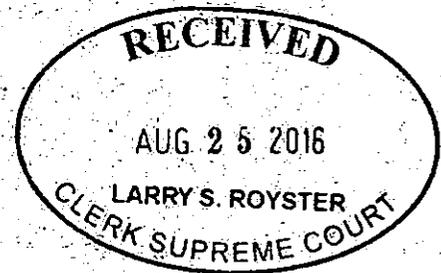


**STATE OF MICHIGAN
IN THE SUPREME COURT**

In re Request for Advisory Opinion
Regarding Constitutionality of 2016 PA 249

Supreme Court No. 154085

**Brief of Speaker Kevin Cotter and Representatives Tim Kelly
and Amanda Price of the Michigan House of Representatives**



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STATEMENT OF JURISDICTION

Section 152b of 2016 PA 249 provides that a nonpublic school may seek reimbursement from the State for costs incurred in complying with state mandates designed to “ensur[e] the health, safety, and welfare of the children in nonpublic schools” and appropriates up to \$2,500,00.00 for that purpose.¹ The law was filed by the Secretary of State on June 27, 2016 and includes an effective date of October 1, 2016.² On July 13, 2016, the Governor asked this Court to issue an advisory opinion pursuant to Const 1963, art 3, § 8 regarding the constitutionality of Section 152b. On July 20, 2016, this Court granted consideration of the Governor’s request and invited members of the House and Senate to file briefs.

STATEMENT OF QUESTIONS INVOLVED

- (1) Should this Court exercise its discretion to grant the Governor’s request to issue an advisory opinion in this matter?

Michigan House Speaker Cotter and Representatives Kelly and Price answer, “YES.”

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

Michigan House Speaker Cotter and Representatives Kelly and Price answer, “NO.”

¹ MCL 388.1752b.

² *Id.* at Enacting Section 3.

SUMMARY OF ARGUMENT

The Michigan Constitution does not prohibit the Legislature from reimbursing nonpublic schools for costs incurred due to state-mandated health, safety, and general welfare requirements because: (1) the Constitution mandates that the Legislature protect and promote the health and welfare of its citizens³ and that concern is at its pinnacle when children are at issue; (2) funding for student health, safety, and general welfare serves a secular purpose that does not promote or support religious schools; (3) the Legislature has a compelling interest in providing funding to ensure its health, safety, and general welfare mandates are properly implemented; and (4) there is strong precedent for public money flowing to nonpublic schools for secular purposes.⁴

This Court should issue an advisory opinion on this important question of law because increased constitutional certainty would help ensure the unhindered implementation of Section 152 and provide needed direction to the Legislature, the Governor, and interested parties. A prompt determination will best serve the People of Michigan by avoiding or minimizing a proliferation of state and federal lawsuits on the question. Consequently, and for reasons more fully discussed below, this Court should resolve the issue before it by granting the Governor's request and concluding that Section 152b passes constitutional muster.

³ Const 1963, art 4, § 51 states, "The 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."

⁴ See, e.g., 2016 PA 268, Section 901 (providing public money to private schools through Michigan State Police grants for school safety initiatives). Most recently, a Michigan State Police grant for school safety was appropriated in fiscal year 2016 as part of the Michigan State Police portion of the Omnibus Budget. Additionally, Section 1102 of the Michigan Department of Education portion of the 2016-2017 Omnibus Budget includes \$4 million to reimburse local schools for the cost to test water for lead. Of this \$ 4 million, \$3.5 million is allocated for public schools and \$500,000 is allocated for nonpublic schools.

STATEMENT OF FACTS

I. History of the Blaine Amendment

The Blaine Amendment began as a federal effort. Representative James Blaine from Maine offered an amendment to the U.S. Constitution in 1875, which sought to accomplish two goals: (1) to extend the First Amendment's religious provisions to the states; and (2) to prohibit the expenditure of public funds on religious schools.⁵ The effort at the federal level eventually died, and supporters of the proposal turned to state legislatures. In Michigan, the debate concerning the public funding of private schools – what is commonly referred to as parochial aid – eventually led to the State adopting its own Blaine Amendment in the form of Proposal C. Leading up to Proposal C, Michigan families who sent their children to private schools grew concerned with having to pay the cost of public schools that they did not utilize through taxes. These families proposed that some taxpayer funding go to private education.⁶ The Legislature responded by providing direct financial support to eligible private schools via 1970 PA 100.⁷

This Court upheld 1970 PA 100 in an advisory opinion, concluding that the Act did not advance or inhibit religion and did not violate the free exercise and establishment clauses of the U.S. and Michigan Constitutions.⁸ A campaign to amend the 1963 Constitution to expressly prohibit funding of private schools followed. The campaign culminated in Proposal C, which was

⁵ Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv J L & Pub Pol'y 657, 670-72 (1998).

