IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Murphy, P.J., and Gleicher and Letica, JJ.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP), AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU), MICHIGAN PARENTS FOR SCHOOLS, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS, MICHIGAN ASSOCIATION OF INTERMEDIATE SCHOOL ADMINISTRATORS, MICHIGAN SCHOOL BUSINESS OFFICIALS, MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, MIDDLE CITIES EDUCATION ASSOCIATION, MICHIGAN ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS ASSOCIATION, KALAMAZOO PUBLIC SCHOOLS, and KALAMAZOO PUBLIC SCHOOLS BOARD OF EDUCATION,

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN, GOVERNOR, DEPARTMENT OF EDUCATION, and SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

MSC No. 158751

COA No. 343801

Trial Ct No. 17-000068-MB

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

BRIEF ON APPEAL – PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

[CAPTION CONTINUED ON NEXT PAGE]

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION

This Court has jurisdiction over Plaintiffs' appeal pursuant to MCR 7.303(B)(1). On April 26, 2018, the Court of Claims issued an "Opinion and Order" declaring that MCL 388.1752b violates Const 1963, art 8, § 2 and enjoining Defendants "from distributing any funds under the statute." (App 2a). Pursuant to MCR 7.203(A) and MCR 7.204(A), Defendants filed a timely claim of appeal to the Court of Appeals, which reversed the Court of Claims' decision in a 2-1 opinion issued on October 16, 2018. (App 16a). Plaintiffs filed a timely application for leave to appeal on November 27, 2018, and this Court granted leave on June 24, 2019. (App 42a).

STATEMENT OF QUESTION INVOLVED

Const 1963, art 8, § 2 expressly states that "[n]o public monies shall be appropriated or paid . . . directly or indirectly to aid or maintain any . . . nonpublic . . . school," and that no public funding "shall be provided, directly or indirectly, to support . . . the employment of any person at any such nonpublic school."

Does MCL 388.1752b violate Article 8, § 2 by appropriating public funds to be paid directly to nonpublic schools to reimburse them for the costs of complying with state mandates that apply to all Michigan schools, when compliance with such mandates is essential to nonpublic schools' operation and, indeed, their very existence, and the funds may be used to pay the wages of nonpublic school employees?

The Court of Claims answered: Yes.

In a 2-1 decision, the Court of Appeals majority answered: No.

The Court of Appeals dissent answered: Yes.

Plaintiffs answer: Yes.

I. INTRODUCTION

This case implicates the Michigan electorate's decision in 1970 to amend the Michigan Constitution to prohibit financial aid to nonpublic schools, and whether the Legislature has disregarded the voters' will by passing a statute that does just that.

In relevant part, Const 1963, art 8, § 2 provides that no "public monies or property shall be appropriated or paid" either to "aid or maintain" a nonpublic school, or to "support . . . the employment of any person at any such nonpublic school." Despite these explicit prohibitions, the Legislature enacted MCL 388.1752b ("§ 152b"), which appropriates funds to be paid directly to nonpublic schools to reimburse them for the costs they incur, primarily in the form of employee wages, in complying with various state mandates that apply to all schools in Michigan—public or private.

For that reason, the Court of Claims appropriately declared § 152b to be unconstitutional. The Court of Appeals, however, reversed in a 2-1 published decision. The majority said that it "might very well agree" that § 152b violates Article 8, § 2 were it not for this Court's decisions in *Traverse City Sch Dist v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971), and *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). According to the majority, those decisions stand for the proposition that direct public funding of private schools is permissible so long as the funding is ostensibly for students' "health, safety, and welfare," as opposed to "educational" purposes.

But as the Court of Appeals dissent correctly explained, such a distinction finds no support either in the constitutional text or this Court's decisions. The plain text of Article 8, § 2 "forbids publicly-funded financial aid payments to nonpublic schools." (COA Concurrence/Dissent at 2, App 34a). As for this Court's decisions applying that text, the Court has simply drawn a line between aid that is a "'primary' element of the support and maintenance

of a private school," which is forbidden, and that which results in only an "incidental" benefit to a private school, which is permissible. *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48 n 2, citing *Traverse City Sch Dist*, 384 Mich at 413. In *Advisory Opinion re Constitutionality of 1974 PA 242*, this Court explained that incidental benefits are those that are "useful only to an otherwise viable school," whereas primary benefits are those that are necessary "element[s] required for any school to exist." *Id*. at 48.

In distinguishing between primary and incidental benefits, the Court has also stressed the element of "control." For example, when public authorities use their own employees, facilities, or equipment to provide "auxiliary services" (e.g., nursing or counseling services, or crossing guards at nearby intersections) to students who just so happen to attend private school, benefits to the school are incidental. On the other hand, when activities or employees are controlled, selected, or administered by the private school, public funding for the private school is prohibited.

The Court of Claims properly applied these principles in striking down § 152b. As the Court of Claims explained, the funds appropriated under § 152b are provided directly to nonpublic schools, and their use is entirely within the private schools' discretion. Thus, the element of "control" by public authorities is lacking. Moreover, § 152b funds directly subsidize the wages of the private school employees responsible for ensuring compliance with the mandates at issue—mandates that must be met in order for "any school to exist." That is not "incidental" aid, but rather the prohibited "passage of public funds into private school hands for purposes of running the private school operation." *Traverse City Sch Dist*, 384 Mich at 419-420. As a result, § 152b plainly violates Article 8, § 2's prohibition against public funding of private schools. In reaching a contrary conclusion, the Court of Appeals majority disregarded both

Article 8, § 2's plain text and this Court's directives as to how that language is to be applied. This Court should, therefore, reverse the Court of Appeals majority's decision and reinstate the Court of Claims' decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. In 1970, the voters adopted Const 1963, art 8, § 2 (Proposal C), to prohibit public funding of nonpublic schools.

