

**STATE OF MICHIGAN
IN THE SUPREME COURT**

In re ADVISORY OPINION 2016 PA 249

MICHIGAN ASSOCIATION OF SCHOOL BOARDS,
MICHIGAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, and MICHIGAN
SCHOOL BUSINESS OFFICIALS,

Amici.

Supreme Court
Docket No. 154085

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BRIEF AMICUS CURIAE OF
MICHIGAN ASSOCIATION OF SCHOOL BOARDS
MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS
MICHIGAN SCHOOL BUSINESS OFFICIALS

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STATEMENT OF APPELLATE JURISDICTION

On July 13, 2016, the Governor requested the Supreme Court to issue an Advisory Opinion regarding the constitutionality of 2016 PA 249. This Court has jurisdiction pursuant to Const 1963, art 3, § 28.

STATEMENT OF QUESTIONS INVOLVED

The Court specified 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.

Amici Michigan Association of School Boards, Michigan Association of School Administrators, and Michigan School Business Officials answer: "Yes."

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

Amici Michigan Association of School Boards, Michigan Association of School Administrators, and Michigan School Business Officials answer: "Yes."

I. INTRODUCTION

On June 27, 2016, Governor Snyder signed into law a \$16 billion education budget that included a \$2.5 million appropriation to reimburse nonpublic schools for complying with certain state mandates. In violation of Article 8, Section 2 of the Michigan Constitution, the \$2.5 million appropriation permits nonpublic schools to use public funds to provide a basic, core curriculum education.

At the time of signing, Governor Snyder recognized “potential legal issues associated” with the \$2.5 million appropriation, and he thereafter requested from this Court an advisory opinion. This Court subsequently ordered that briefs be filed addressing whether: (1) this Court should grant the Governor’s request for an advisory opinion; and (2) the \$2.5 million appropriation violates Article 8, Section 2 of the Michigan Constitution, which prohibits the appropriation of public funds to nonpublic schools for “primary” (or, *non*-incidental) benefits.

Regarding the first question, the Governor’s request meets the standard for advisory opinions set forth in Article 3, Section 8 of the Michigan Constitution, in part because it concerns an important question of law. The question pertains to fundamental values associated with a free public education and the People’s decision to limit the manner in which public funds can be given to nonpublic schools. The request should therefore be granted.

Regarding the second question, both the People of this State and this Court have previously rejected as unconstitutional what the Legislature now seeks to do—permit reimbursement of costs for instruction, including the teaching of a core curriculum at nonpublic schools. The \$2.5 million appropriation is thus unconstitutional.

Accordingly, for these reasons, and as more fully discussed in this brief, this Court should declare the appropriation unconstitutional in its entirety.

II. STATEMENT OF INTEREST

Proposed Amici are the Michigan Association of School Boards (MASB), the Michigan Association of School Administrators (MASA), and the Michigan School Business Officials (MSBO).

MASB is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, whose membership consists of boards of education of over 600 local school boards and intermediate school boards in this state. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

MASA is a voluntary, nonprofit association of public school administrators, and is the professional association serving superintendents and their first line of assistants, who serve as CEOs for their community's public schools. The mission of MASA is to develop leadership and unity within its membership to achieve the continuous improvement of public education in Michigan. MASA serves as an information-rich source of advice and support in areas critical to over 700 public school superintendents and first-line assistants in 584 school districts and 56 intermediate school districts. MASA serves nearly 2000 members including professionals, retirees, and businesses, helping the leaders of Michigan's most important public institutions get better results for more than 1.5 million students.

MSBO is a nonprofit professional organization founded in 1937 to serve the multifaceted interests of education. MSBO strives to continually improve the leadership of and management in school business and operational services while serving over 2,500 school business

professionals who work in the non-curricular aspects of a school district, primarily in the areas of finance, accounting, facilities, technology, transportation, human resources, and food and nutrition services. MSBO provides professional development opportunities, certification programs, technical support, informational publications, advocacy and school business solutions to and for its members.

Proposed Amici have substantial legal interests in ensuring the proper appropriation of public monies relative to education in this state, including compliance with Article 8, Section 2 of Michigan's Constitution, and represent the interests of K-12 public schools in this State. MASB and MASA have before appeared as Amici in similar instances, including in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975) (advisory opinion regarding whether the providing of textbooks to nonpublic schools violated Article 8, Section 2 of the Michigan Constitution—finding that it did).

Proposed Amici believe that the \$2.5 million appropriation violates Article 8, Section 2 of the Michigan Constitution, for the reasons set forth in this brief.

III. STATEMENT OF FACTS AND RELEVANT HISTORY

A. The People's 1970 Amendment To The Michigan Constitution Prohibiting Aid To Nonpublic Schools

In 1968, the Michigan Legislature created a joint committee to study the question of aid to nonpublic schools, then commonly known as "parochiaid," and at times referenced herein as "aid to nonpublic schools." *Traverse City Sch Dist v Attorney Gen*, 384 Mich 390, 406 n 2; 185 NW2d 9 (1971). The joint committee thereafter recommended to the Legislature that it enact parochiaid, and two related bills were subsequently introduced during the 1969 legislative session—each designed to give tax relief to tuition paying parents of children attending nonpublic schools. *Id.* Senate Bill 1097 ("SB 1097") provided a tax credit for any person who

paid tuition for students in elementary or secondary grades in nonpublic schools, and House Bill 2697 (“HB 2697”) proposed that individual taxpayers be allowed to subtract the cost of tuition, books and fees for any school or college from their adjusted gross income to determine taxable income for the Michigan income tax. *Id.* Neither of the bills passed. *Id.*

After the defeat of SB 1097 and HB 2697, then-Governor William Milliken created a Committee on Educational Reform. *Traverse City Sch Dist*, 384 Mich at 406 n 2. Like the Legislature’s joint committee, the Committee on Educational Reform recommended that the Legislature enact parochiaid. *Id.* (citation omitted). This time around, the Legislature proposed Senate Bill 1082 (“SB 1082”), which included the Committee’s recommendation adopted by Governor Milliken. *Id.* SB 1082 ultimately passed the Senate in the 1969 legislative session, and, anticipating House approval, Governor Milliken included a \$22 million appropriation for aid to nonpublic schools in his estimated state budget for the year 1970. *Id.* As foreshadowed by Governor Milliken, the House approved aid to nonpublic schools in February of 1970. *Id.*

When it became clear in February of 1970 that the Michigan Legislature would pass aid to nonpublic schools, a group of citizens called “Council Against Parochiaid” circulated petitions containing a proposed constitutional amendment, and they succeeded in obtaining sufficient signatures to place the proposal—known as “Proposal C”—on the ballot for the next general election, set to take place on November 3, 1970. *Traverse City Sch Dist*, 384 Mich at 406 n 2. The State Board of Canvassers refused to certify Proposal C on the grounds the petition was defective. But the Michigan Court of Appeals in a mandamus action brought by members of the Council Against Parochiaid ordered Proposal C on the ballot. See *Carman v Sec’y of State*, 26 Mich App 403; 182 NW2d 563 (1970), vacated on other grounds 384 Mich 443 (1971). On September 14, 1970, this Court denied leave to appeal *Carman* and, notwithstanding certain

establishment clause arguments, upheld the constitutional validity of aid to nonpublic schools. See *Advisory Opinion re Constitutionality of P.A.1970, No. 100*, 384 Mich 82; 180 NW2d 265 (1970). Two things were thus clear by that date: (1) parochial aid was law in Michigan, at least temporarily; and (2) the Council Against Parochial Aid had its challenge ready in the form of Proposal C on the fall ballot.

The stage was set for the November 3, 1970 election. “Everyone agreed [that Proposal C] was designed to halt parochial aid and would have that effect if adopted.” *Traverse City Sch Dist*, 384 Mich at 406 n 2. “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. . . .” *Id.*

On November 3, 1970, the Michigan electorate adopted Proposal C by a vote of: Yes—1,416,800; No—1,078,705. *Id.* As far as aid to nonpublic schools was concerned, the voters rejected it. *Id.*

Proposal C added the following language to Article 8, Section 2 of Michigan’s Constitution:

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

Thus, at the time of its adoption, Proposal C contained five prohibitions:

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 anyone 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; and
5. No public money to support the employment of any person at any location where instruction is offered to a nonpublic school student. [*Traverse City Sch Dist*, 384 Mich at 411.]

The last two of these prohibitions—and their corresponding constitutional language “at any location ... where instruction is offered ... to [a] nonpublic school student[]”—were deemed unconstitutional by this Court. *Id.* at 412-15. The first three prohibitions, however, still remain today. *Id.* at 415.

B. The Enactment Of 2016 PA 249 And Governor Snyder’s Request For An Advisory Opinion

On June 27, 2016, and more than 45 years after Proposal C became law, Governor Snyder signed Senate Bill 801, which became Public Act 249 of 2016 (the “Act”). The Act is a \$16 billion budget that covers K-12 education, community colleges and the state’s 15 public universities. See generally 2016 PA 249. Included in the Act is Section 152b, which appropriates to nonpublic schools the sum of \$2,500,000.00 for reimbursement of costs incurred in having to comply with state mandates identified in a November 25, 2014 “nonpublic school mandate report” (“Mandate Report”) published by the Michigan Department of Education (“MDE”). See generally MCL 388.1752b; Exhibit 1. A copy of the Mandate Report is attached as Exhibit 2.

