

STATE OF MICHIGAN  
IN THE SUPREME COURT

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*In re* REQUEST FOR ADVISORY OPINION      Supreme Court Case No. 154085  
REGARDING THE CONSTITUTIONALITY  
OF 2016 PA 249

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**BRIEF OF *AMICI CURIAE***  
**MICHIGAN ASSOCIATION OF NON-PUBLIC SCHOOLS, THE COUNCIL  
FOR AMERICAN PRIVATE EDUCATION, AGUDATH ISRAEL OF  
AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS  
INTERNATIONAL, ASSOCIATION OF WALDORF SCHOOLS OF  
NORTH AMERICA, CALIFORNIA ASSOCIATION OF PRIVATE SCHOOL  
ORGANIZATIONS, INDIANA NON-PUBLIC EDUCATION ASSOCIATION,  
NEW MEXICO ASSOCIATION OF NON-PUBLIC SCHOOLS, NEW YORK  
STATE COALITION OF INDEPENDENT AND RELIGIOUS SCHOOLS,  
COUNCIL FOR AMERICAN PRIVATE EDUCATION – OHIO CHAPTER,  
LUTHERAN SCHOOLS OF OHIO – OHIO DISTRICT LUTHERAN  
SCHOOLS MISSOURI SYNOD, COUNCIL FOR OKLAHOMA PRIVATE  
EDUCATION, PENNSYLVANIA STATE COUNCIL FOR AMERICAN  
PRIVATE EDUCATION, TEXAS PRIVATE SCHOOL ASSOCIATION,  
ORAL ROBERTS EDUCATIONAL FELLOWSHIP, and INTERNATIONAL  
CHRISTIAN ACCREDITING ASSOCIATION**

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF APPELLATE JURISDICTION .....	1
STATEMENT OF QUESTIONS PRESENTED.....	2
INTRODUCTION AND STATEMENTS OF INTEREST.....	3
ARGUMENT .....	8
I.    Recognizing the importance of properly educating nonpublic school children, several states have authorized reimbursements for nonpublic schools similar to that authorized by Section 152b .....	8
A.    New York.....	9
B.    Ohio.....	11
C.    Illinois .....	12
D.    Louisiana.....	13
II.   The mandated reimbursement programs in other states are constitutional under both state and federal constitutions.....	15
III.  The language of the bill should be read to avoid serious constitutional questions .....	18
CONCLUSION.....	19

**TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b>Cases</b>	
<i>CAF Investment Co v State Tax Commission</i> , 392 Mich 442; 221 NW2d 588 (1974).....	18
<i>Committee for Public Education &amp; Religious Liberty v Regan</i> , 444 US 646, 658; 100 S Ct 840; 63 L Ed 2d 94 (1980).....	17
<i>Frost-Pack Distributing Co v City of Grand Rapids</i> , 399 Mich 664; 252 NW2d 747 (1977).....	18
<i>Helms v Cody</i> , 856 F Supp 1102 (ED La, 1994).....	14
<i>In re Proposal C</i> , 384 Mich 390; 185 NW2d 9 (1971).....	18
<i>Lichtman v City of Detroit</i> , 75 Mich App 731; 255 NW2d 750 (1977).....	18
<i>Mitchell v Helms</i> , 530 US 793; 120 S Ct 2530; 147 L Ed 2d 660 (2000).....	12, 17
<i>Royal Auto Parts v State</i> , 118 Mich App 284; 324 NW2d 607 (1982).....	18
<i>Wolman v Walter</i> , 433 US 229; 97 S Ct 2593; 53 L Ed 2d 714 (1977).....	12, 17
<b>Statutes</b>	
105 Illinois Compiled Statutes 5/2-3.51.5 .....	12, 13
2009 IL SB 3547.....	13
Louisiana Statute Annotated § 17:361 (2016) .....	13, 14
MCL 388.552.....	8
New York Unconsolidated Law ch 91-C (1993) .....	10, 14
New York Unconsolidated Law ch 91-C (2016) .....	9
Ohio Administrative Code 3301-40-03 (2016).....	12
Ohio Revised Code Annotated § 3317.063 (West 2013).....	11

Page(s)

**Other Authorities**

Illinois Constitution article 10, § 3 ..... 16

Michigan Constitution 1963, article 8, § 2 ..... 16

New York Constitution article 11, § 3 ..... 16

Ohio Constitution article 6, § 2..... 16

## **STATEMENT OF APPELLATE JURISDICTION**

This Court has jurisdiction over this matter pursuant to its July 20, 2016 order requesting briefing regarding the constitutionality of Section 152b of 2016 PA 249.