In 1970, the Legislature and then-Governor William G. Milliken proposed appropriating $22 million in direct aid to pay for the salaries of lay teachers at nonpublic schools. See generally *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 580-582; 566 NW2d 208 (1997). In response, Plaintiff Council of Organizations and Others for Education about Parochiaid ("CAP")[1] drafted "Proposal C" and secured its placement on the November 1970 regular election ballot. The voters ratified Proposal C, and it took effect on December 19, 1970.

Proposal C added a second paragraph to Article 8 of the 1963 Constitution:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. [Const 1963, art 8, § 2.]

[1] At the time of the 1970 vote, Plaintiff Council of Organizations and Others for Education About Parochiaid (CAP) was simply known as the "Council Against Parochiaid."

B. Despite Article 8, § 2, the Legislature enacted MCL 388.1752b, which appropriates funds to reimburse nonpublic schools for the cost of complying with various state mandates.

On June 27, 2016—despite Proposal C—Governor Rick Snyder signed into law a $16 billion education budget that included a $2.5 million appropriation to reimburse nonpublic schools for the cost of complying with a panoply of laws and regulations. The new law was codified at MCL 388.1752b. (App 45a). The Court of Appeals majority accurately summarized the statute's history and key provisions:

> The statute at issue, MCL 388.1752b, was first enacted by the Legislature pursuant to 2016 PA 249 and made effective October 1, 2016. Pursuant to 2017 PA 108, the Legislature amended MCL 388.1752b, effective July 14, 2017, making some substantive changes to the statute.[2] Under the amended version of the statute, it allocates general fund money 'to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). With respect to the Legislature's characterization of the appropriated funds, they "are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section." MCL 388.1752b(7). Additionally, [§ 152b states that] the funds allocated under the statute "are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student." MCL 388.1752b(8).
>
> The Department of Education (DOE) is tasked with publishing "a form for reporting actual costs incurred by a nonpublic school in complying with a health, safety, or welfare requirement mandated under state law containing each health, safety, or welfare requirement mandated by a law or administrative rule of this state applicable to a nonpublic school and with a reference to each relevant provision of law or administrative rule for the requirement." MCL 388.1752b(2). And "a nonpublic school seeking reimbursement for actual costs incurred in complying with a health, safety, or welfare requirement under a law or administrative rule of this state" must timely submit a completed reporting form

[2] See July 14, 2017 amendment to MCL 388.1752b (2017 PA 108). (App 48a).

published by the DOE. MCL 388.1752b(3).[3] "The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state." MCL 388.1752b(4). The DOE is then directed to distribute funds to each of the nonpublic schools that timely submitted a completed form. *Id*. And with respect to actual costs, MCL 388.1752b(9) provides:

> For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state identified by the department . . . and is to be calculated in accordance with the form published by the department . . ., which shall include a detailed itemization of costs. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing a specific task regardless of whether that individual is available and regardless of who actually performs a specific task. Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs . . ., fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.[4]

In footnote two of its opinion, the Court of Appeals majority listed the subjects covered by the various mandates for which reimbursement is available (according to the DOE form):

> hazardous chemicals, MCL 29.5p; fire/tornado/lockdown/shelter in place, MCL 29.19; inspections of certain motor vehicles by state police, MCL 257.715a; pupil transportation, MCL 257.1807 to MCL 257.1873; food law, MCL 289.1101 to MCL 289.8111; pesticide application, MCL 324.8316; concussion education, MCL 333.9155 and MCL 333.9156; immunizations, MCL 333.9208; licensure of speech pathologists, MCL 333.17609; release of information to parent covered by personal protection order, MCL 380.1137a; immunization statement and vision screening, MCL 380.1177 and MCL 380.1177a; inhalers and epinephrine auto injectors, MCL 380.1179 and MCL 380.1179a; criminal background checks, MCL 380.1230 to MCL 380.1230h; noncertified teachers and counselors, MCL

[3] The DOE form in effect at the time of the Court of Claims' decision can be found at App 51a.

[4] COA Op at 2-4, App 17a-19a (footnotes omitted).

> 380.1233; products containing mercury, MCL 380.1274b; teacher certification and administrator certificates, MCL 380.1531 to MCL 380.1538; convicted persons holding board approval, MCL 380.1539b; compulsory school attendance, MCL 380.1561; attendance records, MCL 380.1578; postsecondary enrollment options, MCL 388.514; postsecondary enrollment information and counseling, MCL 388.519 and MCL 388.520; private, denominational, and parochial schools, MCL 388.551 to MCL 388.557; school building construction, MCL 388.851 to MCL 388.855b; federal asbestos building regulations, MCL 388.863; career and technical prep programs and enrollment, 388.1904; career and technical prep information and counseling, MCL 388.1909 and MCL 388.1910; playground equipment safety, MCL 408.681 to MCL 408.687; youth employment standards and permits, MCL 409.104 to MCL 409.106; child care and criminal history and background, MCL 722.115c; child protection laws, MCL 722.621 to MCL 722.638; annual school bus inspections, Mich Admin Code, R 257.955; pesticide use, Mich Admin Code, R 285.637; food establishment manager certification, Mich Admin Code, R 289.570.1 to Mich Admin Code, R 289.570.6; blood-borne pathogens, Mich Admin Code, R 325.70001 to Mich Admin Code, R 325.70018; auxiliary services notification, Mich Admin Code, R 340.293; boarding school requirements, Mich Admin Code, R 340.484; emergency-situation permits, Mich Admin Code, R 390.1145; mentor teachers for noncertified instructors, Mich Admin Code, R 390.1146; and school counselor certification, Mich Admin Code, R 390.1147.[5]

As the Court of Appeals majority observed, the Legislature amended § 152b again for 2018, after the Court of Claims' decision. See 2018 PA 265. (App 53a). "However, the new changes only concern some dollar figures, the alteration of applicable fiscal years, and the carrying over of unexpended funds from previous years." (COA Op at 2 n 1, App 17a).

