

STATE OF MICHIGAN  
IN THE SUPREME COURT

Supreme Court No. 154085

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

**The appeal involves a question whether a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.**

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**RESPONSE BRIEF OF ATTORNEY GENERAL  
ARGUING THAT  
(1) THIS COURT SHOULD DECLINE THE GOVERNOR'S REQUEST AND  
(2) 2016 PA 249 IS UNCONSTITUTIONAL**

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## INTRODUCTION

In defending the constitutionality of § 152b of Public Act 249 under 8, § 2 (the Amendment), the Attorney General makes three errors. This reply addresses each.

**First**, the Attorney General's brief fails to apply the Amendment's plain language by engrafting-in limitations that are not present in the constitutional text. The Amendment limits any state funding to aid the private schools, not just their activities that are "instructional." No such qualification appears. Thus, the brief wrongly contends that "[n]othing in § 2 prevents the Legislature from defraying the required costs of the non-instructional services" for private schools, Br. at 27, when the ordinary words of the Amendment do just that. The contrast is jarring.

**Second**, the brief also misreads *Traverse City* and effectively reads out its requirements that the State cannot provide educational services where the control remains within the private schools. Many of the reimbursements required by § 152b are just like auxiliary services, which *Traverse City* defined as "educational services," *id.* 384 Mich at 420, and then held that one of the key prohibitions bars state funding of "educational services" in private schools "where the hiring and control is in the hands of the nonpublic school," *id.* at 435. That is the case here. So § 152b violates *Traverse City*.

**Third**, the argument that stare decisis shields *Traverse City* from being revisited – if the issue is joined – is unavailing. The decision strays far from the ordinary words of the People. As an alternative to overruling it, this Court could merely limit its application to shared time and auxiliary services, but cannot extend it to reimbursement costs. Section 152b cannot survive the Amendment.

## ARGUMENT

### I. **The plain language of the Amendment bars the reimbursement costs of these mandates to private schools in § 152b.**

As noted in the opening brief of the Attorney General arguing against the constitutionality of § 152b, the language in the Amendment could not be more sweeping in its opposition to state funding of the private schools. Br. 23–25. It includes two prohibitions: one that prevents funding (“monies or property . . . appropriated” or “public credit”) to “aid or maintain” a private school; and a second one that prevents a broader listing of funding (“payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan”) that supports the attendance of any student or employment of any person at a private school or any place where private school students receive instruction. Const 1963, art 8, § 2.

In ordinary terms, reimbursing the private schools’ different state-mandated requirements in § 152b aids them and helps to maintain them. It violates the Amendment’s first prohibition.

The Attorney General brief supporting the constitutionality of § 152b appears to recognize as much, see Br. at 10 (“it could be argued”), and at 10 (“[t]hese words are broad enough to prohibit”), but then attempts to avoid the clear meaning of these words by arguing that the Amendment would then also bar the type of governmental funding for general services “that it is hard to conceive anyone would object to.” *Id.* The contention is that the prohibition on “aid” to the private schools is a limitation that “stops nowhere.” *Id.* at 12. Not so.

The Amendment's first prohibition bars state funding to aid private schools, not private businesses generally. This is significant. Thus, a program that benefits all businesses of which the schools were just one member in that category would not aid the private schools specifically. In ordinary language, the benefit in that circumstance would run to everyone, not just the private schools.

Consider the hypothetical of a state funding program that will provide a public credit to defray the cost of any business that seeks to retrofit its building to ensure greater safety for its occupants. Such a credit program would not violate the Amendment because it would serve to aid private businesses generally, and would not aid private schools as a class separate from all other private businesses. But a credit program *offered only to the private schools would violate* the Amendment. Yet, general services are not given to the non-public schools only; so police and fire protection, mail delivery, public water services, sidewalk repair, and the maintenance of the public roads, see Br. 10–11, do not violate the Amendment. See OAG, 1971-1972, No. 4715, pp 186 (November 3, 1970) (“fire protection, police protection, public sanitation and sewerage would not be affected by adoption of the proposed amendment”). The violation occurs in the singling out of the private schools for special financial assistance. While there may be legitimate policy reasons for supporting such programs, the people of Michigan foreclosed this option. *Council of Organizations Parochial, Inc v Governor*, 455 Mich 557, 583 (1997) (“the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school”). No state funding for private schools.

