

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2016 PA 249

Supreme Court Case No. 154085

John J. Bursch (P57679)
BURSCH LAW PLLC
Attorney for Amici members of the House and
Senate and the Great Lakes Education Project
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
616.450.4235
jbursch@burschlaw.com

**BRIEF OF AMICI MICHIGAN SENATOR COLBECK,
REPRESENTATIVES GARCIA AND KELLY, AND THE GREAT
LAKES EDUCATION PROJECT IN SUPPORT OF THE
CONSTITUTIONALITY OF 2016 PA 249**

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction over this matter by virtue of its July 20, 2016 order inviting the Governor and any member of the House or Senate to file briefs regarding the constitutionality of 2016 PA 249.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion in this matter.

Amici answer: Yes.

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

Amici: No. And if the Court reaches the contrary conclusion, then it should still uphold the validity of PA 249 because article 8, § 2 violates the First and Fourteenth Amendments of the United States Constitution.

STATEMENT OF INTEREST

Amicus Senator Pat Collbeck represents Michigan's 7th Senate District. *Amicus* Representative Daniela Garcia represents Michigan's 90th House District. And *amicus* Representative Tim Kelly represents Michigan's 94th House District. All of these *amici* Senators and Representatives voted in favor of the bill that became 2016 PA 249. And all of these *amici* Senators and Representatives would introduce and support legislation for true school choice through a voucher program were it not for the unconstitutional prohibition embodied in article 8, § 2 of Michigan's 1963 Constitution.

Amicus The Great Lakes Education Project is a bi-partisan, non-profit advocacy organization supporting quality choices in public education for all Michigan students. The Project supports efforts to improve academic achievement, increase accountability, and empower parental choice in Michigan's public schools. Full choice for students and parents includes, but is not limited to: meaningful public school choice, charter public schools, virtual charter schools, home schooling, Education Savings Accounts, scholarship tax credit programs, and school vouchers.

CONSTITUTIONAL PROVISION INVOLVED

Article 8, § 2 of Michigan's Constitution states:

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 or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

INTRODUCTION

Amici Michigan Senator Pat Collbeck, Michigan Representatives Daniela Garcia and Tim Kelly, and the Great Lakes Education Project support the Governor’s request for an advisory opinion regarding 2016 PA 249. The issue of whether the State can fund health and safety measures that benefit nonpublic school children is precisely the type of “important question” that the People of Michigan contemplated when adopting the advisory-opinion process in article 3, § 8 of the 1963 Constitution. And the Governor, Legislature, courts, and the People themselves would all benefit from this Court’s reasoned decision.

The Court should also uphold 2016 PA 249’s validity. Programs and services that promote student and employee safety are only incidental to a school’s core education function. Accordingly, they are “not the type of services that flout the intent of the electorate expressed through Proposal C [article 8, § 2].” *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48–49; 228 NW2d 772 (1975). Accord, e.g., *In re Proposal C*, 384 Mich 390, 418–419; 185 NW2d 9 (1971) (State’s provisions of auxiliary “health and safety” services to nonpublic students “have only an incidental relation to the instruction of private school children” and therefore do not run afoul of article 8, § 2, Michigan’s Blaine Amendment).

If the Court concludes that 2016 PA 249 does violate article 8, § 2, then the Court must determine whether article 8, § 2 itself is consistent with the rights enumerated in the United States Constitution. *In re Advisory Opinion re Constitutionality of PA 1966, No 261*, 380 Mich 736; 158 NW2d 497 (1968) (per curiam) (this Court issued an advisory opinion upholding 1966 PA 261 even though PA 261 violated article 7, § 7 of the 1963 Constitution because article 7, § 7 was itself invalid under the U.S. Constitution). Such an inquiry should result in the Court concluding that article 8, § 2 is unconstitutional for three independent reasons.

First, article 8, § 2 violates the Free Exercise Clause of the First Amendment to the U.S. Constitution. Even a facially neutral state law violates the Free Exercise Clause where the public record demonstrates that the law was targeted at religious conduct. *Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 531–534 (1993). And the public record includes abundant evidence that article 8, § 2 targeted religious schools, particularly Catholic schools. Article 8, § 2 was proposed in direct response to the State’s appropriation of modest funding to Michigan religious schools, 80% of which were Catholic. The ballot committee that placed the proposal on the ballot used a religious slur as its name: the “Council Against Parochiad.” And campaign literature and ads attacked the Catholic Church and Catholic schools, causing one Michigan Senator to comment that he had “never witnessed such anti-Catholic sentiment in [his] life.”

Second, article 8, § 2 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Just like the Free Exercise Clause, even a facially neutral state law runs afoul of equal protection if “invidious discriminatory purpose was a motivating factor.” *Village of Arlington Heights v Metro House Dev Corp*, 429 US 252, 266 (1977). And given the historical record, it cannot be disputed that invidious discriminatory animus against Catholics and the Catholic Church was at least “a” motivating factor for article 8, § 2’s enactment, if not the primary motivating factor.

