

**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

Supreme Court No. 154085

**AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN
AND THE EDUCATION LAW CENTER**

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INTEREST OF AMICI CURIAE

The **American Civil Liberties Union of Michigan** (“ACLU”) is a nonpartisan non-profit membership organization dedicated to protecting rights guaranteed by the United States and Michigan Constitutions. The ACLU has long been committed to protecting the right to a quality education in our public schools, and believes that right is protected in part by the state constitution’s prohibition on public aid for nonpublic schools. The ACLU regularly files amicus curiae briefs on constitutional questions pending before this and other courts. In this case, the Governor’s request for an advisory opinion specifically mentioned the ACLU as considering a legal challenge to the legislation in question.

The **Education Law Center** (“ELC”) is a nonprofit organization established to advocate, on behalf of public school children, for access to a fair and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. In states across the nation, ELC advances children’s opportunities to learn and assists advocates promoting better educational opportunities. ELC provides analyses and other support on relevant litigation, high quality preschool and other proven educational programs, resource gaps, education cost studies, and policies that help states and school districts gain the expertise needed to narrow and close achievement gaps. ELC has participated as amicus curiae in cases in California, Colorado, Connecticut, Indiana, Maryland, Oregon, Pennsylvania, South Carolina, and Texas.

INTRODUCTION

In 1971, voters adopted Proposal C, amending the Michigan Constitution to prohibit forms of public support for nonpublic schools. See Const 1963, art 8, § 2. This Court first interpreted Proposal C in its advisory opinion, *Traverse City School District v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971). The Court upheld three of Proposal C’s prohibitions on state support for 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.

[*Id.* at 411.]

However, in a manner inconsistent with more recent teaching of this Court, *Traverse City* did not employ a strict textual approach to interpreting the Constitution. The language of Proposal C is clear:

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. [Const 1963, art 8, § 2.]

Despite the clarity of this language, *Traverse City* departed from its plain meaning and examined extrinsic evidence from the contested pre-election debates to interpret what the language actually meant. See *Traverse City*, 384 Mich at 406 n 2. The Court reasoned that the prohibition against public money “to aid or maintain” nonpublic schools was intended to counter the controversial “parochial” policies of the day—but was not intended otherwise to mean what it said. *Id.*

The result has been substantial confusion. Now, in light of new legislation that would “reimburse” nonpublic schools for complying with statutory mandates, the Court faces yet

another request for an advisory opinion on what Proposal C really means. On July 20, 2016, this Court issued the following order:

We invite the Governor and any member of the House or Senate to file briefs on the following questions: (1) whether the Court should exercise its discretion to grant the Governor’s request to issue an advisory opinion in this matter; and (2) whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const 1963, art 8, § 2. [*In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 881 NW2d 472 (Mich, 2016).]

Section 152b of 2016 PA 249 (“Section 152b”) is an appropriation bill authorizing the expenditure of \$2.5 million to support nonpublic schools. The public money will pay for a hodgepodge of items identified in the Michigan Department of Education Nonpublic Mandate Report as “the mandates required of nonpublic schools.” See Michigan Department of Education, *Public Act 252 of 2014 Nonpublic Mandate Report* (November 25, 2014) (revised) (hereinafter “Mandate Report”).¹

Amici write to advance four arguments. First, we urge the Court to return to a textual interpretation of Const 1963, art 8, § 2 (“Proposal C”) to establish clarity in this area of law. The text states that “no public monies . . . shall be appropriated or paid . . . directly or indirectly to aid or maintain” any nonpublic school. Section 152b violates the plain meaning of Proposal C by directly appropriating \$2.5 million to nonpublic schools. This Court’s analysis may, and should, end there.

Second, if this Court does choose to assess the voters’ policy motivations for adopting Proposal C, the opposition to parochiaid must also be understood as an affirmative expression of support for Michigan’s public schools provided as a traditional public good—an objective seriously undermined by Section 152b. Section 152b, unlike any form of state support upheld in

¹ The Mandate Report is Exhibit B to the Governor’s July 13, 2016 letter to the Chief Justice requesting an advisory opinion.

Traverse City or subsequent cases, is structured and functions as an appropriation providing a direct monetary subsidy to nonpublic schools. This alone renders it unconstitutional as the unlawful appropriation of public money “to aid or maintain” nonpublic schools in contravention of the voters’ intent to reserve public education dollars exclusively for public schools.

Third, even under the Court’s non-text-based interpretation of Proposal C, Section 152b’s appropriations for the 44 items listed in the Mandate Report are unconstitutional, particularly as they relate to educational requirements, accountability, school operations and the employment of personnel in nonpublic schools.