## STATEMENT OF QUESTIONS PRESENTED

1. Should this Court exercise its jurisdiction to issue an advisory opinion on the constitutionality of Section 152b of 2016 PA 249?

*Amici* answer: Yes.

2. Does Section 152b of 2016 PA 249's appropriate to non-public schools violate Const 1963, art 8, § 2?

*Amici* answer: No.

## INTRODUCTION AND STATEMENTS OF INTEREST

*Amici curiae* are a variety of educational advocacy, policy, and service groups from Michigan and around the United States.

*Amicus* the Michigan Association of Non-Public Schools (MANS) is a service provider and public policy voice for nonpublic schools from the Catholic dioceses, Lutheran Church-Missouri Synod, and Christian Schools International in Michigan. In a given school year, approximately 1.5 million students are enrolled in roughly 900 public schools and 600 nonpublic schools throughout the state of Michigan. See Mich Dep't of Educ, *MDE Fast Facts 2015-2016* <[https://www.michigan.gov/documents/mde/MDE\\_Fast\\_Fact\\_379573\\_7.pdf](https://www.michigan.gov/documents/mde/MDE_Fast_Fact_379573_7.pdf)>; see also *Number of Public School Districts in Michigan* <[https://www.michigan.gov/documents/numbsch\\_26940\\_7.pdf](https://www.michigan.gov/documents/numbsch_26940_7.pdf)>. Of these 600 nonpublic schools, approximately 400 are members of MANS.

Founded in 1972, MANS was formed to influence educational issues for nonpublic schools ranging from providing auxiliary services to organizing bus transportation to establishing a system for funding equity. MANS' mission is to advocate for faith-based schools with public policy makers; raise visibility, value, and awareness of faith-based schools; and provide resources for quality instruction and managerial practice that enhance faith-based education. Since its founding, MANS has been instrumental in providing essential services to nonpublic school students throughout Michigan. One of MANS' earliest successes was its contribution to the enactment of the Auxiliary Services Act, which provides health, remedial, and psychological services to nonpublic school students. MANS has continued to pursue additional educational services for nonpublic school students since this time. MANS believes that “[a]ll parents need to have the power to choose their children’s educational delivery system” but that “[t]his power is

currently limited due to the funding structure of education and constitutional prohibition.” MANS, *Statements of Belief* <<http://m-a-n-s.org/about-mans/statements-of-beliefs>> (last accessed Aug 16, 2016).

*Amicus* the Council for American Private Education (CAPE) is a coalition of national organizations and state affiliates serving religious and independent elementary and secondary schools. Founded in 1971 to provide a coherent voice for private education, CAPE member organizations and affiliates represent more than 80 percent of private school enrollment nationwide. CAPE’s mission is to preserve and promote educational pluralism so that parents have a choice in the schooling of their children. CAPE is dedicated to fostering communication and cooperation within the private school community and with the public sector to improve the quality of education for all of the nation’s children.

*Amicus* Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission of or participation in *amicus curiae* briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States. One of Agudath Israel’s roles is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor—perhaps *the* critical factor—in ensuring Jewish religious continuity.

*Amicus* the Association of Christian Schools International (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5

million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K–12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. ACSI's calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

*Amicus* the Association of Waldorf Schools of North America (AWSNA) is a non-profit membership organization of independent Waldorf Schools and Institutes in Canada, the United States, and Mexico. The Association was founded in 1968 to support schools and institutes. Today, there are over 900 Waldorf schools in 83 countries. In North America, there are more than 160 member schools and 14 teacher-education institutes. AWSNA's mission is to support schools through collaborative regional work, professional and resource development, accreditation, community outreach, and advocacy.