C. Plaintiffs filed suit challenging § 152b's constitutionality.

In March 2017, Plaintiffs filed a lawsuit challenging the constitutionality of § 152b on two grounds: (1) that it violates Const 1963, art 8, § 2's prohibition against "aid[ing] or maintain[ing]" private schools and "support[ing] . . . the employment of any person at any such nonpublic school"; and (2) that it also violates Const 1963, art 4, § 30's requirement that an expenditure of public money for private purposes be approved by a two-thirds majority vote in

[5] *Id*. at 3 n 2, App 18a.

both houses of the Legislature. The parties filed cross-motions for summary disposition in April and May 2017, which they later supplemented in March and April 2018.

D. The Court of Claims found that § 152b violated Article 8, § 2, declared it unconstitutional, and entered a permanent injunction.

On April 26, 2018, the Court of Claims found § 152b, on its face, to violate Const 1963, art 8, § 2 and entered a final judgment and permanent injunction prohibiting Defendants from distributing any funds under the statute. (COC Op & Order, App 2a). As the Court of Claims explained, § 152b violates Article 8, § 2 because it authorizes the "direct payment of public funds to nonpublic schools." (*Id.* at 10, App 11a). Moreover, "these appropriations aid or maintain the nonpublic schools by supporting the employment of persons at nonpublic schools." (*Id*.). In reaching its decision, the Court of Claims rejected Defendants' challenge to Plaintiffs' standing (*id*. at 5-6, App 6a-7a), and declined to address whether § 152b also violates Const 1963, art 4, § 30, finding it to be unnecessary to do so. (*Id*. at 14 n 11, App 15a).

E. The Court of Appeals reversed in a 2-1 published opinion.

After agreeing to expedite Defendants' appeal, the Court of Appeals issued a 2-1 published opinion on October 16, 2018. (App 16a). The Court of Appeals majority agreed with the Court of Claims that Plaintiffs had standing, but disagreed with the Court of Claims that § 152b is unconstitutional on its face. Instead, the majority concluded that reimbursement of certain costs is permissible *if* they relate to a "health, safety, or welfare mandate" that "(1) is, at most, merely incidental to teaching and providing educational services to private school students (non-instructional in nature), (2) does not constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement." (COA Op at 2, App 17a).

According to the majority, this Court in *Traverse City Sch Dist*, 384 Mich 390, and *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, narrowly interpreted Const 1963, art 8, § 2 so as to prohibit the use of public funds only in relation to providing "educational services" at private schools. (*Id*. at 12, App 27a). By contrast, the majority reasoned, public funding *is* permissible if it relates to "health and safety measures." (*Id*.). In light of that distinction, the majority reversed the Court of Claims' decision and remanded for an examination, under the majority's three-part test, of each "'actual cost' for which a nonpublic school may be reimbursed." (*Id*. at 16, App 31a).[6] The majority also ordered the Court of Claims to "examine Plaintiffs' contention that MCL 388.1752b violates Const 1963, art 4, § 30." (*Id*. at 17, App 32a).

Judge Gleicher concurred with the majority's standing analysis, but dissented from the majority's conclusions with respect to Const 1963, art 8, § 2. She explained that the text of Article 8, § 2 plainly prohibits the "direct payment of public funds to nonpublic schools," and that nothing in this Court's opinions in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242* suggested otherwise. (COA Concurrence/Dissent at 4-7, App 36a-39a). Instead, those decisions reinforced that "in passing Proposal C the people meant to entirely curtail public financial support for nonpublic school operations," regardless whether aid payments "are intended to cover 'education' or any of the myriad costs that a business must

[6] As examples of "actual costs" that it believed would be reimbursable under its "test," the majority cited the cost of "[c]onducting criminal background checks, disposing of instruments containing mercury, and maintaining epinephrine auto-injectors." (*Id*. at 14, App 29a). "[W]hile mandatory," the majority reasoned, these requirements "have nothing directly to do with teaching and educating students." (*Id*.). These examples illustrate the flawed nature of the majority's "test," under which financial "aid" presumably could be provided to nonpublic schools for anything besides "instruction." As discussed below, that would flatly contradict the plain text of Const 1963, art 8, § 2, and is not at all what this Court held in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*.

bear." (*Id*. at 6, App 38a). Because compliance with state mandates is essential to a nonpublic school's existence and operation, the dissent would have affirmed the Court of Claims' determination that reimbursing nonpublic schools for those costs is constitutionally prohibited. (*Id.* at 7-9, App 39a-41a). The dissent further noted that § 152b separately violates Const 1963, art 8, § 2 because it "support[s] the employment of any person" at a nonpublic school by reimbursing their "actual wages." (*Id*. at 9, App 41a).

This Court granted leave to appeal on June 24, 2019. (App 42a).

III. SUMMARY OF ARGUMENT

Article 8, § 2 speaks plainly and unambiguously when it says that "[n]o public monies shall be appropriated or paid . . . directly or indirectly to aid or maintain any . . . nonpublic . . . school," and that no public funding "shall be provided, directly or indirectly, to support . . . the employment of any person at any such nonpublic school." As the Court of Appeals dissent aptly observed, those words "broo[k] no exceptions or tests." (COA Concurrence/Dissent at 3, App 35a). "The 'common understanding' of those words is that the public funds may not be used to help nonpublic schools stay in business." (*Id*.).

MCL 388.1752b contravenes that common understanding in two ways. First, the appropriations provide public funds that must be paid directly to nonpublic schools. And because the payments are used to help nonpublic schools remain in operation by complying with state mandates, they "aid or maintain" nonpublic schools. Second, the appropriations support the employment of nonpublic school employees by reimbursing nonpublic schools for their "actual cost" of complying with state mandates. Those costs are calculated in part based on the "hourly wage for the employee or employees performing [the] task or tasks." MCL 388.1752b(9). Thus, § 152b directly subsidizes the wages of nonpublic school employees. In sum, by directly financing nonpublic schools' compliance with state mandates and paying the wages of nonpublic

school employees who carry out that function, § 152b violates the plain language of 1963 Const, art 8, § 2.

