

**IN THE SUPREME COURT
OF THE STATE OF MICHIGAN**

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

Supreme Court No. 154085

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BRIEF OF *AMICUS CURIAE* MICHIGAN CATHOLIC CONFERENCE

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**STATEMENT OF THE BASIS OF JURISDICTION AND STATEMENT OF
INTEREST OF AMICUS CURIAE**

On July 13, 2016, Governor Rick Snyder, as permitted under Const 1963, art 3, § 8, filed a request for an advisory opinion with this Court concerning the constitutionality of Section 152b (“Section 152b”) contained in Public Act 249 of 2016 (“2016 PA 249”) (“Advisory Opinion Request”).¹ On July 20, 2016, this Court issued an order considering the Advisory Opinion Request (“Order”). In the Order, consistent with MCR 7.308(B), this Court invited interested parties to move this Court for permission to file briefs amicus curiae on either or both sides of the questions presented by August 26, 2016. This Court, therefore, has jurisdiction under Const art 3, § 8 and MCR 7.308(B).

Founded in 1963, the Michigan Catholic Conference (“MCC”) serves as the official voice of the Catholic Church in Michigan on matters of public policy. The Catholic school presence in the State of Michigan (the “State”) consists of approximately 36,994 students attending 178 elementary and middle schools, and approximately 15,453 students attending 44 high schools throughout the entire State. As nonpublic schools, Catholic schools are part of the nonpublic school population that will be affected by a decision on the constitutionality of Section 152b. MCC provided input to the Michigan Department of Education (“MDE”) as MDE prepared the Nonpublic Mandate Report (“MDE Mandate Report”) cited in Section 152b, and MCC was publicly supportive of the Legislature’s effort to enact Section 152b. Accordingly, MCC respectfully requests that this Court accept MCC’s amicus brief in support of the constitutionality of Section 152b pursuant to MCR 7.308(B).

¹ Section 152b can be found in the State School Aid Act of 1979, MCL 388.1752b.

STATEMENT OF QUESTION PRESENTED

1. Should this Court exercise its discretion to grant the Governor's request to issue an advisory opinion regarding the constitutionality of Section 152b of 2016 PA 249?

Amicus Curiae MCC answers: Yes.

2. Does the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 violate Const 1963, art 8, § 2?

Amicus Curiae MCC answers: No.

INTRODUCTION

On any given day, you can pick up a newspaper or read a story on-line about the health and safety conditions of our State's schools – both public and nonpublic. Whether it is the conditions of the schools, compliance with existing mandates, or student safety issues, the list of issues affecting the learning environment for our State's school children is broad, complex and ever growing. The State has an obligation to ensure that all students and the learning environment they choose to use is not only safe and clean, but fosters the intellectual development of our State's greatest asset and its future – Michigan's school children. This includes all of Michigan's school children irrespective of whether they choose to attend a public or nonpublic school. Although the underlying constitutional question in this case is relatively straightforward – whether the State can appropriate funds to nonpublic schools to foster compliance with existing health, safety, and general welfare measures and reporting requirements without running afoul of our Constitution – the matter is of significant importance to the State and its oversight of nonpublic education. Indeed, this issue implicates multiple constitutional provisions, including Const 1963, art 8, § 1; art 8, § 2 and art 4, § 51. As noted in the Order, article 8, § 2 is the clearest potential issue raised by Section 152b. But article 8, § 2 does *not* prohibit all forms of public funding for functions or services from being paid or provided to nonpublic schools. Public support may be provided to nonpublic schools if it is incidentally related to the operation of education and does not excessively entangle the State with religion. The small appropriation granted under Section 152b is intended to reimburse nonpublic schools for certifying that they are in compliance with a number of State-mandated requirements relating to the health, safety, and general welfare of Michigan students. The appropriation does not serve as a primary educational tool and cannot be considered an educational equivalent. Contrary to what opponents of Section 152b may argue, this appropriation does not reimburse

salaries of nonpublic school teachers or other personnel, does not fund or support any nonpublic school educational programs, and does not provide any public money for nonpublic school materials, equipment or supplies. Rather its purpose is to ensure that nonpublic schools are in compliance with State law and that nonpublic schools are providing a safe and healthy environment for its students, a responsibility shared by the State for all school children.

Simply because the funding under Section 152b would be directly provided to the nonpublic schools does not automatically mean that article 8, § 2 would be violated. Voluntarily seeking reimbursement for certifying compliance with certain State-mandated requirements is not essential to running a nonpublic school. A nonpublic school's certification in this respect serves to bolster the State's duty to encourage and ensure that the State's nonpublic school children are learning in safe and healthy environments, and the State is encouraging the means of education irrespective of what type of school a student attends. This Court should grant the Governor's request and find that Section 152b is constitutional and does not violate article 8, § 2.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. SECTION 152b AND ITS FRAMEWORK

2016 PA 249 is the fiscal year 2016-2017 omnibus appropriations for schools, community colleges and universities that also contains certain supplemental appropriations for fiscal year 2015-2016 funding for schools, colleges and universities.² As part of this year's State budget process, the Michigan House of Representatives and Senate passed separate education appropriations bills.³ Both House and Senate bills contained similar Section 152b language, but

² The bill leading to the enactment of 2016 PA 249, Senate Bill 801, was initially introduced on February 16, 2016.

