**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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

**Plaintiffs/Appellants**

**v.**

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

**Defendant/Appellee**

**MSC. No. 166871**

**COA No. 369314**

**Case No.: 23-000120-MB**

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

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# PLAINTIFFS/APPELLANTS' REPLY REGARDING APPLICATION FOR LEAVE TO APPEAL

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## DISCUSSION

### I. Application for Leave to Appeal.

As at least one Plaintiff/Appellant had standing, most of Plaintiffs/Appellants briefing went to this Court's 51% clarity test.[1]

### II. Treasurer's Response.

The Treasurer's Response was filed on April 22, 2024. Only a few items from it need to be addressed.

### A. Timing of the budget and this Court's actions.

The Treasurer notes that the May consensus revenue estimating conference is upcoming. Response at 7-8. To the extent that the Treasurer is contending that it would be best to determine the correct meaning of MCL 206.51(1) as soon as possible as a matter of comity to the Legislature and the Executive, Plaintiffs/Appellants agree.

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[1] Justice Viviano has questioned whether an absolute tie is the right standard to reach ambiguity. *Griffin v Swartz Ambulance Serv*, 947 NW2d 826, Supreme Court No 159205 (Sept. 11, 2020) (dissenting from denial of leave to appeal). In that dissent, he cited to a book review by then Judge Kavanagh. *Id*. at n 38 (citing Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2136-37 (2016)). Judge Kavanagh cast doubt upon the idea that clarity and ambiguity could be easily differentiated and implicitly rejected the idea that this differentiation could be done with the precision necessary to identify ties. *Id*. at 2137 ("Discerning the level of ambiguity in a given piece of statutory language is often not possible in any rational way."). He claimed to personally apply something "approaching a 65-35[%] rule" and claimed to have colleagues who might say a statute is clear it if is "90% to 10%" clear while others "appear to apply a 55-45[%] rule." *Id*.

But, again, Michigan's current rule is 51%. *People v Hall*, 499 Mich 446, 454 (2016); *Lansing Mayor v Pub Serv Comm'n*, 470 Mich 154, 166 (2004).

## B. Construction of MCL 206.51(1)

### 1. Interaction of MCL 206.51(1)(b) and (1)(c).

The Treasurer contends that the underlined portion of MCL 206.51(1)(b) will be rendered nugatory if any income tax rate cut does not revert back to 4.25% the next year: "(b) Except as otherwise provided under subdivision (c), on and after October 1, 2012, 4.25%."

When the 2015 Legislature created MCL 206.51(1)(b) and (c), it set the conditional test for an income tax rate cut to begin for tax year 2023. But it had no idea when or if an income tax rate cut would occur. It could have been in 2023 (it was), it could have been in 2024, 2025, or perhaps never. Thus, it is the first triggering of MCL 206.51(1)(c) that sets the outer temporal limit for the last 4.25% tax year. The underlined language accounts for the contingency that the 2015 Legislature could not know when the first income tax rate cut under MCL 206.51(1)(c) would occur. Until that first income tax rate cut occurs, the income tax rate will remain at 4.25% under MCL 206.51(1)(b).

Compare the language of MCL 206.51(1)(b) with MCL 206.635(f) and (g) (another portion of the income tax statute dealing with the tax on insurance companies): "(f) Calculate the **rate reduction for the current calendar year** by. . . . (g) Calculate **the tax rate for the current calendar year** by. . . ." *Id*. (emphasis added). Both MCL 206.635(f) and (g) contain explicit language that any tax rate cut is for that particular year only. MCL 206.51(1)(b) does not. If the Treasurer is correct, why did the 2015 Legislature not add similar language to MCL 206.51(1)(c)?

### 2. Meaning of "current rate" in MCL 206.51(1)(c).

The Treasurer argues:

> "Current" must also be read in context of MCL 206.51(1)(a) and (b), which provide for different rates effective at different times. In particular, the rate was 4.35% "[o]n and after October 1, 2007 and before October 1, 2012," and 4.25% "[e]xcept as otherwise provided under subdivision (c), on and after October 1,

> 2012." MCL 206.51(1)(a) and (b). "Current," then, recognizes that Subsections (1)(a) and (b) provide a different rate for different years, and ensures that the rate reduction applies to the base rate arrived at by reading the statute beginning at Subsection (1)(a) and then (1)(b) based on the current/present tax year, i.e., the rate that "exist[s] at the present time."

Response at 18. This makes no sense. In 2015, when the Legislature passed what became 2015 PA 180, MCL 206.51(1)(a) created a limited time period – between October 1, 2007, and October 1, 2012. MCL 206.51(1)(c) begins "(c) For each tax year beginning on and after January 1, 2023." Obviously, both dates in MCL 206.51(1)(a) are before January 1, 2023. So, the fact that "Subsections 1(a) and (b) provide a different rate for different years" is irrelevant. The **starting** income tax rate on January 1, 2023, necessary for the MCL 206.51(1)(c) analysis, can only be MCL 206.51(1)(b)'s 4.25%. Thus, the Treasurer has nothing for the word "current" to do.

The Treasurer also makes an oblique reference to the Court of Appeals' new future-looking surplusage canon exception stating: "The Court of Appeals also correctly explained that this construction recognizes that the income tax rate has changed over time." Response at 18. But the Treasurer did not provide any other cases where this exception to the surplusage canon was applied.