In *Traverse City Sch Dist*, this Court recognized two narrow circumstances in which Article 8, § 2's prohibition does not apply, but neither saves § 152b. The Court first held that public school teachers could teach non-religious subjects to nonpublic school students, either on public school or nonpublic school grounds (so-called "shared time" instruction). See *Traverse City Sch Dist*, 384 Mich at 413-417. The Court further held that Article 8, § 2 does not prohibit public school districts from providing "auxiliary services," such as nursing services and drivers training, to students who attend nonpublic schools. *Id*. at 417-421.

In both of those instances, there is no violation of Article 8, § 2 because public authorities remain in "control" of the public school teachers providing the shared-time instruction and the auxiliary services being supplied by public employees. *Id*. at 414, 416, 420. Those situations are not remotely comparable to how § 152b operates, as the appropriations made under § 152b flow directly to nonpublic schools and are entirely within their control. As a result, § 152b runs afoul of Article 8, § 2.

In creating a "test" that approves of direct aid payments to nonpublic schools so long as they do not relate to "teaching and providing educational services" (COA Op at 2, App 17a), the Court of Appeals majority misread both *Traverse City Sch Dist* and this Court's later decision in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41. In the latter case, the Court held that, unlike the shared time and auxiliary services at issue in *Traverse City Sch Dist*, supplying textbooks and supplies to nonpublic schools *does* violate Article 8, § 2.

Despite the Court of Appeals majority's view, the line drawn by this Court is not an educational one. In other words, public funding of nonpublic schools is not permissible simply

because it is unrelated to instruction of students. That is not what this Court meant in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, when it referred to shared time instruction and auxiliary services as constituting "aid that is only 'incidental' to the private schools support and maintenance." *Id.* at 48 n 2, citing *Traverse City Sch Dist*, 384 Mich at 413. Such aid provides only an "incidental" benefit because it is provided to students, not the school itself, and is "useful only to an otherwise viable school." *Id*. at 49. Thus, it is not a "primary and essential elemen[t] of a private school's existence." *Id*.

Here, on the other hand, the mandates at issue must be complied with in order for "any school to exist." *Id.* As the Court of Appeals dissent explained, the public funds appropriated by § 152b thus "directly and indirectly assis[t] nonpublic schools in keeping their doors open," rendering the statute "unconstitutional for that simple reason." (COA Concurrence/Dissent at 8, App 40a). Additionally, § 152b expressly authorizes the use of public funds to pay the wages of nonpublic school employees, a clear violation of Article 8, § 2 that finds no support in *Traverse City Sch Dist* or *Advisory Opinion re Constitutionality of 1974 PA 242*.

IV. ARGUMENT

A. Standard of Review

MCL 388.1752b's constitutionality is a question of law that is reviewed de novo. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

While the Court's authority to declare a statute unconstitutional should be used sparingly, "the power of the legislature is not without limits." *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 666; 232 NW2d 636 (1975), overruled in part on other grounds by *Harvey v Michigan*, 469 Mich 1, 14; 664 NW2d 767 (2003), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 176; 2 L Ed 60 (1803) ("[T]hat those limits may not be mistaken, or forgotten, the constitution is written."). Under the separation of powers principles of Const 1963, art 3, § 2,

"courts are entrusted with the responsibility to review and the power to nullify legislative acts which are repugnant to the constitution." *Id*. As this Court long ago observed in *Hamilton v Vaughan*, 212 Mich 31; 179 NW 553 (1920):

> The power of judicial veto is based upon no constitutional provision directly conferring it, but arises only from the impelling logic of our system of government providing for a distinctively judicial department as one of its three co-ordinate branches, created for the exclusive exercise of judicial functions. . . . When, in the exercise of its judicial functions and required to decide a controversy in conformity with existing law, the court, as sometimes occurs, may find itself confronted with the necessity of choosing between two applicable, but conflicting laws, one a constitutional provision adopted by the people, in whom rests the sovereign power, and the other an enactment of the legislative body, which owes its existence to the Constitution, one must be set aside. Such a situation necessitates and authorizes the court to reject the secondary law emanating from the Legislature if in conflict with limitations imposed by the Constitution adopted by the people. [*Id*. at 37-38.]

Heeding these principles is even more important in this case because Const 1963, art 8, § 2 was not just *ratified* by the people—it was *proposed* by the people in an exercise of the "political power" specifically reserved to them under Const 1963, art 1, § 1 ("All political power is inherent in the people. . . ."). See Const 1963, art 12, § 2 (providing for amendment by petition). As this Court recently recognized, "there is no more constitutionally significant event than when the wielders of '[a]ll political power' under [the Michigan Constitution] choose to exercise their extraordinary authority to directly approve . . . an amendment thereto." *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018), citing *Blank v Dep't of Corrections*, 462 Mich 103, 150; 611 NW2d 530 (2000) (Markman, J., concurring) (some quotation marks omitted).

B. MCL 388.1752b provides public funding to private schools in violation of Const 1963, art 8, § 2.

1. The "common understanding" of Article 8, § 2 is that no public money may be appropriated by the Legislature to "aid or maintain" nonpublic schools, yet § 152b does just that.

There is no dispute about the aim of MCL 388.1752b: to provide funding to "reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state." MCL 388.1752b(1). The problem is that Article 8, § 2 of Michigan's 1963 Constitution expressly prohibits public funding of nonpublic schools:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . . The legislature may provide for the transportation of students to and from any school. [Const 1963, art 8, § 2.][7]

In finding MCL 388.1752b to violate this provision, the Court of Claims reasoned that the statute "effectuate[d] the direct payment of public funds to nonpublic schools" to assist them in complying with mandates "that must be complied with in order for the nonpublic schools to function," and that these appropriations "aid or maintain the nonpublic schools by supporting the employment of persons at nonpublic schools." (COC Op & Order at 10-12, App 11a-13a). The Court of Appeals concurrence/dissent agreed, concluding that "[b]y passing this statute, the

[7] The omitted portion states: "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students." That portion of Article 8, § 2 was struck down in *Traverse City Sch Dist*, 384 Mich 390, as violative of the free exercise and equal protection guarantees of the First and Fourteenth Amendments of the United States Constitution. *Id*. at 414-415.

