exceed estimated revenues. That is a must in any good budget; the two should balance. . . .

1 Official Record, Constitutional Convention 1961, p 1639. An amendment was proffered to eliminate what would become Const 1963, art 4, § 31 entirely. It was defeated by voice vote. 1 Official Record, Constitutional Convention 1961, p 1653. In arguing against that amendment, Delegate Martin stated:

> The fundamental purpose of this section is to get the attention of the legislature to the main business of appropriations, that is, the general appropriation bills before it acts on so called special bills for this, that, or the other thing, which are thrown in by individual legislators and which do not come from a consideration of the total needs of the state government and the total revenue. This seems to be the only way and the best way to do it, and is certainly the orderly way to get these matters considered. We think it is an integral part of this whole proposal and makes extremely good sense in getting the legislature to consider the main problems first and then, if it is desired, to add additional appropriations. This does not prevent it.

> This does not prevent any special bill from being acted upon. It simply says, act on the main bills first.

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

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

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

2 Official Record, Constitutional Convention 1961, p 3375.

In 1991, Michigan created the revenue estimating conference. 1991 PA 72. This conference involved both the executive and the two legislative branches. It required the three entities to come to consensus on "a forecast of anticipated state revenues" including "State income tax collections." *Id*. (Codified at MCL 18.1367b(3)). As passed and currently, the forecast is "based upon the assumption that the current law and current administrative procedures will remain in effect for the forecast period." MCL 18.1367b(7).

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 advocate 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.

The goal of the Const 1963, art 4, § 31 as augmented by the forecasting provisions is that the budgeting process matches expenditures with expected revenue. What the Constitutional Convention delegates rejected was the idea that the executive and the legislature would budget with wildly divergent revenue projections, which would invariably lead to more spending than there is revenue.

Defendant takes exception to plaintiffs' use of the word "precise" and contends that all that is required under the Constitution is "a rough or approximate calculation" and that "there is no right to a crystal ball for revenue." Defendant's Motion at 11. It is certainly true that it is unlikely even the best economic forecasters are going to hit revenue projections to the penny. But that does not mean defendant's misconstruction of MCL 206.51(1)(c), which leads to a $714.2 million overstatement in the revenue projection, satisfies the Constitutional requirement of Const 1963, art 4, § 31 or MCL 18.1367b. These two provisions do not permit an anything-goes revenue projection so long as adjustments can be made to expenditures later in the process. Rather, they seek to have an orderly budget process where expenditures and revenue align as early and as consistently as possible. This is an interest that is "distinct from that of the general public." The plaintiff legislators have the stronger argument in that they can cite to the constitution, but the advocacy groups also participate in the budget process in a manner different from that of the general public. If defendant's argument were accepted, it would essentially define Const 1963, art 4, § 31 and Const 1963, art 5, § 18, not as supreme law of the State, but rather as mere suggestions from a long-ago era that can be ignored by any governor or legislator that decides to do so.

While both of the plaintiff legislators were serving and voted when 2015 PA 180 passed,[14] neither has brought suit here as voting members of the 2015 Legislature. Rather, their claim is that as 2023 members of the Legislature they are being provided a $712.4 million revenue estimating error due to the actions of defendant. That error affects their ability to perform their current legislative duty to create and vote for a budget where expenditures and revenues match as nearly as possible – a process so important it was constitutionalized. Their status is not that of legislators upset at having lost a vote; thus, this is a question requiring a judicial determination rather than a political solution. If they are correct about the proper interpretation of MCL 206.51(1)(c), this Court should say so. And if their fellow legislators want to change that policy, it is incumbent upon them to pass legislation doing so.

B. This matter is ripe for adjudication.

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

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

> 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 these 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). The injury continues for future budget cycles as well should defendant continue to use the wrong income tax rate for revenue projections.

Defendant's argument regarding the plaintiff legislators and advocacy groups largely echoes its standing argument: "[E]ven if Plaintiffs were correct as to the meaning of MCL 206.51(1)(c), their assertion that they have been cognizably injured ignores the statutory scheme for appropriation adjustments. See, e.g., MCL 18.1391-1392." Defendant is mistaken. Plaintiffs have repeatedly noted that if their interpretation of the tax rate is correct that the revenue estimates will be off around $714 million and adjustments would be necessary under Const 1963, art 5, § 20. But, as noted above, Const 1963, art 4, § 31 does not indicate that any revenue projection will suffice as long as the budget is "fixable" later through expenditure-reduction legislation. Rather, it shows that in enacting § 31 the people wanted revenues and expenditures to match as much as possible throughout the entire budgetary process.