⁶ Broillette, *School Choice in Michigan: A Primer for Freedom in Education* (Mackinac Center For Public Policy, 1999), pp 14-15.

⁷ *Id.*

⁸ *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82; 180 NW2d 265 (1970).

placed on the November 1970 ballot,⁹ and approved by 56 percent of the voters.¹⁰ Upon approval, the State could no longer provide direct financial support to maintain private schools.¹¹

II. Legislative History of Section 152b of 2016 PA 249

In its final version, SB 801 appropriated no more than \$2.5 million in reimbursements to nonpublic schools¹² for costs associated with complying with activities identified in the nonpublic school mandate report.¹³ The Governor signed the bill into law on June 27, 2016 and it became Public Act 249 of 2016.

⁹ *Supra* note 7.

¹⁰ *Id.*

¹¹ The Blaine Amendment is found in 1963 Const, art 8, § 2 and reads: “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, preelementary, 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.”

¹² MCL 388.1752b (Subsection (7) limits the funds for “purposes related to education,” and clarifies that the funds “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.” (emphasis added). And Subsection (8) states that the 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.”)

¹³ See Michigan Department of Education, *Nonpublic Mandate Report*. Attached as Exhibit A.

ANALYSIS

I. The Court Should Grant the Governor’s Request to Issue an Advisory Opinion on This Important Question of Law.

When requested by the Governor, this Court may issue an advisory opinion “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.”¹⁴ The timing element of Section 8 has been satisfied. The Governor requested an advisory opinion on the constitutionality of Section 152b of Public Act 249 of 2016 after signing the bill but before its effective date of October 1, 2016. As a result, the remaining questions are whether the Governor’s request touches on an “important question[] of law” and whether it was made “upon [a] solemn occasion[].”

A. *The constitutionality of public funding to ensure the health, safety, and general welfare of children in nonpublic schools is of vital importance.*

Section 152b of Public Act 249 of 2016 appropriates no more than \$2.5 million for fiscal year 2016-17 to reimburse costs incurred by nonpublic schools to comply with certain health, safety, and general welfare mandates. The Legislature’s intent for this appropriation is stated in the bill itself:

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.¹⁵

Importantly, Section 152b also clarifies that these 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

¹⁴ Const 1963, art 3, § 8.

¹⁵ MCL 388.1752b(7) (emphasis added).

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.”¹⁶

Whether the Legislature can appropriate money to ensure that *all* of our children are healthy and safe at school is a vitally important question. Indeed, this Court has “recognize[d] that the state has a legitimate—and crucial—interest in protecting the health and safety of minor children.”¹⁷ That crucial interest is amplified in the classroom, as “education is perhaps the most important function of state and local governments.”¹⁸ Without guidance on the constitutionality of Section 152b, funding for these critical student health, safety, and general welfare requirements will be in an indeterminate state. Given these elements, it is difficult to imagine a more important question that the Governor or the Legislature could ask this Court to answer.

B. This is a sufficiently solemn occasion for the Court to address the long-unsettled meaning of the Blaine Amendment.

As noted above, the Blaine Amendment became effective on December 19, 1970.¹⁹ Several months later, this Court answered certified questions regarding the construction of the Blaine Amendment.²⁰ These questions focused on the constitutionality of shared time services and auxiliary services, among other things.²¹ The Court again addressed the constitutionality of shared time services in 1984, though that opinion primarily focused on the U.S. Constitution.²² Neither of these opinions, however, addressed the present question or offered sufficient guidance for interested parties to know their rights with certainty. And since 1984, the Court has not had the

¹⁶ MCL 388.1752b(8) (emphasis added).

¹⁷ *In re Sanders*, 495 Mich 394, 421; 852 NW2d 524, 538 (2014).

¹⁸ *Brown v Bd of Ed of Topeka*, 347 US 483, 493; 74 S Ct 686 (1954).