³ The House passed its own appropriations bill, House Bill 5291, on April 26, 2016, and the Senate initially passed SB 801 on May 4, 2016.

differed in the amount appropriated.⁴ (See Exhibit A for House and Senate language). As part of the conference committee process⁵, House and Senate conferees negotiated a revised Section 152b that was submitted in the final conference report to both chambers for approval. (See Exhibit B). The House and Senate approved the conference committee report on June 8, 2016 (“Conference Committee Report”). The Governor signed 2016 PA 249 into law on June 27, 2016, but Section 152b is not effective until October 1, 2016.

Section 152b provides that nonpublic schools may voluntarily seek reimbursement for the cost of reporting the nonpublic school’s compliance with certain State mandated health, safety and general welfare requirements. Specifically, Section 152b incorporates the MDE Nonpublic Mandate Report. As part of a 2014-2015 supplemental State appropriation bill for MDE⁶, the Michigan Legislature (“Legislature”) commissioned the MDE Mandate Report:

Sec. 236. 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

⁴ The House recommended a \$1M appropriation while the Senate recommended a \$5M appropriation.

⁵ The House passed a substitute for SB 801, but the House substitute for SB 801 was not concurred with by the Senate necessitating the bill be sent to conference committee to work out matters of difference. House and Senate leadership ultimately agreed to utilize SB 801 as the vehicle bill for the omnibus appropriations for schools, community colleges and universities.

⁶ The MDE Mandate Report was incorporated into HB 5313 which was passed by the Legislature and signed into law by Governor Snyder and became Public Act 252 of 2014 (“2014 PA 252”). 2014 PA 252 became effective June 30, 2014.

responsible for the department of education, and the senate and house fiscal agencies not later than April 15, 2015. (emphasis added).

The MDE Mandate Report identifies those State statutes that apply to nonpublic schools, as well as those statutes requiring some form of reporting or deliverable from the nonpublic schools. (Exhibit C).

Based on the MDE Mandate Report, Section 152b requires MDE to develop a form that identifies the mandates requiring nonpublic school compliance and those mandates requiring a deliverable from the nonpublic school. § 152b(2). Section 152b authorizes the reimbursement of nonpublic schools for their cost in reporting the nonpublic school's compliance with the mandates identified in the MDE Mandate Report, as well as a nonpublic school's cost of complying with the deliverables (i.e., reporting of compliance) nonpublic schools must comply with under applicable State law. § 152b(1)-(3). Section 152b also requires MDE to identify additional statutory mandates on nonpublic schools and deliverables from nonpublic schools based on State laws enacted after the issuance of the MDE Mandate Report. *Id.*, § 152b(2). A requesting school can only receive an amount that is the school's "actual cost" to comply with the requirements under the statute, which is limited under Section 152b to the hourly wage of the lowest-paid employee capable of performing the reported task(s) excluding their benefits and any overtime pay.⁷ *Id.*, §§ 152b(4), (9). A nonpublic school's decision to submit the MDE form is voluntary. § 152b(3). A nonpublic school is not, however, eligible for reimbursement unless it submits a completed form. *Id.*

Section 152b also makes explicitly clear that funds appropriated "are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are

⁷ The entire amount appropriated under Section 152b is not to exceed \$2.5M.

noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and general welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.” § 152b(7). In addition, Section 152b addresses directly any potential issues associated with the Const 1963, art 8, § 2, by providing that appropriate funds “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.” § 152b(8). MDE is given limited authority to review a nonpublic school’s records to ensure compliance with Section 152b’s requirements. A nonpublic school unwilling to allow for limited MDE review is not eligible to receive funding. § 152b(6).

Prior to signing 2016 PA 249 into law, the Governor received correspondence from several groups addressing the constitutionality of Section 152b. MCC, along with other education groups, submitted a letter in support of Section 152b. (Exhibit D). Although the Governor elected to sign 2016 PA 249 into law, he publicly acknowledged that some parties questioned whether Section 152b was constitutional. (Exhibit E). Following his signing of the bill, the Governor requested that this Court exercise its discretion and address whether Section 152b complies with Const 1963, art 8, § 2. (Exhibit F). In response, this Court issued the Order inviting briefs from the Governor and any member of the House or Senate, as well as from other interested parties, on the following questions:

- (1) whether the Court should exercise its discretion to grant the Governor’s request to issue an advisory opinion in this matter; and
- (2) whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate Const 1963, art 8, § 2.