Finally, if the unconstitutionality of Section 152b can only be established by facts that could be developed at the trial court level, the Court should not exercise its discretion to issue an advisory opinion and should instead permit a challenge to proceed through the adversarial process contemplated by MCL 600.2041(3) and MCR 2.201(B)(4).

ARGUMENT

- I. The Court should return to a textual interpretation of Proposal C and hold appropriations to nonpublic schools as authorized by Section 152b of 2016 PA 249 unconstitutional for violating the plain meaning of the Constitution, which states that “no public monies . . . shall be appropriated or paid . . . directly or indirectly to aid or maintain” nonpublic schools.**

The Governor’s request for an advisory opinion provides the Court an opportunity to clear up existing confusion regarding public appropriations to nonpublic schools and to return to the plain meaning of the constitutional provision.

In 1971, voters adopted Proposal C, amending the Michigan Constitution to prohibit any and all forms of public support for nonpublic schools except transportation. See Const 1963, art 8, § 2. This Court first attempted to interpret Proposal C in its advisory opinion, *Traverse City School District v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971).

The Court in *Traverse City* went astray when it departed from the plain meaning of the text and inappropriately relied upon extrinsic evidence to channel the intent of the voters. See *id.* at 406 n 2. The contrast between the Court’s analysis in *Traverse City* and its more recent opinion in *National Pride at Work, Inc v Governor*, 481 Mich 56; 748 NW2d 524 (2008), is striking.

National Pride at Work articulated controlling standards for interpreting constitutional provisions:

[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law. This Court typically discerns the common understanding of constitutional text by applying each term’s plain meaning at the time of ratification. [*Id.* at 67-68.]

The Court cautioned against the use of extrinsic evidence:

[E]xtrinsic evidence can hardly be used to contradict the unambiguous language of the constitution. *American Axle & Mfg,*

Inc v Hamtramck, 461 Mich 352, 362; 604 NW2d 330 (2000) (“[R]eliance on extrinsic evidence was inappropriate because the constitutional language is clear.”). As Justice Cooley explained:

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself.... “Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the [lawgiver] should be intended to mean what they have plainly expressed, and consequently no room is left for construction.” [Cooley, *Constitutional Limitations* (1st ed), p 55 (emphasis in the original), quoted in *American Axle*, 461 Mich at 362.]

When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited [*Id.* at 80.]

The Court in *Traverse City* failed to respect these principles of constitutional interpretation. The Court engaged in almost no textual analysis and found no textual ambiguity before diving into “the circumstances surrounding the adoption of a constitutional provision.” *Traverse City*, 384 Mich at 405. What followed was a good illustration as to why this Court has urged caution about trying to infer the intent of the voter from extrinsic evidence, particularly in highly contentious elections.

Not surprisingly, the Court found the Proposal C record full of conflicting and contradictory claims: “During the campaign the voter was barraged with contradictory statements on what effect the proposal would have on these various forms of state aid.” *Id.* at 406 n 2. Then, without any textual analysis, the Court claimed to have ascertained the voters’ intent: “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 amendment—no public monies to run parochial schools—and beyond that all else was utter and complete confusion.” *Id.*

Traverse City's effort to divine intent from sources other than the language (in the absence of ambiguity) runs contrary to more recent teaching of this Court. At this juncture, the Court should have invoked the maxim that only the language was on the ballot and that the voters can be assumed to have read and understood its plain meaning. Again, *National Pride at Work* is instructive:

In *Michigan Civil Rights Initiative v Bd of State Canvassers*, 475 Mich 903, 903; 716 NW2d 590 (2006) (Markman, J., concurring), in which it was alleged that numerous petition signatures had been obtained in support of placing the Michigan Civil Rights Initiative (MCRI) on the ballot by circulators who misrepresented the MCRI, it was emphasized that “the signers of these petitions did not sign the oral representations made to them by circulators; rather, they signed written petitions that contained the actual language of the MCRI.” Similarly, the voters here did not vote for or against any brochure produced by Citizens for the Protection of Marriage; rather, they voted for or against a ballot proposal that contained the actual language of the marriage amendment. [*National Pride at Work*, 481 Mich at 81.]