¹⁹ *In re Proposal C*, 384 Mich 390, 408; 185 NW2d 9, 15 (1971).

²⁰ *Id.*

²¹ *Id.* at 435-36.

²² See *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517; 365 NW2d 151 (1984).

opportunity to address the present question or issue any other opinions substantially interpreting the Blaine Amendment.

The relative lack of precedent regarding the Blaine Amendment has led to uncertainty in the important area of school funding. In 2014, the Attorney General admitted that he was unable to answer a Senator's questions regarding public reimbursement of nonpublic schools for various administrative costs due to the lack of authority on the Blaine Amendment.²³ Nor is the present question answered by the history of the debate leading up to the passage of Proposal C. As this Court noted, "[a]s far as the voter was concerned . . . Proposal C was an anti-parochiaid amendment . . . *and beyond that all else was utter and complete confusion.*"²⁴ By granting the Governor's request for an advisory opinion, "this Court would expedite the process by which some measure of certainty can be brought to [a] law[] having a broad and significant . . . effect upon this state."²⁵

It is all but certain that if the Court declines to answer the present question, protracted and costly litigation will result, likely involving multiple lawsuits in both state and federal courts. As the Governor noted in his request, the American Civil Liberties Union has threatened a lawsuit challenging Section 152b, and other interested parties have written to the Governor expressing their opinions that Section 152b is unconstitutional (in addition to the parties who have written arguing that Section 152b *is* constitutional). Such litigation is unnecessary; the substantive question presented by the Governor is "readily susceptible to resolution by this Court absent a specific case or controversy."²⁶ Further, the substantive question is narrow: it is limited to the

²³ Letter from the Attorney General to State Senator Howard Walker, dated May 15, 2014. Attached as Exhibit B.

²⁴ See *In re Proposal C*, 384 Mich at 406 n 2.

²⁵ *In Advisory Opinion re Constitutionality of PA 2012, Nos 348, 349, 493* Mich 1016, 1017; 829 NW2d 872 (2013) (Markman, J, dissenting).

²⁶ *Id.* at 1018.

constitutionality of a single section of a single act, under a single provision in Michigan's Constitution. Even if ordinary litigation were necessary to resolve this issue (it is not), any subsequent litigation will not be fully resolved by the law's October 1, 2016 effective date. Though an advisory opinion would not absolutely prevent litigation, it would minimize the possibility of such costly, unnecessary, duplicative, and protracted litigation. In contrast, the Court's silence on the issue will most certainly leave students, schools, and other interested stakeholders in legal limbo.

In sum, it has been 45 years since this Court issued an opinion examining the Blaine Amendment, and it has never addressed the present question. Protracted litigation is almost sure to result if the Court declines to issue an advisory opinion, creating uncertainty and costing the taxpayers additional legal expenses. For these reasons, now is the time for this Court to issue an advisory opinion on the crucial question of public reimbursement for health, safety, and general welfare mandates to protect children at nonpublic schools.²⁷

II. The Appropriation to Nonpublic Schools Authorized by Section 152b of 2016 PA 249 Does Not Violate Michigan's Blaine Amendment.

The main question before this Court is whether Section 152b's reimbursement to nonpublic schools for state health, safety, and general welfare mandates violates the Blaine Amendment in our State's Constitution. Other provisions in the Constitution, historical precedent, and our State's interest in promoting policies of public concern, especially the health, safety, and general welfare of our children, demonstrate that Section 152b does not violate the Constitution.

²⁷ See also *In re 2002 PA 48*, 467 Mich 1203; 652 NW2d 667, 667 (2002) (“[O]ur constitution's system of separated powers not only requires that each branch of government, in its relationships with the others, assert and defend its prerogatives where necessary, but that each also demonstrate comity with the others wherever possible.” (Markman, J, dissenting)).