II. BRIEF OVERVIEW OF ARTICLE 8 OF THE MICHIGAN CONSTITUTION

Should this Court decide to grant the Governor’s request for an advisory opinion, the crux of the Court’s analysis will be Const 1963, art 8—specifically article 8, § 2. Article 8, § 2, however, does not exist in a vacuum. The entirety of Article 8 is important to understand article 8, § 2’s context and meaning.

Michigan’s Constitution provides that the State “shall forever” encourage “schools and the means of education[.]” Const 1963, art 8, § 1.⁸ Art 8, § 1 does not limit “schools or the means of education” to only public schools but includes all schools both public and nonpublic. The Constitution, moreover, provides that the Legislature shall maintain and support a free public school system. Const 1963, art 8, § 2. Article 8, § 2, in its entirety, reads as follows:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school[.]⁹ . . .

⁸ This language can be traced back to the Northwest Ordinance, Article the Third, which stated that “schools and the means of education shall forever be encouraged.”

⁹ This sentence of paragraph 2 also contains the following language: “**or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.**” Const 1963, art 8, § 2 (emphasis added). The Michigan Supreme Court held, however, that this language violated the United States Constitution’s protections of free exercise of religion and equal protection of laws. *In re Proposal C*, 384 Mich 390, 414-15; 185 NW2d 9 (1971). The *In re Proposal C* Court, therefore, found that this quoted portion of the sentence was unconstitutional, void, and unenforceable. *Id.* The remainder of the provision remains in effect.

The legislature may provide for the transportation of students to and from any school.

The second paragraph of article 8, § 2 was added in 1970 by constitutional amendment (“Parochial Amendment”). This Court examined the Parochial Amendment in the context of textbooks or other supplies to a nonpublic school and found that providing such materials violated this section of article 8, § 2 because 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.” *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 49; 228 NW2d 772 (1975).¹⁰

III. BRIEF HISTORY OF NONPUBLIC SCHOOL REGULATION IN MICHIGAN

Because article 8, § 2 essentially distills down to payment and regulation of nonpublic schools in Michigan, MCC provides a brief history of nonpublic school regulation in Michigan. Indeed, the State has long-regulated nonpublic schools. In 1921, the Legislature enacted the private, denominational, and parochial act, MCL 388.551 *et seq.* (the “Act”). The Act makes the Superintendent of Public Instruction the supervisor of all private, denominational, and parochial schools and requires that all teachers in the State be certified. MCL 388.551; see *Sheridan Road Baptist Church v Dep’t of Ed*, 426 Mich 462; 396 NW2d 373 (1986) (holding that the Act’s requirement of mandating nonpublic teachers to be certified was constitutional). As this Court noted in *Advisory Opinion re Constitutionality of PA 1970, No. 100*, 384 Mich 82, 100-101; 180 NW2d 265 (1970):

[t]he nonpublic schools have long been subject to state inspection and control over most nonsectarian aspects of their existence. They must meet the same requirements with regard to qualifications of teachers, construction and safety of buildings, sanitary conditions, fire drills and equipment, instruction of

¹⁰ See *infra* for further discussion of this decision and *In re Proposal C*.

handicapped students, selection of textbooks to recognize ethnic-group achievements, and language of instruction as are imposed on public schools. They must periodically file reports with state agencies regarding the attendance and immunization records of their students. Their secular curriculum must be comparable to that of local public schools at the same age and grade level and must include instruction in the Constitutions and history of our state and national governments. They must admit representatives of the department of education in order to facilitate inspection of sanitary conditions, enrollment records, courses of study and teacher qualifications. The vast extent of the present supervisory authority of the Department of Education over nonpublic schools is best indicated by the fact that it includes the power to close nonpublic schools for failure to comply with orders enforcing the above requirements.¹¹

“Some relationship between government and religious organizations is inevitable.” *Lemon v Kurtzman*, 403 US 602, 614; 91 S Ct 2105 (1971). Rather, the question is one of degree. See *Walz v Tax Comm’n*, 397 US 664, 674; 90 S Ct 1409 (1970). Based on this logic, the Michigan Court of Appeals upheld the State’s regulation of teacher certification requirements and curriculum requirements on nonpublic schools. *Sheridan Road*, 426 Mich at 24.

Although Michigan’s nonpublic schools are not publicly supported and maintained by the State, the State continues to exert regulatory authority over the nonpublic schools, as noted above.¹² In addition to the general supervision provided by the Superintendent of Public Instruction, the State also mandates that nonpublic schools perform certain health, safety and general welfare functions and services that are for the betterment of the State and all children attending nonpublic schools, including the following:

¹¹ Legal citations to referenced mandates have been omitted, but can be found in the footnotes in the opinion. See 384 Mich at 100-101.

¹² In addition to the Legislature’s constitutional powers over schools under article 8 of the Michigan Constitution, article 4, § 51 provides that “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.”