Because there will always be conflicting claims in an election, the most solid foundation for divining the intent of the voters is the text of the provision itself. *National Pride at Work* continues:

[A]ll that can reasonably be discerned from the extrinsic evidence is this: before the adoption of the marriage amendment, there was public debate regarding its effect, and this debate focused in part on whether the amendment would affect domestic-partnership benefits. The people of this state then proceeded to the polls, they presumably assessed the actual language of the amendment in light of this debate, and a majority proceeded to vote in favor. The role of this Court is not to determine who said what about the amendment before it was ratified, or to speculate about how these statements may have influenced voters. Instead, our responsibility is, as it has always been in matters of constitutional interpretation, to determine the meaning of the amendment’s actual language. [*Id.* at 83-83 (footnote omitted).]

If this standard were applied in *Traverse City*, the Court would have disregarded the extrinsic evidence, which the Court conceded was confusing and contradictory, and instead would have focused on the language of the provision itself.

Here, the plain language of Proposal C is clear and broadly prohibits aid to 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. [Const 1963, art 8, § 2 (emphasis added).]

If this language were not clear enough, the constitutional provision continues:

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. [*Id.* (emphasis added).]

An indication of the intended breadth of the prohibition is that the provision makes clear only a single exception: “The legislature may provide for the transportation of students to and from any school.” *Id.*

This language is not ambiguous, particularly when applied to Section 152b. Section 152b appropriates \$2,500,000 “to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report.” 2016 PA 249, § 152b. The Michigan Department of Education (MDE) will publish a form containing the nonpublic school mandates. *Id.* To receive funds, nonpublic schools “seeking reimbursement” must complete the MDE form by June 15, 2017. *Id.* By August 15, 2017, the MDE will “distribute funds to nonpublic schools that submit a completed form.” *Id.* The superintendent “will determine the amount of funds to be paid to

each nonpublic school in an amount that does not exceed the nonpublic school’s actual cost to comply” with nonpublic school mandates. *Id.*

The plain language of the Michigan Constitution provides that “no public monies . . . shall be appropriated or paid . . . directly or indirectly” to nonpublic schools. Const 1963, art 8, § 2. Section 152b of 2016 PA 249 appropriates funds directly to nonpublic schools. In light of the plain meaning of the Constitution’s text, Section 152b should be declared unconstitutional.

II. Even considering the voters’ purpose and motivations for adopting Proposal C, Section 152b is unconstitutional because it is structured and functions as a direct appropriation of public money “to aid or maintain” nonpublic schools, undermining the mandate that public moneys be reserved exclusively for public schools as a traditional public good.

Section 152b is unlike any form of state support upheld in *Traverse City* or subsequent cases. Section 152b is structured and functions as a direct appropriation providing a \$2.5 million subsidy to nonpublic schools. Such direct payments are unconstitutional under the prohibition of appropriating public money to “aid or maintain” nonpublic schools and for violating the intent of the voters supporting Proposal C.

After examining extrinsic evidence, *Traverse City* reasoned that Proposal C was clearly intended to counter parochiaid. “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-parochiaid amendment—no public monies to run parochial schools.” *Traverse City*, 384 Mich at 406 n 2. Even if one accepts this narrower interpretation of the intent behind Proposal C, it cannot reasonably be limited to historic proposals for parochiaid.

While Proposal C is phrased in oppositional terms and consists of multiple prohibitions, every photographic negative contains in its essence a positive photographic image. As such, it is wrong to view Proposal C simply in terms of opposition to parochial schools. It is necessary to

acknowledge its affirmative motivation. In positive terms, Proposal C is a strong constitutional affirmation of Michigan's system of public education provided as a traditional public good.

As discussed above, Proposal C contains strong and repeated prohibitions on public support for nonpublic schools. The provision's primary objective, however, is to preserve traditional public schools provided as a traditional public good, realizing that the provision of public goods presents difficult economic and political challenges—challenges that are interconnected.

The provision of public goods first requires overcoming individual collective action problems, a task best accomplished by the state. Secondly, the provision of public goods requires the cultivation and preservation of a long-term political consensus. One of the most effective ways to maintain this political consensus is to substantially limit the availability of competing alternatives, particularly ones subsidized by the state. If the number of competing alternatives is permitted to grow, the political consensus in support of the public good can start to fracture. Fractured economic markets lead to fractured political support.

As a result, if one wanted to preserve traditional public schools in the long term, one would seek to establish and maintain strong prohibitions on public support to nonpublic schools, just as Proposal C does. The prohibition of support to nonpublic schools limits the growth of nonpublic schools and helps maintain the political consensus needed to support public schools in the first place.