Legislature opened the door to direct payments to nonpublic schools intended to help those schools do business," and that this renders the statute unconstitutional. (COA Concurrence/Dissent at 2, App 34a).

That conclusion follows readily both from the unambiguous text of Article 8, § 2, as well as the circumstances surrounding its adoption. The objective in interpreting Article 8, § 2 "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Citizens Protecting Michigan's Constitution*, 503 Mich at 61 (citations and internal quotations omitted). Justice Cooley long ago described this rule of "common understanding":

> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed.'"[8]

In discerning the common understanding of constitutional text, the "first rule" is to apply its "plain meaning . . . as understood by the people who adopted it." *People v Tanner*, 496 Mich 199, 224; 853 NW2d 653 (2014) (citation and internal quotation marks omitted).[9] Courts may also consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished[.]" *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014) (citations and internal quotation marks omitted).

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[8] *Traverse City Sch Dist*, 384 Mich at 405, quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (emphasis in *Traverse City Sch Dist*).

[9] See also *Wayne Co v Hathcock*, 471 Mich 445, 468–469; 684 NW2d 765 (2004) (explaining that the Court "typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification"); *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003) ("[I]n analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face.").

The text of Article 8, § 2 is straightforward. It expressly provides that "[n]o public monies . . . shall be appropriated or paid . . . directly or indirectly to aid or maintain any private . . . school," or to "support . . . the employment of any person at any such nonpublic school." As the Court of Appeals concurrence/dissent correctly observed, these words are "clear, cogent, and commanding":

> No public money may be appropriated by the Legislature "directly or indirectly to aid or maintain" a nonpublic school. Const 1963, art 8, § 2. No public money may be provided "directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . . ." *Id*. The natural and ordinary meaning of those words—today and in 1970—forbids publicly funded financial aid payments to nonpublic schools. [COA Concurrence/Dissent at 1-2, App 33a-34a.]

This Court viewed the constitutional text in a similar fashion in *Traverse City Sch Dist*, 384 Mich 390, explaining that the voters understood it to prohibit, among other things, "public money 'to aid or maintain' a nonpublic school" and "public money to employ any one at a nonpublic school." *Id*. at 411.

That conclusion finds additional support in "the circumstances surrounding" Article 8, § 2's adoption. As summarized in the Court of Appeals concurrence/dissent:

> Before Proposal C passed, the Legislature had appropriated funds to nonpublic schools to pay lay teachers to teach secular subjects in nonpublic schools. The purpose of these appropriations was "clearly, plainly and unambiguously" to aid nonpublic schools in meeting the increasing costs of education. The appropriation of public funds to aid nonpublic schools did not sit well with the people, and Proposal C ended it. After it passed, the Supreme Court struck down as unconstitutional the appropriation statute that it had approved just a year earlier. [COA Concurrence/Dissent at 1-2, App 33a-34a (citations omitted).]

With that "common understanding" in mind, the appropriations under MCL 388.1752b contravene it in at least two ways. *First*, the statute specifically provides for direct payments to nonpublic schools to assist them in complying with state mandates. See MCL 388.1752b(1) ("From the general fund money . . . there is allocated an amount . . . to reimburse actual costs

incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state."). As the Court of Appeals concurrence/dissent properly recognized, this "constitute[s] direct or indirect aid to a nonpublic school" because "[t]he money is intended to help nonpublic schools cover the overhead costs that result from adherence to governmental mandates." (COA Concurrence/Dissent at 8, App 40a). "Assisting nonpublic schools in this fashion," the concurrence/dissent observed, "is precisely what the voters sought to outlaw by passing Proposal C." (*Id.*).

Second, § 152b's appropriations "suppor[t] the employment of persons at nonpublic schools," as they reimburse private schools for their "actual cost" of complying with the statutory and regulatory mandates—an amount calculated, at least in part, on the basis of the "hourly wage for the employee or employees performing [the] task or tasks." See MCL 388.1752b(4) ("The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state."); MCL 388.1752b(9) ("For purposes of this section, 'actual cost' means the hourly wage for the employee or employees performing the reported task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state. . . ."). By creating what the Court of Appeals concurrence/dissent accurately described as a "mechanism for direct wage reimbursement," the Legislature's enactment of MCL 388.1752b helps nonpublic schools "mee[t] their payroll," and thus contravenes Article 8, § 2's plain text for that reason as well. (COA Concurrence/Dissent at 8-9, App 40a-41a).

2. The judicial gloss that the Court placed on Article 8, § 2 in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242* does not save § 152b.

The Court of Appeals majority suggested that it "might very well agree" with this textual analysis if it were not for this Court's interpretation of Article 8, § 2 in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*. Those decisions, however, do not save § 152b from constitutional infirmity.[10]

In *Traverse City Sch Dist*, 384 Mich 390, this Court placed something of a judicial gloss on Article 8, § 2, declining to adopt "a strict 'no benefits, primary or incidental' rule." *Id*. at 413 (citation omitted). Instead, as later summarized in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, the Court adopted what it considered to be a "reasonable construction," resulting in the following "rule" for "distinguishing between permissible and impermissible state assistance" to private schools:

> Proposal C forbids aid that is a 'primary' element of the support and maintenance of a private school but permits aid that is only 'incidental' to the private schools support and maintenance. [*Id*. at 48 n 2, citing *Traverse City Sch Dist*, 384 Mich at 413.]