In this way, the Attorney General’s hypotheticals about the Amendment barring a state police response to a non-public school emergency, Br. at 10, or a response to a fire, *id.* at 11, misconstrue the Amendment. The Amendment would only bar a program that provided police or fire services to the private schools that are not otherwise also provided to other citizens. It is their singling out for benefits that the Amendment prevents. As the Attorney General arguing in support notes, § 152b’s reimbursements are for the private schools alone. Br. at 13 (the reimbursements cover costs that private schools encounter as part of “the overarching structure that makes education compulsory”). The Amendment bars it.<sup>1</sup>

The exclusion of “indirect” aid to the schools is explained by the Amendment’s second prohibition barring funding to assist school attendance or private school employment. Art 8, § 2. Even if the aid is not given directly to the private school, the State cannot fashion it so that the benefit may be funneled to the private schools through a private-school student or teacher, indirectly benefiting only the private school. The indirect limitation still requires the private school to be singled out. For example, Michigan’s general child tax credit might benefit private schools by making it easier for parents to pay private-school tuition, but only a *tuition* credit, i.e., a credit only for *school* payments, would violate the Amendment.

By misconstruing it to bar general services, the Attorney General justifies textual points that markedly change the Amendment, reflecting two basic errors.

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<sup>1</sup> Any argument about the supposed unfairness of imposing mandates and only reimbursing the public schools is misplaced. E.g., private businesses, as a rule, do not receive state funding to meet safety standards. The private schools are in the same position, and the State has no duty to fund them as well as the public schools.

First, the brief argues that “aid to schools is aid that supports ‘education’ and ‘instruction’” to justify reducing the Amendment’s bar to state support of “parochial instruction.” Br. 12, 16. But the use of the word “instruction” only appears in the Amendment’s second prohibition in the phrase “any location or institution where instruction is offered” to nonpublic school students; it merely describes places where the Amendment forbids the state support of student attendance or employment at places teaching private-school students. Const 1963, art 8, § 2. It does nothing to limit the scope of the first prohibition’s bar on state aid to the private schools.

Second, the brief argues that “the people focused on actual teaching, rather than on incidental matters, by using the word ‘instruction.’” Br. 12. Again, the fact that schools instruct and educate children does not suggest in any way that the state aid prohibition was somehow limited to the funding of instruction alone. The amendment does not say that.

Under the Attorney General’s brief supporting § 152b, the Amendment provides only a narrow limitation on state funding (with accretions in bold):

No public monies or property shall be appropriated or paid [by the State] directly or indirectly to aid or maintain **the cost of instruction of** any [private school].

No payment or [other funding] 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 where nonpublic school students are instructed] **for the cost of instruction.**

Under this understanding, the State could fund any administrative or building cost, and could even underwrite the non-instruction cost of student tuition or teacher salaries. This reduction in the scope of the Amendment’s constraints is profound.

## II. *Traverse City* bars the state funding in § 152b.

While this Court’s decision in *Traverse City* does not track the plain language of the Amendment, it did create an important limitation on the non-instructional, or incidental, costs that it allowed the State to fund. That limitation was in the nature of control. The concept of “control” appeared repeatedly in the opinion – 15 times – and it was central to the first overarching conclusion from the decision:

Proposal C *above all else* prohibits state funding of purchased educational services in the nonpublic school where the hiring and **control** is in the hands of the nonpublic school, otherwise known as ‘parochiaid. [*Traverse City*, 384 Mich at 435 (emphasis added).]

This conclusion, arising from Part II of the decision, indicates that it is a stand-alone rule. It limits the provision of funding to nonpublic schools for an activity that remains in the private school’s control. As noted by the Attorney General arguing in support, many of the requirements in the mandate are similar in content to the auxiliary services at issue there. Br. 17 (e.g., health exams, crossing guards).

But *Traverse City* defined the auxiliary services as “special education services,” *id.* at 418, which then are subject to the conclusion that the Amendment bars state funding if the service is in the private school’s control. *Id.* at 419. The decision provided significant analysis about how auxiliary services would remain within the control of the *public authorities*, because they “are performed by public employees under the exclusive direction of public authorities.” *Id.* at 420. It is hard to see how this is true of any of the reimbursements, where ostensibly all of the action will be taken by private school employees under the direction of the private school. The Attorney General in support of § 152b did not address control at all.

In contrast, the amicus brief for the Michigan Catholic Conference did address this point, arguing that the activities that are subject to reimbursement under § 152b are “under the control of the State.” MCC Br 17. And this argument is predicated on the claim that “[t]he 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.” *Id.* This claim about control is unavailing.

The mandates are filled with actions that the private school must take, some related to educational requirements, some administrative, and others relating to health and safety, among others. See Nonpublic Mandate Report. All appear to share the quality that they are actions taken by the private school, by private school employees, on private school premises, at the time the private school elects, and initially paid by the private school. While it shares the characteristic with the auxiliary services that it occurs by “statutory direction,” *Traverse City*, 384 Mich at 420, that is where the public control ends. Otherwise, it is entirely controlled by the private school. Other than a state grant given without limitations, it is hard to conceive an activity more clearly controlled privately. The publicly provided auxiliary services or shared time stand in stark contrast. Section 152b violates *Traverse City*.

Insofar as it is not clear how much actual control the private schools maintain over these mandates, this lack of factual clarity again counsels against granting the request for an advisory opinion. See *In Request for Advisory Opinion on Constitutionality of 1979 PA 57*, 407 Mich 60, 66 (1979) (“[A]ny advisory opinion of the Court would depend for resolution on whatever particular factual situations the Court would be forced to hypothesize”). This Court should deny the request.

