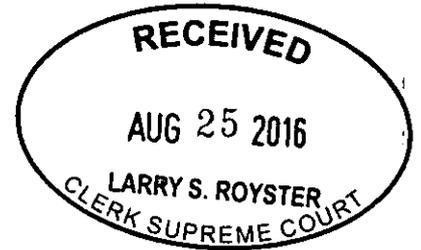


STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF
2016 PA 249

Supreme Court No. 154085

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**AMICI BRIEF OF SENATE MAJORITY LEADER ARLAN B. MEEKHOF AND
SENATORS JACK BRANDENBURG, MIKE KOWALL, RICK JONES, PHIL PAVLOV,
PETER MACGREGOR, MIKE GREEN, AND DARWIN L. BOOHER
IN SUPPORT OF SECTION 152B OF 2016 PA 249**

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BASIS OF JURISDICTION

The Michigan Constitution permits the Governor to “request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” Const 1963, art 3, § 8.

On July 13, 2016, the Governor requested an advisory opinion from the Court on the constitutionality of Section 152b of 2016 PA 249, which will become effective October 1, 2016. This Court formally considered the request by Order dated July 20, 2016.

This Court has jurisdiction over this matter pursuant to Const 1963, art 3, § 8 and MCR 7.303(B)(3).

QUESTIONS PRESENTED

The Court's Order of July 20, 2016, identified the following questions:

- I. Whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion in this matter.

Amici Members of the Michigan Senate Answer: Yes

- II. Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const 1963, art 8, § 2.

Amici Members of the Michigan Senate Answer: No

STATEMENT OF INTEREST

Senate Majority Leader Arlan B. Meekhof represents the 30th Senate District. By virtue of his leadership position in the Legislature, Senator Meekhof shares primary responsibility for making difficult policy decisions regarding the public health, safety, and welfare and for ensuring that all appropriations are made in accordance with the Michigan Constitution of 1963.

Senator Jack Brandenburg represents the 8th Senate District; Senator Mike Kowall represents the 15th Senate District; Senator Rick Jones represents the 24th Senate District; Senator Phil Pavlov represents the 25th Senate District; Senator Peter MacGregor represents the 28th Senate District; Senator Mike Green represents the 31st Senate District; and Senator Darwin L. Booher represents the 35th Senate District. All of the *amici* support the appropriation for nonpublic schools authorized by Section 152b of 2016 PA 249.

As members of the Michigan Senate, these *amici* are authorized to file this brief pursuant to MCR 7.308(B)(2) and the Court's Order of July 20, 2016.

INTRODUCTION

It is a rare occasion that this Court is called upon to exercise its judicial power to issue an advisory opinion on an important question of law as to the constitutionality of legislation. Indeed, it appears that the Court has been presented with only a handful of such requests during the last few decades. No doubt this is one of those “solemn occasions” that the framers of the Michigan Constitution had in mind in enacting article 3, § 8, as the issue presented here concerns a matter of statewide importance that impacts the public health, safety, and welfare.

The request in this case asks the Court to consider whether an appropriation for nonpublic schools, intended to reimburse the actual costs of complying with health, safety, and welfare mandates unrelated to instruction, would violate Proposal C of 1970, a so-called antiparochiaid amendment. Although the legislation at issue would appropriate only up to \$2.5 million for such purposes, those funds could potentially impact more than 100,000 students attending nearly 600 nonpublic schools throughout Michigan. Yet this is *not* a parochiaid case. The subject appropriation would not fund the primary or essential elements of nonpublic schools. Any aid or support to the schools resulting from the appropriation would be unrelated to instruction and would be incidental to the operation of otherwise viable schools. Therefore, the appropriation for nonpublic schools would not violate Proposal C.

STATEMENT OF FACTS

A. Background on Proposal C

The provision of public aid to nonpublic schools is not a new idea in Michigan. Shared-time classes and bus transportation have been available to private school students since at least the 1920s and 1930s, respectively. Other forms of public aid to nonpublic schools, such as property tax exemptions, predate those programs. See generally *In re Proposal C*, 384 Mich 390, 406 n 2; 185 NW2d 9 (1971).