The Mandate Report is a document extrinsic to Section 152b. That is to say, Section 152b only makes reference to the Mandate Report—it does not incorporate any of the Mandate

Report's language. See MCL 388.1752b(1). When MDE created the Mandate Report, it did so pursuant to Section 236 of 2014 PA 252, which directed MDE to compile a report identifying the state mandates required of nonpublic schools. The Mandate Report lists many already-enacted statutes and regulations that impose upon nonpublic schools various mandates, ranging from a statute requiring nonpublic schools to teach a course in civics (MCL 380.1166), to a statute requiring nonpublic schools to use certain fire retardant materials when constructing their school buildings (MCL 388.851). Section 152b reimburses nonpublic schools for the actual cost of employee wages incurred in complying with the statutes and regulations included in the Mandate Report, without limitation on which statutes and regulations are reimbursable. See MCL 388.1752b(4), (9).

Prior to Governor Snyder's signing of Senate Bill 801, a number of interested groups, including Proposed Amici MASB and MASA, wrote to Governor Snyder about the constitutionality of Section 152b. When signing the Act, Governor Snyder acknowledged his concerns about Section 152b, stating: "There are some potential legal issues associated with [Section 152b] ... but I thought it was appropriate to move ahead and then address the legal question." See *Gov. Snyder signs \$16B education budget that includes private school money*, Detroit Free Press (June 28, 2016).

On July 13, 2016, Governor Snyder requested that this Court issue an advisory opinion on the following question:

Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Article VIII, § 2 of the Michigan Constitution of 1963, which prohibits certain types of aid to nonpublic schools. [See Governor Snyder's July 13, 2016 Request For Advisory Opinion (hereinafter, the "Governor's Request").]

On July 20, 2016, and in response to the Governor’s Request, this Court requested that briefs be filed on two issues: (1) whether this Court should exercise its discretion and grant the Governor’s Request to issue an advisory opinion; and (2) whether Section 152b violates Article 8, Section 2 of the Michigan Constitution. See July 20, 2016 Order.

Proposed Amici MASB, MASA, and MSBO have separately filed a motion and now file this brief amicus curiae consistent with this Court’s July 20, 2016 Order.

IV. SUMMARY OF ARGUMENT

Section 152b violates Article 8, Section 2 of the Michigan Constitution because it reimburses nonpublic schools for the primary and essential elements of education, including the provision of a core curriculum. On at least one prior occasion, this Court determined that certain costs for which the Legislature now seeks to reimburse nonpublic schools, including the costs of instruction, are unconstitutional as violative of Article 8, Section 2. Section 152b is irreconcilable with both this Court’s precedent and the People’s intent in voting “Yes” on Proposal C—that no public monies can be appropriated to fund aid to nonpublic schools. Accordingly, Section 152b cannot survive constitutional scrutiny and is unconstitutional in its entirety.

V. ARGUMENT¹

A. Authority For Advisory Opinion Request

The Michigan 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

¹ Proposed Amici limit their argument to the constitutional provision raised in the Governor’s Request, being Article 8, Section 2 of the Michigan Constitution, and do not address other infirmities, constitutional or otherwise.

date.” Const 1963, art 3, § 8. This Court has directed briefing as to whether it should grant the request and as to whether the challenged provision is unconstitutional.

B. This Court Should Exercise Its Discretion And Issue An Advisory Opinion

1. The Governor’s Request concerns an important question of law

“Although public education is not a fundamental right granted by the federal constitution, it is not merely some governmental benefit which is indistinguishable from other forms of social welfare legislation.” *Snyder v Charlotte Pub Sch Dist, Eaton Cty*, 421 Mich 517, 525; 365 NW2d 151 (1984), citing *Plyer v Doe*, 457 US 202, 221; 102 S Ct 2382; 72 L Ed 2d 786 (1982). To the contrary, “education is perhaps the most important function of state and local governments.” *Snyder*, 421 Mich at 525, quoting *Brown v Topeka Bd of Educ*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954). Indeed, the Michigan Constitution enshrines the State’s unmistakable commitment to the provision of public education to its citizens:

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 education of its pupils without discrimination as to religion, creed, race, color or national origin. [Const 1963, art 8, § 2.]

“Clearly, then, under the Michigan Constitution, the citizens of this state have a fundamental right to a free public education.” *Lintz v Alpena Pub Schs of Alpena and Presque Isle Ctys*, 119 Mich App 32, 37; 325 NW2d 803 (1982).

As noted earlier, in 1970 the People of the State of Michigan further demonstrated their commitment to providing free *public* education by voting to amend the Michigan Constitution to ban the appropriation of public funds to nonpublic schools. Const 1963, art 8, § 2. The People thus made their will clear: public funds could not be used to fund aid to nonpublic schools.

In this case, the Governor’s Request lands safely in the category of an “important question of law” because it bears upon the basic and fundamental values associated with a free public education in this State, as well as the Michigan electorate’s decision in 1970 to amend this State’s Constitution to reject aid to nonpublic schools.

2. The Governor’s Request satisfies the remaining standards relative to advisory opinions

The Governor’s Request satisfies the remaining standards relative to advisory opinions because it: (1) concerns the constitutionality of legislation, i.e., whether Section 152b of the Act “would violate Article VIII, § 2 of the Michigan Constitution of 1963;” (2) is made upon solemn occasion, particularly in light of the number of interested groups, including MASB and MASA, writing to the Governor prior to Section 152b becoming law, as well as the high likelihood of protracted litigation; and (3) is made after Section 152b became law but before its effective date (see Section 3 of 2016 PA 249).

It is thus appropriate for this Court to exercise its discretion and render an advisory opinion. Indeed, this Court previously granted a request for an advisory opinion in an analogous circumstance. See *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 47-50; 228 NW2d 772 (1975) (“*In re PA 242*”) (granting a request for an advisory opinion to consider whether, and then finding that, providing textbooks to nonpublic schools violated Article 8, Section 2 of the Michigan Constitution).

C. Section 152b Violates Article 8, Section 2 Of The Michigan Constitution Because It Appropriates Public Funds To Nonpublic Schools For *Non-Incidental* Benefits

1. Standards of constitutional review

In construing the Michigan Constitution, this Court holds that “[t]he rule of ‘common understanding’” applies, which provides:

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 and 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) [citation omitted].]

“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 (citation omitted).

The Court must “examine the statute’s requirements rather than the method by which the individual schools administer their programs.” *Council of Orgs and Others for Educ About Parochiaid Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997), citing *Rassner v Fed Collateral Soc’y, Inc*, 299 Mich 206, 217-18; 300 NW 45 (1941). Stated differently, “an invalid statute is not redeemed by compensating actions on the part of its administrators.” *Council of Orgs*, 455 Mich at 571, citing *Rassner*, 299 Mich at 217-18. Instead, “[t]he constitutionality of a law must be tested by what may be done under it without offending any express provision of the constitution.” *Council of Orgs*, 455 Mich at 571, citing *Cummings v Garner*, 213 Mich 408, 435; 182 NW 9 (1921).

While this Court must exercise its authority to declare laws unconstitutional with caution, legislation will not be upheld when “invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. . . .” *Council of Orgs*, 455 Mich at 570 (citation omitted).

2. Article 8, Section 2 prohibits reimbursement of costs incurred for *non-incident*al benefits

Article 8, Section 2 of the Michigan Constitution prohibits appropriation of public funds to nonpublic schools for the following purposes:

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; and
3. No public money to “employ” anyone at a nonpublic school.

Traverse City, 384 Mich at 412-15.

In construing the words “aid or maintain,” this Court has declined to adopt a strict, “no benefits, primary or incidental” rule. *Id.* at 413. Instead, this Court decided upon a “reasonable construction” and held that “incidental” benefits provided to nonpublic schools are permissible. *In re PA 242*, 394 Mich at 48-49. “Incidental” benefits are those benefits that 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.* at 49 (emphasis added).² Conversely, “essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist” cannot be reconciled with Article 8, Section 2, because “the voters in adopting Proposal C were simply intent on outlawing parochiaid.” *Id.* at 48-49. Therefore, “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.

² For example, this Court deemed auxiliary services provided by public employees as “incidental” to the maintenance of private schools (and thus permissible under Article 8, Section 2), which includes, among other things, “health and nursing services and examinations; street crossing guards services; national defense education act testing services; speech correction services; [and] visiting teacher services for delinquent and disturbed children. . . .” *Traverse City*, 384 Mich at 418-19 (citation omitted).

In construing the prohibition on “employment,” this Court explained that, “[s]ince the employment stricture is part of the educational article of the constitution, ... it ... mean[s] employment for educational purposes only.” *Traverse City*, 384 Mich at 421. Put differently, this Court does “not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health, and general welfare activities.” *Id.* at 420. This Court deems important the employer from whom employees (i.e., teachers) “draw their check”—a public school or from a nonpublic school—and similarly whether the hiring and control of the employee is left with a public school or a nonpublic school. *Id.* at 416, 419, 435.