In adopting this approach, the *Traverse City Sch Dist* Court cited its prior decision in *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82; 180 NW2d 265 (1970). There, the Court considered whether paying a portion of the salaries of certified lay teachers teaching secular subjects in religious schools violated the Establishment Clause of the 1963 Michigan Constitution:

> No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property

[10] Even if it could be argued that the appropriations in § 152b are permissible under an expansive reading of what *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242* allow, any conflict between the unambiguous language of the Michigan Constitution and those decisions must be resolved in favor of the constitutional text.

> belonging to the state be appropriated for any such purpose. [Const 1963, art 1, § 4.]

Finding there to be no violation of this prohibition, the Court reasoned that "'incidental benefits' to religious [schools] do not invalidate an otherwise constitutional statutory program plainly intended and formulated to serve a public purpose," and that adopting "a strict 'no benefits, primary or incidental' rule would render religious . . . schools completely ineligible for all State services." *Id*. at 104. The Court also expressed concern that such a rule "might result in a direct conflict with [the free exercise of religion]." *Id*. at 105.

The *Traverse City Sch Dist* Court found this "same reasoning" to apply to Article 8, § 2's prohibition against using public money to "aid or maintain" nonpublic schools or "support" the "attendance of any student or the employment of any person at any such nonpublic school." *Traverse City Sch Dist*, 384 Mich at 413. According to the *Traverse City Sch Dist* Court, drawing a distinction between "primary" and "incidental" support recognizes Proposal C's restrictions as being "keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation." *Traverse City Sch Dist*, 384 Mich at 419-420.

Applying this rationale in *Traverse City Sch Dist*, this Court addressed whether Article 8, § 2 prohibited either "shared time" instruction[11] or "auxiliary services." The Court first addressed shared time instruction, holding that it was permissible so long as "the ultimate and immediate control of the subject matter, the personnel and premises" are "under the public school system authorities." *Id*. at 415. This is so regardless of where the instruction is provided (i.e., at a public school, private school, or on leased or other premises under the control of the

[11] "[S]hared time is an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students . . . ." *Id*. at 411 n 3.

public school system), since "the location where [the public school teachers] perform some or all of their services . . . does not alter" the fact that the teachers "draw their check" from the public school where they regularly work, which remains the "location of their employment." *Id*. at 416. So, for example, Proposal C would not prohibit "special limited courses by experts in the employ of the public school system or public instruction at a planetarium or art collection of a nonpublic school." *Id*. at 416. It also would not prohibit "the regular visitations by noninstructional public school employees provided the purpose of the visitation is otherwise proper and they are not so extensive as to constitute the nonpublic school as the regular and usual work station of the public school employees." *Id.* at 416-417. In all events, "control" by public authorities—a concept that the Court repeatedly referenced throughout its opinion—is critical. See *id*. at 413-417.

The *Traverse City Sch Dist* Court also addressed the provision of "auxiliary services" to students attending private schools, namely:

> [H]ealth and nursing services and examinations; street crossing guards services; national defense education act testing services; speech correction services; visiting teacher services for delinquent and disturbed children; school diagnostician services for all mentally handicapped children; teacher counsellor services for physically handicapped children; teacher consultant services for mentally handicapped or emotionally disturbed children; remedial reading; and such other services as may be determined by the legislature. [*Id*. at 418 (citation and internal quotations omitted).]

The Court noted that, as "general health and welfare measures," auxiliary services "have only an incidental relation to the instruction of private school children." *Id*. And, again stressing the importance of control, the Court further reasoned that "auxiliary services are similar to shared time instruction in that private schools exercise no control over them," as they are "performed by public school employees under the exclusive direction of public authorities." *Id*. at 420. Consequently, the Court concluded, "the prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the

private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children." *Id*. at 419-420. In sum, to whatever extent a private school benefits from auxiliary services that are provided directly by the state to its students, such a benefit is incidental and thus not prohibited by Const 1963, art 8, § 2.

By contrast, this Court in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, held that providing textbooks and supplies to private schools *does* violate Article 8, § 2. The Court explained that while "[s]uch programs as shared time and auxiliary services . . . do help a private school compete in today's harsh economic climate," they are not "'primary' elements necessary for the school's survival as an educational institution" since they "are useful only to an otherwise viable school." *Id*. at 49. Textbooks and supplies, on the other hand, are "essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist." *Id*.

Even with the additional gloss that this Court placed on Article 8, § 2 in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, § 152b still violates it. As both the Court of Claims and the Court of Appeals concurrence/dissent recognized, the fundamental problem with § 152b is that it provides funds directly to nonpublic schools, thus removing the "control" that the Court found to be so important in *Traverse City Sch Dist*.[12] The "passage of [these] public funds into private schools hands," moreover, is "for purposes of

[12] See COC Op & Order at 10, App 11a (observing that the appropriations under § 152b "effectuate the direct payment of public funds to nonpublic schools" and that the statute "cedes a significant amount of control to the nonpublic schools"); COA Concurrence/Dissent at 2, App 34a ("By limiting shared time to circumstances in which absolute control over every dollar was retained by public schools, the [*Traverse City Sch Dist*] Court respected Article 8, § 2's command that no public aid enrich nonpublic school coffers, even indirectly. The shared-time services that passed constitutional muster in *Traverse City Sch Dist* are a far cry from the direct payment of public funds to nonpublic schools [under § 152b].").

running the private school operation," *Traverse City Sch Dist* at 419-420, insofar as no school—public or private—is permitted to operate in Michigan unless it complies with state mandates. And, as previously discussed, the public funds appropriated by § 152b directly subsidize the wages of the private school employees responsible for ensuring compliance with those mandates. (See COC Op & Order at 10, App 11a ("[T]he funds are expressly linked to wages owed to nonpublic school employees."); COA Concurrence/Dissent at 9, App 41a ("Any way I look at the statute's definition of 'actual costs,' it is impossible to avoid concluding that in enacting MCL 388.1752b, the Legislature created a mechanism for direct wage reimbursement.")).