- **Attendance Reports** (MCL 380.1578). Michigan mandates that all children from the age of 6 until the age of 18 attend school—public, private, or home school. MCL 380.1561. Nonpublic schools must submit attendance reports to the superintendent of the district in which the school is situated. Nonpublic schools must maintain daily attendance records in order to determine whether a student is in regular attendance. If a student is not in regular attendance, then the school must report the student to the appropriate State attendance officer.
- **Immunization Statements and Vision Reports** (MCL 380.1177). The administrator of a nonpublic school must submit an immunization report to the Department of Community Health for each pupil enrolled in the school for the first time as well as a vision report for first-time kindergarteners.
- **Criminal Background and Records Checks** (MCL 380.1230 *et seq.*). Upon an offer of employment, the nonpublic school must run criminal background checks upon the employee.
- **Class requirements** (MCL 380.1278, .1151, .1166). Nonpublic schools may consider the recommended core curriculum from the State in developing its own core curriculum, but there are certain classes that the nonpublic school must offer, including classes on the United States Constitution, the Michigan Constitution, and the historical and present form of the United States, Michigan and its political subdivisions. State law also requires that all courses, except religion courses, be taught in English.
- **Comply with the social security number privacy act** (MCL 445.81 *et seq.*). Nonpublic schools must comply with the procedures in the Social Security Number Act.
- **Chemical Clean-Up** (MCL 388.861 *et seq.*; 380.1274b). Nonpublic schools must ensure that their facilities are asbestos-free and develop a compliance plan if the facility does have asbestos. Nonpublic schools must also ensure that they do not purchase, store, or use instruments containing Mercury (or purchase or use the most lowest mercury instrument available if no mercury-free instrument is reasonably available).
- **Construction/Fire Safety** (MCL 388.851). All school buildings, including nonpublic school building, must comply with certain construction and fire safety requirements under Michigan law, including that all plans must be completed by a licensed architect or engineer and that all materials used to construct the buildings be made of fire-resistant materials.

In addition to these general health, safety and general welfare functions and services noted above, nonpublic schools must also follow certain State-mandated procedures for

compensation of employees convicted of a crime (MCL 380.1535a, .1539b), for providing work permits to students (MCL 409.104), for withholding information if a personal protection order is in effect (MCL 380.1137a), and for working with students who have inhalers (MCL 380.1179).

The State also requires that all nonpublic schools submit an annual form demonstrating their compliance with certain State law mandates. This form, entitled the “Nonpublic School Membership Report,” form SM-4325, must be submitted by every nonpublic school each year by October 1st (“MDE form SM-4325”) (Exhibit G). While MDE form SM-4325 is issued under the State’s authority to oversee certain nonpublic school activities pursuant to MCL 388.851 *et seq.*, that authority does not extend or include all of the requirements identified above or those included in the MDE Mandate Report. In addition, nonpublic schools are not entitled to any funding or reimbursement of costs associated with the completion or submission of MDE form SM-4325.

ARGUMENT

I. STANDARD OF REVIEW

Whether this Court grants the Governor’s request for an advisory opinion lies within this Court’s discretion. Article 3, § 8 provides that the Governor may make such a request “on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” As set forth in a concurring opinion in *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 482-483; 208 NW2d 469 (1973):

Michigan’s Constitution, thus, restricts advisory opinions to
 “-- important questions of ‘law’,
 -- concerning the ‘constitutionality’ of legislation,

-- ‘upon solemn occasions’ when requested by either house of the Legislature or the Governor,

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

This Court has stated that the “important questions of law” requirement suggests that the request for an advisory opinion must “particularize any claims of unconstitutionality.” *In re Request for Advisory Opinion, etc.*, 395 Mich 148, 149; 235 NW2d 321 (1975), citing *Advisory Opinion re Constitutionality of 1972 PA 294, supra*, 389 Mich 441, 484 and *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 53; 228 NW2d 772 (1975). Indeed, a request stated too broadly “cannot be considered.” *Id.*, citing *Advisory Opinion re Constitutionality of 1974 PA 272*, 393 Mich 916 (1975).

Should this Court grant the Governor’s request, the constitutional question presented should be reviewed *de novo*. *Michigan Dept of Trans v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) (“Questions of constitutional interpretation and statutory interpretation are questions of law reviewed *de novo* by this Court.”) (citations omitted).

II. THIS COURT SHOULD GRANT THE GOVERNOR’S REQUEST FOR AN ADVISORY OPINION.

Governor Snyder’s request for an advisory opinion raises an important question of law—whether public monies intended to ensure the health, safety and general welfare of Michigan students may be appropriated to nonpublic schools when those monies are incidental—at best—to the operation of a nonpublic school.¹³ This request contains a particularized claim related to Section 152b’s constitutionality; specifically whether the subject appropriation violates article 8, § 2 of the Michigan Constitution. This request is not overbroad and is of vital importance to the

¹³ The timing requirement of article 3, § 8 is clearly satisfied here where Section 152b was enacted into law on June 27, 2016 but does not have an effective date until October 1, 2016.

educational landscape of Michigan, which is under ongoing pressures to ensure a healthy and safe learning environment for all students.