For example, in describing the important differences between the providing of “shared time” services versus aid to nonpublic schools, this Court noted the important distinctions:

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. [*Id.* at 413.]

And when describing the differences between “auxiliary services” and aid to nonpublic schools, this Court stated:

[A]uxiliary services are similar to shared time instruction in that private schools exercise no control over them. They are performed by public employees under the exclusive direction of public authorities and are given to private school children by statutory direction, not by an administrative order from a private school. [*Id.* at 420.]

Based on the foregoing, it is clear that if public funds are paid directly to a nonpublic school to employ a nonpublic school teacher, and if the nonpublic school exercises “control over” that teacher, a violation of Article 8, Section 2 is triggered. *Id.*

Illustratively, this Court’s 1971 decision in *Traverse City* considered the constitutionality of 1970 P.A. 100, which appropriated \$22 million for the purchase of “secular educational services” from nonpublic schools. *Traverse City*, 384 Mich at 406; see also *Advisory Opinion re Constitutionality of P.A.1970, No. 100*, 384 Mich 82, 90 n 4; 180 NW2d 265 (1970) (“*In re PA 100*”). Specifically, the Legislature appropriated public funds to “eligible nonpublic schools to pay a portion of the salaries of lay teachers who taught secular subjects in the nonpublic school.” *Traverse City*, 384 Mich at 406 n 1. The funds were expressly restricted to lay teachers who taught secular subjects using textbooks that met the criteria required of public schools’ textbooks, and there could be no payment or reimbursement for services to any teacher who was “a member of a religious order ... or who wears any distinctive hat, or both.” *In re PA 100*, 384 Mich at 90. Similarly, the funds could not be used to reimburse nonpublic school teachers for “any course of instruction in religious or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship.” *Id.* at 90-91. Finally, to receive the reimbursement, eligible nonpublic schools were required to meet certain administrative requirements and to maintain an accounting system segregating funds attributable to payment of the certified lay teachers teaching secular subjects. *Id.* at 91.

Notwithstanding the Legislature’s restriction on the use of the appropriated funds to secular purposes and the mandated administrative requirements, this Court held that the appropriation did not survive Article 8, Section 2. *Traverse City*, 384 Mich at 406-408. To the contrary,

Article 8, Sec. 2 ... prohibits the use of public funds “directly or indirectly to aid or maintain” a nonpublic school. The language of this amendment, read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, of educational services from a nonpublic school.

Id. at 406-407. Accordingly, this Court held that payment to nonpublic schools for the instruction of secular subjects by lay teachers violated the Michigan Constitution. *Id.* at 408.

Three years after *Traverse City*, this Court again considered the reach of Article 8, Section 2 in *In re PA 242*. In *In re PA 242*, the Senate requested an advisory opinion regarding Section 18(3) of 1974 PA 242, which provided that the state board of education would purchase and loan or provide textbooks and supplies, such as pencils, paper, and erasers, to school-aged children free of charge, including children attending nonpublic schools. This Court rejected the notion that textbooks or supplies were “incidental” benefits:

A very different situation is presented ... in the case of the textbooks and supplies that would be made available to private schools under s 18(3). 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. . . . However Proposal C is to be construed, ... if the will of the electorate is to be respected it must be read to bar public funding for primary and essential elements of a private school’s existence.

In re PA 242, 394 Mich at 49.³

The holding in *Traverse City* and the advice given in *In re PA 242* are clear: the provision of public funds to nonpublic schools for primary educational benefits—including, among other things, instruction—violates Article 8, Section 2 of the Michigan Constitution. That notwithstanding, Section 152b would reimburse nonpublic schools for exactly that.

³ See also *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 702; 178 NW2d 484 (1970) (“Applying either the ‘necessary elements of any school’s activity’ test or the ‘integral fundamental part of the elementary and secondary education’ test, it is clear that books and school supplies are an essential part of a system of free public elementary and secondary schools.”).

3. Section 152b is unconstitutional because it would reimburse nonpublic schools for instruction, including core curriculum

Section 152b, by and through the Mandate Report, permits reimbursement to nonpublic schools for compliance with multiple statutes and regulations, all of which contain state-imposed mandates. See Mandate Report, Exhibit 2, at p 1 (compiling a “list of Michigan Compiled Laws ... and Michigan Administrative Regulations ... that impose mandates on nonpublic schools. . . .”). Section 4 of Section 152b provides that only the “*actual cost* to comply with requirements” contained in the Mandate Report shall be reimbursable. MCL 388.1752b(4) (emphasis added). Importantly, Section 9 of Section 152b defines “actual cost” as meaning employee wages, as follows and in pertinent part:

... “actual cost” means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. ... Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs. [MCL 388.1752b(9).]

Thus, by its express terms, Section 152b reimburses nonpublic schools for wages paid to nonpublic school employees in having to comply with the requirements contained in the Mandate Report. And as explained immediately below, that includes payment of wages for having to teach various subjects at nonpublic schools, including core curriculum.

For example, Section 152b permits reimbursement for costs incurred in complying with MCL 380.1166, which mandates that “nonpublic schools” provide “regular courses of

instruction ... 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,” as well as—for nonpublic high schools—a “1-semester course of study of 5 periods per week in civics which shall include the form and functions of the federal, state, and local governments and shall stress the rights and responsibilities of citizens.” MCL 380.1166(1), (2) (emphasis added).

Similarly, Section 152b permits reimbursement for costs incurred in complying with both MCL 380.1561(3)(a) and MCL 388.551, each of which bears upon teaching a core curriculum at nonpublic schools. That is, under MCL 380.1561(3)(a), “a nonpublic school *must offer* courses ‘comparable’ to those offered by the public schools in the district within which the nonpublic school is located.” *Sheridan Rd Baptist Church v Dep’t of Educ*, 132 Mich App 1, 25; 348 NW2d 263 (1984), lv den 426 Mich 462 (1986), citing MCL 380.1561(3)(a) (emphasis added).⁴ This Court recognizes that MCL 380.1561(3)(a) “implies that [a] nonpublic school must provide a ‘core curriculum’ for its students, *such as basic reading, mathematics, writing, English, etc.*” *Snyder*, 421 Mich at 539-40 (emphasis added). As for MCL 388.551,⁵ which is part of the Private, Denominational, and Parochial Schools Act, nonpublic schools must offer “courses of study [that are] of the same standard as [public schools].” *Id.* at 539 n 13.

⁴ Specifically, this statute provides in part that all school-aged children must attend public schools, except that a child need not attend a public school so long as the child attends a nonpublic school that “teaches subjects comparable to those taught in the public schools to children of corresponding age and grade” MCL 380.1561(3)(a).

⁵ This statute provides in part that “the sanitary conditions of [nonpublic schools], the courses of study in [nonpublic schools], and the qualifications of the teachers in [nonpublic schools] shall be of the same standard as [public schools].” MCL 388.551.

As an initial matter, it cannot seriously be contended that reimbursing nonpublic schools for providing “instruction” while complying with MCL 380.1166 is permissible under Article 8, Section 2. Nor can it be said that reimbursing nonpublic schools for complying with both MCL 380.1561(3)(a) and MCL 388.551 in providing a “core curriculum” for students, such as “basic reading, mathematics, writing, [and] English,” is permissible under Article 8, Section 2. For example, undoubtedly “actual costs” incurred in having to provide “instruction,” or secular, core curriculum subjects encompasses the payment of wages for teachers. MCL 388.1752b(9). Undoubtedly, the teachers employed by nonpublic schools are subject to the “hiring and control” of the nonpublic school, and similarly “draw their check” from the nonpublic school. *Traverse City*, 384 Mich at 416, 435. And, the provision of funds to employ teachers at nonpublic schools for providing “instruction” and a “core curriculum” directly violates Article 8, Section 2 of the Michigan Constitution—including both the “aid or maintain” clause and the “employment” clause. See *Traverse City*, 384 Mich at 406-408 (determining that salary supplements to nonpublic teachers teaching secular subjects violate Article 8, Section 2, placing emphasis on factors such as “hiring and control” as well as from where the employee in question “draws [his or her] check”).

There could be nothing more “primary” (or, *less* “incidental”) to the educational function of a school than the very act of providing an *education* in core curriculum subjects. Indeed, Section 152b itself provides that “[t]he funds appropriated under this section are for purposes related to *education*. . . .” MCL 388.1752b(9) (emphasis added). Even the Mandate Report

describes 12 different categories of statutes and administrative rules as containing “Educational Requirements.”⁶ And in the context of “shared time” services, this Court previously stated:

[I]f public schools can be required to satisfy in any way a *parochial* school’s statutory responsibility to provide a core curriculum to its students, this might constitute impermissible direct aid to the parochial school, rather than legitimate aid to the students which incidentally benefits the parochial school. [*Snyder*, 421 Mich at 539-540 (citation omitted).]

In other words, because it is the nonpublic school—*not* the students—that must comply with “the statutory responsibility to provide a core curriculum to its students,” Section 152b’s appropriation of public funds to satisfy the same constitutes direct aid for a primary benefit to nonpublic schools, and unconstitutionally employs nonpublic school employees—both of which violate Article 8, Section 2.

