STATE OF MICHIGAN

IN THE SUPREME COURT

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.

Docket No.

Court of Appeals No. 343801

Court of Claims
LC No. 17-000068-MB
Hon. Cynthia Diane Stephens

_____/

PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

[CAPTION CONTINUED ON NEXT PAGE]

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[1] Although it is undated, the Court of Claims issued its opinion and order on April 26, 2018.

ORDER APPEALED AND RELIEF SOUGHT

Plaintiffs seek leave to appeal from the Court of Appeals' October 16, 2018 published, 2-1 opinion (**Tab 1**) reversing the Court of Claims' April 26, 2018 decision (**Tab 2**) declaring MCL 388.1752b to be in violation of Const 1963, art 8, § 2. This application is timely filed within 42 days of the Court of Appeals' decision.

Plaintiffs requests that the Court grant leave to appeal or, in the alternative, that it enter an order pursuant to MCR 7.305(H)(1) peremptorily reversing the Court of Appeals' opinion and reinstating the Court of Claims' decision finding § 152b to violate Const 1963, art 8, § 2.

QUESTION PRESENTED FOR REVIEW

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 attendance of any student or the employment of any person at any such nonpublic school." Does MCL 388.1752b violate art 8, § 2 by appropriating public funds 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 the nonpublic schools' operation and, indeed, their very existence, and the funds may be used to pay the wages of nonpublic school employees?

I. INTRODUCTION AND SUMMARY OF REASONS TO GRANT LEAVE

This case implicates the Michigan electorate's decision in 1970 to amend the state's constitution to prohibit financial aid to nonpublic schools, and whether the Legislature has flouted the voters' intent by passing a statute that does just that. Leave should be granted because the case "involves a substantial question about the validity of a legislative act," MCR 7.305(B)(1), "has significant public interest and . . . is one . . . against the state," MCR 7.305(B)(2), and "involves legal principle[s] of major significance to the state's jurisprudence," MCR 7.305(B)(3).

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 prohibitions, the Legislature enacted MCL 388.1752b, which appropriates funds 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 stated that it "might very well agree" that § 152b violates art 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. Instead, this Court has simply

distinguished between aid that is a "'primary' element of the support and maintenance of a private school," which is forbidden, and that which is only "incidental," 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) 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, use of the funds appropriated under § 152b is entirely within the private schools' discretion, and 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 Const 1963, art 8, § 2's prohibition against public funding of private schools. In reaching a contrary conclusion, the

Court of Appeals majority disregarded both art 8, § 2's plain text and this Court's directives as to how that language is to be applied. This Court's plenary review is warranted.

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")[2] 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.]

B. Notwithstanding art 8, § 2, the Legislature has 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

[2] 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."

schools for the cost of complying with a panoply of laws and regulations. The new law was codified at MCL 388.1752b. (**Tab 3**). The Court of Appeals majority provided an accurate summary of 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.[3] 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 published by the DOE. MCL 388.1752b(3).[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(4). The DOE is then directed to distribute funds to each

[3] See **Tab 4**.

[4] The DOE form in effect at the time of the Court of Claims' decision is attached at **Tab 5**.

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.[5]

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 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

[5] COA Op at 2-4 (footnotes omitted).

> 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.[6]

As the Court of Appeals majority observed, the Legislature amended § 152b again for 2018, after the Court of Claims' decision. See 2018 PA 265. "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).

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 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.

[6] *Id*. at 3 n 2.

D. The Court of Claims found that § 152b violated Const 1963, art 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 (Tab 2)). As the Court of Claims explained, § 152b violates art 8, § 2 because it authorizes the "direct payment of public funds to nonpublic schools." (*Id.* at 10). 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), 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).

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. (Tab 1). The Court of Appeals majority agreed 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 are 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).

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). 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).[7] 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).

Judge Gleicher concurred with the majority's standing analysis, but dissented from the majority's conclusions with respect to Const 1963, art 8, § 2. In her view, the text of art 8, § 2 plainly prohibits the "direct payment of public funds to nonpublic schools," and nothing in the 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). 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 bear." (*Id*. at 6). 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). The dissent further noted that

[7] 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). "[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*.

§ 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).

III. 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.]

In this case, the need for this Court's judicial review is even more important because Const 1963, art 8, § 2 was not only 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). "[T]here 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*, ___ Mich ___; ___ NW2d ___; 2018 WL 3635832, *8 (2018), citing *Blank v Dep't of Corrections*, 462 Mich 103, 150; 611 NW2d 530 (2000) (Markman, J., concurring) (some internal quotation marks omitted).