However, serious consideration of parochial aid—public aid to *operate* nonpublic schools—and tuition support for parents of nonpublic school children did not begin until approximately 1967, when the Michigan School Finance Study recommended additional public aid to private schools. Two years after the study, a joint legislative committee recommended that the Legislature enact parochial aid, a recommendation echoed by a gubernatorial committee later that year. The Legislature responded by including \$22 million for parochial aid in the state budget for 1970. See *id.*

When it became clear that the Legislature would pass some form of parochial aid, a group of citizens formed the Council Against Parochial Aid and circulated petitions that included the present language of Proposal C.¹ The group eventually obtained an adequate number of signatures, and following a series of legal challenges, the constitutional amendment was placed on the ballot on November 3, 1970. See *id.*

The months leading up to the November election were filled with misinformation regarding the actual intent of the proposal. “As far as the voter was concerned, the result of all the pre-election talk and action concerning Proposal C was simply this—Proposal C was an anti-parochial aid amendment—*no public monies to run parochial schools*—and beyond that all else was utter and complete confusion.” *Id.* (emphasis added). Amidst all the confusion, voters approved the language of Proposal C.

Following approval by the electorate in 1970, Proposal C was added as a second paragraph to article 8, § 2 of the Michigan Constitution. That section now reads in its entirety as follows:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the

¹ For purposes of this brief, Proposal C refers to the second paragraph of Const 1963, art 8, § 2.

education of its pupils without discrimination as to religion, creed, race, color or national origin.

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.

As set forth in *In re Proposal C*, 384 Mich at 411, the language of the constitutional amendment contains five prohibitions against public aid to nonpublic schools:

1. No public money 'to aid or maintain' a nonpublic school;
2. No public money 'to support the attendance of any student' at a nonpublic school;
3. No public money to employ any one at a nonpublic school;
4. No public money to support the attendance of any student at any location where instruction is offered to a nonpublic school student.
5. No public money to support the employment of any person at any location where instruction is offered to a nonpublic school student.

However, this Court has ruled that a portion of the second sentence of Proposal C is unconstitutional, void, and unenforceable; therefore, the fourth and fifth prohibitions above are no longer valid. *Id.* at 415.

B. Nonpublic Schools Mandate Report

Recent events, including the tragedy at Sandy Hook Elementary School in Newtown, Connecticut, have led to increased regulation of public and private schools in order to protect the health, safety, and welfare of students, teachers, and other school personnel and visitors. In 2013, for example, with the support of the Governor's multi-agency School Safety Task Force, the Legislature introduced a bill to revise the number and scheduling of required school safety drills,

provide reporting requirements, and require school officials to adopt and implement a cardiac emergency response plan. That bill was ultimately passed with great support in both legislative chambers and signed into law. (See generally Legislative Analysis of 2014 PA 12, attached as Exhibit A.)

Although few might question the soundness of the policies underlying such regulations, the new and updated requirements have created additional hardships on regulated entities, including increased costs of compliance. To better understand the extent and potential costs of these regulations, in 2014 the Legislature appropriated money to the Michigan Department of Education (the “department”) to compile a report identifying the mandates required of nonpublic schools.

Section 236 of 2014 PA 252 directed as follows:

From the funds appropriated in part 1, the department shall compile a report that identifies the mandates required of nonpublic schools. In compiling the report, the department may consult with relevant statewide education associations in Michigan. **The report compiled by the department shall indicate the type of mandate, including, but not limited to, student health, student or building safety, accountability, and educational requirements, and shall indicate whether a school has to report on the specified mandates.** The report required under this section shall be completed by April 1, 2015 and transmitted to the state budget director, the house and senate appropriations subcommittees responsible for the department of education, and the senate and house fiscal agencies not later than April 15, 2015. [Emphasis added.]

On November 25, 2014, the department issued its Nonpublic Mandate Report, in accordance with the requirements of 2014 PA 252. The report identified more than 44 mandates required of nonpublic schools, including mandates involving building safety, student health, and student and staff safety, among others.

C. Passage of 2016 PA 249

Following publication of the Nonpublic Mandate Report, members of the Legislature began discussing a mechanism to reimburse nonpublic schools for certain costs identified in the

report. An appropriation was eventually included in Enrolled Senate Bill No. 801, which was signed into law on June 27, 2016, and assigned 2016 PA 249 (the "Act"). Section 152b of the Act, codified at MCL 388.1752b, provides in relevant part as follows:

(1) From the general fund money appropriated under section 11, there is allocated an amount not to exceed \$2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2).