In addition, having the Court address this issue now in response to the Governor's request will expedite what is sure to follow if this Court does not grant the request. The State is required to take certain actions to implement Section 152b beginning this fall including the development of the form nonpublic schools will use to confirm compliance with State mandates. Likewise, nonpublic schools wishing to participate in the State's reimbursement program will need to identify and ensure that they are in compliance with all identified State mandates included on the State's form. As Section 152b takes effect, any number of parties will likely file suit presenting lower courts with the same issue presented here—does Section 152b violate article 8, § 2? No matter the outcome in the lower courts, this issue would very likely—after untold resources (both public and private) are spent—end up back before this Court for decision. Thus, in the name of judicial economy, this Court should also grant the Governor's request and address the constitutionality of Section 152b at this time.

III. SECTION 152b DOES NOT VIOLATE ARTICLE 8, § 2.

This Court gives deference to a deliberate act of the Legislature and does not inquire into the wisdom of its legislation. *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 690; 55 NW2d 201 (1952). Accordingly, this Court has recognized that the “power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict.” *Council of Orgs & Others for Educ About Parochial v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997), citing *Thayer v Dep't of Agriculture*, 323 Mich 403, 413; 35 NW2d 360 (1949). “Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will

refuse to sustain its validity.” *Id.*, citing *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).¹⁴ In addition, “[i]t is a general rule of statutory construction that a construction which avoids a constitutional question will be preferred over one that does involve such a question.” *American Federation of State, Co & Muni Employees v Recorder's Court Judges*, 399 Mich 1, 15; 248 NW2d 220 (1976), citing *Attorney General ex rel Fuller v Parsell*, 100 Mich 170, 174; 58 NW 839 (1894); see also *Falk v State Bar of Mich*, 411 Mich 63, 178; 305 NW2d 201 (1981) (Levin, J. concurring) (noting “the important goal of avoiding unnecessary decision of constitutional questions”). Thus, this Court must begin its review of Section 152b with the presumption that it is constitutional.

The constitutional question presented by the Governor in his request was whether or not Section 152b violated article 8, § 2 of the Michigan Constitution. And while one could assume that article 8, § 2’s prohibitory language is triggered by Section 152b because it appropriates monies that may be paid to nonpublic schools under certain circumstances, the simple fact of this case is that the appropriation does not directly or indirectly aid or maintain a nonpublic school or support the attendance of any student or the employment of any person at a nonpublic school—this is a health, safety and general welfare measure that is not prohibited by article 8, § 2.

Article 8, § 2 provides that the Legislature shall maintain and support a free public school system but that public monies shall not directly, or indirectly, aid or maintain any nonpublic school. Despite what some contend, the restrictions placed in article 8, § 2 do not completely bar any public money from being provided to nonpublic schools. This is evident by the plain

¹⁴ Moreover, the Constitution, including art 8, § 2, must be construed in a reasonable manner. *Alan v County of Wayne*, 388 Mich 210; 200 NW2d 628 (1972), citing *People v Mahaney*, 13 Mich 481 (1865).

language of the Constitution as well the Michigan Supreme Court’s interpretation of the provision.

Taking each relevant sentence of article 8, § 2 separately, it is clear that Section 152b does not violate its prohibitions. The first sentence of the relevant portion of article 8, § 2 states as follows:

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.

(Emphasis added).

The second sentence of article 8, § 2 states as follows:

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[.]**¹⁵

(Emphasis added).

Michigan courts have examined challenges to the scope of article 8, § 2’s limitations on funding to nonpublic schools in a limited number of circumstances. The most significant being the initial challenge brought immediately following the passage of Proposal C in November 1970 in *In re Proposal C*. 384 Mich 390; 185 NW2d 9 (1971). On the same day as the passage of Proposal C, then-Attorney General Frank Kelley issued formal opinion 4715, which interpreted

¹⁵ This sentence of Section 2 also contains the following language: **“or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.”** Const 1963, art 8, § 2 (emphasis added). The Michigan Supreme Court held, however, that this language violated the United States Constitution’s protections of free exercise of religion and equal protection of laws. *In re Proposal C*, 384 Mich 390, 414-15; 185 NW2d 9 (1971). The *In re Proposal C* Court, therefore, found that this quoted portion of the sentence was unconstitutional, void, and unenforceable. *Id.* The remainder of the provision remains in effect.

Proposal C as eliminating shared time and auxiliary services to nonpublic schools. *Id.* at 404. The State Board of Education announced that it intended to follow the Attorney General’s opinion and halt funding of shared time and auxiliary services, which led to this initial challenge. *Id.* at fn 2. The Michigan Supreme Court reviewed Proposal C and held that only one portion of the section was unconstitutional. See 384 Mich 390, 414-15; 185 NW2d 9 (1971) and footnote 1. While the *In re Proposal C* Court did not examine Proposal C’s language in the context of an appropriation like that in Section 152b, the analysis in the Court’s opinion is helpful to understand the scope of article 8, § 2.