It is in this light that Section 152b must be assessed. The forest cannot be lost for the trees. Section 152b and the Mandate Report are much more than a series of individual mandates and individual appropriations standing in isolation. At its most basic level, Section 152b is an appropriations bill authorizing \$2.5 million in spending directly to nonpublic schools. But, there

is no limiting principle in the form of Section 152b as a funding mechanism, either in terms of the scope of potential future mandates or in the size of future levels of appropriation. In this respect, the existing version of Section 152b and the existing Mandate Report could easily serve as a Trojan horse, waiting for constitutional sanction before realizing its ultimate objective.

Proposal C states that “no public monies . . . shall be appropriated or paid . . . directly or indirectly to aid or maintain” nonpublic schools. Const 1963, art 8, § 2. The intention behind this prohibition is to limit the growth of nonpublic schools in order to strengthen the political consensus in support of traditional public schools. Unlike any form of state support upheld in *Traverse City*, Section 152b is a naked appropriations bill providing a direct subsidy to nonpublic schools with no prospective limiting principle.

Proposal C did not oppose parochial schools out of hostility to nonpublic schools. It did so because strong prohibitions on subsidies for nonpublic schools are essential for maintaining the political consensus needed to maintain traditional public schools. The direct subsidies Section 152b provides to nonpublic schools threatens this political consensus and should be declared unconstitutional for violating the intent of Proposal C.

III. Section 152b’s appropriations for the 44 items listed in the Mandate Report are unconstitutional even under the Court’s non-text-based interpretation of Proposal C, particularly as they relate to educational requirements, accountability, school operations and the employment of personnel in nonpublic schools.

Substantial legal confusion has persisted in the wake of *Traverse City*’s departure from the plain meaning of the constitutional text. No coherent legal framework currently exists to assess what is permitted and what is not permitted in terms of state support for nonpublic schools.

Like the story of the blind men and the elephant, all that can be gleaned from the case law are a series of partial perspectives as to the totality of Proposal C's actual scope and meaning. The first partial insights come from the three prohibitions upheld in *Traverse City*:

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.

[*Traverse City*, 384 Mich at 411.]

Second, in holding parochiaid unconstitutional, the Court announced a broader proposition that is relevant here. The ban on parochiaid functionally "prohibits the purchase, with public funds, of educational services from a nonpublic school." *Id.* at 407.

Third, additional partial insights can be derived from the "control tests" announced in *Traverse City* to distinguish parochiaid from permissible shared time programs:

Shared time differs from parochiaid in three significant respects. First, under parochiaid the public funds are paid to a private agency whereas under shared time they are paid to a public agency. Second, parochiaid permitted the private school to choose and to control a lay teacher where as under shared time the public school district chooses and controls the teacher. Thirdly, parochiaid permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects. These differences in control are legally significant. [*Id.* at 413-14.]

The Court further elaborated on the type of control needed to make the program constitutional: "Shared time can be provided by a public school system only under conditions appropriate for a public school. This means that the ultimate and immediate control of the subject matter, the personnel and premises must be under the public school system authorities, and the courses open to all eligible to attend a public school." *Id.* at 415.

The final partial insight comes from this Court's subsequent ruling in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). 1974 PA 242 required the State Board of Education to purchase textbooks and supplies and loan or provide them free of charge on an equal basis to public and nonpublic schools. Writing an opinion that received a majority of the votes, Justice Swainson held:

[I]t is a proper interpretation of the *Traverse City School Dist v Attorney General* rule to state that 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 (citation omitted).]

The meaning of "primary" and "incidental" needs to be interpreted in light of the Court's holding. Applying this test, the Court found that it easily proscribed the provision of both books and supplies:

When we speak of textbooks and supplies we are no longer describing commodities "incidental" to a school's maintenance and support. Textbooks 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.]

Here, the Mandate Report compiles a list of mandates already required of nonpublic schools. These mandates pertain to critical aspects of what it means to be a school, educate students and employ personnel. The Report breaks mandates down by categories, including "Educational Requirements: pertaining to curriculum, teacher certification, instruction hours, etc."; "School Operations: pertaining to concerns such as fair labor practices, taxation and environmental regulations"; and "Accountability: pertaining to student, school and other records." Mandate Report at 2. There are a total of 44 listed mandates. Of these mandates, twelve pertain to Educational Requirements, nine pertain to School Operations, including many relating to aspects of employment, and three pertain to issues of Accountability.

Appropriating public money funding these 44 mandates clearly provides funds to “aid and maintain” nonpublic schools and assist in the employment of educational personnel in violation of the Constitution. *Traverse City*, 384 Mich at 411. Moreover, these mandates run afoul of key aspects of *Traverse City*’s “control tests.” These funds are paid directly to nonpublic schools, not public schools; and nonpublic schools, not public schools, select and control the curriculum, teachers, staff and premises. *Id.* at 413-14.