Third, article 8, § 2 violates the Free Speech Clause of the First Amendment to the U.S. Constitution. The government cannot create a limited-public forum for funding educational speech, then deny funds based on viewpoint discrimination. *Rosenberger v Rector & Visitors of Univ of Va*, 515 US 819, 829–835 (1995). Yet that is precisely what article 8, § 2 accomplishes in the context of funding for Michigan’s charter schools.

For all these reasons, this Court should hold article 8, § 2 invalid and uphold § 152b.

STATEMENT OF FACTS

I. 2016 PA 249

Section 152b of 2016 PA 249 allows a Michigan nonpublic school to seek reimbursement from the State for costs that the school incurs complying with state mandates designed to “ensur[e] the health, safety, and welfare of the children in nonpublic schools” and appropriates up to \$2.5 million for that purpose. MCL 388.1752b. The law was initiated as Senate Bill 801 and passed both the House and Senate on June 8, 2016. Governor Rick Snyder signed the bill into law on June 27, 2016, and it has an effective date of October 1, 2016. *Id.* at enacting § 3.

The funds that PA 249 provides for nonpublic schools cover a myriad of state mandates, documented in the nonpublic schools mandate report required under Section 236 of PA 252 of 2014. That report was issued (as revised) on November 25, 2014 (see <http://goo.gl/gQEiYl>), and includes the following legislative requirements for nonpublic schools:

<u>MCL/Admin Rule</u>	<u>Description</u>	<u>Category</u>
29.5p	Hazardous Chemicals—Employee Right to Know	School Operations— Student/Staff Safety
29.19	Fire/Tornado Drills/Lockdown/Shelter in Place	Student/Staff Safety
257.715a	State Police inspection 12+ passenger motor vehicles	Student/Staff Safety
257.1807-.1873	(Pupil Transportation Act)—school bus owned/operated by nonpublic school must meet or exceed federal & state motor vehicle safety standards	Student/Staff Safety
289.1101-.8111	Food Law	School Operations— Student/Staff Safety
324.8316	Notice of pesticide application at school or day care center	Student/Staff Safety
333.9155	Concussion education	Student Health
333.9208	Immunizations	Student Health
333.17609	Licensure of school speech pathologist	Student Health

380.1135	Student records	Accountability
380.1137a	Release of student information to parent subject to PPO	Accountability
380.1151	English as basic language of instruction	Educational Requirements
380.1166	Constitution and governments mandatory courses	Educational Requirements
380.1177-.1177a	Immunization statements and vision screening	Student Health
380.1179	Possession/use of inhalers and epinephrine auto-injectors	Student Health
380.1230-.1230h	Required criminal background check by State Police/FBI; unprofessional employment history check; registered education personnel	Student/Staff Safety
380.1274b	Products containing mercury; prohibit in schools	Student/Staff Safety
380.1233; R390-1145	Teaching or counseling as noncertificated teacher; special permits; emergency permits	Educational Requirements
380.1531-.1538	Teacher certification and administrator certificates	Educational Requirements
380.1539b	Notification of conviction of listed offense	Student/Staff Safety
380.1561	Compulsory school attendance	Educational Requirements
380.1578	Attendance records	Accountability
388.514	Postsecondary Enrollment Act information and counseling	Educational Requirements
388.551-.557	Private, Denominational & Parochial Schools Act	School Operations
388.851-.855b	Construction of school buildings	Building Safety
388.863	Compliance with federal asbestos building regulation	Building Safety
388.1904	Career and technical preparation program; enrollment; records	Educational Requirements
388.1909-.1910	Career and Technical preparation information and counseling	Educational Requirements

408.411-.424	Workforce Opportunity Wage Act (minimum wage)	School Operations
408.681-.687	Playground Equipment Safety Act	Student/Staff Safety
409.104-.106	Youth Employment Standards Act; work permits in student files	School Operations
423.501-.512	Bullard-Plawecki Employee Right to Know Act (employee files)	School Operations
722.112	Child care organizations	School Operations
722.115c	Child care organization criminal history and criminal background checks	Student/Staff Safety
722.621-.638	Child Protection Law	Student/Staff Safety
R257.955	Annual school bus inspections	Student/Staff Safety
R285.637	Pesticide use	Student/Staff Safety
R289.5701.1-.6	Food establishment manager certification	School Operations
R325.70001-.700018	Bloodborne Pathogens	Student/Staff Safety
R340.293	Notification to district of auxiliary services needed	Educational Requirements
R340.484	Boarding school requirements	School Operations—includes aspects of all categories
R390.1146	Mentor teachers for noncertificated instructors	Educational Requirements
R390.1147	Certification of school counselors	Educational Requirements

None of these mandates is strictly necessary for a nonpublic school to operate or to employ teachers or staff. In other words, if the mandates did not exist, a nonpublic school could still conduct its educational day-to-day business. The mandates are simply the Legislature's entirely secular method to protect and promote the health and welfare of children attending, and employees of, Michigan's nonpublic schools. See Const 1963, art 4, § 51 ("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.").

II. The history of Blaine Amendments in the United States demonstrates animus and hostility against Catholics and the Catholic Church.