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

1. Section 152b runs afoul of the "common understanding" of art 8, § 2's prohibitions.

The aim of MCL 388.1752b is clear: 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 Const 1963, art 8, § 2 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.[8]

[8] 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 Const 1963, art 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.

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). The Court of Appeals concurrence/dissent agreed, concluding that "[b]y passing this statute, the 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).

That conclusion follows readily both from the unambiguous text of Const 1963, art 8, § 2, as well as the circumstances surrounding its adoption. The objective in interpreting Const 1963, art 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*, 2018 WL 3635832, at *8 (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.'"[9]

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

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

199, 224; 853 NW2d 653 (2014) (citation and internal quotation marks omitted). 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).

The text of Const 1963, art 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," including to "support . . . the employment of any person at any such nonpublic school." As the Court of Appeals concurrence/dissent correctly observed, these words are "easily parsed": "No public money may be appropriated by the Legislature to directly or indirectly aid or maintain nonpublic schools." (COA Concurrence/Dissent at 3). That is also how this Court viewed the constitutional text 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.

Such a view finds additional support in "the circumstances surrounding the adoption" of Const 1963, art 8, § 2. As this Court summarized in *Traverse City Sch Dist*, there was a great deal of "pre-election talk and action concerning Proposal C," with "contradictory statements" made by both sides as well the media concerning its impact. *Traverse City Sch Dist*, 384 Mich at 407 n 2. For example, Proposal C's opponents claimed that it would go so far as to "possibly affect fire and police protection," while its proponents argued that it would do no such thing. *Id.* This Court observed that "[a]s far as the voters were concerned in 1970, the result of all the

preelection talk and action concerning Proposal C was simply this—Proposal C was an anti-parochiaid amendment——*no public monies to* ***run*** *parochial schools*." *Id*. (emphasis added).[10]

With that "common understanding" in mind, the appropriations under MCL 388.1752b run afoul of 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). "Assisting nonpublic schools in this fashion," the concurrence/dissent observed, "is precisely what the voters sought to outlaw by passing Proposal C." (*Id.* at 8).

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

[10] Although *Traverse City Sch Dist* referenced "parochiaid" and "parochial schools," the actual language and application of art 8, § 2 of course includes all nonpublic schools.

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 art 8, § 2's plain words for that reason as well. (COA Concurrence/Dissent at 8-9). There is no need to go any further than that.

2. The judicial gloss that this Court placed on art 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 Const 1963, art 8, § 2 in *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*. But MCL 388.1752b does not pass muster under those decisions either.[11]

In *Traverse City Sch Dist*, 384 Mich 390, this Court placed something of a judicial gloss on Const 1963, art 8, § 2, declining to adopt a "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.]

[11] Even if § 152b arguably did satisfy *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*, this Court's review would still be in order. If, as the Court of Appeals majority suggested, there truly is a conflict between the plain text of the Michigan Constitution and two nearly 50-year-old decisions of this Court, this Court should grant leave to resolve the conflict in favor of the constitutional text.

According to the Court, this distinction 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 Const 1963, art 8, § 2 prohibited either "shared time" instruction[12] 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 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:

[12] "[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.

> [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 Const 1963, art 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 art 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*.[13] These funds are provided "for purposes of 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, they directly subsidize the wages of the private school employees responsible for ensuring compliance with those mandates. (See COC Op & Order at 10 ("[T]he funds are expressly linked to wages owed to nonpublic school employees."); COA Concurrence/Dissent at 9 ("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). 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

[13] See COC Op & Order at 10 (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 ("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].").

"absolute control over every dollar was retained by public schools." (COA Concurrence/Dissent at 5). 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). 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). This "test" is fatally flawed for two reasons. *First*, it is contrary to the plain language of Const 1963, art 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 "non-instructional services" finds no support even in the judicial gloss placed on Const 1963, art 8, § 2 by *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242*.

To be sure, *Traverse City Sch Dist* differentiated between educational services and "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 funneled to 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). "[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).

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). 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.]

By any stretch, offering financial assistance directly to nonpublic schools to help them remain "viable" is providing "aid," and is thus prohibited under Const 1963, art 8, § 2.

Plaintiffs fully appreciate their burden in challenging § 152b's constitutionality. "To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *Judicial Attorneys Ass'n v State of Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998) (citations and internal quotations omitted). But that is precisely the case here. 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.]

IV. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Plaintiffs respectfully request that this Court grant leave to appeal the Court of Appeals majority's decision upholding the constitutionality of MCL 388.1752b. In the alternative, Plaintiffs request that the Court enter a peremptory order reversing the Court of Appeals' decision and reinstating the Court of Claims' decision finding § 152b to violate Const 1963, art 8, § 2.

Respectfully submitted,

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