**III. This Court need not revisit *Traverse City*, but if it does, stare decisis does not shield it from being overruled – at the least the decision should not be extended to allow § 152b to survive.**

The *Traverse City* decision does not adhere to the Amendment’s language and explains its lack of fidelity to the “literal perspective” of its meaning, see *id.*, 384 Mich at 430, by contending that it was necessary to give the Amendment a constitutional construction. But as the Attorney General notes in his brief arguing against the constitutionality of § 152b, see Br 30–33, the refusal to provide funding to the private schools does not violate the constitution. See, e.g., *Norwood v Harrison*, 413 US 455, 462 (1973) (“It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause.”). The Attorney General arguing against shall not reiterate those points here.

In contrast, in the brief supporting the constitutionality of § 152b, the Attorney General approvingly notes that the purpose behind the Amendment was only to prevent state aid for “educational services,” apparently understood to mean instructional services. Br 18–19. The authority for this comes from *Traverse City* where it discusses what “[e]veryone agreed” on with regard to the scope of the Amendment and the evaluation of “the pre-election talk and action.” 384 Mich at 407 n 2. But this Court has since clarified that the political discourse surrounding the debate of a constitutional proposal cannot prejudice the unambiguous text that was enacted. See *National Pride at Work v Governor*, 481 Mich 56, 81 (2008) (“When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited”). That point is applicable here.

Consequently, insofar as *Traverse City* relied on the controverted nature of the debate leading up to the vote on its effect on auxiliary services and shared time, describing it as “utter and complete confusion,” 384 Mich at 407 n 2, to justify its non-textual construction, this reliance was misplaced. The *National Pride* decision forcefully rejected this kind of inquiry, explaining that the “role of this Court is not to determine who said what about the amendment before it was ratified, or to speculate about how these statements may have influenced voters” but rather the Court’s responsibility is, “in matters of constitutional interpretation, to determine the meaning of the amendment’s actual language.” 481 Mich at 83. The earlier debate cannot defeat the Amendment’s plain meaning.<sup>2</sup>

Moreover, the doctrine of stare decisis does not support sustaining the *Traverse City* opinion.<sup>3</sup> The fact that auxiliary services that are health and safety services have been in place for the last 45 years cannot be used to overturn the Amendment’s plain language. The Court in *Traverse City* relied in part on the same point in deciding not to apply the Amendment to shared time programs. 384 Mich

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<sup>2</sup> In explaining why the exception for transportation costs should not foreclose other exceptions, the Attorney General brief supporting § 152b’s constitutionality suggests that the doctrine of *expressio unius* is not applicable where it does “violence to the plain intent of the framers.” Br 14, citing *City of Ecorse v Peoples Cmty Hosp Auth*, 336 Mich 490, 502 (1953). But just the opposite is true here. The canon of construction only confirms the significance and breadth of the limitations the people imposed on state funding of private schools in adopting the Amendment.

<sup>3</sup> Any suggestion that the doctrine of stare decisis applies to advisory opinions, see Br 28, is contradicted by this Court’s established precedents. See, e.g., *Cassidy v McGovern*, 415 Mich 483, 497 (1982) overruled on other grounds, *DiFranco v Pickard*, 427 Mich 32 (1986); *Appeal of Apportionment of Wayne County*, 413 Mich 224, 250 (1982) (“The 1968 advisory opinion is not precedentially binding because advisory opinions are not precedent”).

at 17 n 3 (“Shared time has been an accepted fact of American life for more than forty years”). The strongest and most important consideration in stare decisis is the clarity of the constitutional language, which here plainly bars this program.

*Robinson v City of Detroit*, 462 Mich 439, 467 (2000). This is an important principle of representative democracy – the words the people adopt should be given effect.

On this point, the Attorney General argues in defending § 152b that the people have taken no action to overturn this Court’s construction of the Amendment in *Traverse City*. Br. 29. But it is hard to see how the people could have adopted any broader language or how they would correct the error, other than to specify as the Legislature has in the past in enacting language that the Court misinterpreted the language. See, e.g., 1999 PA 202 (“This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision”). This is not language for a constitution.

Rather than overrule *Traverse City* if the issue is joined, a more modest approach would be merely to reserve its application to auxiliary services and shared time. The Court should not *extend* its application to the new circumstance of reimbursing mandated costs.<sup>4</sup>

### CONCLUSION AND RELIEF REQUESTED

This Court should decline the request to issue an advisory opinion. But should it proceed with an opinion, it should hold that § 152b is unconstitutional.

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<sup>4</sup> The Attorney General has not reiterated the argument in this brief about why the Court should decline the request but refers the Court to the opening brief. Br 6–11.

Respectfully submitted,

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