So-called “Blaine Amendments” are named after former U.S. Representative (and later Senator and Presidential Candidate) James G. Blaine of Maine. In 1875, Blaine proposed an amendment to the United States Constitution that sought to bar government aid to sectarian schools and institutions. Toby Heytens, *Note: School Choice And State Constitutions*, 86 Va. L. Rev. 117, 131 (2000) [hereinafter *School Choice*].

When Blaine made his proposal, public schools—often described as common schools—were largely Protestant. As one scholar explains, the “common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism.” Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol’y 657, 666 (1998) [hereinafter *Blaines Wake*]. Catholic immigrants, who began to arrive in America in waves in the 180s, “perceived Protestant-controlled public schools as hostile to their faith and values.” *School Choice*, p 136. And these immigrants were starting to request government financial support for Catholic schools. *Id.* The federal Blaine Amendment was a direct response to these efforts, intended to curtail the minority but growing Catholic school system.

It is now beyond cavil that the Blaine Amendment was a largely anti-Catholic response to the request by Catholics for public funding. E.g., *School Choice*, p 138; *Blaine’s Wake*, p 659 (“[T]he Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics.”). Blaine’s Amendment would have mandated that no federal funds could be used to aid “sectarian” institutions, which was code for Catholic schools. *School*

Choice, p 133. With the support of President Grant, the proposed amendment was approved by the House of Representatives, but it narrowly failed to achieve the two-third majority necessary for an amendment in the Senate. *Id.*

Blaine's defeat at the federal level "did not, however, end the matter." *School Choice*, p 134. In the late 19th and 20th Century, in the wake of the federal Blaine Amendment proposal, "approximately thirty states wrote or amended their constitutions to include language substantially similar to that of" the federal Blaine Amendment. *Id.* In fact, Congress made the inclusion of Blaine Amendments a condition "of admission to the Union" for several states. *Id.* As the United States Supreme Court has noted, "[c]onsideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for Catholic." *Mitchell v Helms*, 530 US 793, 828 (2000) (plurality opinion).

Michigan did not need to pass a new Blaine Amendment as part of this wave, as it had already enshrined anti-Catholic bias in its 1850 Constitution. Article 4, § 20 stated that "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose." Const 1850, art 4, § 40. Nonetheless, Catholic animus in Michigan continued unabated. The anti-Catholic American Protective Association, an influential anti-Catholic group, had a strong membership in Michigan, and its members "swore a solemn oath never to vote for a Catholic, never to join one on strike, and to avoid hiring one if a Protestant was available." Mark S. Massa, *Anti-Catholicism in the United States* (June 2016), available at <http://goo.gl/PYWsEB>.

III. The history of Michigan's Blaine Amendment, codified in article 8, § 2 of Michigan's Constitution, similarly demonstrates animus and hostility toward Catholics and the Catholic Church.

In the mid-1960s, after years of paying taxes that subsidized public schools *and* paying private tuition, families who sent their children to private schools began to lobby the State to provide direct financial support to nonpublic schools. In response, the Legislature proposed allocating \$100 for each high-school student and \$50 to each grade-school student attending a nonpublic school. This legislation ultimately became law with the passage of 1970 PA 100, and this Court affirmed the validity of the appropriation, concluding that the legislation neither advanced nor inhibited religion and did not violate the free exercise or establishment clauses of the U.S. or Michigan constitutions. *In re Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82; 180 NW2d 265 (1970).

In 1970, Catholic schools accounted for by far the largest number of nonpublic schools in Michigan, with nearly 218,000 of the 275,000 nonpublic school students in the state. (*Detroit News*, 11/1/70.) The next largest system was the National Union of Christian Schools of the Christian Reformed Church in West Michigan, with 23,000 students. (*Id.*) As a result, the “nonpublic schools” in Michigan *circa* 1970 meant, for all practical purposes, Catholic schools. And opponents of the 1970 funding measure turned public opinion against state funding by demonizing the Catholic church and the Catholic school system.

These opponents to Catholic school funding created a ballot committee, the “Council Against Parochiad,” the third word being a religious slur meant to play on the word “parochial,” which means “of or relating to a church parish and the area around it,” see <http://www.merriam-webster.com/dictionary/parochial>. The Council Against Parochiad introduced to the November 1970 ballot what was known as “Proposal C,” which eventually became article 8, § 2. The

proposal was cleverly neutral in its language, barring public funding not only for “denominational” schools but for all “nonpublic” schools. But the advocacy behind it was anything but.