4. Section 152b impermissibly reimburses costs for the construction of a nonpublic school

In addition to impermissibly appropriating public funds for the most basic function of any school—educating its students—Section 152b is unconstitutional for the simple reason that a nonpublic school cannot “otherwise be viable” without complying with many of the mandates included in the Mandate Report. As noted earlier in this brief, only benefits that are “incidental” are permissible, and “incidental” benefits are those benefits that 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].” *In re PA 242*, 394 Mich at 48-49 (emphasis added). In this case, if a

⁶ The statutes placed in the “Educational Requirements” category include: MCL 380.1151 (English as basic language of instruction); MCL 380.1166 (mandatory courses); MCL 380.1233 (teaching or counseling by noncertificated teacher); MCL 380.1531-380.1538 (teaching certificates); MCL 380.1561 (must provide a core curriculum); MCL 388.514 (student eligibility); MCL 388.519-388.520 (shall provide counseling services); MCL 388.1904 (shall provide to students eligibility letters); and MCL 388.1909-388.1910 (shall provide counseling services regarding career and technical preparation). See Mandate Report, Exhibit 2, at p. 3.

nonpublic school does not comply with certain of the mandates included in the Mandate Report, it cannot be said that the nonpublic school is viable.

For example, MCL 388.551 is not limited to nonpublic schools being required to offer “courses of study [that are] of the same standard as [public schools].” *Snyder*, 421 Mich at 539 n 13. That statute also requires that “the qualifications of the teachers in [nonpublic schools] ... be of the same standard as [public schools].” MCL 388.551. Notably, a failure to comply with MCL 388.551 “shall be considered sufficient cause to suspend the operation of said school. . . .” MCL 388.555. Put differently, the operation of a nonpublic school can be suspended for failure to comply with the mandates contained in MCL 388.551. But even if that enforcement mechanism did not exist, a nonpublic school would not “otherwise be viable” absent having qualified teachers. There are other examples.

For instance, Section 152b, by reference to the Mandate Report, allows reimbursement for costs incurred in complying with the Construction of School Buildings Act, without limitation, which includes:

Except as provided in subsection (2), a school building, public or private, or any additions to a school building, shall not be erected, remodeled, or reconstructed in this state unless all of the following requirements are met: . . . All walls, floors, partitions, and roofs shall be constructed of fire-resisting materials such as stone, brick, tile, concrete, gypsum, steel, or similar fire-resisting material. [MCL 388.851(1)(b).]

Thus, Section 152b permits reimbursement to pay the wages of employees “erect[ing]” a “school building,” at least during the time that the employees are using fire retardant materials for the walls, floors, partitions, and roofs—in other words, the school building. *Id.* The building in which students will be educated can hardly be called “incidental”—an appropriation for such purposes cannot find any support in this Court’s jurisprudence. To the contrary, and again, this Court previously stated that incidental benefits are those benefits that are “useful only to *an*

*otherwise viable school” In re PA 242, 394 Mich at 49 (emphasis added). Certainly, a brick-and-mortar school cannot be “otherwise viable” if its building is not yet constructed, and paying employees the wages necessary to use materials to construct a school are “primary” benefits because they are benefits “required for [the] school to exist.” *Id.**

Under similar circumstances, the Kentucky Supreme Court reached this conclusion in *Univ of Cumberlands v Pennybacker*, 308 SW3d 668 (Ky 2010). Similar to Article 8, Section 2 of the Michigan Constitution, Kentucky’s Constitution provides:

No portion of any fund or tax now existing, or that may hereafter be raised or levied for education purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian, or denominational school. [Ky Const sec 189.]

Notwithstanding this constitutional provision, the Kentucky Legislature passed a bill appropriating \$10 million in public funds for the construction of a pharmacy school on the campus of a religious university. *Pennybacker*, 308 SW3d at 671. In response to a constitutional challenge, the State argued that the pharmacy school satisfied the purpose of health and welfare, rather than educational purposes, because Kentucky faced a shortage of pharmacists. *Id.* at 674.

The court disagreed:

Assuming this legislative intent, this argument begs the question—how can an appropriation to construct a pharmacy school not entail an educational purpose? What could the construction of a building possibly accomplish in addressing the alleged shortage of pharmacists in the Commonwealth unless faculty are retained and students are then recruited and educated in a manner that will enable them to pass the requisite professional licensing examinations? *The \$10 million appropriation is for bricks and mortar but its ultimate purpose is to provide a venue for the education of pharmacy students.* [*Id.* (emphasis added).]

In other words, while the construction of a building or using certain construction materials may certainly serve some public purpose, the unavoidable conclusion is that the ultimate purpose of

constructing a nonpublic school (or an “addition” to a nonpublic school) “is to provide a venue for the education” of students. *Id.*

Here, too, paying the wages of those constructing a school when using fire retardant materials, while serving certain other public purposes, serves the ultimate—and *primary*—purpose of paying for the construction of a nonpublic school. Certainly a grant of public funds for the construction of a nonpublic school—like the grant in *Pennybacker*—violates Article 8, Section 2 of the Michigan Constitution. Importantly, there is no practical distinction between expressly earmarking funds for the construction of a nonpublic school and earmarking funds for the payment of wages of employees erecting the nonpublic school.

Based on the foregoing, Section 152b allows for the unconstitutional reimbursement of costs incurred by nonpublic schools for having to comply with multiple statutes, including MCL 380.1166, MCL 380.1561(3)(a), MCL 388.551, and MCL 388.851(1)(b).

D. The Statement Of Public Purpose Does Not Excuse Section 152b’s Violation Of Article 8, Section 2

The constitutional infirmity cannot be avoided by calling the \$2.5 million appropriation “incidental” or “noninstructional” in character, or by providing a statement of public purpose. Specifically, Section 152b provides:

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.

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. [MCL 388.1752b(7), (8).]

Notwithstanding this apparent attempt to cure Section 152b's constitutional infirmities, Michigan law recognizes that labels are not dispositive. To the contrary, "legislative labeling cannot preclude judicial determination, or excuse a court from its responsibility to give realistic construction to terms employed in statutes." *People v Barber*, 14 Mich App 395, 401; 165 NW2d 608 (1968). A label "cannot circumvent the explicit provision[s] of the Constitution," i.e., by calling a statute or a term what it is not. *Id.* at 404. Accordingly, despite statements to the contrary, Section 152b comes to this Court as a wolf in sheep's clothing, seeking to do what the People of this State and this Court have already rejected. *Traverse City*, 384 Mich at 406-408; *In re PA 242*, 394 Mich at 49.

To illustrate, on the one hand, Section 152b states that the "[f]unds allocated ... are not intended to aid or maintain any nonpublic school." MCL 388.1752b(7). On the other hand, Section 152b states that the "funds appropriated under this section are ... intended ... to reimburse nonpublic schools for costs described in this section." *Id.* Importantly, the costs described in Section 152b are the "costs incurred by nonpublic schools as identified in the [Mandate Report] published by the department on November 25, 2014 and under subsection (2)." Therefore, the inescapable conclusion is that all of the costs identified in the Mandate Report are reimbursable, regardless of how the costs are labeled. In similar fashion, Section 152b states that the "[f]unds allocated under this section are not intended to ... employ any person at a nonpublic school." MCL 388.1752b(7) (emphasis added). Yet, Section 152b defines "actual cost" as meaning "the hourly wage for the employee or employees performing the reported task or tasks. . . ." MCL 388.1752b(9). It is axiomatic that paying a nonpublic school "the hourly wage for the employee" is reimbursement for the "employ" of a "person at a nonpublic school."

Courts construing state prohibitions on the use of public funds for nonpublic schools routinely reject arguments that the appropriation of funds is somehow permissible because it serves a public purpose or benefits the child. For example, in *Fannin v. Williams*, 655 SW2d 480, 483-84 (Ky 1983), the Kentucky Supreme Court addressed the constitutionality of legislation that sought to provide textbooks to students in nonpublic schools. In holding that the statute violated a constitutional provision akin to Article 8, Section 2, among other provisions, the Kentucky Supreme Court disregarded arguments that the legislation served other public purposes:

The people of Kentucky specified by the language of the Constitution in terms that are clear and unmistakable that the type of expenditure authorized by the statute in question should be unconstitutional. If the people of Kentucky wish to change their position in this matter, it is their right to do so. . . . One can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution established a public school system and limits spending money for education to spending in its public schools. . . . [T]he Kentucky Constitutional provisions that restrict spending money for education to public schools, restrict *where* and *how* public funds can be expended for education, not just *when* and *why*. So we cannot uphold the statute because we could find some public benefit in its purpose. It is constitutionally impermissible because of the manner in which it directs the expenditure of public funds for educational purposes, through nonpublic schools. [*Id.* at 484-85 (emphasis in original)].

Succinctly stated: “We cannot sell the people of Kentucky a mule and call it a horse, even if we believe the public needs a mule.” *Id.* at 484. See also *Moses v Skanders*, 367 P3d 838, 845 (NM 2015) (holding that, while it agreed with the “broad philosophical statement” that the provision of textbooks to children attending nonpublic schools constitutes a “public service,” “the provision of school books is an educational purpose[] [and] Article XII, Section 3 controls the

Legislature’s discretion when money is appropriated for educational purposes by prohibiting the appropriation of educational funds to private schools.”).