(2) By January 1, 2017, the department shall publish a form containing the requirements identified in the report under subsection (1). The department shall include other requirements on the form that were enacted into law after publication of the report. The form shall be posted on the department's website in electronic form.

* * *

(7) The 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 the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section 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.

Questions have arisen regarding the constitutionality of the appropriation for nonpublic schools authorized by Section 152b. Prior to approving the Act, the Governor received a written request to line-item veto Section 152b signed by representatives of various school associations. This request asserted that the appropriation in Section 152b would violate article 8, § 2 of the Michigan Constitution. Moreover, it has been reported that the American Civil Liberties Union (the "ACLU") is considering a legal challenge to Section 152b. (See July 13, 2016 Advisory Opinion Request, attached as Exhibit B (exhibits omitted).) Other groups, however, have voiced their support for the appropriation.

On July 13, 2016, the Governor submitted a request to this Court, seeking an advisory opinion on the constitutionality of Section 152b. For the reasons that follow, the Court should exercise its discretion to grant the Governor's request for an advisory opinion and, further, issue an advisory opinion upholding the constitutionality of Section 152b of the Act.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE GOVERNOR'S REQUEST FOR AN ADVISORY OPINION

A. The Governor's Request Is Sufficient to Invoke this Court's Discretionary Power to Render an Advisory Opinion

The Michigan Constitution of 1963 grants this Court the authority to issue an advisory opinion on important questions of law as to the constitutionality of legislation when requested by either house of the Legislature or by the Governor. Article 3, § 8 of the Constitution provides: "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Accordingly, as set forth in *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 482-83; 208 NW2d 469 (1973) (LEVIN, J., concurring):

Michigan's Constitution, thus, restricts advisory opinions to

—important questions of 'law,'

—concerning the 'constitutionality' of legislation,

—'upon solemn occasions' when requested by either house of the Legislature or the Governor,

—after the legislation has been enacted into law but before the effective date.

It is undisputed that the Governor's request for an advisory opinion was made after the legislation was enacted into law but before the effective date of Section 152b and that the request concerns the constitutionality of the Act. (See July 13, 2016 Advisory Opinion Request.) Thus,

the critical questions are whether the request concerns an “important question of law” and whether this constitutes a “solemn occasion” as required by article 3, § 8.

This Court has consistently interpreted the “important questions of law” requirement to demand that the party making a request “particularize any claims of unconstitutionality” on which the party wishes the Court to speak. *In re Request for Advisory Opinion, Enrolled House Bill No 5250 (being 1975 PA 227)*, 395 Mich 148, 149; 235 NW2d 321 (1975); *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 53; 228 NW2d 772 (1975). “A request stated too broadly cannot be considered.” *In re Request for Advisory Opinion, Enrolled House Bill No. 5250*, 395 Mich at 149.

The Governor’s request for an advisory opinion here is sufficient to invoke the Court’s authority to issue an advisory opinion under the Michigan Constitution because the request raises a specific and narrow question regarding the constitutionality of Section 152b, namely whether the appropriation authorized by that section would violate article 8, § 2 of the Michigan Constitution of 1963. (July 13, 2016 Advisory Opinion Request, p 1.) The question in this case is significantly narrower than previous requests that this Court has considered; for example, the Court has granted a request that did not specify a particular constitutional provision that may have been offended by legislation. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 474 Mich 1230; 712 NW2d 450 (2006) (granting a request involving the question whether certain photo identification requirements would “violate either the Michigan Constitution or the United States Constitution”). The request here does not require the Court to search the state or federal constitutions for any relevant provision that might be violated by the Act. Rather, it asks the Court to consider only whether a specific appropriation would violate a single section of the Michigan Constitution.

The remaining question is whether this constitutes a “solemn occasion” for purposes of article 3, § 8. One dictionary defines *solemn* as “very serious or formal in manner, behavior, or expression” or “done or made sincerely.” *Merriam-Webster’s Learner’s Dictionary*, available at <<http://www.merriam-webster.com/dictionary/solemn>> (accessed August 25, 2016); see also *Black’s Law Dictionary* (10th ed) (defining *solemn occasion* as “the serious and unusual circumstance in which the supreme court is constitutionally permitted to render advisory opinions to the remaining branches of government, *as when the legislature doubts the legality of proposed legislation and a determination must be made to allow the legislature to exercise its functions*” (emphasis added)). The Governor’s formal request for an advisory opinion easily satisfies this requirement. Requests for advisory opinions are made neither routinely nor frivolously. The request here concerns an important question of law on a topic left unresolved since the passage of Proposal C in 1970. The unresolved nature of this issue over such an extended period of time has only served to nurture doubt and uncertainty about the scope of the proposal. These are unusual circumstances, and this matter is ripe for an opinion.