Consider just a small sample of the public advocacy in support of Proposal C and against funding for Catholic schools:

- “Parochialism is basically a Catholic position. Catholics say they cannot afford to educate their children, which is of course their own choosing. . . . As far as I am concerned the Catholic Church is the largest profit-making non-profit organization in the world.” (*Detroit News*, Letter to the editor, 11/1/70.)
- “Money used to relieve the religious body of a responsibility it has chosen to take of its own free will, immediately is a violation of church and state.” (Methodist Bishop Dwight E. Loder in an article he authored in the *Michigan Christian Advocate*, cited in the *Detroit News*, 10/21/70.)
- “Parochialism forces advertise many well-known people who oppose Proposal C. The influence of these people is negated since, to my knowledge, they are all either Catholic, or wealthy, or both, with a personal desire to see a tax breakthrough for private parochial schools.” (*Detroit News*, Letter to the editor, 10/31/70.)
- “Public funds to finance . . . specific religious indoctrination[] would only weaken our public school system.” (*Detroit News*, Letter to the editor, 10/21/70.)
- “As more tax funds are pumped into school systems not controlled by the public, enrollments are encouraged and other churches and private groups are encouraged to open similar schools in which to indoctrinate children in their religious or political beliefs.” Voters should “reject all demands of politically-active clergy men who are seeking tax funds for religious schools. It was their decision, not the public’s to open and to operate then.” (*Grand Rapids Press* op-ed, 10/26/70.)
- “Honest, sincere teachers steeped in their faith might find it impossible to separate religious conviction from even the physical sciences. Such considerations, apparently, do not seriously worry Speaker Ryan and his minions. They are determined to fasten on the state by hook or crook, a policy of public funds for private, religious-oriented schools. (*Grand Rapids Press*, 5/8/69.)
- “[S]ince no Legislature can bind the next one, the Legislature we elect Tuesday will be free to raise the aid to the 90 percent or more, which Catholic leaders already have announced they will ask.” (*Grand Rapids Press*, Letter to the editor, 11/7/70.)

- “To those tax-hungry clergymen who formed an alliance with unprincipled politicians to jam repeated parochiaid measures through the legislature and who, during the campaign, have threatened to close their religious schools . . . , we say ‘Don’t just talk about it, DO IT!’” (*Grand Rapids Press*, 11/4/70.)
- “Outright anti-Catholicism” is one of the reasons for supporting Proposal C. (*Grand Rapids Press*, 10/22/70.)
- “I am deeply concerned with the possibility of parochial aid to private and catholic and other religious schools. I am asking you to vote against any form of parochial aid.” (Letter from public-school principal to Sen. James Fleming, 5/13/69.)
- “It is a well known fact that the Roman Catholic Church—as an organization—is reputed to be the wealthiest church in our nation and thus can afford their own schools, but this present move on their part smells of greed to make every taxpayer help support and encourage their church slanted education.” (Letter to Sen. James Fleming, 5/15/69.)
- “I have never witnessed such anti-Catholic sentiment in my life. It might even be that divisiveness created by this issue would set back ecumenicalism fifty years in Michigan.” (Letter of Senator James Fleming to Dr. Charles T. Vear, referencing a press release issued by Bishop Dwight Loder, Michigan Area United Methodist Church, 5/9/69.)
- “When the parochiaid people reach their goal of funding private and church schools on an equal basis with public schools it will cost Michigan taxpayers at least a quarter of a billion dollars!! That’s No claim, that’s their aim!” (Yes Ad, paid for by the Council Against Parochiaid, *Detroit News*, 10/30/70.)
- “Support Church Schools by Giving on Sunday!! (And Not With Our Public Tax Money) Parochiaid Must Be Stopped – Now!!” (Yes Ad paid for by the Council Against Parochiad, *Detroit News*, 10/30/70.)
- “This Amounts to Segregation on a Religious Basis! Keep Church and State Separate!” (Yes Ad paid for by the Council Against Parochiaid, *Detroit News*, 10/30/70.)
- And: “LET’S BE FAIR.More than 90% of all parochiaid funds go to schools owned by the clergy of one politically active church – a church which pays no taxes on its \$80 billion holdings in real estate, stocks, bonds, and business investments, or on its \$12 billion annual income in this country.” “BUT THIS IS ONLY THE BEGINNING.You will go on paying and paying for church and private schools of all kinds – unless you put a stop to it now.” “You may never have another chance!” (Vote Yes on “C” November 3 Ad.)

In testimony to the U.S. House Ways and Means Committee about parochialism, the president of the Grand Rapids area chapter of Americans United and the Michigan Federation Chapters of Americans United for Separation of Church and State summed it all up when he “spoke of his groups’ efforts in passing a referendum in Michigan in 1970 which prohibits tax dollars going to private schools. The proposal ‘said in no uncertain terms that we would not sell public education for a mess of parochial pottage . . .’” (*Grand Rapids Press*, 8/16/72.) And he was right—based on all of the anti-Catholic rhetoric, voters narrowly approved Proposal C with 56% of the votes cast in the November 1970 election. Broillette, *School Choice in Michigan: A Primer for Freedom in Education* (Mackinac Center for Public Policy, 1999), pp 14-15.

ARGUMENT

- I. **The Court should exercise its discretion to grant the Governor’s request for an advisory opinion regarding the constitutionality of 2016 PA 249.**
 - A. **There are many benefits to this Court’s issuance of advisory opinions generally.**

In adopting article 3, § 8 of the 1963 Constitution, the People of Michigan endorsed this Court’s use of advisory opinions to answer questions about “important questions of law” posed by the Governor or either chamber of the Legislature regarding the constitutionality of newly enacted (but not yet effective) legislation. The advisory-opinion process has numerous benefits.