Similarly, courts criticize the “child-benefit” theory, particularly where, as here, the constitutional provision at issue is not limited to direct aid that runs to nonpublic schools. For example, in *Dickman v School Dist*, 232 Or 238, 250; 366 P2d 533 (1961), the Oregon Supreme Court stated:

This so-called ‘child benefit theory’ has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools. The difficulty with this theory is, however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil.

The California Supreme Court reiterated a similar criticism:

The “child benefit” theory has been criticized by courts and commentators on the ground that it proves too much. If the fact that a child is aided by an expenditure of public money insulates a statute from challenge, constitutional proscriptions on state aid to sectarian schools would be virtually eradicated. There is no logical stopping point. The doctrine may be used to justify any type of aid to sectarian schools because ... practically every proper expenditure for school purposes aids the child.

California Teachers Ass’n v Riles, 29 Cal3d 794, 807; 176 Cal Rptr 300; 632 P2d 953 (1981) (internal citations omitted).

By its very terms, Article 8, Section 2 of the Michigan Constitution does not limit its prohibitions to only those appropriations that serve no public purpose. Rather, it prohibits the provision of public funds to nonpublic schools for primary educational benefits. That notwithstanding, Section 152b permits—without exception—reimbursement for costs incurred in having to comply with MCL 380.1166, MCL 380.1561(3)(a), MCL 388.551, and MCL 388.851(1)(b), which in turn is unconstitutional because it violates Article 8, Section 2. And

Section 152b’s use of the words “incidental” and “noninstructional,” as well as the statement of Section 152b’s supposed intent, cannot make constitutional that which is not—reimbursement to nonpublic schools for costs incurred for *non*-incidental (or, primary) benefits. To hold otherwise would be to “sell the people of [Michigan] a mule and call it a horse, even if [the Legislature] believe[s] the public needs a mule.” *Fannin*, 655 SW2d at 484.

E. The Legislature Cannot Avoid Section 152b’s Unconstitutionality By Adding Administrative Oversight

In enacting Section 152b, the Legislature imposed certain administrative requirements. Specifically, by January 1, 2017, MDE “shall publish a form containing the requirements identified in the [Mandate Report].” MCL 388.1752b(2). Then, by June 15, 2017, “a nonpublic school seeking reimbursement ... of costs incurred ... shall submit the form ... to [MDE].” MCL 388.1752b(3). And, by August 15, 2017, “[MDE] shall distribute funds to nonpublic schools that submit a completed form ... in a timely manner.” MCL 388.1752b(4). Each of the foregoing provisions is non-discretionary. That is to say, each contains the commanding word “shall.” For example, MDE must publish a form that contains *all* of the requirements identified in the Mandate Report (including MCL 380.1166; MCL 380.1561(3)(a); MCL 388.551; and MCL 388.851(1)(b)). And if reimbursement is timely sought by a nonpublic school for the same, MDE “shall distribute funds.”⁷ MCL 388.1752b(4).

Even if the Legislature did afford to MDE (or some other party) the authority to reject reimbursement for costs that are unconstitutional, that would be insufficient. As recognized by this Court, “an invalid statute is not redeemed by compensating actions on the part of its

⁷ Indeed, the only authoritative function afforded to MDE is that MDE “has the authority to review the records of a nonpublic school submitting a form ... only for the *limited purpose* of verifying the nonpublic school's compliance with [Section 152b].” MCL 388.1752b(6) (emphasis added).

administrators.” *Council of Orgs*, 455 Mich at 571, citing *Rassner*, 299 Mich at 217-18. Accordingly, a statute must stand or fall by its terms, and must be tested by what it affirmatively permits. *Id.* at 571.⁸

F. The Times And Circumstances Leading Up To Proposal C Demonstrate That Section 152b Violates The Michigan Constitution

The language of Article 8, Section 2 is clear and, coupled with this Court’s jurisprudence, plainly prohibits the type of aid permitted by Section 152b. Nevertheless, if the Court determines that the matter cannot be resolved by looking to the language of the Constitution itself, the Court may look to “the circumstances surrounding the adoption of [Article 8, Section 2] and the purposes sought to be accomplished” by its adoption. *Traverse City*, 384 Mich at 405.

Historically, the Michigan electorate believed that certain aid was appropriately provided to nonpublic schools, such as funds for certain auxiliary services, bus transportation, shared time classes, and property tax exemptions for nonprofit or private schools. See *Traverse City*, 384 Mich at 406 n 2. However, in the 1960s, the Michigan Legislature introduced several bills regarding aid to nonpublic schools, which did not fund such auxiliary services, but instead funded the very functions of parochial schools. As this Court explained in its 1971 *Traverse City* decision:

[T]he steps leading up to the enactment of parochial aid and serious consideration of tuition support for parents of children attending private schools are recent developments on the Michigan scene. The events culminating in the passage of parochial aid began in 1967 when the Michigan School Finance Study proposed by the State Board of Education, funded by the legislature and conducted by Dr. J. Allen Thomas recommended additional state aid for private

⁸ Notably, the very act of *appropriating* public funds offends Article 8, Section 2, which provides: “No public monies or property shall *be appropriated* . . . to aid or maintain any private. . . .” (Emphasis added). And because the Act “appropriated” public funds, Section 152b violates Article 8, Section 2 irrespective of whether MDE disburses funds.

schools. In 1968, the legislature created a joint committee to study the question of aid to private schools. The committee recommended to the 1969 legislature that it enact parochiaid. House Bill 3875, which embodied the committee's recommendation was defeated by eight votes in the House. Two unsuccessful bills were introduced during the 1969 legislative session designed to give tax relief to tuition paying parents of children attending private schools. Senate Bill 1097 provided for a tax credit for any person who paid tuition for students in elementary or secondary grades in private schools. House Bill 2697 proposed that individual taxpayers be allowed to subtract the cost of tuition, books and fees for any school or college from their adjusted gross income to determine taxable income for the Michigan income tax. Subsequent to the House defeat of parochiaid, the Governor created a Committee on Educational Reform. The Committee recommended that the legislature enact parochiaid. Senate Bill 1082, which included the committee's recommendation adopted by the Governor, was passed by the Senate in the 1969 session. Foreseeing House approval, the Governor included \$22 million in his estimated state budget for 1970 to fund the parochiaid scheme. During February of 1970 the House approved parochiaid. [*Id.* (internal citations omitted)].

In other words, the Legislature set forth on a path determined to enact parochiaid and provide public funds for use by nonpublic schools in unprecedented ways.

Though the Legislature made numerous attempts to enact parochiaid, 1970 PA 100, which appropriated \$22 million to be paid to nonpublic school teachers for instruction of secular subjects in nonpublic schools, is what triggered Proposal C. That is, the passage of 1970 P.A. 100 resulted in a ballot initiative by the Council Against Parochiaid, which succeeded in obtaining enough signatures to place Proposal C on the ballot for the November 1970 election.

Consideration of aid to nonpublic schools generated heated debate, with one newspaper calling it “one of the most important [decisions] the people of Michigan ever will make.” *Parochiaid Controversy Takes Inevitable Turn*, Michigan Press Reading Service (Sept 16, 1970), Exhibit 3. While the People of the State of Michigan did not disfavor auxiliary aid, news

coverage of the debate demonstrated the vigor with which the citizenry objected to aid to nonpublic schools:

The decision to grant public aid to church schools would represent the abandonment of sound constitutional practice, of long-standing tradition and of the only defensible distinction between the public and private sectors of this state's life. [*It's Still Unconstitutional*, Detroit Free Press (Dec 11, 1969), Exhibit 4].

How can a nation hold that it is wrong to introduce religious practice into the public schools—to protect Catholic children from Protestant practice as well as vice versa—and then sanction direct aid to religious institutions? It cannot. [*Is Church, State Separation Worth the Struggle Today?*, Detroit Free Press (Oct 15, 1969), Exhibit 5].

Whatever you call it, parochiaid or educaid, it is state support for schools which exist primarily to teach a particular religion (the fact that they teach nonreligious subjects does not change their primary purpose). It is this fact, and its implications, which is of basic importance, and which is obscured by most of the money-time talk. [*Talk About Principle*, Bay City Times (May 6, 1969), Exhibit 6].

Indeed, opponents of aid to nonpublic schools found it so contrary to the State's traditional values that lobbyists were prepared to reject a large aid package for public schools where its approval depended upon an appropriation granting funds for aid to nonpublic schools:

Speaker William Ryan is evidently determined that there will be no school reform that does not include parochiaid. Now the state's major public school lobby groups have put together a united front saying just the opposite: They do not want public school reform if parochiaid is a part of the bargain. [*Legislature Must Separate Parochiaid, School Reform*, Detroit Free Press (Dec 7, 1969), Exhibit 7].