A. Standard of constitutional review.

The constitutionality of Section 152b is a question of law that is reviewed de novo.²⁸ “Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.”²⁹ The Court should “exercise the power to declare a law unconstitutional with extreme caution, and . . . never exercise it where serious doubt exists with regard to the conflict.”³⁰ “Every reasonable presumption or intendment must be indulged in favor of the validity of an 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.”³¹ In addition, when reviewing the Constitution, the Court’s objective should be to “effectuate the intent of the people who adopted the constitution.”³² Finally, “when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation.”³³

B. The Legislature has a duty to protect and promote the public health and welfare of the State’s citizens.

The 1963 Michigan Constitution explicitly requires the Legislature to protect and promote the health and welfare of its citizens, which is at its pinnacle when children are at issue.³⁴ Specifically, during the 1963 Michigan Constitutional Convention, art 4, § 51 was added to reinforce the traditional police powers and to highlight the importance of public health and welfare.³⁵ More importantly, however, this constitutional provision reinforces the self-evident

²⁸ See *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 5; 658 NW2d 127, 130 (2003).

²⁹ *Id.* at 6.

³⁰ *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174, 179 (2004).

³¹ *Id.* (quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805, 807 (1939)).

³² *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53, 56-57 (1999).

³³ See *Taylor*, 468 Mich at 6.

³⁴ *Supra* note 3.

³⁵ Fino, *The Michigan State Constitution A Reference Guide* (Westport, Connecticut: Greenwood Press), p 99.

truth that the Legislature has a compelling interest in promoting the health and welfare of its citizens.

Here, it is dispositive that the funding provided under Section 152b *only* applies to state mandates designed to ensure the health, safety, and general welfare of the children at nonpublic schools.³⁶ If the Legislature could only impose, but not fund, health, safety and general welfare mandates in schools, as opponents to Section 152b suggest, then the Legislature's ability to fulfill its constitutional duty to protect the public health and general welfare of its citizens would be severely frustrated. With the State currently addressing a public health crisis in Flint and the Legislature considering improvements to water and lead testing in schools, *including nonpublic schools*, a ruling to the contrary would effectively prohibit government from solving the most serious problems that our citizens face today.³⁷ Our Constitution's drafters could not have intended that harmful result and this Court should avoid such an overly narrow interpretation of the Legislature's authority.

1. *The funding included in Section 152b benefits children who attend nonpublic schools.*

The Blaine Amendment is intended to prevent the Legislature from directly advancing, promoting, and funding private religious schools. This Court has interpreted the provision as barring public funding for the primary and essential elements of a private school's existence.³⁸ Since Section 152b does not fund any of the primary or essential elements of a private school's existence, it passes constitutional scrutiny.

³⁶ *Supra* note 12.

³⁷ See, e.g., 2016 HB 5440.

³⁸ *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48-49; 228 NW2d 772, 774-75 (1975).

Section 152b expressly states that the reimbursement is:

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.³⁹

To be clear, the reimbursement provided by Section 152b is a mechanism to ensure that *all* of Michigan's students, irrespective of the school they attend, receive the same health, safety, and general welfare protections. Reimbursement of costs incurred when complying with these mandates does not confer an extraordinary benefit upon these nonpublic schools; it merely places them in the same position that they otherwise would have been in had the health, safety, and general welfare mandates not been imposed on them.

Similar to the transportation funding at issue in *Alexander v Bartlett*, the funding in Section 152b helps to ensure compliance with state imposed mandates.⁴⁰ In *Alexander*, the court held that certain transportation funding does not violate Michigan's Blaine Amendment because its intended and actual effect is to assist parents in complying with state compulsory education laws while recognizing their right to send their children to religious schools. Section 152b reimbursements similarly guarantee that schools are able to comply with health, safety, and general welfare mandates that are for the benefit of all students, while continuing to recognize the right of each Michigan resident to send their children to the school of their choice.

In re Advisory Opinion re Constitutionality of 1974 PA 242 involved a wholly different situation. In that case, this Court held that Michigan's Blaine Amendment bars public funding for

³⁹ MCL 388.1752b(8).

⁴⁰ *Alexander v Barlett*, 14 Mich App 177, 179-80; 165 NW2d 445, 447 (1968) (the Court of Appeals noted that the purpose of the statute was clearly for secular purposes, and that it cannot be said that the primary effect is to "either advance or inhibit religion").

primary and essential elements of a private school's existence.⁴¹ The Court advised that textbooks and supplies are essential aids that constitute a primary feature of the educational process.⁴² In contrast, Section 152b funds public health, safety, and general welfare mandates, which while important are not primary and essential elements of a school's existence.