First, an advisory opinion allows the legislative and executive branches to guide their conduct in the absence of clear constitutional direction about new legislation’s validity. Second, when this guidance comes in the form of an advisory opinion, it is typically much faster and less costly than adversarial litigation. Third, litigants and lower courts respect this Court’s well-reasoned advisory opinions, which provide a high degree of predictability as to how constitu-

tional issues are likely to be resolved in future litigation. Finally, advisory opinions represent a public conversation between different branches of state government, one that helps frame large political debates. This dialogue allows all public officials to reduce the risk of constitutional error and minimize future problems.

All of these benefits were evident in this Court's 2011 decision to grant the Governor's request for an advisory opinion concerning a new tax statute. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 489 Mich 954; 806 NW2d 683 (2011). Numerous *amici* submitted briefs in response to the Court's invitation; the Michigan Attorney General's Office ensured that there was vigorous advocacy on both sides of the constitutional questions presented; the Court's opinion allowed the Legislature and the Governor to modify the state budget based on the outcome; and Treasury did not implement the portion of the statute this Court concluded was in violation of Michigan's Constitution. Predictably, this Court's reasoned analysis carried great weight with the public, and private litigants chose not to file adversarial proceedings in state or federal court. The opinion was a benefit to Michigan, its citizens, and principles of good government.

The drafters of Michigan's 1963 Constitution envisioned these very benefits. Article 3, § 8's proponents said that advisory opinions "would facilitate the effective and efficient operation of our state government." Constitutional Convention 1963, Official Record, p 1543. The drafters foresaw that an advisory opinion could "give[] the legislature and the governor on really important questions an opportunity to get a decision rather than to plunge ahead regardless of what the legal outcome may be." *Id.* at 1544. And these benefits outweighed any concern about preserving the "traditional notion that there must be a case or controversy presented before the court may exercise its judicial power," *id.*, or that the decision would lack *stare decisis* effect, *id.*

The drafters correctly predicted that this Court would “undoubtedly request briefs *amicus curiae* from persons or groups that might be interested in those opinions and that [the Court] w[ould] give careful consideration even though the matter [wa]s not presented as an adversary proceeding.” *Id.* at 1544. And the drafters recognized that constitutional questions raised by new legislation rarely turn on the facts: “The issue is not decided in one case that it is constitutional because the facts were thus and so and in another case it was unconstitutional because the facts were thus and so.” *Id.* at 1547. “It is one way or the other because the court applies a principle and determines whether the legislation fits within this principle or not, and you don’t have it operating on one set of facts and inoperative on another set of facts.” *Id.*

In sum, the drafters of the Michigan Constitution correctly anticipated—and this Court’s past and present practice have demonstrated—that advisory opinions foster clarity and expedient resolution regarding issues that might otherwise have flummoxed politicians and citizens for many years. Absent abuse by the executive or legislative branches, this Court should not hesitate to issue an advisory opinion to address constitutional questions about new legislation.

B. The public would benefit from an advisory opinion regarding 2016 PA 249 specifically.

The many benefits of this Court’s advisory opinions apply here. Answering any constitutional questions about PA 249 will provide necessary direction to the Legislature, the Governor, and interested parties on both sides of the question. A prompt decision will avoid protracted and multiplicitous litigation in state and federal courts. This Court’s advisory opinion will, depending on the outcome, either stop an illegal appropriation or endorse a legitimate exercise of the Legislature’s power to promote the public’s safety and welfare. And the Court’s opinion will guide the Legislature and the Governor—and the schools themselves—in their future decision-making with respect to the costs of state-imposed mandates on schools.

It can hardly be contested that the Legislature’s authority to appropriate money to ensure that all children are safe and healthy at school—whether that school is public or nonpublic—is not only an “important” question but a critical one. And the intersection of school funding and Michigan’s Blaine Amendment is one of continuing importance. Indeed, in 2014, the Office of the Attorney General said it was unable to answer a Senator’s questions regarding state reimbursement of nonpublic-school administrative costs due to a lack of authority on the Blaine Amendment. (Letter from the Attorney General to State Senator Howard Walker, 5/5/14.) This Court’s decision to issue an advisory opinion would clarify an important public legal issue with broad significance to government officials and the public.

II. The Court should hold that the appropriation to nonpublic schools authorized by § 152b of 2016 PA 249 is valid, either because it does not violate Const 1963, art 8, § 2, or because article 8 § 2 is itself unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

A. Section 152b provides funding for state-mandated health and safety measures at private schools and therefore does not violate the letter or the spirit of article 8, § 2.

Under this Court’s well-settled standard of review, § 152b is “presumed to be constitutional” and must be construed as such “unless its unconstitutionality is clearly apparent.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). “Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears to 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.” *Phillips v Mirac, Inc.*, 470 Mich 415, 422; 685 NW2d 174 (2004) (quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW2d 805 (1939)).