There can be no doubt, then, that the request satisfies the technical requirements for an advisory opinion under article 3, § 8 of the Michigan Constitution.

B. The Court Should Grant the Governor’s Request for an Advisory Opinion

The Governor’s request constitutes a reasonable exercise of the authority of the chief executive of the state under article 3, § 8 of the Michigan Constitution. Through this process, the Governor is able to expedite judicial review of an important constitutional question on significant legislation concerning the public health, safety, and welfare. As was previously recognized, “[t]he Governor’s request constitutes a rational response to a judicial culture in which the decision-making of courts has been extended into an increasingly broad array of public policy areas.” *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348*,

493 Mich 1016, 1017; 829 NW2d 872 (2013) (MARKMAN, J., dissenting). That reasoning applies equally well here.

Similarly, granting the Governor's request would be a reasonable exercise of this Court's constitutional authority under article 3, § 8. "That such requests . . . are . . . an 'extraordinary exception to the typical process that brings cases to the Court,' does not alter the fact that responding to such requests remains an express part of [its] 'judicial power.'" *In re 2002 PA 48*, 467 Mich 1203, 1203 n 1; 652 NW2d 667 (2002) (MARKMAN, J., dissenting). The Court should exercise its judicial power here in order "to promote certainty and clarity" with regard to Section 152b, an important component of the state's education omnibus budget act. *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348*, 493 Mich at 1018 (MARKMAN, J., dissenting).

An advisory opinion of this Court would promote certainty and clarity with regard to the challenged provisions of the Act by resolving the question whether the subject appropriation would violate article 8, § 2. In this case, "the uncertain constitutionality of this law, by itself, threatens to undermine its effective implementation." *In re 2002 PA 48*, 467 Mich at 1203 (MARKMAN, J., dissenting). Absent an advisory opinion, and faced with the threat of a legal challenge to the appropriation authorized by Section 152b (see July 13, 2016 Advisory Opinion Request, p 2), the department would lack the requisite clarity to properly administer the appropriation. An advisory opinion would facilitate the orderly implementation and administration of Section 152b by eliminating, to the extent possible, any uncertainty about the constitutionality of the appropriation authorized by Section 152b.

Moreover, an advisory opinion would minimize the possibility of protracted—and expensive—litigation concerning the validity of Section 152b. Although no legal challenge has

been filed to date, the Governor already has been made aware of a potential challenge by the ACLU. (See July 13, 2016 Advisory Opinion Request, p 2.) Any such legal challenge, which has increasingly become a routine part of any contentious legislation, would disrupt the effective implementation of legitimate and enforceable public policies reflected in Section 152b. As explained in *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348*, 493 Mich at 1018 (MARKMAN, J., dissenting):

Perhaps most importantly, the Governor’s request must be viewed against the backdrop of a policy-making process of which it has become an increasingly ubiquitous and routine part that controversial pieces of legislation . . . must, following legislative and executive approval, now make a third stop—at the judiciary—before they are viewed as fully legitimate and enforceable public policies. The advisory opinion enables this Court, at the request of either the executive or the legislative branches, to promptly resolve a dispute that otherwise might languish within the judiciary.

A favorable response by this Court to the Governor’s request for an advisory opinion also would demonstrate comity between our separate, but interdependent, branches of state government. Justice Markman previously explained:

Further militating in favor of a response to the request for an advisory opinion is that the Michigan Constitution’s system of separated powers not only requires that each branch of state government in its relationship with the others assert and defend its prerogatives when necessary, but compels that each also demonstrate comity with the others whenever possible. [*Id.* at 1019.]

See also *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 635; 72 S Ct 863; 96 L Ed 1153 (1952) (JACKSON, J., concurring) (stating that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity”).

Requests for advisory opinions of this Court are made only upon solemn occasions such as here. The constitutional question presented in this case is of considerable importance to the state and is precisely the type that the framers of the Michigan Constitution must have had in mind in enacting article 3, § 8.