2. *Even if nonpublic schools derive some benefit from Section 152b funding, that benefit is indirect and its impact is de minimis.*

In *In re Advisory Opinion re Constitutionality of 1974*, the Court aptly noted that public funding for incidental services to nonpublic schools are not of the type that the Blaine Amendment intends to prohibit. Instead, the purpose of the Blaine Amendment was to avoid situations where the Legislature is funding primary and essential elements and services that promote or advance a nonpublic school.⁴³

Numerous other courts have acknowledged that laws which promote child safety and public health serve a secular purpose and do not violate the intent or purpose of a state's Blaine Amendment.⁴⁴ These courts found that a Blaine Amendment's primary function is to shield against

⁴¹ 394 Mich at 48-49 (this Court noted that programs and services "outside" of the classroom can at times be seen as incidental services. Such programs 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").

⁴² *Id.* at 49 (quoting *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 702; 178 NW2d 484, 488 (1970)).

⁴³ 394 Mich at 48-50.

⁴⁴ See, e.g., *Bd of Ed v Bakalis*, 54 Ill 2d 448; 299 NE2d 737 (1973) (the Illinois Supreme Court held that a statute requiring public school buses to transport private school students did not violate Illinois' Blaine Amendment because it was primarily a health and safety measure for the benefit of all students, and any aid to religious schools chosen by families was incidental); *Bd of Ed v State Bd of Ed*, 243 Conn 772; 709 A2d 510 (1998) (the Connecticut Supreme Court held that a law requiring transportation of private school students at public expense did not violate the Connecticut Constitution's Compelled Support Clause; it had the secular purpose of ensuring child safety and was for the benefit of the students riding the buses rather than the schools to which they were being transported); *Rhoades v Sch Dist*, 424 Pa 202; 226 A2d 53 (1967) (the Pennsylvania Supreme Court upheld the constitutionality of a statute authorizing transportation of private school students at public expense as a health and safety measure).

a state promoting or advancing religious, nonpublic schools or services. In each of the cases, these courts held that the public health and safety programs were incidental to education, and therefore, did not violate each state's Blaine Amendment.

Similarly, the reimbursement mechanism found in Section 152b merely ensures compliance with one of the State's mandatory programs. Reimbursement for compliance has the primary effect of guaranteeing the State's mandates are implemented, which is incidental to a nonpublic school's primary purpose.

Reimbursements to nonpublic schools for the cost of complying with state mandates is not only incidental to those schools' main function, but any benefit the school may receive through a reimbursement is indirect and has a *de minimis* impact at best. If a school qualifies for the reimbursement and receives the funding, the school is not receiving the funding to directly aid the school or its mission. Instead, the reimbursement covers, in whole or in part, the school's cost of compliance with the State's health, safety, and general welfare mandates, simply putting the school in the same position it was in before the imposition of the mandate. Any additional benefit resulting from compliance with these mandates is at best an indirect and *de minimis* benefit.

2016 PA 249 included a gross appropriation of \$16.1 billion, with \$14.16 billion dedicated to the School Aid portion of the budget.⁴⁵ The appropriation to nonpublic schools under Section 152b is only .017 percent of the total funding made available to public schools and the reimbursement is made available to all 600 nonpublic schools in the State. This means that each individual school will receive a number significantly smaller than that of any public school. With such minimal reimbursements, which represent only about two-tenths of one percent of total

⁴⁵ See FY 2016-17 Education Omnibus Budget Conference Report prepared by the House Fiscal Agency. Attached as Exhibit C.

school funding, funding to nonpublic schools under Section 152b can have no more than a *de minimis* impact on both public and nonpublic schools.

Finally, the reimbursement to nonpublic schools applies to mandates that promote or ensure public health, safety, and general welfare,⁴⁶ such as ensuring that fire and tornado drills are conducted and immunization statements and vision screenings are conducted.⁴⁷ Nonpublic schools are required to comply with many mandates, some of which do not directly pertain to public health, safety, or general welfare.⁴⁸ In those instances, Section 152b funding would not be available. Therefore, the instances in which a nonpublic school may qualify for the reimbursement are minimal and the restrictions found in Section 152b are narrowly tailored so that the reimbursement only applies to mandates that aid in the Legislature's interest in protecting the public health and general welfare.⁴⁹ The primary purpose of the Blaine Amendment—to prevent the use of public funds to promote or advance religious, nonpublic schools or services—is not implicated by Section 152b.⁵⁰

3. *Funding for public health, safety, and general welfare mandates do not quantifiably advance or accommodate religious services or education.*

The public health, safety, and general welfare mandates required by the State do not advance or accommodate religious services or education. Instead, they fulfill the constitutional duty to promote public health and general welfare. In *Lemon v Kurtzman*, the U.S. Supreme Court noted that a state, as part of its general health and welfare programs, can provide numerous services

⁴⁶ *Supra* note 12.