Section § 152b's backdrop is that it provides funding only to state requirements that guarantee the health, safety, and welfare of children attending nonpublic schools. This scope falls squarely within the Legislature's authority to "pass suitable laws for the protection and promotion of the public health," Const 1963, art 4, § 51, and to ensure those laws are adequately funded so that they can be implemented. The situation would be no different if, in mandating lead testing for the water in all public and nonpublic schools, the State chose to provide funding to ensure that the testing actually took place and children were adequately protected from consuming lead. Programs and services that promote student and employee safety are only incidental to a school's core education function and thus are "not the type of services that flout the intent of the electorate expressed through Proposal C [article 8, § 2]." *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48–49; 228 NW2d 772 (1975).

Indeed, this Court made this very point in *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971). There this Court considered a variety of state laws involving public monies and private schools in the immediate wake of Proposal C's adoption. In examining "auxiliary services" (which the Court defined as "special education services designed to remedy physical and mental deficiencies of school child") and drivers training, the Court concluded that laws assisting nonpublic schools with providing both categories of these services were "general health and safety measures." *Id.* at 418–419. Auxiliary services provide for the "physical health and safety" of special education students, and drivers training serves the state interest "in providing driving instruction to high school age youth . . . to enable neophyte drivers to safely handle an automobile in order to protect themselves and other citizens from injuries." *Id.*

This Court concluded that Proposal C’s prohibitions “have no impact upon auxiliary services.” *Id.* at 419. “Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children. *Id.* Auxiliary services “are related to educational instruction only in that by design and purpose they seek to provide for the physical health and safety of school children.” *Id.* Accordingly, “the prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children.” *Id.* And the same is true of drivers training. Accordingly, “Proposal C does not prohibit auxiliary services and drivers training, which are general health and safety services, wherever these services are offered except in those unlikely circumstances of religious entanglement.” *Id.* at 435.

The activities that § 152b funds are similarly focused health and safety measures which are, at most, incidental to the purpose of running a private school and which do not present circumstances where religious entanglement is likely. The funds do not promote nonpublic school education or employment directly or indirectly. They merely ensure that proper steps are taken to keep teachers and students safe and well. Because the services that § 152b funds are only incidental to the instruction of private school children, this Court should follow the reasoning of *In re Proposal C* and hold that § 152b was a proper exercise of the Legislature’s authority and not prohibited by Const 1963, art 8, § 2.

B. If Section 152b conflicts with Const 1963, art 8, § 2, then this Court should hold that § 2 violates the First and Fourteenth Amendments to the United States Constitution.

If the Court concludes that § 152b's appropriation of monies to fund health and safety measures at nonpublic schools violates Const 1963, art 8, § 2, then the Court must decide whether article 8, § 2 is valid. *In re Advisory Opinion re Constitutionality of PA 1966, No 261*, 380 Mich 736; 158 NW2d 497 (1968) (per curiam) (upholding PA 261 because conflicting Michigan constitutional provision violated federal law). It is not, for three independent reasons.

1. *The Michigan Blaine Amendment violates the Free Exercise Clause of the United States Constitution.*

The First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” US Const amend 1. The Free Exercise Clause “applies to the States by incorporation into the Fourteenth Amendment.” *Employment Division v Smith*, 494 US 872, 893 (1990). The “Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’ and inequality results when a [decision-making body] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 542–43 (1993) (quotations omitted).

“[T]he First Amendment forbids an official purpose to disapprove of *a particular religion* or of *religion in general*.” *Lukumi*, 508 US at 532 (emphasis added). Non-neutral laws must be “justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Id.* at 531–32. A law is non-neutral if its “object . . . is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. And a “law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Id.* at 546.

Importantly, a law’s facial neutrality is insufficient to take it outside the scope of the Free Exercise Clause. In *Lukumi*, the Supreme Court expressly “reject[ed] the contention . . . that [its free-exercise] inquiry must end with the text of the laws at issue.” 508 US at 534 (Section II.A.1, opinion of the Court). “Facial neutrality,” said the Court “is *not* determinative.” *Id.* at 534 (emphasis added). That is because the “Free Exercise Clause, like the Establishment Clause, extends *beyond* facial discrimination. . . . Official action that targets religious conduct for distinctive treatment *cannot* be shielded by mere compliance with the requirement of facial neutrality.” *Id.* (emphases added). Because the record in *Lukumi* “compel[led] the conclusion that suppression” of a religious sect “was the object of the” otherwise facially neutral ordinances at issue, the Supreme Court held that the ordinances, which were “*designed to persecute or oppress* a religion or its practices,” *id.* at 547 (Section IV, opinion of the Court (emphasis added); *see also id.* at 559 (Souter, J, concurring in part and in judgment) (joining Section IV), were non-neutral and violated the Free Exercise Clause.

The United States Court of Appeals for the First Circuit followed the *Lukumi* analysis in considering whether the passage of a provision of the Massachusetts Constitution in 1918 was motivated by animus toward religion. *Wirzburger v Galvin*, 412 F3d 271, 281 (CA 1, 2005). The facially-neutral state constitutional provision at issue “prevent[ed] anyone from proposing new laws or constitutional amendments relating to religion through the popular initiative process.” *Id.* at 280. Although the Court ultimately concluded the amendment was not motivated by animus—given the wide margin by which the proposal passed, the presence of significant Catholic representation at the relevant Constitutional Convention, and the lack of evidence that legislators (save one) acted from religious motivation—the Court’s analytical framework, *see id.* at 281–282, is the same one this Court should follow here.