*Amicus* California Association of Private School Organizations (CAPSO) is a statewide association whose members consist of 21 private school service agencies and administrative units that provide service to some 1,450 private schools in which approximately 480,000 students are enrolled in grades K-12, inclusive. Among CAPSO members are the Archdiocese of Los Angeles Department of Catholic Schools, the Association of Christian Schools International California & Hawaii Region, BJE—Builders of Jewish Education California, the Episcopal Diocese of Los Angeles, the Evangelical Lutheran Education Association – Northern California Network, the Lutheran Church – Missouri Synod California-Nevada-Hawaii District, and the Seventh-day Adventists Pacific Union Conference.

*Amicus* the Indiana Non-Public Education (INPEA), a State CAPE affiliate, is a membership association serving approximately 420 non-public schools in Indiana. INPEA serves its members through advocacy, professional development and consultation. In an effort to ensure quality options for Hoosier families, INPEA is committed to the quality and viability of all Indiana Non-Public Schools.

*Amicus* the New Mexico Association of Non-Public Schools (NMANS) is a statewide fellowship of private schools representing the interests of over 200 non-public schools and 26,000 students across New Mexico.

*Amicus* the New York State Coalition of Independent and Religious Schools (NYSCIRS) provides a collective voice for the religious and independent school community across the State of New York and comprises the following six organizations: Agudath Israel of America; American Christian Schools International of New York; the Jewish Education Project; the Lutheran Schools Association; New York State Association of Independent Schools; and the New York State Catholic Conference.

*Amicus* the Ohio Chapter – Council for American Private Education is made up of the Lutheran Schools of Ohio, Ohio Association of Independent Schools, Ohio Conference of Seventh-day Adventist, Association of Christian Schools International, and Agudath Israel - Midwest Region.

*Amicus* Lutheran Schools of Ohio, Ohio District Lutheran Schools Missouri Synod (LCMS) is an association of over 65 Lutheran Schools throughout the state of Ohio serving and working alongside families as they prepare students for this life and their eternal life with Christ.

*Amicus* the Council for Oklahoma Private Education (COPE) is an organization serving private schools in Oklahoma. COPE advocates for private school education with the Oklahoma

Legislature, other education policy makers, the general public, and others and sponsors activities in support of private schools across the state.

*Amicus* the Pennsylvania Council on American Private Education (PACAPE) is an association of private school associations which includes the Association of Christian Schools International, Pennsylvania Catholic Conference, Northeast Region of Agudath Israel, Jewish Orthodox Union, The Friends Schools, and Pennsylvania American Montessori Society. It represents about 85% of the private school population in Pennsylvania.

*Amicus* the Texas Private Schools Association (TPSA) is a statewide organization representing more than 800 accredited private schools and 250,000 students throughout the state of Texas. TPSA advocates for the independence of Texas private schools, ensuring their freedom to fulfill their unique missions and meet the diverse needs of students.

*Amicus* the Oral Roberts University Educational Fellowship (ORUEF) is a professional service organization dedicated to serving Christian schools. ORUEF provides services and support to Christian schools by providing resources and encouragement, guiding member schools to continuous improvement in academic quality and credibility, financial strength, spiritual and moral formation, and mission fulfillment.

*Amicus* the International Christian Accrediting Association (ICAA) is an accrediting association serving Christian schools with early childhood, elementary, and/or secondary ages/grades. ICAA has established a quality accreditation process and standards to guide a school to achieve and maintain a high level of educational quality within the context of a strong Christian culture and identity that is recognized by government and other education policy makers, other school leaders, families and other stakeholders. The purpose of ICAA is to assist Christian schools in the improvement of education within their Christian distinctive by

establishing an external, organizational witness and validation of a school's credibility of performance, integrity and quality.