II. THE APPROPRIATION FOR NONPUBLIC SCHOOLS AUTHORIZED BY SECTION 152B OF 2016 PA 249 WOULD NOT VIOLATE CONST 1963, ART 8, § 2

A. Standard of Review

This Court frequently recognizes that it has “a duty to interpret statutes as being constitutional whenever possible.” E.g., *In re Sanders*, 495 Mich 394, 412-13; 852 NW2d 524 (2014). More than a century ago the Court explained: “There is always a presumption in favor of constitutionality, and this presumption justifies a construction which is rather against the natural interpretation of the language used, if necessary to sustain the law.” *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897); see also *Meridian Charter Twp v Ingham Cty Clerk*, 285 Mich App 581, 587; 777 NW2d 452 (2009) (applying the same rule of construction). Thus, the Court should favor a construction of Section 152b that does not create a constitutional invalidity. *In re Proposal C*, 384 Mich at 406.

Resolution of this question also requires the construction of a constitution, where the technical rules of statutory construction do not apply. *Id.* at 405 (citing *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407; 4 L Ed 579 (1819)). “The primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification.” *Wayne Cty v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

Justice Cooley described this rule of “common understanding” as follows:

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.

Adair v Michigan, 497 Mich 89, 101; 860 NW2d 93 (2014), reh’g denied, 497 Mich 959; 858 NW2d 460 (2015) (quoting Cooley, *Constitutional Limitations*, p 81).

“This Court locates the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification. Interpretation of a constitutional provision also takes account of ‘the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.’” *Id.* at 102 (quoting *People v Tanner*, 496 Mich 199, 226; 853 NW2d 653 (2014)).

B. Proposal C Does Not Prohibit All Public Aid to Nonpublic Schools

This Court previously opined on the constitutionality of enacted legislation under Proposal C. See *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; *In re Proposal C*, 384 Mich 390. However, the most recent of those opinions is more than 40 years old, and neither of the opinions addresses the particular issue before the Court today. While these opinions are instructive because they reflect a narrower construction of article 8, § 2 than advanced by opponents of Section 152b, further guidance from this Court is necessary.

1. In re Proposal C

Following the passage of Proposal C, this Court outlined the impact of the constitutional amendment on various types of educational assistance programs in *In re Proposal C*, 384 Mich 390. Specifically, the Court considered seven questions related to the construction of the language added by the proposal. Three of those questions are relevant to the current issue before the Court.

a. Shared-Time Programs

The first question considered by the Court involved the effect of article 8, § 2 on shared-time programs. Certified question No. 1 provided as follows:

Does Proposal C preclude the provision, through shared time or dual enrollment programs, of elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students? [*Id.* at 410.]

Finding it unnecessary to adopt a “strict ‘no benefits, primary or incidental’ rule,” this Court concluded that Proposal C does not necessarily prohibit shared-time programs, even if the programs are conducted on nonpublic school premises. *Id.* at 411. The Court reasoned that shared-time instruction programs provide only *incidental* aid or support, which Proposal C does not prohibit. *Id.* at 415-16.

b. Auxiliary Services

The second question considered by the Court involved the provision of auxiliary services to nonpublic school students:

Does Proposal C preclude the provision of auxiliary services (as defined in Section 622 of Act 629, P.A.1955, being Section of Act 343, P.A.1965, being Section 340.622 of the Compiled Laws of 1948) to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students? [*Id.* at 417.]

Answering in the negative, the Court found that any support or aid to the nonpublic school would be incidental, similar to shared-time programs. The Court explained:

The prohibitions of Proposal C have no impact upon auxiliary services. **Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children.** They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children **Consequently, 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 419-20 (emphasis added).]

This passage makes two important points. First, “general health and welfare measures . . . have only an incidental relation to the instruction of private school children.” *Id.* at 419. Such

general health and welfare measures, therefore, are not impacted by Proposal C, even if those measures provide incidental aid or support to a nonpublic school. Second, “the prohibitions of Proposal C . . . are keyed into prohibiting the passage of public funds into private school hands *for purposes of running the private school operation.*” *Id.* at 419-20 (emphasis added). Stated differently, Proposal C does not prohibit measures *unrelated* to running a private school operation.

c. Federal Funds: Special Education Services

The Court considered a third question related to the use of federal funding for special educational services. The question was as follows:

Does Proposal C preclude use of federal moneys, made available to the State of Michigan through Title I of the Elementary and Secondary Education Act of 1965, being 20 U.S.C. Section 241a et seq., for the purpose of providing elementary or secondary instruction or educational services to nonpublic school students at any nonpublic school or at any other location or institution where instruction is offered in whole or in part to such nonpublic school students? [*Id.* at 421.]