And as detailed above, the Michigan historical record is replete with evidence that the Blaine Amendment was motivated by anti-Catholic animus. At the time of the Amendment’s passage, 80% of students attending nonpublic schools were at Catholic institutions. The ballot committee that placed Proposal C on the ballot used a religious slur as its name: the “Council Against Parochiaid.” Even a cursory investigation of the relevant campaign literature, newspaper ads, and letters to the editor reveal pernicious attacks on Catholics (these people “are all either Catholic, or wealthy, or both”; Catholic leaders will be back asking for more money; opposition to public funding based on “outright anti-Catholicism”; “I have never witnessed such anti-Catholic sentiment in my life”), the Catholic Church (“largest profit-making non-profit organization in the world”; “tax-hungry clergymen”; “[i]t is a well known fact that the Roman Catholic Church—as an organization—is reputed to be the wealthiest church in our nation and thus can well afford their own schools”; “smells of greed”), and Catholic Schools (intended “to indoctrinate children”; “segregation on a religious basis”; “Their total demise cannot come too soon”).

In sum, the history of the Michigan Blaine Amendment’s passage demonstrates that it was enacted based on animus toward a particular religious group—the Roman Catholic Church. The Amendment was specifically targeted to eliminate validly enacted (and constitutional) funding for Catholic and other sectarian schools, and to prevent Catholic families or school officials from ever lobbying the Legislature for such funds again. The “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Department of Agriculture v Moreno*, 413 US 528, 534 (1973). Accordingly, this Court should strike down Michigan’s Blaine Amendment for violating the Establishment Clause.

The United States Supreme Court’s decision in *Locke v Davey*, 540 US 712 (2004), is not to the contrary. There, the Court considered Washington State’s Promise Scholarship Program, which assisted students with postsecondary education costs, including at religious schools, but prohibited students using monies to obtain a theology degree. The Court concluded that, “[f]ar from evincing the hostility toward religions which was manifest in *Lukumi*, . . . the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits.” *Id.* at 724. The program did “not require students to choose between their religious beliefs and receiving a government benefit.” *Id.* at 720–21. As a result, the State of Washington had not targeted religion *per se* but merely declined to fund “training for religious professions” themselves. *Id.* at 721.

That is a far cry from the circumstances here, where Proposal C’s purpose was to stop funding for Catholic schools which, proponents said, were wholly undeserving of public support. The end result of the campaign was to accomplish precisely that which *Locke* suggested was unlawful: to force Catholic families to choose between their religious beliefs and receiving a government benefit. Imposing that choice is precisely what the Free Exercise Clause prohibits.

2. *The Michigan Blaine Amendment violates the Equal Protection Clause of the United States Constitution.*

The Equal Protection Clause of the Fourteenth Amendment states that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” US Const amend 14. This is “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 439 (1985). The United States Supreme Court has “treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’ ” *Id.* at 216–217. When a state engages in such discrimination, it must “demonstrate that its classification has been

precisely tailored to serve a compelling governmental interest.” *Id.* at 217. Laws that classify in this manner “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *City of Cleburne*, 473 US at 440. Religion is both a suspect classification and a fundamental right. *United States v Batchelder*, 442 US 114, 125 n9 (1979); *Wisconsin v Yoder*, 406 US 205, 214 (1972); *West Virginia State Bd of Educ v Barnette*, 319 US 624, 638 (1943).

As with the Establishment Clause, the United States Supreme Court has explained that an equal-protection analysis requires more than simply looking at a law’s text. “[D]etermining whether invidious discriminatory purpose was a motivating factor [in government action] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Village of Arlington Heights v Metro House Dev Corp*, 429 US 252, 266 (1977). This means that the “historical background of the decision is [an] evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267.

For example, *Hunter v Underwood*, 471 US 22 (1985), involved a facially neutral law that blocked individuals from voting if they had been convicted of a crime of moral turpitude. The Supreme Court began by observing that once “discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of [a] law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” *Id.* at 228. The Court concluded the voting law was unconstitutional because its “original enactment was motivated by the desire to discriminate” against African-American voters. *Id.* at 233. Significantly, whether the law would be valid if enacted today, without the “impermissible motivation,” does not influence the analysis. *Id.* Nor did it matter that the law might have been enacted to discriminate against African-Americans *and* poor white voters. *Id.*

Again, even a cursory look at the historical evidence demonstrates that anti-Catholicism was at least a “motivating factor” behind the enactment of Michigan’s Blaine Amendment. And the Amendment certainly had a discriminatory effect, as 80% of all nonpublic students attended Catholic schools at the time of Proposal C’s passage. It may be that some voters had other motivations to support the proposal. But that is legally irrelevant given the extensive evidence of religious discrimination and bigotry. To paraphrase the Supreme Court, just like the wave of Blaine Amendments enacted in the late 1800s, “it was an open secret that [“parochiaid”] was code for ‘Catholic.’ ” *Mitchell*, 530 US at 838 (plurality opinion). This Court should also invalidate Michigan’s Blaine Amendment under the Equal Protection Clause.