⁴⁷ *Supra* note 13.

⁴⁸ *Id.*

⁴⁹ *Supra* note 12 (each identifying the limited instances and numerous restrictions to nonpublic schools from applying for and receiving the reimbursement for complying with the public mandate).

⁵⁰ *Supra* note 42.

to students so long as those services are secular, neutral, and nonideological in nature.⁵¹ Similarly, Michigan's public health, safety, and general welfare mandates—and the corresponding reimbursement for complying with the mandates—are secular, neutral, and nonideological. Complying with secular mandates cannot and do not advance or accommodate any religious purpose of nonpublic schools.

C. *Ensuring student safety is a secular purpose that does not depend upon whether a student attends a public or nonpublic school.*

In *Lemon*, the U.S. Supreme Court noted that a state, as part of its general health and welfare programs, can provide numerous services to nonpublic school students so long as the services are secular, neutral, and nonideological in nature.⁵² Although *Lemon* did not directly address Blaine Amendment provisions, it reinforces the Legislature's ability to promote public health, safety, and general welfare as a completely secular purpose. In this regard, the public health, safety, and general welfare mandates are required for all students, and the reimbursement is to ensure that a student attending a nonpublic school is not adversely impacted by a school's financial inability to comply.

Likewise, courts in states with Blaine Amendments have acknowledged that child safety serves a secular purpose that does not violate the intent or purpose of the Blaine Amendment.⁵³ Similarly, Michigan's Blaine Amendment is not intended to prohibit funding for secular purposes, including those that are for child safety. With this in mind, the Legislature would be doing a

⁵¹ *Lemon v Kurtzman*, 403 US 602, 616-17; 91 S Ct 2105, 2113 (1971) (the Court noted that in previous decisions it permitted the states to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials).

⁵² *Id.*

⁵³ *Supra* note 44.

disservice to the State's residents if it determined that child safety only applies to students attending public schools.

This Court in *In re Proposal C* held that health and safety measures must be given on a non-discriminatory basis to all children.⁵⁴ To this end, the reimbursement is not intended to benefit a nonpublic school, but is instead an effort to guarantee that no child is placed in harm's way simply because of his or her parents' choice to have them attend a nonpublic school.

D. The Legislature has a compelling interest in providing funding to ensure that health, safety, and general welfare mandates are properly implemented.

The Michigan Constitution's Headlee Amendment establishes a duty that the State must fund mandates at the state and local level.⁵⁵ The Legislature has recognized the importance of many of the public health, safety, and general welfare mandates and continues to fund these mandates.⁵⁶ Since the mandates have proven important and vital in promoting the public health, safety, and general welfare of its citizens, the Legislature should be afforded the opportunity to reimburse, in part or in whole, nonpublic schools for implementing these same mandates.

If the Legislature fails to provide reimbursements to nonpublic schools, it would be jeopardizing the legitimacy of these proven, necessary mandates by only funding public schools and not providing funding for nonpublic schools. Prohibiting such a measure would limit the Legislature's constitutional right to protect and promote the public health and general welfare. The reimbursement available under Section 152b is merely a mechanism that can be used to encourage

⁵⁴ 384 Mich at 434 (citing *Hughes v Bd of Ed*, 154 W Va 107; 174 SE2d 711 (1970) and *Everson v Bd of Ed*, 330 US 1; 67 S Ct 504 (1947)).

⁵⁵ Const 1963, art 9, § 29, reads: "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."

⁵⁶ See Section II.E for further discussion.

compliance, which is for the benefit of Michigan students and has no real direct impact on the schools themselves.