The funding appropriated under MCL 388.1752b is therefore much different from the shared-time instruction and auxiliary services approved in *Traverse City Sch Dist*. Those services did not involve "the direct payment of public funds to nonpublic schools." (COA Concurrence/Dissent at 4, App 36a). Shared-time classes were instead "under the authority, control and operation of the public school system," *Traverse City Sch Dist*, 384 Mich at 415, such that "absolute control over every dollar was retained by public schools." (*Id.* at 5, App 37a). Similarly, "private schools exercise[d] no control over" auxiliary services. *Traverse City Sch Dist*, 384 Mich at 420. Instead, "[t]hey [were] performed by public employees under the exclusive direction of public authorities." *Id*. Thus, as the Court of Appeals concurrence/dissent explained, both sets of services "benefitted students, not institutions. . . . [N]onpublic schools were not monetarily enriched." (COA Concurrence/Dissent at 5, App 37a). Any resulting benefit to the schools was purely incidental.

In upholding § 152b's appropriations, the Court of Appeals majority badly misread *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*. According to the majority's newly-created "test," "the Legislature may allocate public funds to reimburse

nonpublic schools for actual costs incurred in complying . . . with a health, safety, or welfare mandate [that] (1) is, at most, merely *incidental* to teaching and providing educational services to private school students (non-instructional in nature), (2) does not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement." (COA Op at 2, App 17a). This "test" is fatally flawed for two reasons. *First*, it is contrary to the plain language of Article 8, § 2, which leaves no room for *any* public funding of a nonpublic school's operations. *Second*, its distinction between public funding for "educational services" and those that are "non-instructional in nature" finds no support even in the judicial gloss placed on Article 8, § 2 by *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*.

To be sure, the *Traverse City Sch Dist* Court stated that Article 8, § 2 does not categorically prohibit "general health and welfare" measures that "have only an incidental relation to the instruction of private school children." *Traverse City Sch Dist*, 384 Mich at 419. But the Court did not stop there. In approving the provision of auxiliary services, the Court stressed the importance of "control," observing that "auxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities." *Id*. at 420. Thus, providing auxiliary services did not result in "the passage of public funds into private school hands for the purposes of running the private school operations." *Id*. at 419-420. The Court never suggested that public funds could be directly funneled to aid or maintain private schools so long as they were not for "educational purposes"—nor does the constitutional text support such a construction. As the Court of Appeals concurrence/dissent correctly recognized, it does not matter whether the payments "are intended to cover 'education' or any of the myriad costs that a

business must bear." (COA Concurrence/Dissent at 6, App 38a). "[W]hether a cost borne by a nonpublic school is 'educational' or in the nature of overhead, the underlying principal remains the same: the Legislature may not appropriate funds to offset costs if doing so directly or indirectly 'aids or maintains' the nonpublic school." (*Id*. at 8-9, App 40a-41a).

The Court of Appeals majority's new test also shows that it misunderstood what this Court meant in *Advisory Opinion re Constitutionality of 1974 PA 242* when it distinguished between "incidental" benefits to nonpublic schools and providing programs that are "'primary elements for the school's survival as an educational institution." *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48-49. The Court in *Advisory Opinion re Constitutionality of 1974 PA 242* found that although shared time and auxiliary services "do help a private school compete," they provide only an "incidental" benefit because they "are useful only to an otherwise viable school." *Id*. at 49. That is because those services are provided to *students*, and thus only provide an incidental benefit to the school itself. On the other hand, books and school supplies, such as those at issue in *Advisory Opinion re Constitutionality of 1974 PA 242*, are "primary and essential elements of a private school's existence," *id*., and thus their public funding is prohibited.

Reimbursing private schools for the cost of meeting statutory and regulatory mandates is no different. By definition, those mandates "must be complied with in order for the nonpublic schools to function." (COC Op & Order at 12, App 13a). Otherwise, the nonpublic schools could not be "viable." The Court of Appeals concurrence/dissent persuasively illustrated this reality:

> According to the majority, allocating public funds to nonpublic schools to cover the costs of criminal background checks, maintaining epinephrine injectors, and disposing of instruments containing mercury, all mandated by state law, is permissible because these tasks "do[] not constitute a primary function or element

> necessary for a nonpublic school's existence, operation, and survival[.]" The majority's strained reasoning illustrates the infirmities of its test. Criminal background checks of school personnel (public and private) are a safety measure mandated by state law. Because they are a mandate, they are by definition a primary element necessary for a school's operation. Nor can I agree that criminal background checks are merely "incidental" to providing educational services. A school may not employ a teacher who has been convicted of a listed sex offense, as a teacher convicted of a listed sexual crime is not legally qualified to teach Michigan children. See MCL 380.1230(9). Employing legally qualified teachers is a primary function of a school. I cannot agree that criminal background check costs are either "incidental" to a school's existence, or fall outside a school's primary function. [COA Concurrence/Dissent at 7-8, App 39a-40a.]

By any stretch, offering financial assistance directly to nonpublic schools to help them remain "viable" is providing "aid," and is thus prohibited under Article 8, § 2.

As opposed to the Court of Appeals majority's "three-part test," which "does not engage the constitutional text or address [this Court's] pronouncements" in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, the concurrence/dissent properly identified the relevant factors leading to the unavoidable conclusion that §152b is unconstitutional on its face:

> The threshold inquiries in this case *should* be: does the reimbursement of state mandates constitute direct or indirect aid to a nonpublic school? Is the reimbursement of state mandates with public funds a "payment," "subsidy" or "grant" of public money "to support the attendance" of a student or "the employment of any person" at a nonpublic school? The answers to these questions are yes. A direct payment to a nonpublic school intended to offset the costs of doing business is aid, a payment, a subsidy, and a grant. The public money directly and indirectly assists nonpublic schools in keeping their doors open and meeting their payroll. It is unconstitutional for that simple reason. [COA Concurrence/Dissent at 8, App 40a.]