*Amici* are therefore deeply invested in protecting the rights of nonpublic school parents and students through the implementation of Section 152b contained in 2016 PA 249. *Amici* believe that the proposed reimbursement program will provide significant benefits to nonpublic school students and parents, as demonstrated by mandatory reimbursement programs in other states, including New York, Ohio, Illinois, and Louisiana. Importantly, many of these states have constitutional provisions similar to Article 8, § 2 of the Michigan Constitution and have still effectively implemented these reimbursement programs. Enactment of Section 152b would be neither impractical nor unconstitutional. Therefore, the Governor's request to issue an advisory opinion on Section 152b should be granted, and this Court should find that the appropriation authorized by Section 152b of 2016 PA 249 would not violate Const 1963, art 8, § 2.

## ARGUMENT

### I. **Recognizing the importance of properly educating nonpublic school children, several states have authorized reimbursements for nonpublic schools similar to that authorized by Section 152b.**

Reimbursement programs are essential to providing a proper education for nonpublic school children across the United States. In Michigan, a nonpublic school is defined as “any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state.” MCL 388.552. Like the public schools in Michigan, nonpublic schools are required to comply with laws governing educational requirements within the state. Mich Dep't of Educ, *Nonpublic and Home School Information 2016-2017* <<http://www.michigan.gov/>

documents/Info2005\_132227\_7.pdf>. These laws—over 40 in total—include laws governing compulsory education, immunization, recordkeeping, and curriculum. (Nonpublic Mandate Report, 2014 PA 252.) Yet under Michigan’s current system, nonpublic schools must incur the full cost of complying with these mandatory statutes, while public schools are provided public funding to do the same.

Like Michigan, other states—including New York, Ohio, Illinois, and Louisiana—also require nonpublic schools to comply with numerous educational mandates. But unlike Michigan, these states have implemented reimbursement programs to compensate their nonpublic schools for compliance with these mandatory programs. The reason for these reimbursement programs, according to these states’ Legislatures, is because the mandated services they support are a necessary part of the state’s educational responsibility and, therefore, reimbursement for these vital services is also a necessary part of the state’s responsibility.

#### **A. New York**

In 1974, New York created the Mandated Services Aid (MSA) program. Under the MSA program, nonpublic schools receive reimbursement for the state mandates they have complied with in the prior school year. See NY Unconsol Law ch 91-C, § 3 (2016). In order to receive reimbursement, the school must have met the requirements of the mandate and must have documentation to support its compliance. *Id.* § 5. The school must also submit an application to the commissioner to determine whether the reimbursement is appropriate. *Id.* §§ 4, 7.

Currently, 17 mandates are available for reimbursement under the MSA. These mandates include those regarding the health and safety of students as well as mandates regarding reporting requirements, educational assessments, and other systems-based mandates. The mandates are: (1) pupil attendance reporting; (2) English language, arts, and math assessments; (3) basic

educational data systems; (4) Regents exams; (5) Regents competency tests; (6) calculators; (7) registration of high school; (8) state school immunization program; (9) documentation of integration of required instruction in 7th and 8th grade; (10) graduation report for nonpublic schools; (11) grade four science test; (12) expenditure for travel costs to examination storage sites; (13) New York State Scholarships for Academic Excellence application; (14) grade eight science test; (15) pesticide neighbor notification; (16) New York State English as a Second Language Achievement test; and (17) RIC and Scoring Center. NY State Educ Dep't, *Mandated Services Aid* < <http://www.p12.nysed.gov/nonpub/mandatedservices/>> (last accessed August 16, 2016). Filing for MSA is a voluntary process, requiring schools to keep abreast of the changes and notices so they can comply properly. *Id.* Many of the mandates are met by reporting information in a timely fashion to the Department of Education. *Id.* Other mandates, such as pupil attendance reporting, rely on the school providing the state information relative to the time and effort attributed to complying with the regulation. *Id.*

The New York Legislature has acknowledged the program's utility and significance for the proper management of nonpublic schools. Specifically, the Legislature found:

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. *It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.*" [NY Unconsol Law ch 91-C, § 1 (1993) (emphasis added).]

The Legislature further found that "[t]he state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century." *Id.* As such, the New York Legislature recognized the state's responsibility to reimburse nonpublic schools for the programs in which it requires

nonpublic schools to participate. More important, New York has long recognized that such reimbursement is vital to the continued success of nonpublic schools and their students.