E. There is existing precedent for state funds flowing to nonpublic schools.

1. The Legislature has included funding to nonpublic schools in past budgets.

The Legislature has a history of appropriating public money to nonpublic schools as part of past budgets. One such instance includes the Michigan State Police grants for school safety initiatives, a program that was funded two years ago and is again eligible for funding this year.⁵⁷ As indicated in the act, the funding is to improve the safety and security of all buildings, and to protect students and staff. The current budget for the Michigan Department of Education also

⁵⁷ See 2016 PA 268. Section 901 of the Michigan State Police portion of the Omnibus Budget appropriates \$2 million for school safety initiatives to “public ***or nonpublic schools*** ... to purchase technology and equipment and to conduct assessments to improve the safety and security of school buildings, students, and staff” (emphasis added).

includes \$4 million for voluntary water testing. Of the \$4 million appropriated, \$500,000 is reserved for nonpublic schools.⁵⁸

In past budgets and in multiple sections of this year's budget, the Legislature has appropriated funding to nonpublic schools for health and safety measures. In these examples, the programs serve the wholly secular purpose of ensuring the safety and health of Michigan's children. Similarly, Section 152b funding provides the same type of reimbursement for health and safety programs that serve the secular purpose of ensuring the health and safety of children.

2. *The Legislature has appropriated money for other programs that partially go to nonpublic schools.*

In addition, the State has provided education funding to nonpublic schools for numerous other health, safety, and general welfare services or programs for more than 35 years under the restrictions of the Blaine Amendment. For example, after a tragic bus accident that killed three children in the Boys Club of Ypsilanti and injured dozens of other kids, the Legislature enacted

⁵⁸ See 2016 PA 268, Section 1102 of the Michigan Department of Education portion of the Omnibus Budget states, in relevant part: "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 ... (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" (emphasis added).

HB 6521 of 1979 to prevent the recurrence of a similarly tragic accident.⁵⁹ The legislation expanded bus inspections to include not only those used to transport public school children, but for any vehicle with a certain capacity owned by a nonpublic school, religious organization, or various other nonpublic organizations.⁶⁰ These inspections were to be performed by the state-funded and publicly employed inspectors within the Department of State Police. The Legislature expanded this mandate five years later to subject leased vehicles used to transport school children to the already established state-funded inspections.⁶¹

In another instance, the Legislature enacted the Pupil Transportation Act in 1990, which overhauled the standards for student transportation in an effort to ensure greater safety for children and others around school buses.⁶² Among other things, the legislation created requirements for driver education and examinations, expanded vehicle inspection requirements, and established reporting requirements for pupil transportation incidents.⁶³ These mandates applied equally to public *and* nonpublic schools, and much of the costs of required inspections and education would continue to be borne by the State.⁶⁴ The Pupil Transportation Act of 1990 went so far as to provide for reimbursement of driver education course and compensation costs on an equal basis to public and nonpublic schools.⁶⁵

⁵⁹ House Legislative Analysis Section, Second Analysis for HB 6521 of 1979 sponsored by Representative Gary Owen (January 9, 1979). Attached as Exhibit D.

⁶⁰ *Id.*

⁶¹ House Legislative Analysis Section, Analysis for HB 5221 of 1984 with committee amendments sponsored by Representative Jelt Sietsema (February 14, 1984). Attached as Exhibit E.

⁶² House Legislative Analysis Section, Analysis for SB 534 (with H-2 substitute) of 1990 sponsored by Senator Frederick Dillingham (June 5, 1990). Attached as Exhibit F.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MCL 257.1851(3) (enacted through 1990 SB 534).

Legislative action was again taken in 1992 to ensure the health, safety, and general welfare of *all* Michigan students.⁶⁶ HB 4569 of 1992 required all school districts and nonpublic schools to obtain a criminal history report from the state police before making an offer of employment for certain positions.⁶⁷ The Department of State Police was required to conduct the checks and provide a report when asked by a school, meaning the Legislature again funded the costs of this mandate equally for public and nonpublic schools.⁶⁸

Where student safety, health, or welfare are at issue, the Legislature has always treated public and nonpublic school students equally. Decades of precedent exists demonstrating that important efforts to ensure that students are safely transported to school and are kept safe while at school, *whether public or nonpublic*, has required funding and legislative action to guarantee compliance.

When such programs have been challenged, this Court has held that the funding for secular programs and services *did not* violate Michigan's Blaine Amendment. In one case, this Court held that incidental and indirect benefits that flow to religious schools as a result of the State's shared-time statute does not violate the Michigan Constitution because the primary effect is to provide secular, public instruction to nonpublic school children.⁶⁹

⁶⁶ House Legislative Analysis Section, Second Analysis for HB 4569 of 1992 sponsored by Representative Terry London (August 27, 1992). Attached as Exhibit G.