Turning to the individual taxpayer plaintiffs, in about 3 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.

Defendant makes one ripeness argument as to the individual taxpayers – that an interpretation of MCL 206.51(1)(c) is contingent upon a future event occurring (the January 2024 formulaic calculation) and the Legislature may change the statute before then.

As a primary matter, it seems unlikely that the current majority in the Legislature would amend MCL 206.51(1)(c) as the House Appropriations Chair, Representative Angela Witwer, intimated that any attempt to have eliminated the tax cut from that provision would be "political suicide."[15] But it is always the case that the legislature has the power to amend laws and to grant immediate effect. Yet declaratory judgments still occur.

This is not surprising. In *Taxpayers Allied*, the Michigan Supreme Court indicated that plaintiffs challenging improper taxes could generally get forward looking relief. There, taxpayers sought a refund for taxes improperly implemented due to the Headlee Amendment. The court held that refunds were foreclosed as being past the statute of limitations. *Taxpayers Allied for Const Tax'n v Wayne Cnty*, 450 Mich 119, 125-26 (1995).

But, regarding an injunction request as to future tax years, the Michigan Supreme Court noted: "Because a suit for injunctive relief may seek to prevent a future wrong, the cause of action necessarily arises before the wrong occurs." *Id*. at 127. Further, it was indicated that the statute of

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[15] https://www.bridgemi.com/michigan-government/michigan-tax-cuts-could-total-16b-democrats-wont-block-income-tax-rollback (last visited Oct. 15, 2023).

limitations would not bar future relief and that plaintiffs' declaratory relief request could proceed. *Id*. at 129. The Michigan Supreme Court held that a contrary ruling would unnecessarily burden the court system: "It would present the judicial system with numerous individual and class actions for refunds each year, without any offsetting benefit in terms of enhancing the fiscal integrity of the [taxing authority]." *Id*. at 128. Contrary to what defendant argues here, the Michigan Supreme Court did not indicate that the case was not ripe because Wayne County might have fixed its allegedly problematic tax statute before the next round of taxes were due.

III. 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. Both clarity and ambiguity analysis favors Plaintiffs.

Somewhat surprisingly, defendant's Motion only cites to the Attorney General's Opinion in the facts section of its motion and not when arguing the merits of MCL 206.51(1)(c)'s meaning. Because judicial notice of that opinion is possible, plaintiffs will use the Attorney General Opinion as a framework and will address the arguments made within it. While doing so, plaintiffs will discuss any overlap and augmentation from defendant's instant motion as they occur.

1. Clear meaning.

In *American Civil Liberties Union of Michigan v Calhoun County Sheriff'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 were: (1) a dictionary definition of "current" (the Attorney General claimed her preferred definition is "the common meaning of the word," but there is at least one other meaning that works better); (2) a lack of specific legislative language to the contrary ("Had the Legislature intended the phrase 'current rate' in subsection (1)(c) to require a permanent change to the rate specifically set out in subsection (1)(b), it could have easily, and clearly, done so[.]"); and (3) a policy argument that a rate reduction should only be temporary since the state might not be able to "afford to provide relief to taxpayers" unless state tax collections and other revenue outpace inflation. The Attorney General did not make an explicit ambiguity argument in her opinion (although the policy argument may constitute an implicit one).

a. Dictionary definition.

The online version of Merriam-Webster's Dictionary (the same source used by the Attorney General Opinion and cited to by 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:[16] (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).[17] 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."[18]

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)).

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[16] https://www.merriam-webster.com/dictionary/current (last visited Oct. 15, 2023).

[17] 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.

[18] https://www.dictionary.com/browse/current (last visited Oct. 15, 2023). The example given with this fourth definition is "the current issue of a publication."

In its motion, defendant contends "existing at the present time" is the correct meaning of "current." Defendant's Motion at 23. But most of defendant's argument is related to the overall structure and "context" of MCL 206.51.