Notwithstanding the clear will of the People through the adoption of Proposal C, the Legislature now seeks to appropriate funds in contravention of that will. Section 152b permits reimbursement for the very costs that gave rise to the ballot initiative—payment to nonpublic school teachers for instruction in secular subjects. See MCL 380.1166 (reimbursing costs associated with instruction in civics and history courses); MCL 380.1561 (reimbursing costs

associated with teaching core curriculum subjects comparable to those taught in public schools). As explained in this brief, if reimbursements for complying with these mandates does not pay for the costs of “instruction” and “teaching,” what do they pay for?

Under the guise of the labels “incidental” and “noninstructional,” the Legislature seeks to “flout the intent of the electorate” and appropriate public monies to fund the primary and essential functions of nonpublic schools. Section 152b cannot stand in the face of this Court’s contrary jurisprudence and the clear intent of the People.

G. Section 152b Fails In Its Entirety

Section 152b is severable from the Act. See MCL 8.5. But parts of Section 152b are not severable from Section 152b itself, and it fails in its entirety.

MCL 8.5 provides:

If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

In determining whether provisions of a statute are severable upon a finding of unconstitutionality, Michigan courts have long held that the provisions of a statute are not severable where the provisions are “connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other.” *People v McMurchy*, 249 Mich 147, 158; 228 NW 723 (1930) (citation omitted). Thus, this Court holds that the provisions of a statute must fail in their entirety if the provisions are so mutually connected “as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently” *Id.* at

159. In other words, a statute cannot stand if the Legislature would not have passed the legislation at issue in the absence of its unconstitutional provisions.

As a preliminary matter, legislative analysis regarding Section 152b is scant. Nevertheless, the language of Section 152b and its existing legislative history demonstrate that reimbursement for educational costs was a central component of the Legislature's intent and that the Legislature would not have enacted Section 152b in the absence of such educational reimbursements. Specifically, in its original drafts, Section 152b provided a per-pupil allotment for nonpublic schools' compliance with the Mandate Report "to ensure the health and safety of all schoolchildren in the state." See Exhibit 8. Section 152b, as originally drafted, contained no further statement regarding the purpose of the legislation.

However, the Legislature thereafter amended 152b to include that "[t]he funds appropriated under this section *are for purposes related to education . . .*" Section 152b(7) (emphasis added). The Legislature's addition of offending provisions reveals that the Legislature would not have enacted Section 152b in the absence of the same. In such a circumstance, other courts have recognized that the court should not substitute its judgment for that of the legislature and that the entire section should be stricken.

For example, in *Mayor of Boston v Treasurer and Receiver Gen*, 384 Mass 718, 718-19; 429 NE2d 691 (1981), the Massachusetts Supreme Court considered the severability of independent sections of a \$348,000,000 appropriation that was, itself, part of a larger, general appropriations bill. There, the Massachusetts Legislature appropriated \$348 million in financial aid to cities and towns as a whole but, in doing so, imposed a specific limitation on the distribution of funds to the city of Boston. After finding the conditional grant to Boston unconstitutional, the court determined that the entire aid provision—\$348 million to *all* cities and

towns—must be struck down because the court was unable to determine whether the funds would have been appropriated in the same manner in the absence of the conditional grant. *Id.* at 725. As the court noted, “[i]f the court is unable to know whether the Legislature would have enacted a particular bill without the unconstitutional provision, it will not sever the unconstitutional provision, but will strike the entire statute.” *Id.* The court reasoned:

We cannot say that the General Court would have enacted the same budget item without the limitation if it had known the limitation to be illegal. Perhaps the Legislature granted Boston extra funds, by its adjustment of the distribution formula, because of the additional burden of the limitation concerning police and fire services in Boston. As to the entire budget item, perhaps the Legislature would have appropriated some amount other than \$348,000,000 or it might have directed the funds to be distributed among municipalities according to a different formula. It is sheer conjecture to say what, if any, alternative the Legislature would have adopted. We would be engaging in legislating ourselves if we were to determine that (1) Boston may receive its share of the additional local aid funds free of the limitation or (2) the portion of the additional local aid funds not going to Boston should be distributed without regard to the invalidity of the conditional grant to Boston. [*Id.* at 725-26].

Accordingly, while the appropriation of \$348,000,000 was severable from the larger, general appropriations bill, the \$348,000,000 appropriation itself could not be severed among its component parts. Notably, the court struck down the entirety of the \$348 million appropriation with full awareness of its import, recognizing its decision to be grounded in constitutional principles. *Id.* at 720.

Here, too, the Court, at the very least, can no more than guess at whether the Legislature would have enacted Section 152b in the absence of a critical component—the reimbursement of costs related to education. The legislative history of Section 152b does not include a financial analysis or other indication of how much—if anything—the Legislature would have appropriated in the absence of the unconstitutional provisions. As noted in *Mayor of Boston*, perhaps the

Legislature granted additional funds to nonpublic schools by virtue of the schools' compliance with mandates "related to education." Conversely, perhaps the Legislature would have appropriated fewer funds, or appropriated funds according to a different formula, in the absence of the unconstitutional provisions. Given the lack of financial analysis and other legislative history, the Court cannot know whether the Legislature would have enacted Section 152b in the manner that it did. As such, the Court would be required to employ "sheer conjecture" and to substitute its judgment for that of the Legislature in order to determine the manner in which the funds should be distributed in the absence of the offending provisions.

Accordingly, Section 152b fails in its entirety.

VI. CONCLUSION

The constitutionality of Section 152b in light of Article 8, Section 2 is a question most deserving of this Court's consideration. Section 152b implicates the fundamental values associated with a free public education and the electorate's clear intent in limiting the manner in which public monies can be used to aid nonpublic schools. Additionally, the Governor's Request is made upon a solemn occasion, regarding the constitutionality of Section 152b, and after Section 152b was enacted into law, but before its effective date. This Court should, respectfully, grant the Governor's Request for an advisory opinion.

Moreover, the Legislature appropriated \$2.5 million to reimburse nonpublic schools for certain mandates it called "incidental" and "noninstructional," and for the ostensible purpose of ensuring the health, safety, and welfare of nonpublic school children. Notwithstanding those labels and the declaration of benevolent purpose, Section 152b, in substance and operation, reimburses nonpublic schools for the primary and essential elements of education in violation of Article 8, Section 2 of the Michigan Constitution. Indeed, Section 152b seeks to reimburse nonpublic schools for educational benefits which the People of this State and this Court

previously rejected, and itself recognizes that the “funds appropriated ... are for purposes related to education.” Accordingly, Section 152b cannot survive constitutional scrutiny.

For the foregoing reasons, this Court should issue an advisory opinion declaring that Section 152b violates the Michigan Constitution and striking Section 152b in its entirety.

Respectfully submitted,

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Dated: August 26, 2016.

DETROIT 29877-7 1399155

EXHIBIT 1

THE STATE SCHOOL AID ACT OF 1979 (EXCERPT)
Act 94 of 1979

***** 388.1752b.added THIS ADDED SECTION IS EFFECTIVE OCTOBER 1 2016 *****

388.1752b.added Certain identified costs incurred by nonpublic schools; reimbursement; "actual cost" defined.

Sec. 152b. (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.

(3) By June 15, 2017, a nonpublic school seeking reimbursement under subsection (1) of costs incurred during the 2016-2017 school year shall submit the form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section unless the nonpublic school submits the form described in subsection (2) in a timely manner.

(4) By August 15, 2017, the department shall distribute funds to nonpublic schools that submit a completed form described under subsection (2) in a timely manner. The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual cost to comply with requirements under subsections (1) and (2). The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.

(5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.

(6) The department has the authority to review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection for this limited purpose, the nonpublic school is not eligible for reimbursement under this section.

(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.

(9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing the reported task regardless of whether that individual is available and regardless of who actually performs the reported task. Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

History: Add. 2016, Act 249, Eff. Oct. 1, 2016.

EXHIBIT 2



Public Act 252 of 2014

NONPUBLIC MANDATE REPORT

November 25, 2014 (Revised)

Michigan Department of Education

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NONPUBLICMANDATEREPORT

TO THE STATE BUDGET DIRECTOR, THE HOUSE AND SENATE APPROPRIATIONS SUBCOMMITTEES
RESPONSIBLE FOR THE DEPARTMENT OF EDUCATION, AND THE SENATE AND HOUSE FISCAL AGENCIES

Public Act 252 of 2014

Summary of Legislation

Sec. 236 of (2014 PA 252) 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.

Summary of Data Collection of Nonpublic School Mandates

The list of Michigan Compiled Laws (MCL) and Michigan Administrative Regulations (R) that impose mandates on nonpublic schools is the product of a thorough search conducted by the Library of Michigan through Lexis. The Library of Michigan reference staff researched hundreds of pages of results one page at a time, screening the most recent edition of the Michigan Association of Nonpublic Schools (MANS) Manual, which includes the School Legal Obligation Compliance Checklist, as well as the list compiled by the Michigan Catholic Conference. The research did not include federal law, nor did it include Pre-K or post-secondary provisions unless they also applied to K-12.

The list is comprehensive, but it is not exhaustive. As evidenced by examples, such as requirements regarding underground storage tanks and blood borne pathogen training, not all of these mandates are relevant based on the nonpublic school setting. They apply only because a school, as an institution, has to comply with laws regarding employment practices, environmental regulation, building codes, etc., just as any other institution or place of business would.