⁶⁷ *Id.* at 2 (the analysis notes that “[t]he aim of this area of the School Code, it should be kept in mind, is to safeguard the schools against those who have committed crimes of the sort that suggest schoolchildren would be at risk”).

⁶⁸ *Id.* (the analysis lists costs to the State of conducting various background checks and producing reports).

⁶⁹ *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517, 545-46; 365 NW2d 151, 164 (1984) (citing *Citizens to Advance Pub Ed v State Superintendent of Pub Instruction*, 65 Mich App 168, 176; 237 NW2d 232, 235-36 (1975)).

This Court has also recognized that public funding for auxiliary services does not violate the Constitution's Blaine Amendment. In *In re Proposal C*, this Court noted that auxiliary services are similar to shared time services because in both instances nonpublic schools exercise no control over the programs or services.⁷⁰ Further, this Court acknowledged that "auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children."⁷¹ The auxiliary services offered in that case were driver education courses, which the Legislature treated as a general safety measure.

As previously discussed, the Michigan Court of Appeals in *Alexander v Bartlett* held that a state statute permitting local school districts to furnish transportation without charge to nonpublic schools did not violate Michigan's Blaine Amendment because its actual and intended effect was to assist parents in complying with state compulsory education laws.⁷² Numerous other states have also held that transportation is a permissible use of public funds that can benefit nonpublic school students.⁷³

In each instance, the mandate at issue was secular because it served the purpose of promoting the health, safety, and welfare of the children in Michigan. Similarly, the reimbursement found in Section 152b continues along the same path by promoting the health, safety, and welfare of schoolchildren. The reimbursement, like each education funding program or service above, does

⁷⁰ 384 Mich at 417-21.

⁷¹ *Id.* at 419.

⁷² *Supra* note 40.

⁷³ *Attorney General v Sch Committee of Essex*, 387 Mass 326; 439 NE2d 770 (1982) (the Massachusetts Supreme Court held that a statute requiring transportation of private school students on public school buses was a community safety measure not unlike police or fire protection; any benefit provided to the private schools was remote and did not constitute substantial aid sufficient to violate the Massachusetts Constitution); *Bowker v Baker*, 73 Cal App 2d 653; 167 P2d 256 (1946) (the California Supreme Court held that transporting private school students at public expense is constitutionally acceptable because it is aimed at child safety not education, and any benefit to the school is "incidental").

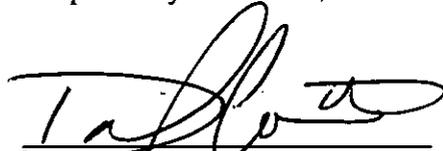
not directly benefit the nonpublic school, but instead is focused on ensuring the health, safety, and welfare of the student.

CONCLUSION

This Court should grant the Governor's request to decide this important matter of law regarding the funding of mandates to protect the health, safety, and general welfare of Michigan's school children and settle decades of uncertainty surrounding the Blaine Amendment.

Section 152b ensures that all state mandates that protect and promote the health, safety, and general welfare of Michigan's students are complied with, regardless of whether a child attends a public or nonpublic school. The reimbursements available to nonpublic schools under Section 152b merely exist to ensure compliance with these state mandates, and do not promote or support religious education or services. For these reasons, the Court should declare that Section 152b does not violate the Michigan Constitution.

Respectfully submitted,



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Dated: August 25, 2016

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Request for Advisory Opinion
Regarding Constitutionality of 2016 PA 249

Supreme Court No. 154085

PROOF OF SERVICE

I, David Greco, III, an attorney, state that I caused true and correct copies of the **Brief of Speaker Kevin Cotter and Representatives Tim Kelly and Amanda Price of the Michigan House of Representatives** and accompanying **Appendix** to be served upon the Governor of the State of Michigan via hand-delivery to a person of suitable age and discretion at 111 S. Capitol Ave., Lansing, MI 48933, and via e-mail to Michelle Lange, the Governor's Deputy Director of Legislative Affairs, on August 25, 2016.

I declare that the statements above are true to the best of my information, knowledge, and belief.



David Greco, III
P79643