In *In re Proposal C*, the Traverse City School District challenged the Michigan Attorney General’s Opinion that Proposal C forbid public money to be dispensed for “shared time”¹⁶ and auxiliary services as related to nonpublic schools.¹⁷ In reaching the conclusion that the new language did not forbid “shared time,” the *In re Proposal C* Court reasoned that “shared time,” under the control of a public school, provided only **incidental aid**, if any, to a nonpublic school and only **incidental support** to the attendance of a nonpublic school student at a nonpublic school. 384 Mich at 416. The Court also held that article 8, § 2 did not prohibit the provision of auxiliary services to nonpublic schools.¹⁸ *Id.* at 417. Auxiliary services, as defined below, are functionally general health and safety measures. *Id.* at 419. The Court held that Proposal C had

¹⁶ “Shared time” means an arrangement for pupils enrolled in nonpublic schools to attend public schools for instruction on certain subjects. *In re Proposal C*, 384 Mich at fn 3.

¹⁷ This case involved a variety of other claims, including its applicability to private foster homes, that are not relevant to the Advisory Opinion Request. For further explication of the issues involves, see *In re Proposal C*, 384 Mich 390, 435; 185 NW2d 9 (1971).

¹⁸ The Court defined auxiliary services, as used in MCL 380.1296, which includes: “health and nursing services and examinations; street crossing guards services; national defense education act testing services; teacher of speech and language services; school social work services; school psychological services; teacher consultant services for students with a disability and other ancillary services for students with a disability; remedial reading; and other services determined by the legislature.”

no impact on auxiliary services because such services have “only an incidental relation to the instruction of private school children.” *Id.* Important to the Court’s decision was that Proposal C was “keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation.” *Id.* at 419-20. Proposal C’s intent, then, was not applicable to auxiliary services because they “only incidentally involve the operation of educating private school children.” *Id.* at 419-20. Of course, the Court noted that its holding would differ if there was evidence of excessive entanglement between the State and religion. *Id.* at 417.

What is clear from the Court’s opinion in *In re Proposal C* is that Proposal C, now article 8, § 2, did not place a complete bar on any and all public funding to nonpublic schools. The court, or the Legislature, must examine whether the aid is merely incidental to the operation of educating private school children or of primary significance to running a nonpublic school. This Court has, thus, stated that State funding is appropriate for certain services to nonpublic schools, including shared time and auxiliary services. The logic of this Court’s decision can easily be applied to Section 152b.

Indeed, in finding that funding of auxiliary services did not violate article 8, § 2, this Court focused on the fact that such services are “general health and safety measures” rather than instructional measures. *Id.* at 418-19. The same analysis applies to Section 152b. The State has long been able to utilize its police powers to regulate education. See *In re Constitutionality of Chapter 2*, 384 Mich 82, 97; 180 NW2d 265 (1970) (noting that the State has a proper interest, based on its police powers, in the manner in which private schools perform their secular education function). The purpose of the appropriation in Section 152b is to promote compliance with State law and to ensure that all Michigan students are able to attend healthy and safe

schools. In other words, the purpose of the appropriation is not to educate students or fund the operation of a nonpublic school, but rather to ensure that the State is effecting its duty under article 8, § 1 and article 4, § 51 by encouraging nonpublic schools to ensure that their schools are healthy and safe for students and that the environment created is conducive to learning.

Moreover, the Section 152b appropriation, like shared time or the auxiliary services explored in *In re Proposal C*, is under the control of the State. See *id.* at 420. The State controls the content of the required form, the administration of the appropriation, and the ability to review records to validate compliance if so desired. Moreover, the appropriation is designed to ensure safety and compliance with State law—it is not designed to educate nonpublic school students or aid or maintain nonpublic schools. The funds are not for the operation of education of private school children in any way. And if it were, any benefit would be incidental at best. The intent of Proposal C was clearly not to prohibit nonpublic school students from attending safe schools that are in compliance with State law. If anything, confirming such compliance acts to ensure that the State is fulfilling its Constitutional mandate to promote and encourage the education of all of the State’s children, not just the public school children.

For these same reasons, Section 152b is unlike instances where Michigan courts or the Michigan Attorney General have found State funding to be in violation of article 8, § 2. The clearest distinction is probably found in *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). In this case, the Michigan Supreme Court held that the provision of textbooks or other supplies to a nonpublic school violates article 8, § 2 because textbooks and supplies are “essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist.” *Id.* at 49. Section 152b funds cannot be described in this manner. Nonpublic schools exist without such funds; they are not

necessary to the nonpublic “school’s survival as an educational institution.” *Id.* at 49. Such funds cannot be considered a “primary element” of nonpublic school education.