Summary of Nonpublic School Mandate Report

The laws found to be pertinent are presented in the table below. The report includes the MCL citation, a brief description of the law, the category assigned to the law, and a deliverable column. A deliverable represents if the mandate requires a report(s), the submission of a form(s), or other types of documents to be produced.

The categories used are listed and defined below:

Accountability: pertaining to student, school, or other records

Building Safety: pertaining to building and structural requirements

Educational Requirements: pertaining to curriculum, teacher certification, instruction hours, etc.

School Operations: pertaining to concerns such as fair labor practices, taxation, environmental regulations

Student Health: pertaining to the physiological or mental health of students

Student/Staff Safety: pertaining to the providing a safe environment for students and staff

NONPUBLIC MANDATES ⁽¹⁾

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MCL/ RULE	DESCRIPTION	CATEGORY	DELIVERABLE
29.5p	Hazardous Chemicals— Employee Right to Know	School Operations - Student/Staff Safety	no
29.19	Fire/Tornado Drills/Lockdown/Shelter in Place	Student/Staff Safety	yes
257.715a	State Police inspection 12+ passenger motor vehicles	Student/Staff Safety	no
257.1807—257.1873	(Pupil Transportation Act)-School bus owned/operated by nonpublic school must meet or exceed federal and state motor vehicle safety standards	Student/Staff Safety	no
289.1101-289.8111	Food Law	School Operations - Student/Staff Safety	no
324.8316	Notice of pesticide application at school or day care center	Student/Staff Safety	no
333.9155	Concussion education	Student Health	no
333.9208	Immunizations	Student Health	no
333.17609	Licensure of school speech pathologist	Student Health	no
380.1135	Student records	Accountability	yes
380.1137a	Release of student information to parent subject to PPO	Accountability	no
380.1151	English as basic language of instruction	Educational Requirements	no
380.1166	Constitution and governments mandatory courses	Educational Requirements	no
380.1177—380.1177a	Immunization statements and vision screening	Student Health	yes
380.1179	Possession/use of inhalers and epinephrine auto-injectors	Student Health	no
380.1230—380.1230h	Required criminal background check by State Police/FBI; unprofessional employment history check; registered educational personnel	Student/Staff Safety	yes
380.1274b	Products containing mercury; prohibit in schools	Student/Staff Safety	no
380.1233; R390-1145	Teaching or counseling as noncertificated teacher ; special permits; emergency permits	Educational Requirements	no
380.1531—380.1538	Teacher certification and administrator certificates	Educational Requirements	yes
380.1539b	Notification of conviction of listed offense	Student/Staff Safety	yes
380.1561	Compulsory school attendance	Educational Requirements	no
380.1578	Attendance records	Accountability	yes
388.514	Postsecondary Enrollment options	Educational Requirements	yes
388.519—388.520	Postsecondary Enrollment Act information and counseling	Educational Requirements	no
388.551—388.557	Private, Denominational & Parochial Schools Act	School Operations	no
388.851—388.855b	Construction of school buildings	Building Safety	no
388.863	Compliance with federal asbestos building regulation	Building Safety	no
388.1904	Career and technical preparation program; enrollment; records	Educational Requirements	yes
388.1909—388.1910	Career and Technical preparation information and counseling	Educational Requirements	no
408.411—408.424	Workforce Opportunity Wage Act (minimum wage)	School Operations	no
408.681—408.687	Playground Equipment Safety Act	Student/Staff Safety	no
409.104—409.106	Youth Employment Standards Act; work permits in student files	School Operations	no
423.501—423.512	Bullard-Plawecki Employee Right to Know Act (employee files)	School Operations	no
722.112	Child care organizations	School Operations	yes
722.115c	Child care organization criminal history and criminal background checks	Student/Staff Safety	yes
722.621—722.638	Child Protection Law	Student/Staff Safety	yes
R 257.955	Annual school bus inspections	Student/Staff Safety	no
R 285.637	Pesticide use	Student/Staff Safety	no
R 289.570.1—289.570.6	Food establishment manager certification	School Operations	no
R325.70001—325.70018	Bloodborne Pathogens	Student/Staff Safety	yes
R340.293	Notification to district of auxiliary services needed	Educational Requirements	no
R340.484	Boarding school requirements	School Operations - includes aspects of all categories	no
R390.1146	Mentor teachers for noncertificated instructors	Educational Requirements	no
R390.1147	Certification of school counselors	Educational Requirements	no

(1) Compiled October 2014 by Library of Michigan Reference Staff

EXHIBIT 3

SEP 16-70

171 Parochiaid Controversy Takes Inevitable Turn

The drama of the battle over aid to nonpublic schools in Michigan is plunging toward its final act. The script for the curtain scene will be written by the voters at the November general election.

This development seemingly became inevitable the moment the first state grant to nonpublic schools became a matter of law.

Early in the game it became clear that the Legislature would approve the aid principle (commonly known as Parochiaid) in some form or another. The advocates of such aid had the troops and powerful leadership in the persons of House Speaker William A. Ryan and Gov. William Milliken.

In such an atmosphere the temptation was great for members of the Legislature to pass the bill and "let the courts decide" whether it was constitutional.

Thus the bill was passed with a provision that the financial aid provision not become effective until the State Supreme Court had ruled on the controversy.

This the Supreme Court has done, upholding Parochiaid as constitutional on a 4-to-3 vote. At the same time the Supreme Court said, in effect, "let the people decide" by upholding a move to put a constitutional amendment on the ballot in November. The court thus overruled Atty. Gen. Frank J. Kelley who had held that the petitions, while having sufficient signers, were not in proper form.

It would be an undue reflection in the high court to say that the justices took the easy way out by upholding Parochiaid while passing

the buck on the final decision to the voters in November. The court's decisions, however, have to be considered fortunate.

Because of the heat generated in the Legislature in the course of the debate over aid to nonpublic schools the vote by the people seems to be the best way to end the controversy.

With the door to grants to private schools opened, the Legislature had to expect continuing pressure for larger and larger grants in coming years. That would mean a new fight in every session of the Legislature.

An alternative to the popular vote was an appeal to the United States Supreme Court which now has before it several cases involving laws similar to that passed by Michigan. The high court might end the controversy, but it is utterly unpredictable.

As matters stand now, the people have a chance to put an end to the argument, once and for all, by changing the constitution. If they reject the proposed amendment, then the Legislature will know that aid to private schools is acceptable to a majority of the people and will have no fears of increasing the grants in future years.

The stage is set, of course, for a heated campaign between now and election day. Both parties to the dispute will roll out their biggest guns to turn on the electorate. That is good, too. The decision is one of the most important ones the people of Michigan ever will make. They need to hear both sides of the story and go to the polls as well informed as possible.

EXHIBIT 4

MICHIGAN PRESS
CLIPPING BUREAU

EAST LANSING, MICH
TELEPHONE EDGewood 3-4610
217 Michigan Avenue

MICHIGAN
Detroit, The Free Press
(D)

DEC 11 1969

171 It's Still Unconstitutional

BECAUSE Michigan so urgently needs educational reform and because some legislators are willing to hold reform hostage unless they also get aid to non-public schools, the odds are strong that parochial aid will pass in Michigan this year.

It is, we think, a tragic mistake. The state has already paid a fearful price for Gov. Milliken's decision to make aid to religious institutions a matter of public policy. The bitterness and the accusations of religious bigotry will not soon dissipate.

The governor, we recognize, has supported the principle of parochial aid over a good many years. We would not accuse him of mere expediency. Nor do we question the earnestness with which many advocates of such aid believe it to be only fair.

Yet once more, before the Legislature makes its final decision, we must reiterate: The decision to grant public aid to church schools would represent the abandonment of sound constitutional practice, of long-standing tradition and of the only defensible distinction between the public and private sectors of this state's life.

Surely the most angry zealot can recognize that what we have been asking is merely the preservation of existing practice. The rule that church and state should be strictly separated has served us well in the past. It has been deemed so important

that it is enshrined in the U.S. and Michigan Constitutions.

Consider the Michigan Constitution:

"No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose."

Where in that language is the authorization for applying any "child benefit theory" to direct support of a church school program? How is the state treasurer going to make out the checks?

And how, may we ask once more, can a distinction be drawn between secular and non-secular subjects? Even science has been a battlefield across which religious conflicts have raged. Even the study of language—the writing of themes, for instance—and the study of literature are subject to religious interpretation and influence.

If the granting of such aid is, as Bishop Thomas Gumbleton has said, a way to help keep whites from abandoning Detroit, is providing aid to non-public schools not, then, offering a means of escape from the non-discriminatory public schools? Will it not encourage the development of two school systems, one for the more affluent, mostly white children, the other for poor blacks and whites?

These questions we ask in all respect and affection for those who support private education. Though some of them doubt our goodwill, we admire their insistence on what they think is something better for their children. We ask the questions with regret that they have to be asked. We would much prefer that parochial school policies and enrollment should be the concern of the parents and the parishes alone.

But the governor and the Legislature have made them everyone's business. They have made a venomous public debate very much a part of all our lives this autumn. In their haste to lay aside sound, old principles, they have created greater rancor, not greater equity.