## **B. Ohio**

This significant responsibility has not gone unnoticed in Ohio, which has also adopted a Nonpublic School Reimbursement program. Under this program, annual reimbursement is provided to each chartered nonpublic school for the actual mandated service administrative and clerical costs incurred during the preceding school year “in preparing, maintaining, and filing reports, forms, and records, and in providing such other administrative and clerical services that are not an integral part of the teaching process as may be required by state law or rule or by requirements duly promulgated by city, exempted village, or local school districts.” Ohio Rev Code Ann § 3317.063 (West 2013). A companion provision authorizes the expenditure of public funds to supply nonpublic school students with instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation services that are available to public school students. *Id.* § 3317.06. While some of these mandates concern the health and safety of nonpublic school students, reimbursement is also available for clerical and administrative costs as well. See *id.*

To participate in this program, nonpublic schools in Ohio must first be chartered. *Id.*<sup>1</sup> In addition, they must submit an application to the superintendent, documenting the costs to be reimbursed under the program. *Id.* Each nonpublic school must maintain the following

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<sup>1</sup> Ohio’s nonpublic chartered schools differ from charter schools in other states. See Ohio Dep’t of Educ, *Private Schools* < <http://education.ohio.gov/Topics/Quality-School-Choice/Private-Schools> > (last accessed August 23, 2016). Under Ohio’s system, the Ohio Department of Education charts nonpublic schools on behalf of the State Board of Education. *Id.* These schools differ from Ohio’s (and other states’) public charter schools in several ways, including that they may choose to offer a religious-based curriculum. *Id.*

information for reimbursement purposes: (1) a separate account for expenses in rendering the required services for which reimbursement is sought; (2) a time report for each employee involved in providing services for which reimbursement is requested; (3) salary reports for each employee involved in providing services for which reimbursement is requested; and (4) a voucher file to include all paid vouchers used to verify costs included in the request for reimbursement. Ohio Admin Code 3301-40-03 (2016). The superintendent may at any time review these records in support of a reimbursement application to determine the actual costs to be reimbursed. *Id.* 3301-40-06.

The recognized purpose of Ohio's apportionment scheme is to "protect[] the health of its youth and [to] provid[e] a fertile educational environment for all the schoolchildren of the State." *Wolman v Walter*, 433 US 229; 97 S Ct 2593; 53 L Ed 2d 714 (1977), *overruled in part by Mitchell v Helms*, 530 US 793; 120 S Ct 2530; 147 L Ed 2d 660 (2000). Like the Legislature in New York, Ohio also created this reimbursement scheme with the simultaneous goals of equalizing the services and programs available to both public and nonpublic school students and of providing its students with an adequate secular education.

### **C. Illinois**

In 2008, Illinois also implemented a mandated reimbursement program, known as the Educational Improvement and School Safety Block Grant. 105 ILCS 5/2-3.51.5. Under this program, Illinois provides public and state-recognized nonpublic schools per-pupil basis funding to meet otherwise unfunded education, health, and safety mandates. See Ill State Bd of Educ, *Funding and Disbursements: School Safety and Educational Improvement Block Grant* <[http://www.isbe.net/funding/html/block\\_grant.htm](http://www.isbe.net/funding/html/block_grant.htm)> (last accessed August 15, 2016). For nonpublic schools in particular, the statute requires the block grant's resources to provide

reimbursements for local, state, and federal health and safety mandates such as fingerprint-based criminal history checks, the purchase of Automated External Defibrillators, the implementation of school crisis plans, and many other expectations of fire, health, and safety codes. 105 ILCS 5/2-3.51.5. The existence of this program allows policymakers to at least partially fund the previously unfunded school safety mandates that the General Assembly imposes on nonpublic schools each year. Catholic Conference of Ill, *Education Newsletter* (Jan 2014) <<http://www.ilcatholic.org/wp-content/uploads/EdNewsletterJanuary2014.pdf>>.