If the provision of basic school supplies is a form of “primary” support deemed unconstitutional, it is difficult to see how money to provide so many key aspects supporting the facilities, regulating the staff and educating the students as listed in the 44 mandates are not also “essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist.” *In re Advisory Opinion*, 394 Mich at 49.

Indeed, since by definition a mandate is literally a legal requirement for operating a school, direct financial payment to assist in complying with the mandate cannot be considered merely “incidental” to a school’s maintenance and support, or merely “useful” to an otherwise viable school as in the case of shared time or auxiliary services. Rather, complying with the mandate is, as a matter of law, “necessary for the school’s survival as an educational institution.” *Id.* As such, it is a “primary element” required for the school to exist. *Id.* Supporting it through direct public funding, therefore, violates Proposal C.

A few examples are illustrative of how deeply payments for the nonpublic mandates contravene the prohibitions of Proposal C. The Mandate Report includes Administrative Rule 390.1146 as a requirement for which nonpublic schools will now be reimbursed. That rule provides:

- (1) A school district or nonpublic school . . . 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.]

Similarly, MCL 380.1166(1) requires that “instruction shall be given in the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions.”

Obviously, complying with these requirements entails a number of costs that will be subject to reimbursement, including employment of noncertified teachers, the provision of mentors, as well as the costs of instruction and curriculum development. Section 152b would require the payment of public funds for core curriculum subjects, such as world languages, mathematics, biology, chemistry, engineering and physics. Public funds would also support the employment of educational personnel.

These are clear violations of Proposal C, whether framed in the express prohibitions of public money to “aid or maintain” nonpublic schools or the prohibition of such funds to “employ” persons at nonpublic schools. *Traverse City*, 384 Mich at 411. They violate the residual prohibition against parochial aid of the legislature purchasing with public funds “educational services from a nonpublic school.” *Id.* at 407. These provisions also violate every aspect of *Traverse City*’s control test, as there is no public control over any of the expenditures. *Id.* at 413-14. Finally, these are clearly “primary” elements of any school, public or nonpublic, required for any school to exist. *In re Advisory Opinion*, 394 Mich at 49.

Some might suggest going carefully through the 44 categories of the Mandate Report and excising elements in clear violation of Proposal C, as if one were removing cancerous tumors. This strategy, however, misses an essential point. The problem ultimately lies with the entire structure of the appropriation. As any economist will tell you, money is fungible. Every dollar that is ultimately paid as an appropriation to a nonpublic school, ostensibly because the mandate relates to some activity that might be deemed “incidental,” is a dollar that frees up alternative funds for core educational activities. In other words, because each of the 44 mandates is, by definition, a required expenditure for the nonpublic school, public “reimbursement” will necessarily leave the school with more money to spend on teachers, textbooks, school supplies and the like. This is what the law forbids and this defect cannot be cured by severing specific line items.

In sum, under all existing judicial understandings of Proposal C, Section 152b should be struck down as unconstitutional in its entirety.

IV. If a factual record is needed to rule on the unconstitutionality of Section 152b, the Court should not exercise its discretion to issue an advisory opinion and should instead permit a challenge to proceed through the adversarial process contemplated by MCL 600.2041(3) and MCR 2.201(B)(4).

If the Court returns to the plain meaning of Proposal C, it can declare Section 152b unconstitutional based on the plain text of the Constitution and does not need further factual inquiry. If the court accepts the ways in which Section 152b is different from anything upheld in *Traverse City* and subsequent cases, and how it is structured and functions as a direct appropriation to nonpublic schools, it can declare the provision unconstitutional without further factual inquiry. And if the Court examines the totality of the Mandate Report’s 44 items, including the numerous provisions pertaining to educational requirements, school operations and

accountability, particularly as they relate to the employment of educational personnel, then it can declare Section 152b unconstitutional without further factual inquiry.

That being said, if the Court has any remaining doubt as to the unconstitutionality of Section 152b that could be resolved by the development of a complete factual record at the trial-court level, it should not exercise its discretion to issue an advisory opinion and should instead allow a challenge to proceed by way of MCL 600.2041(3) and MCR 2.201(B)(4), the provisions that allow nonprofit organizations or taxpayers to commence an action “to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto.” If that is the case, the Court should wait until a complete factual record is developed before ruling.

CONCLUSION

Section 152b of 2016 PA 249 should be declared unconstitutional for violating Article 8, Section 2 of the Michigan Constitution.

Respectfully submitted,

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