EXHIBIT 5

Detroit Free Press

AN INDEPENDENT NEWSPAPER

JOHN S. KNIGHT, Editorial Chairman

LEE HILLS, President and Publisher

JOHN B. OLSON, V. P. and General Manager

DERICK DANIELS, Executive Editor

FRANK ANGELO, Managing Editor

MARK ETHRIDGE JR., Editor

Published every morning by Knight Newspapers, Inc., 321 Lafayette Blvd., Detroit, Michigan 48231

4-A

WEDNESDAY, OCTOBER 15, 1969

As We See It

Is Church, State Separation Worth the Struggle Today?

WITH REMARKABLE regularity now, the proponents of public aid to parochial schools are using a new weapon against those who object to parochial aid: They are charging anyone who opposes them with religious bigotry.

The charge was expressed recently in a letter to us from a Detroit lawyer and advocate of parochial aid: "As one of many thousands of people who have happily supported a dual system of schools, I cannot help but feel that bigotry must constitute a portion of your ownership's feeling in the misleading and ill-considered editorials against any but the public school system."

This is not an easy kind of attack to resist, especially if one is not happy with the idea that he might be a bigot or that someone might think he is a bigot. Moreover, it comes at a time, quite frankly, when we are forced to weigh our deeply felt conviction that such aid is wrong against the practical reality that it may be the price Gov. Milliken has to pay for reform of the structure of public education.

The opponent of parochial aid is forced to ask himself, "Would it be enough simply to trust that the courts of Michigan, at least, will eliminate parochial aid?" And this decision must be made against the background that the federal courts have so far failed to provide a definitive test of the kind of aid proposed. Does one fall back to that second line of defence in opposing parochial aid, or does one persist and run the risk of jeopardizing the other parts of the governor's education program?

The temptation to yield is strong, especially when it would presumably be accompanied by an easing of the charge that bigotry motivates us.

It is strong, but it is also seductive and dangerous.

For in fact the charge that bigotry motivates the opponents of parochial aid in itself proves the great historic point about such breaches of the wall separating church and state: Reasonable men endanger their politics when they make religious questions a matter of public policy.

It is fundamentally wrong to make parochial schools instruments of state policy, and it is impossible to subsidize them without making religion itself a matter of public policy. The Supreme Court has upheld some peripheral assistance to parochial schools—the lending of textbooks, for instance—but it has permitted to stand a Maryland decision that the secular and religious functions of a church-related school cannot be sorted out. And historically it has ruled that direct aid violates the principle of separation of church and state.

How can a nation hold that it is wrong to introduce religious practice into the public schools—to protect Catholic children from Protestant practice as well as vice versa—and then sanction direct aid to religious institutions? It cannot.

And if the relevance of the rule against mixing religion and politics is still doubted, consider Northern Ireland. Religious conflict is very much alive in the world, and where it can become a matter of state policy, it has the potential at least to be terribly destructive.

True, some nations breach the wall of separation with no apparent damage to themselves. But the American experience is that genuine separation is the safest course. We think it still is.

EXHIBIT 6

MICHIGAN
Bay City Times
(D)

MAY 6 -69

Talk About Principle

"One more such victory and we are undone," said Pyrrhus, King of Epirus, after defeating the Romans at Asculum.

If the foes of private school aid succeed in blocking such aid now, only to set the stage for it next year, their victory will be too costly.

Rep. J. Robert Traxler says he is confident that although he has failed to gain majority support for a \$40-million-plus appropriation for private schools, he is confident that the Legislature will approve a token appropriation and the principle of aid, so that a full program may be funded for 1970-71.

If all Traxler and the proponents of parochiaid have lost is a few months, they have not lost much, and those who thought they were winning something may be deluding themselves.

In any case, a clear-cut decision right now would benefit everyone and should be provided by the House and the Senate.

The State's financial situation is not likely to be much better in 1970 than it is now, and it may well be worse. So the question could be academic. If the reason aid is denied now is a shortage of funds, the reason may apply next year, in spades.

But Traxler may be correct in regarding a victory in principle as a prelude to real victory. If the Legislature approves aid in principle—and this is the important long-term issue—then the only question left is how soon the money may be available, or made available.

Additional school money may have to be appropriated in the fall, whether for one system or for two, and if the Legislature does not set guide-lines now, it will be postponing the inevitable.

Although Gov. William Milliken has so far discussed the matter only in economic terms, his predecessor,

George Romney probed more deeply.

Romney questioned whether publicly supported private education would please anyone, whether it would produce what those who think they want it, think they want.

This is a variation of the constitutional issue, for what separation of church and state means is that when they are not separated, neither is reality itself; each is, if not corrupted, changed into something different from what it claims to be — if the state is in essence democratic and the church is primarily a matter of spirit.

Whatever you call it, parochiaid or educaid, it is state support for schools which exist primarily to teach a particular religion (the fact that they teach nonreligious subjects does not change their primary purpose).

It is this fact, and its implications, which is of basic importance, and which is obscured by most of the money-time talk. In fact, it is usually simply ignored.

We're not even talking about what public education is all about. Who is discussing the implications of turning over control of part of the educational system to private groups? — which is the other way of putting the educaid proposition.

Postpone a decision, of course. We're not even close to talking about the real problems let alone what it might cost to answer them. But let's not commit ourselves in advance to a principle we have neither studied nor understood. The blind leading the blind, we'll fall into a pit, for sure.

Perhaps we are wrong about the principle, but let's find out, Mr. Traxler, what that principle is, and what it means, and then let's talk about what it will cost.

Let's keep parochiaid out of the statute books this session, and do some studying, instead.

EXHIBIT 7

Detroit Free Press

AN INDEPENDENT NEWSPAPER

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2-B

SUNDAY, DECEMBER 7, 1969

As We See It

Legislature Must Separate Parochaid, School Reform

GOV. MILLIKEN has asked the Michigan Legislature to make two important policy decisions this fall, and from the way things are going, he may not get an answer on either.

The major policy decision is whether the state itself should replace the local school district as the principal source of school financing.

But that issue has gotten all tangled up with—and is now overshadowed by—the question of whether the state should give tax funds to support private schools.

The governor obviously thought he could not get consideration of the financing of school reform without including parochaid. It now appears that the opposition to parochaid may be so bitter and deepseated that the whole program will go down to defeat.

Speaker William Ryan is evidently determined that there will be no school reform that does not include parochaid.

Now the state's major public school lobby groups have put together a united front saying just the opposite: They do not want public school reform if parochaid is a part of the bargain.

It seems to us unconscionable that the two policy decisions cannot be separated. Whether to give aid to private schools is too important a decision, too radical a departure from past practice and from the American tradition, to be slipped through as part of some deal. It ought to be voted up or down on its merits, as it was last spring when it was defeated in the House of Representatives.

And the proposed reform of school financing and of the organization of the schools themselves is a bold step that ought not to get bogged down in a bitter fight over public subsidies for church-related schools. Are legislators for or against this on its merits?

The U.S. commissioner of education, James Allen Jr., summarized the importance of that decision: "The nation will be watching what the Michigan Legislature does because Michigan could establish an education system that will be a model for other states."

What could be more democratic and reasonable than for the Legislature, in solemn debate, to consider the issue of reorganization of the financing of public education separately from aid to church schools? Speaker Ryan's apparent intention to hold public school reform as a hostage is outrageous.

If Rep. Ryan's effort succeeds, then Gov. Milliken may find that he has paid too high a price in his attempt to win approval of his program. It is apparent that he has underestimated the intensity and perhaps the strength of the resistance to parochaid. That opposition may prove to be his program's undoing rather than its salvation.

EXHIBIT 8

Senator _____ offered the following amendment to Senate Bill No. 796 (S-1) Draft 2:

1. Amend page 286, following line 20, by inserting:

"SEC. 152B. (1) FROM THE GENERAL FUND MONEY APPROPRIATED IN SECTION 11, THERE IS ALLOCATED AN AMOUNT NOT TO EXCEED \$5,000,000.00 FOR 2016-2017 TO REIMBURSE NONPUBLIC SCHOOLS FOR THE COSTS IDENTIFIED IN THE NONPUBLIC MANDATE REPORT PUBLISHED BY THE DEPARTMENT ON NOVEMBER 25, 2014 TO ENSURE THE HEALTH AND SAFETY OF ALL SCHOOLCHILDREN IN THE STATE.

(2) THE DEPARTMENT SHALL DISTRIBUTE FUNDS ALLOCATED UNDER SUBSECTION (1) TO NONPUBLIC SCHOOL APPLICANTS IN AN AMOUNT EQUAL TO \$50.00 PER ENROLLED STUDENT IN A FORM AND MANNER DETERMINED BY THE DEPARTMENT.

(3) IF THE FUNDS ALLOCATED UNDER THIS SECTION ARE INSUFFICIENT TO FULLY FUND PAYMENTS AS OTHERWISE CALCULATED UNDER THIS SECTION, THE DEPARTMENT SHALL PRORATE PAYMENTS ON AN EQUAL PER-STUDENT BASIS." and adjusting the totals in section 11 and enacting section 1 accordingly.