In enacting this program, the Illinois General Assembly was unequivocal as to its purpose: “The provisions of this Section are in the *public interest*, are for the *public benefit*, and *serve secular public purposes*.” 105 ILCS 5/2-3.51.5(4) (emphasis added). Indeed, the General Assembly recognized the necessity of implementing such a program “[t]o improve the level of education and safety of students from kindergarten through grade 12 in school districts and State-recognized, non-public schools.” 2009 IL SB 3547. Thus, in harmony with the statutes in New York and Ohio, Illinois, too, has recognized the importance of the reimbursement program for the proper education of its nonpublic school students.

#### **D. Louisiana**

Finally, Louisiana also provides a reimbursement program for nonpublic schools—the Required Services Program. This program was established to reimburse approved nonpublic schools for the actual cost of performing mandated activities. La Stat Ann § 17:361 (2016). These activities include maintaining records and completing and filing reports required by law, public attendance, pupil health and pupil health testing, transportation of pupils, federally-funded educational programs including school lunch and breakfast programs, school textbooks and supplies, library books, pupil appraisal, pupil progress, transfer of pupils, teacher certification,

teacher continuing education programs, unemployment, annual school data, and any other education-related data. *Id.* As such, reimbursement is available for a wide array of mandates, including health and safety mandates as well as mandates for clerical or administrative tasks. *Id.*

Participation in the program requires that detailed records be maintained during the school year, documenting the actual amount of time dedicated to the performance of selected services by employees of the nonpublic school. *Id.* § 17:363. Then, in the subsequent school year, reimbursement may be sought for the actual cost incurred for these services. *Id.*

Reimbursement is based on the funds requested, subject to the audit process, and reduced in an amount equal to the appropriation unless funding is provided to meet the total amount requested. *Id.* §§ 17:362–17:365.

Although the Louisiana reimbursement statute does not include the legislative purpose in the language of the statute, the United States District Court for the Eastern District of Louisiana concluded that, like the New York reimbursement statute, “the Louisiana statute also has the secular purpose of providing ‘educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.’ ” *Helms v Cody*, 856 F Supp 1102, 1131 (ED La, 1994), *quoting* NY Unconsol Law ch 91-C, § 1 (1993). Just like the comparable programs in New York, Ohio, and Illinois, the Louisiana reimbursement program is intended to ensure that both public school and nonpublic school students are afforded quality educational opportunities.

Similarly to the states described above, Section 152b also appreciates the importance of reimbursing nonpublic schools for the cost of programs and services that have been mandated by the State of Michigan. Specifically, in the bill, the Legislature has acknowledged that “[t]he funds appropriated under this Section 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 children in nonpublic schools and to reimburse nonpublic schools for costs described in this Section.*” 2016 PA 249 (emphasis added). As each of these states has recognized, the provision of quality educational opportunities is a goal that cannot be overstated. As such, this state and this Court should take every occasion to strengthen these opportunities, including rendering an advisory opinion as to Section 152b’s constitutionality.

## **II. The mandated reimbursement programs in other states are constitutional under both state and federal constitutions.**

To hold that Section 152b is constitutional, this Court need look no further than the constitutionality of mandated reimbursement programs in other states. Of the states listed above that have implemented mandatory reimbursement programs for nonpublic schools, New York, Ohio, and Illinois have constitutional provisions similar to the provision found in Article 8, § 2 of the Michigan Constitution. Not only have these states sustained reimbursement programs even with these constitutional provisions in place, but these programs have routinely been upheld as constitutional under the U.S. Constitution as well. If comparable reimbursement programs are constitutional in states with similar restrictions, so, too, is Michigan’s reimbursement program constitutional under Article 8, § 2.

Article 8, § 2 of the Michigan Constitution provides, in relevant part:

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. [Mi Const 1963, art 8, § 2.]

Similar provisions are present in the New York, Ohio, and Illinois constitutions. For instance, New York's Constitution provides:

Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning. [NY Const art 11, § 3.]

Ohio's Constitution similarly provides:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state. [Ohio Const art 6, § 2.]

Finally, Illinois's Constitution states:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose. [Ill Const art 10, § 3.]

Despite each state's constitutional prohibition on using public money to aid or maintain nonpublic schools, all three states have enacted mandatory reimbursement programs to reimburse nonpublic schools which are consonant with their state constitutions. Likewise, the Michigan

reimbursement mandate will not violate the comparable provisions of Article 8, § 2 of the Michigan Constitution.