Defendant's argument begins by discussing MCL 206.51(1)(a), (b), and (c).[19] It notes that the income tax rate was 4.35% "On and after October 1, 2007 and before October 1, 2012." MCL 206.51(a). On this, plaintiffs agree.

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

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

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

Defendant's Motion at 20. Defendant concludes:

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

[19] All of these came from 2015 PA 180 and were unchanged by 2016 PA 266, 2018 PA 588, and 2020 PA 75.

Id. at 21.

Defendant's problem is that its reading does not give effect to every term in the statute. As noted above, the parties agree that due to MCL 206.51(1)(a) the income tax rate for the time period between October 1, 2007, and October 1, 2012 is 4.35%. The parties also agree that in the time period between MCL 206.51(1)(b)'s "October 1, 2012" and MCL 206.51(1)(c)'s January 1, 2023, the income tax rate was 4.25%. While not specifically discussed by defendant, January 1, 2023, is the first time that the test 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 defendant is correct, then the word "current" is entirely superfluous and the term "that rate" should have been "the rate." Defendant'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."[20] "The rate" would be sufficient to indicate an immutable 4.25% rate, the word "current" would add nothing.

[20] https://www.merriam-webster.com/dictionary/the (last visited Oct. 15, 2023).

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

A similar problem arises with "that rate." According to Merriam-Webster, "that" as an adjective is "being the person, thing, or idea specified, mentioned, or understood."[21] If defendant 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.

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

Plaintiffs' definition of "current rate" is superior.

b. An easily available legislative alternative clearly indicates Plaintiffs' 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

[21] https://www.merriam-webster.com/dictionary/that (last visited Oct. 15, 2023).

time" since "it could have easily, and clearly done so, in subsection (10) (or in subsection (1)(c))." OAG 7320 at 4.[22] But, the Attorney General's preferred definition could have been clearly or easily included as well. All that would have been required is for the word "current" to be stricken and replaced with "4.25%" in MCL 206.51(1)(c) (or as discussed above, "current" could be stricken and not replaced). The fact the Legislature did not do so is telling, as they have previously employed specific rates to accomplish a temporary tax rate reduction.

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

The Legislature did use a particular, identified, numeric income tax rate in 1983 PA 15. There, for the first time, it created a formula for setting the income tax. In section 51(1)(d) it set the formula for "January 1, 1983, and thereafter," which matches up with the "For each tax year beginning on or after January 1, 2023," at issue here. In 1983 PA 15, the Legislature used a specific rate - 3.9% - as its starting point. This indicates that, in 2015, there was legislative experience in setting a particular numerically identified rate (1983's 3.9%) as a starting point for a year-by-year formulaic determination of the applicable income tax. 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

[22] 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).

could have just used "4.25%" instead of "current rate" or as discussed above just used "the rate." There is no point in doing indirectly what so clearly could have been done directly. The Legislature's 2015 choice not to use its past method of a fixed constant in a tax-rate-computation formula is evidence that "current" means "most recent" for purposes of MCL 206.51(1)(c). There is no such support for the Attorney General's definition.[23]

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

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

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

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

c. Policy considerations as an interpretative guide.

The Attorney General's third point related to policy:

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[23] 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.

> 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.

Defendant's Motion echoes and then extends the policy argument:

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

Defendant's Motion at 23.

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

That tax collection should remain at a certain floor unless and until it is absolutely clear an extraordinary revenue event has occurred that would allow for some temporary relief is a reasonable policy belief. But another 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,[24] 1975,[25] 1977,[26] 1982,[27] the previously discussed 1983,[28] 2007,[29] and 2011.[30] It may also have assumed that future legislatures could eliminate programs to reduce spending to account for decreased revenue. This policy belief is at least as rational as the one posited by the Attorney General and defendant.

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

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

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[24] 1971 PA 76.

[25] 1975 PA 19.

[26] 1977 PA 44.

[27] 1982 PA 155.

[28] 1983 PA 15.

[29] 2007 PA 94.

[30] 2011 PA 38.

Senate Fiscal Agency, Road Funding; Income Tax (November 23, 2015) at 15.[31] Remember that income taxes generally made up around $9.4 billion of the state's revenue in 2020. As tax rates decrease, it will mean less revenue will be collected through income taxes, but less revenue will make it less likely there are future cuts since rate cuts are based on revenue exceeding inflation.