Similarly, such funding is supported by the discussions of article 8, § 2 in a number of Michigan Attorney General opinions. For instance, in 1995, the Attorney General opined that article 8, § 2 did not prohibit a school district from funding a student’s tuition to a private college for a course not offered by the school district because article 8, § 2 did not extend beyond secondary education. 1995-1996 OAG 99 (Sept 19, 1995). In so finding, the Attorney General stated that it was clear that article 8, § 2 prohibits “the State from providing public funds to private educational facilities for the *purpose of funding primary or secondary educational services or their equivalent.*” *Id.* at *2 (emphasis added). Section 152b funds are also unlike the Attorney General opinions that found funding to a neighborhood education center operated by a private facility and funding to an Indian-owned and operated school violated article 8, § 2. *See* 1977-1978 OAG 532 (July 12, 1978); 1989-1990 OAG 103 (May 8, 1989).

Section 152b appropriates an amount not to exceed \$2.5M to reimburse nonpublic schools for submitting a form evidencing the school’s compliance with pre-existing State mandates and required deliverables.¹⁹ As has been well-documented, although certain health, safety, and general welfare measures exist to ensure the same of all Michigan students, many schools fail to comply with the required measures. (Exhibit H, News article). The schools are not being reimbursed to aid or maintain the school—and frankly, the amount at issue is so nominal that no one could seriously argue that such funds are aiding or maintaining a nonpublic

¹⁹ There are essentially two categories of reimbursable mandates: (1) those mandates that simply require verification of compliance (e.g., confirming required courses are indeed provided) and (2) those mandates that require compliance and a deliverable (e.g., performing certain tasks related to attendance monitoring and reporting). Neither of these categories are primary elements of educating students.

school. The school can ask for reimbursement for the applicable mandates at a rate that is essentially lower than the actual cost to ensure compliance. The funds appropriated—as expressly stated in Section 152b—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 general welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.” They are not intended to (and will not) aid or maintain a nonpublic school.

Opponents to Section 152b are likely to argue that because some of the items identified in the MDE Mandate Report touch education, any funding received by a nonpublic school for complying with such provisions is a violation of article 8, § 2. Such arguments, however, illustrate that those opposed to Section 152b do not understand what nonpublic schools are being reimbursed for under Section 152b. Take, for example, section 1166 of the Revised School Code (“Code”), MCL 380.1166. Section 1166 of the Code provides as follows:

(1) In all public and nonpublic schools in this state regular courses of instruction shall be given in the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions. Instruction shall begin not later than the opening of the eighth grade, or its equivalent, except in schools maintaining a junior high school, in which case it may begin in the ninth grade.

(2) A high school in this state which offers 12 grades shall require 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. A diploma shall not be issued by a high school to a pupil who has not successfully completed this course. This requirement shall not be applicable as a graduation requirement for a high school pupil who has enlisted or been inducted into military service.

The Legislature, in passing section 1166, relies on its constitutional powers under article 8, § 1 to encourage the teaching of certain courses in all schools as part of its obligation to foster and encourage an educated citizenry. Opponents of Section 152b may contend, however, that by including section 1166 of the Code in the MDE Mandate Report, the Legislature is aiding and maintaining nonpublic schools when they reimburse such schools for confirming their compliance with this section of law. Nothing could be further from the truth. Nothing in Section 152b provides any public funding for nonpublic schools to teach about the Federal and State Constitutions or the history of Michigan's government. The only thing the State is doing is reimbursing nonpublic schools for confirming their schools offer these classes as part of the school's curricula. This can be done by the person completing the form who presumably will look at the nonpublic school's curricula and confirm such courses are being taught at the school as required by section 1166 of the Code. The reimbursement paid by the State is only for the amount of time it takes the person completing the form to confirm the requirement. No money is paid to fund constitutional or State government classes at the school; no money is paid to reimburse the nonpublic school for teachers that instruct in such classes; and no money is used to pay for any materials, textbooks or supplies used in the classroom. To argue otherwise is simply an attempt to make Section 152b an article 8, § 2 issue when no such issue exists. In short, there is no violation of article 8, § 2 in Section 152b. The funds allocated in Section 152b will help nonpublic schools ensure that the health, safety and general welfare of their students remain a top priority—any “aid” to the school itself is, at best, incidental even if the mandate or requirement is of an educational nature.