3. *The Michigan Blaine Amendment violates the Free Speech Clause of the United States Constitution.*

The Michigan Blaine Amendment is also unconstitutional because it violates the Free Speech Clause of the First Amendment to the United States Constitution. As the United States Supreme Court has explained, when “the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v Rector & Visitors of University of Virginia*, 515 US 819, 828–829 (1995).

In *Rosenberger*, the Supreme Court considered a university funding program that paid outside contractors to print student-group publications. The University withheld payments for printing a student newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*, which primarily promoted a particular belief in or about a deity, contrary to the University’s funding guidelines. The Court began by reaffirming that “[d]iscrimination against

speech because of its message is presumed to be unconstitutional,” *id.* at 828 (citing *Turner Broadcasting System, Inc v FCC*, 512 US 622, 611–643 (1994), and that when “the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant,” *id.* at 829 (citing *RAV v St Paul*, 505 US 377, 391 (1992)). Thus, once the government opens a limited forum, the government may not “discriminate against speech on the basis of [the speech’s] viewpoint.” *Id.* (citing *Lamb’s Chapel v Center Moriches Union Free School Dist*, 508 US 384, 392–393 (1993)).

Turning to the University of Virginia’s program, that Court concluded that the funding program was “a forum more in a metaphysical than in a spatial or geographic sense, but the [same] principles are applicable.” *Id.* at 830 (citing *Perry Ed Assn v Perry Local Educators’ Assn*, 460 US 37, 46–47 (1983) (school mail system), and *Cornelius v NAACP Legal Defense & Ed Fund, Inc.*, 473 US 788, 801 (1985) (charitable contribution program)). And while the University’s funding program did not exclude religion as a subject matter, it did select for “disfavored treatment those student journalistic efforts with religious editorial viewpoints.” *Id.* at 831. That was enough for the Court to hold the University’s refusal to fund “a denial of the[] right of free speech guaranteed by the First Amendment.” *Id.* at 837. And the University’s policy was not excused by the Constitution’s prohibition against state establishment of religion; absent the University’s discrimination against religious viewpoints, the funding program was neutral, and “[t]here is no Establishment Clause violation in the University’s honoring its duties under the Free Speech Clause.” *Id.* at 846.

The Michigan Blaine Amendment violates the same prohibition against viewpoint discrimination. Michigan is a state that has authorized charter schools. When it does so, the State, just like the University of Virginia in *Rosenberger*, creates a limited-public forum. (The charter-school statute even invites public-school academy corporations to declare their “purposes.” MCL 380.502(3)(c)(ii).) By creating such a forum, Michigan must accept all those who meet the general criteria of the forum—including corporations that would like to express a religious viewpoint. But the Michigan Blaine Amendment prevents any funding from flowing to a “denominational” school, Const 1963, art 8, § 2, i.e., a school that provides religious education, whether or not owned by a religious organization. Just as in *Rosenberger*, article 8, § 2 results in the denial of funding to participants in a limited-public forum *based solely on viewpoint discrimination*, specifically those views that include a religious message. The First Amendment prohibits precisely that kind of discrimination.

This discrimination is laid bare when one considers a charter-school applicant that expresses its MCL 380.502(3)(c)(ii) “purpose” to promulgate atheist viewpoints when instructing students in the classroom. Provided that the other statutory criteria are met, Michigan’s Blaine Amendment would allow full government funding to that school. But if an identically-situated applicant expressed its “purpose” to promulgate Jewish, or Muslim, or Christian viewpoints as part of its classroom teaching, the Michigan Blaine Amendment would bar funding altogether. Such blatant line-drawing based on religious viewpoints is precisely what the drafters and enactors of article 8, § 2 intended. But it is also a First Amendment violation under *Rosenberger*. Accordingly, this Court should also invalidate Michigan’s Blaine Amendment as violative of the right to Free Speech.

CONCLUSION AND REQUESTED RELIEF

Amici respectfully ask that the Court exercise its discretion and grant the Governor's request to issue an advisory opinion in this matter. The Court should hold that § 152b's appropriation of monies to fund health and safety measures at nonpublic schools does not violate Const 1963, art 8, § 2.

If the Court disagrees and concludes that § 152b does violate article 8, § 2, then the Court has a duty to determine if article 8, § 2 is itself constitutional. *Amici* ask that the Court hold that article 8, § 2 violates the First and Fourteenth Amendments of the United States Constitution and is therefore unenforceable under well-settled precedents of the United States Supreme Court. The end result would be that article 8, § 2 is void, so § 152b must be upheld.

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Respectfully submitted,

BURSCH LAW PLLC

By /s/ John J. Bursch

John J. Bursch (P57679)
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
616.450.4235
jbursch@burschlaw.com

Attorney for *Amici* members of the House & Senate
and the Great Lakes Education Project