The lack of support is not surprising because the concept is contrary to basic principles of statutory interpretation. Statutes are construed as they presently exist, not as they might exist in the indefinite future.

To achieve the Treasurer's construction, all the 2015 Legislature had to do was strike the word "current" and replace it with "4.25%." Instead, the Treasurer relies on the 2015 Legislature's purported desire to anticipate future income tax rates under MCL 206.51(1)(c). This theory would require that future Legislatures would use the indirect method of amending MCL 206.51(1)(b)

instead of directly amending MCL 206.51(1)(c) by replacing "current" with the new desired numeric income tax rate starting point.

**3. Improper attempt to insert a policy argument into the construction of MCL 206.51(1).**

The Court of Appeals stated: "We express no view regarding what is an appropriate policy on income taxation. Our analysis is based on the statutory text rather than policy considerations." Slip Opinion at 13. Undeterred, the Treasurer states:

> In effect, in the years where the State of Michigan receives a tax windfall, the burden on taxpayers is reduced. The reduction in the rate is premised on a single event, not a continuing one, so that the statute's context indicates that the rate reduction should be a single year event. An interpretation of "current" that carries previous reductions forward would transform a single-year windfall into a permanent reduction. . . .

Response at 17-18.

An opposing mainstream policy argument is that when there is an extraordinary revenue uptick then a permanent income tax rate cut would be appropriate. Thus, Plaintiffs/Appellants have a policy argument that is at least as strong. But this Court has held that disagreement based on policy is irrelevant. *Lansing Mayor v Pub Serv Comm'n*, 470 Mich 154, 161 (2004).

**4. The Court of Appeals erred where it failed to consider past legislation.**

The Treasurer defends the Court of Appeals' error in failing to consider 1983 PA 15 and other past legislation.

Statutory analysis in Michigan is a multi-step process. First, a court must examine whether the wording of a statute is 100% clear, and if so, the analysis ends. Second, if one interpretation is 51% to 99% clear, then that interpretation prevails and the analysis ends. Third and last, where

there an ambiguity through either a tie or irreconcilable conflict, the court applies ambiguity canons and reaches a decision.[2] The instant matter is a step 2 and/or step 3 case.

Once in step 2, **all** clarity tests may be used. In his statutory interpretation article, Judge Kavanaugh stated: "judges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among a wealth of canons of construction." Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev at 2118-19. Neither the Court of Appeals nor the Treasurer has provided a principled justification for not considering all clarity arguments in step 2. It is only at the end of the step 2 analysis that a determination of clarity (really 51% to 99% clarity) versus ambiguity (tie or irreconcilable conflict) is made.

Plaintiffs/Appellants past-practice argument had focused on income tax rate legislation such as 1983 PA 15 (the most similar to the current situation), 1977 PA 44, 1982 PA 155, and 1993 PA 328. See Application for Leave to Appeal at 33. But legislation outside of the income tax supports Plaintiffs/Appellants as well. MCL 400.111c(1)(b) of the Social Welfare Act uses "current rate" to indicate the most recent interest rate when calculating interest on a judgment in favor of the state against a provider. MCL 550.2008 of the Elder Prescription Insurance Coverage Act indicates that the Department of Community Health and Human Services is to file quarterly reports with the Legislature to determine if the current (most recent) rate of expenditures for the program will exceed appropriations. MCL 700.3917(1) of the Estates and Protected Individuals

[2] A recent addition to the legislative history that should be considered if MCL 206.51(1) is found to be ambiguous is former Governor Snyder's Op-ed discussing his thoughts and actions related to the 2015 legislation. https://www.detroitnews.com/story/opinion/2024/04/24/rick-snyder-we-signed-a-2015-tax-cut-into-law-meant-to-be-permanent/73438606007/ (last visited May 13, 2024).

Code, which is a program to defray drug costs for seniors, requires county treasurers to "deposit the money in a county depository at the current rate of interest." None of these provisions take "current rate" to mean the rate at the time the legislation was passed.

**5. The Court of Appeals' erroneous economic theory does not lead to application of the surplusage canon.**

The Treasurer does not challenge the calculations or budget data Plaintiffs/Appellants put forward in their Application for Leave to Appeal and admits the possibility that "MCL 206.51(1)(c) could be triggered multiple times ultimately compounding reductions until the rate becomes zero" is "remote." Response at 19. But the Treasurer still contends this remote possibility is sufficient to trigger the surplusage canon. Such a holding would elevate the judiciary's relatively narrow and targeted budgetary knowledge over the Legislature's economic and appropriations expertise.

**C. MCR 7.305(B) factors**

The Court of Appeals decision is published. As a result, the Court of Appeals' improper application of the surplusage canon and its further decision to prematurely end the step 2 clarity analysis risks the upheaval of how Michigan courts interpret statutes. Further, if the Court of Appeals improper interpretation of MCL 206.51(1) stands, up to 5 million taxpayers cumulatively will be denied approximately $700 million on an annual basis. This meets the criteria of MCR 7.305(B).

## RELIEF REQUESTED

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

Respectfully Submitted,

Dated: May 13, 2024

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**STATEMENT OF COMPLIANCE WITH MCR 7.305(C)(3), 7.312(A) and MCR 7.212(B)**

I hereby certify that this brief is compliant with MCR 7.305(C)(3). The brief contains 2250 words in the sections specified by MCR 7.212(B)(2).

Dated: May 13, 2024

/s/ Patrick J. Wright
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