Concluding that Proposal C does not prohibit the provision of special educational services to nonpublic schools under a federal grant, the Court explained: “[Special educational services] are general health and safety measures similar in nature to auxiliary services which we have found to be permissible under Proposal C.” *Id.* at 423. Thus, the Court affirmed its position that general health, safety, and welfare measures do not run afoul of Proposal C because they have only an incidental relation to the operation of a private school.

2. *In re Advisory Opinion re Constitutionality of 1974 PA 242*

Four years after its first opinion interpreting the impact of Proposal C, this Court granted an advisory opinion request to consider a provision of an enrolled bill that would have required the state board of education to provide textbooks and supplies to all children in the state enrolled

in grades 1 through 12, including children attending nonpublic schools. *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41.

Addressing the constitutionality of the enrolled bill, the Court restated its support of the rule set forth in its prior advisory opinion: “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. The Court further explained:

[T]he Court reached correct conclusions in the Traverse City School District case because the services examined therein were properly classified as ‘incidental’ to a private school’s establishment and existence. . . . **Such programs as shared time and auxiliary services to be sure, do help a private school compete in today’s harsh economic climate; but, they are not ‘primary’ elements necessary for the school’s survival as an educational institution. These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.**² [*Id.* at 48-49 (emphasis added).]

However, the Court distinguished the educational programs examined in its earlier opinion from the issue then before the Court, i.e., a requirement that the state board of education provide *textbooks* and *supplies* to nonpublic school students. The latter, the Court concluded, did not result in mere “incidental” maintenance and support of nonpublic schools; rather, “[t]extbooks and supplies are essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist.” *Id.* at 49. Thus, Proposal C bars public funding of “primary and essential elements of a private school’s existence,” such as textbooks and supplies, but does not prohibit incidental aid or support. *Id.*

3. Incidental Aid to Nonpublic Schools Does Not Violate Proposal C

What is clear from this Court’s prior opinions is that Proposal C does not prohibit *all* public aid and support of nonpublic schools, as opponents of Section 152b might suggest.

² *In re Proposal C*, 384 Mich 390, also is commonly referred to as *Traverse City School Dist v Attorney General*.

Proposal C merely bars public funding of “primary and essential elements” of a nonpublic school that are necessary for its existence. *Id.* It does not, however, prohibit aid or support that is *incidental* to the operation of a nonpublic school, including the provision of general health, safety, and welfare measures like auxiliary services and similar aid and support. *In re Proposal C*, 384 Mich at 419-20.

C. The Appropriation for Nonpublic Schools Authorized by Section 152b Relates Only to General Health, Safety, and Welfare Measures and Verification of Such Measures

This is *not* a parochiaid case. The costs incurred by nonpublic schools that are eligible for reimbursement, as identified in the nonpublic schools mandate report, are noninstructional in nature and are incidental to the operation of a nonpublic school. Such costs relate to general health, safety, and welfare measures and verification of such measures. These are the same types of measures that this Court already has determined are incidental to the operation of a nonpublic school and, consequently, not prohibited by Proposal C. See *In re Proposal C*, 384 Mich 390.

For example, the nonpublic schools mandate report identifies MCL 29.19 as one of the mandates required of nonpublic schools. That statute requires schools, including nonpublic schools, to maintain a detailed record of school safety drills. MCL 29.19 provides, in relevant part, as follows:

- (7) For a school that operates any of grades kindergarten to 12, the governing body of the school shall ensure that documentation of a completed school safety drill is posted on its website within 30 school days after the drill is completed and is maintained on the website for at least 3 years. For a school operated by a school district or intermediate school district, the documentation may be posted on the district website. The documentation posted on the website shall include at least all of the following:
 - (a) The name of the school.
 - (b) The school year of the drill.
 - (c) The date and time of the drill.