Indeed, “[i]t has always been the policy of this State, as indicated by the provisions of the Constitution and a long line of legislative enactments, to encourage the cause of education.” *In*

re Proposal C, 132 Mich App at 14, citing *Michigan Female Seminary v Sec of State*, 115 Mich 118, 120; 73 NW 131 (1897). The *In re Proposal C* Court also acknowledged that this “strong state interest” extends to private schools as well as public schools:

No question is raised concerning the power of the state reasonably to regulate **all schools**, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id., citing *Pierce v Society of Sisters*, 268 US 510, 534, 45 S Ct 571 (1925) (emphasis added). The Court then stated that subsequent case law has only confirmed that States have a “proper interest in the manner in which [private] schools perform their secular educational function.” *Id.* at 14-15, citing *Bd of Ed v Allen*, 392 US 236, 247; 88 S Ct 1928 (1968). This interest includes compulsory attendance laws, minimum hours of instruction, teacher qualifications, and subjects of instructions. *Id.* Certifying compliance with health, safety and general welfare measures—like in Section 152b—is entirely in line with such reasoning; and this Court should find that Section 152b does not violate article 8, § 2.²⁰

IV. OTHER HEALTH, SAFETY AND GENERAL WELFARE APPROPRIATIONS LIKE THE APPROPRIATION FOUND IN SECTION 152b ABOUND.

The simple fact of the matter is that what the Legislature did in Section 152b is really not any different than any number of health, safety and general welfare measures that it has taken in the past. For instance, this appropriation is also akin to the legislative appropriation made in Public Act 252 of 2014 for the Competitive School Safety Grant Program, which permitted the Michigan State Police to provide \$4M of grant funding to public and nonpublic schools for

²⁰ In the event that the Court were to find any portion of Section 152b in violation of article 8, § 2, the Court would need to determine whether that part is severable from the remainder of Section 152b that is constitutional. MCL 8.5.

certain school safety programs. (Tab B to Exhibit D). Similarly, section 1102, another provision in 2016 PA 249, appropriates \$4.5M to MDE to administer a school drinking water quality program for both public and nonpublic schools:

Sec. 1102. (1) From the funds appropriated in part 1 for the statewide school drinking water quality program, each public school and registered nonpublic school will be eligible for up to \$950.00 per school building. Funds will be provided on a reimbursement basis for costs for statewide school testing, fixture replacement, filter purchases, plumbing assessments, or technical assistance incurred from July 1, 2016 to September 30, 2017. As used in this subsection, “school building” means a “school” or “unique education provider” as defined within the Educational Entity Master, where instruction is provided to students.

(2) Public school districts, public school academies, and nonpublic schools will be required to submit proof of public notification of the number of fixtures providing water for drinking or food preparation, testing results, number of fixtures replaced, and other corrective action plans prior to reimbursement.

(3) Public school districts, public school academies, and nonpublic schools will be required to submit reimbursement requests through the existing electronic Michigan department of education grant monitoring system, as specified.

(4) The department, department of environmental quality, and department of licensing and regulatory affairs will provide support to the schools, including technical assistance, analysis of results, site visits, and outreach materials. Administrative costs not to exceed 5% of the funding will be supported from the appropriation.

(5) The department and the department of environmental quality will prepare a report summarizing the number of fixtures reported per school, tests completed, tests with elevated levels of lead, fixtures replaced, and schools completing a plumbing assessment. The report will be submitted to the legislature by December 31, 2017.

In addition to the Legislature’s constitutional powers over schools under article 8 of the Michigan Constitution, article 4, § 51 of the Michigan Constitution provides that “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary

public concern. The Legislature shall pass suitable laws for the protection and promotion of the public health.” Given that the Legislature must not only encourage schools (all schools, not just public schools) and the means of education (all education, not just public education) and that the public health and general welfare are matters of primary concern, the fact that the Legislature appropriated a small amount of money so that nonpublic schools may seek some reimbursement for verifying their compliance (on a voluntary basis) with certain State laws related to the health, safety and general welfare of their schools and students is without question permissible. Any doubts certainly cannot overcome the presumption of constitutionality. Article 8, § 2 does provide some limits to the provision of public monies to nonpublic schools, but it does not provide an emphatic prohibition on the public monies. Section 152b simply does not implicate the concerns raised by article 8, § 2. To find otherwise would create a constitutional limit that does not exist and would ultimately harm Michigan’s nonpublic students.

REQUESTED RELIEF

For the reasons set forth herein, MCC respectfully requests that this Court grant the Governor’s request for an advisory opinion regarding the constitutionality of Section 152b of 2016 PA 249 and find that it does not violate article 8, § 2 of the Michigan Constitution.

Respectfully submitted,

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INDEX TO EXHIBITS

- A. Relevant excerpts from House Bill 5294 and Senate Bill 801
- B. Relevant excerpt from Conference Report for Senate Bill 801
- C. MDE Mandate Report
- D. June 27, 2016 Letter to Governor Snyder from MCC and other education groups
- E. News article, “Gov. Snyder signs education budget with per pupil increase, money for private schools” (June 27, 2016, MLive article)
- F. July 13, 2016 Advisory Opinion Request (without attachments)
- G. MDE Form SM-4325
- H. News article, “Michigan school safety flaws: MLive investigation finds corners cut and laws made to be broken” (March 14, 2013, MLive article)