But even if it were realistically possible that MCL 206.51(1)(c) could zero out the tax rate, it would not be an absurd result. Until 1967, this state did not have a broad-based income tax. Before the 1963 Constitution, the electors rejected attempts to constitutionally permit income taxes in 1922, 1924, 1934, 1936. 1961-1962 Michigan Manual at 77 and 79. Const 1963, art 9, § 7 prohibits a graduated income tax and thereby implicitly permits a flat-rate income tax. Thus, Michigan existed for decades without an income tax. Further, these states do not have income taxes: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.[32] The idea of a state without an income tax is not beyond the pale.

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

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

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[31] https://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0414-N.pdf.

[32] https://www.cnbc.com/select/states-with-no-income-tax/ (last visited Oct. 15, 2023).

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 and a past practice limiting a formulaic rate change to a particular year (1983 PA 15's subsection (9)). Further, the Legislature made the policy decision in 2015 to enact a continuing income-tax reduction. That policy decision is exclusively the prerogative of the Legislature, and the Court should uphold that decision regardless of any other parties' policy preference.

2. Ambiguity

"[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 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 an argument cannot overcome the rule that ambiguities in tax statutes are resolved in favor of the taxpayers. Even if that rule is not dispositive, all available evidence shows the ambiguity should be resolved in plaintiffs' favor.

Neither the Attorney General Opinion nor defendant's Motion addresses this rule of construction.

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

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.

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 to the amount the state will likely garner in tax revenue for the fiscal 2023-24 year (and the years that follow) and defendant has a clear legal duty to charge the proper tax rate.

"Mandamus is the appropriate remedy for a party seeking to compel action by 'state officers.'" *Taxpayers for Mich Const Gov't v Dep't of Tech*, ___ Mich App ___; 2022 WL 17865554 at *7 (Dec 22, 2022). To obtain a writ of mandamus, a plaintiff must meet four elements:

"(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgement, and (4) the plaintiff has no other adequate legal or equitable remedy." *Wilcoxon v City of Detroit Election Comm'n*, 301 Mich App 619, 632-33 (2013); *Deleeuw v State Bd of Canvassers*, 263 Mich App 496, 500 (2004). "A clear legal right is a right 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal questions to be decided.'" *Att'y Gen Bd of State Canvassers*, 318 Mich App 242, 249 (2016) (citation omitted).

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.[33]

Defendant's first argument related to mandamus is that it does not have a clear duty. It contends that it does not set the tax rate, but the Legislature does. This is true, but defendant in executing and enforcing MCL 206.51(1)(c) wants to use the wrong rate – 4.25% instead of 4.05% (or perhaps lower if the formula calls for it) for tax year 2024. As a branch of the executive, Const 1963, art 5, § 3, basic separation of powers, Const 1963, art 3, § 2, indicate defendant is the entity that executes the income tax rate. When, as here, it executes the wrong rate, mandamus will lie.

Defendant's second argument is that the Court of Appeals statement from *Berdy v Buffa*, 504 Mich 876 (2019) that mandamus can be issued "where the interpretation of the controlling statute is in doubt" must be cabined to cases where the duty is extraordinarily clear: "*Berdy* . . . involved specific duties to be performed in a ministerial way, i.e., removal of ineligible candidates from ballots for patent candidacy defects." Defendant's Motion at 26-27. Defendant then repeats its first mandamus argument about there not being a clear duty for it related to the proper tax rate.

[33] 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.

It fails for the same reasons as before. Defendant is wrong about *Berdy;* the Michigan Supreme Court gave no indication the general proposition was limited factually.

Defendant's last point is regarding the plaintiff legislators. It is a repeat of its earlier legislative standing argument – because the Constitution calls for estimates as to revenues, there is no duty on defendant to provide an accurate estimate since there exists some mechanism for dealing with revenue shortfalls. Const 1963, art 4, § 31 was a rejection of this type of budgeting. The process is that the Legislature and the Executive are supposed to have projected revenues and expenditures match throughout the entire budget process. Excusing a $714 million revenue projection undermines the substantial right and special injury the plaintiff legislators have that is distinct from the general public.

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

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

RELIEF REQUESTED

For the reasons stated above, this Court should 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: October 17, 2023

/s/ Patrick J. Wright
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