- (d) The type of drill completed.
- (e) The number of completed drills for that school year for each type of drill required under subsections (3) to (5).
- (f) The signature of the school principal or his or her designee acknowledging the completion of the drill.
- (g) The name of the individual in charge of conducting the drill, if other than the school principal.

Maintaining records of completed school safety drills undeniably relates to general health, safety, and welfare measures and the verification of such measures. Reimbursement of any costs incurred by a nonpublic school to maintain such records would provide only incidental aid to the nonpublic school and, therefore, would not run afoul of Proposal C.

The same is true for costs incurred by a nonpublic school under administrative rule R 390.1146, another nonpublic school mandate identified in the report. That rule provides as follows:

- (1) A school district or nonpublic school pursuant to section 1233b of 1976 PA 451, MCL 380.1233b, **may** employ a noncertificated, nonendorsed, teacher for grades 9 to 12 in the subject areas of computer science, world languages, mathematics, biology, chemistry, engineering, physics, and robotics or other subjects, as approved by the superintendent of public instruction.
- (2) The employing school district or **nonpublic school shall verify** that the person is assigned a mentor teacher with experience and expertise in the subject or specialty area that the permit is being issued under section 1233b of 1976 PA 451, MCL 380.1233b. [Mich Admin Code, R 390.1146 (emphasis added).]

Importantly, this administrative rule does not *require* a nonpublic school to *employ* a noncertificated teacher, nor would Section 152b allow for the reimbursement of any portion of a teacher's salary or benefits if a nonpublic school elects to employ such teacher. The rule instead requires a nonpublic school employing a noncertificated teacher to "*verify* that the person is assigned a mentor teacher." *Id.* (emphasis added). In other words, the mandate relates to the *verification* of a general health, safety, and welfare measure, not "primary and essential

elements” of a nonpublic school. *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 49.

No doubt, opponents of Section 152b would argue that the subject appropriation extends beyond general health, safety, and welfare measures. Yet such an interpretation ignores the expressed intent of the Legislature as described in MCL 388.1752b:

(7) The 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 the children in nonpublic schools** and to reimburse nonpublic schools for costs described in this section.

(8) **Funds allocated under this section 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. [Emphasis added.]

In enacting Section 152b, the Legislature clearly intended to allow only for the reimbursement of incidental costs related to general health, safety, and welfare measures and the verification of such measures. This is evident both from the mandates identified in the department’s report and from the expressed intent of the Legislature included in the Act.

To the extent there is any uncertainty about the scope of the appropriation for nonpublic schools authorized by Section 152b of the Act, or the intent of the Legislature, the Court should favor a construction that does not create a constitutional invalidity. *In re Proposal C*, 384 Mich at 406. “This Court . . . has a duty to interpret statutes as being constitutional whenever possible.” *In re Sanders*, 495 Mich at 412-13. Furthermore, “[t]here is always a presumption in favor of constitutionality, and this presumption justifies a construction which is rather against the natural interpretation of the language used, if necessary to sustain the law.” *Osborn*, 114 Mich at

660; see also *Meridian Charter Twp*, 285 Mich App at 587 (applying the same rule of construction).

The mandates identified in the report relate to general health, safety, and welfare measures and the verification of such measures. The mandates do *not* concern the primary and essential features of running a private school, such as student instruction. This is clear from the circumstances leading to publication of the report, the contents of the report, and the language of the appropriation in Section 152b. The Court should refuse to adopt any contrary interpretation.

D. The Appropriation for Nonpublic Schools Authorized by Section 152b Would Provide Only Incidental Aid to Nonpublic Schools

Applying the rule from this Court’s earlier opinions to the appropriation for nonpublic schools authorized by Section 152b, there can be no question that the subject appropriation would provide only incidental aid and support to nonpublic schools and, therefore, would not violate Proposal C.

Much like the auxiliary and special education services considered in *In re Proposal C*, 384 Mich 390, the reimbursements at issue here relate to general health, safety, and welfare regulations, as described above, including costs incurred by a private school to verify that the school is in compliance with applicable regulations. In this regard, the Legislature was unambiguous when it stated, “The 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 the children in nonpublic schools” MCL 388.1752b. Any other construction of Section 152b would ignore the plain language of the Act and should be avoided. See *Osborn*, 114 Mich at 660; *Meridian Charter Twp*, 285 Mich App at 587.