The concurrence/dissent is correct, and the Court of Appeals majority should be reversed.

C. Nullifying MCL 388.1752b would not violate the Free Exercise Clause and does not implicate *Trinity Lutheran*.

In a separate statement concurring with the Court's order granting leave to appeal in this case, Justice Markman suggested that nullifying § 152b "would perhaps be in tension with the Free Exercise Clause" as applied in *Trinity Lutheran Church of Columbia, Inc v Comer*, ___ US ___; 137 S Ct 2012; 198 L Ed 2d 551 (2017), and asked the parties to address "the impact, if any, of *Trinity Lutheran*." (App 43a).

Trinity Lutheran is not implicated here for the simple reason that Article 8, § 2 is neutral when it comes to religion. That was not the case in *Trinity Lutheran*. There, the Missouri Department of Natural Resources operated a program that reimbursed nonprofit organizations when they installed playground surfaces made from recycled tires. *Trinity Lutheran*, 137 S Ct at 2017. But the department "had a policy of categorically disqualifying churches and other religious organizations" from receiving grants. *Id*. The department defended its policy under Article 1, § 7 of the Missouri Constitution, which provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. [Mo Const, art 1, § 7.]

The Supreme Court held that prohibiting the receipt of funds solely on the basis of religious status violated the Free Exercise Clause of the First Amendment. *Id.* at 2025. In reaching that conclusion, the Court focused on how the state of Missouri "expressly require[d] Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program." *Id*. at 2024.

Article 8, § 2 of the Michigan Constitution is very different. In *Trinity Lutheran*, the state of Missouri "expressly discriminate[d] against otherwise eligible recipients by disqualifying

them from a public benefit solely because of their religious character." *Id*. at 2021. That was a violation of the free exercise of religion. See also *id*. at 2025 ("The Free Exercise Clause . . . generally prohibits laws that facially discriminate against religion . . . .") (Scalia, J., concurring). By contrast, Article 8, § 2 prohibits public aid to *all nonpublic schools*, regardless of whether a school is religious in nature. Indeed, it plainly speaks to providing aid to "any private, denominational or other nonpublic . . . school." Thus, *no nonpublic school*, church-affiliated or not, is eligible for state funding under Article 8, § 2.

The Supreme Court specifically distinguished this sort of prohibition from that at issue in *Trinity Lutheran*:

> In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment. [*Id*. at 2020.]

Article 8, § 2 therefore operates precisely as permitted by *Trinity Lutheran*: it is "neutral and generally applicable without regard to religion," and does not "single out the religious for disfavored treatment." On the contrary, religious private schools are treated *exactly the same* as nonreligious ones: they are *all* ineligible for public funding. *Trinity Lutheran* thus poses no obstacle to invalidating § 152b as a violation of Article 8, § 2. See also *Everson v Board of Education of Ewing*, 330 US 1, 16; 67 S Ct 504; 91 L Ed 711 (1947) (holding that a state "'cannot exclude individual Catholics, Lutherans, [Muslims], Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation,'" but observing that when it comes to providing school transportation, "we do not mean to intimate that a state could not provide transportation only to children attending public schools").

Justice Markman asks whether Article 8, § 2 might be considered "effectively indistinguishable from the Missouri provision" since the vast majority of private school students attend schools that are religious in nature. In *Traverse City Sch Dist*, the Court pegged the number at 98 percent. *Traverse City Sch Dist*, 384 Mich at 434. The percentage today is lower, and over 10,000 students attend secular private schools,[13] but the point is the same. Whether viewed through the lens of the Free Exercise Clause or the Equal Protection Clause, the constitutionality of a religiously-neutral prohibition against public funding of nonpublic schools does not turn on the alleged "impact" that such a prohibition may have on religious schools. See *Employment Div, Dep't of Human Resources v Smith*, 494 US 872, 878-879; 110 S Ct 1595; 108 L Ed 2d 876 (1990) (holding that the Free Exercise Clause is not violated by a valid and neutral law of general applicability that incidentally burdens religious conduct); *Schuette v Coal to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal By Any Means Necessary (BAMN)*, 572 US 291, 330; 134 S Ct 1623; 188 L Ed 2d 613 (2014) (Roberts, C.J., concurring) ("'An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent,' and that 'official action will not be held unconstitutional solely because it results in a . . . disproportionate impact.'") (citing cases).

In fact, such an argument has been rejected repeatedly by the Supreme Court in Establishment Clause challenges to the public funding of private schools where the vast majority of public aid is given to religious schools: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most

[13] See Mack, *10 Things To Know About Michigan's Private Schools*, MLive.com (October 2017) < https://www.mlive.com/news/2017/10/2016-17_private_school_enrollm.html> (last accessed 8/19/19).

private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." See also *Agostini v Felton*, 521 US 203, 229; 117 S Ct 1997; 138 L Ed 2d 391 (1997); *Mueller v Allen*, 463 US 388, 401; 103 S Ct 3062; 77 L Ed 2d 721 (1983). The analysis is no different here, where aid to nonpublic schools is prohibited under a uniform and religiously neutral state law.

In sum, because Article 8, § 2 is neutral and generally applicable without regard to religion, and does not single out the religious for disfavored treatment, it easily passes muster under *Trinity Lutheran*. As this Court observed in *Advisory Opinion re Constitutionality of 1974 PA 242*, Article 8, § 2 "does not speak of religion but of nonpublic schools." *Id.* at 47, 54. Thus, *Trinity Lutheran* does not call into question the Court's ability to nullify § 152b as being in violation of Article 8, § 2.

V. CONCLUSION AND RELIEF REQUESTED

For the reasons discussed, Plaintiffs respectfully request that this Court reverse the Court of Appeals majority's decision upholding the constitutionality of MCL 388.1752b and reinstate the Court of Claims' decision finding § 152b to violate Const 1963, art 8, § 2.

Respectfully submitted,

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