In fact, the reimbursement programs in New York and Ohio have both withstood constitutional challenges under the Establishment Clause of the U.S. Constitution. The New York reimbursement program was challenged under the First Amendment in *Committee for Public Education & Religious Liberty v Regan*, 444 US 646, 658; 100 S Ct 840; 63 L Ed 2d 94 (1980), and was upheld by the Supreme Court. The Court opined that the reimbursement scheme had a secular legislative purpose because it was guided by the goal of providing quality educational opportunities to state citizens. *Id.* at 654. Additionally, the program neither advanced nor inhibited religion because it called for state-prepared tests addressing secular academic subjects to be administered on the premises by nonpublic school personnel. *Id.* at 657–658. Finally, the program did not foster excessive entanglement with religion because the reimbursable services were “discrete and clearly identifiable” and the state’s process of reimbursement was straightforward. *Id.* at 660.

Similarly, the Ohio reimbursement program was challenged in *Wolman*. The Court upheld the provisions affording health, therapeutic, guidance, and remedial services to nonpublic schools. 433 US at 241–248. Though the Court initially struck down the provisions affording instructional material and equipment and field trip funding, see *id.* at 248–255, it later reversed this decision and concluded that these services could not reasonably be viewed as an endorsement of religion because of their secular purpose and enforcement, *Mitchell*, 530 US at 835.

Because similar reimbursement programs have been upheld under the U.S. Constitution and such programs coexist with comparable state-constitutional restrictions, by analogy, Michigan’s proposed appropriation bill also does not run afoul of Article 8, § 2.

### III. The language of the bill should be read to avoid serious constitutional questions.

Even assuming that Section 152b raises questions under the Michigan Constitution, these questions can and should be avoided by interpretive principles. It is axiomatic that when a particular construction of legislation allows serious constitutional questions to be avoided, that construction is preferred. *Lichtman v City of Detroit*, 75 Mich App 731, 734; 255 NW2d 750 (1977). Indeed, when construing a statute, the court must begin with the premise that the Legislature did not intend to pass an unconstitutional statute. *Royal Auto Parts v State*, 118 Mich App 284, 289; 324 NW2d 607 (1982). When the meaning of statutory language is questioned, a reasonable construction must be given by looking to the purpose served by the legislation, *Frost-Pack Distributing Co v City of Grand Rapids*, 399 Mich 664, 682–683; 252 NW2d 747 (1977), and the meaning must be derived from the statutory context within which the language is used, *CAF Investment Co v State Tax Comm*, 392 Mich 442, 454; 221 NW2d 588 (1974).

Section 152b can be read to avoid these difficult constitutional questions. This Court should begin by assuming that the Legislature did not intend to implement legislation that would violate Article 8, § 2 of the Michigan Constitution. This conclusion is bolstered by the Legislature's stated purpose for the apportionment, which, as described above (and consistent with the programs in New York, Ohio, Illinois, and Louisiana), is to protect the health, safety, and welfare of nonpublic students in Michigan. (2016 PA 249.) Importantly, the reimbursement program, in combination with the programs for auxiliary services and shared time, illustrate the Legislature's overarching statutory scheme to provide superior educational opportunities to public and nonpublic school students alike. See *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971) (upholding as constitutional under Const 1963 art 8, § 2 shared time and auxiliary services at public and nonpublic schools). Given the state's significant responsibility to provide

*all* students with a quality education, this Court should defer to the Legislature's stated purpose in enacting Section 152b in order to avoid the difficult constitutional questions raised by this legislation.

## CONCLUSION

Education is a vital component of each state's system of governance, and it is the state's responsibility to provide proper educational opportunities to its students. These opportunities should not only be afforded to public school students, particularly because nonpublic schools are required to comply with the same mandated laws and regulations as public schools. For these reasons, MANS respectfully requests that this Court grant the Governor's request to issue an advisory opinion on Section 152b and find that the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would not violate Const 1963, art 8, § 2.

Respectfully submitted,

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