Accordingly, the Court should apply the same rationale here as in its prior opinions:

Since [the mandates identified in the Nonpublic Mandate Report] are general health and welfare measures, they have only an incidental relation to the instruction of private school children. They are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children Consequently, 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 [the identified mandates] which only incidentally involve the operation of educating private school children. [*In re Proposal C*, 384 Mich at 419-20.]

This type of aid to private schools is not new. In fact, the appropriation authorized by Section 152b is indistinguishable from other public aid previously awarded to nonpublic schools. For example, in 2015 the Michigan State Police announced that five sheriff's departments, 56 public school districts, 11 charter schools, and 15 private schools would receive \$4 million in public aid "to purchase equipment and/or technology to improve the safety and security of school buildings, students and staff." (Michigan State Police, *\$4 Million in State Grant Funding Awarded to Support School Safety Initiatives in Michigan* <<http://www.michigan.gov/msp/0,4643,7-123-1586-350490--,00.html>> (dated March 20, 2015) (accessed August 25, 2016), attached as Exhibit C.) In the announcement, a representative of the Michigan State Police explained, "The safety of our students and educators is of paramount importance This Competitive School Safety Grant Program will help schools to make improvements that will provide a safer and more secure learning environment." (*Id.*) Likewise, the appropriation in Section 152b will promote the health, safety, and welfare of nonpublic school students.

Simply stated, this case does *not* involve the provision of "primary and essential elements of a private school's existence," like textbooks and supplies or the employment of instructional personnel. *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 49. Nor does this case involve "parochialism" as that term was understood by the voters who approved Proposal C. See *In re Proposal C*, 384 Mich at 407 n 2.

While the appropriation will undeniably provide some *incidental* aid or support to nonpublic schools, the reimbursements are authorized only for general health, safety, and welfare measures that are not “‘primary’ elements necessary for [a] school’s survival as an educational institution.” *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 49. “These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.” *Id.* Presumably, most if not all of the nonpublic schools that will be eligible for reimbursement of costs under Section 152b have operated for years, or decades, and thus do not depend on the subject appropriation for their survival.

Reimbursement of a school’s costs to comply with *general health, safety, and welfare requirements* would be futile unless the school is otherwise viable as an educational institution. Nor does reimbursement of a school’s costs to *verify compliance with state laws and administrative regulations* rise to the level of prohibited aid under article 8, § 2. The voters who approved Proposal C did not intend to restrict the type of incidental aid and support at issue here.

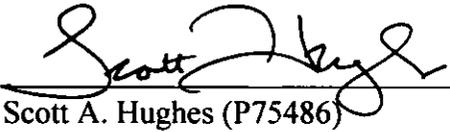
Opponents of Section 152b, no doubt, will attempt to frame this issue as involving some form of prohibited parochial aid. But this Court’s prior opinions make clear that general health, safety, and welfare measures do not run afoul of Proposal C, even if they result in incidental aid or support to a nonpublic school. The Court should decline the invitation of the opponents to mischaracterize the issue. The appropriation for nonpublic schools authorized by Section 152b would not violate article 8, § 2 of the Michigan Constitution of 1963.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the *amici* members of the Michigan Senate respectfully request that the Court grant the Governor’s request for an advisory opinion and issue an opinion

upholding the constitutionality of Section 152b of 2016 PA 249 with respect to the question submitted to the Court.

Respectfully submitted,

By:  _____

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Dated: August 25, 2016

STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF
2016 PA 249

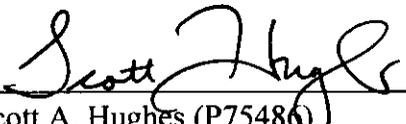
Supreme Court No. 154085

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The undersigned certifies that on the date below he served a copy of *Amici Brief of Senate Majority Leader Arlan B. Meekhof and Senators Jack Brandenburg, Mike Kowall, Rick Jones, Phil Pavlov, Peter MacGregor, Mike Green, and Darwin L. Booher in Support of Section 152b of 2016 PA 249* upon Governor Rick Snyder, George W. Romney Building, 111 South Capitol Avenue, Lansing, Michigan 48909, by placing same in a properly addressed envelope with postage thereon and depositing it in a United States mail box located in the City of Lansing, Michigan. Further the undersigned declares that the foregoing is true to the best of his information and belief.

By: 
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Dated: August 25, 2016