

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals  
Murphy, P.J., and Gleicher and Letica, JJ

COUNCIL OF ORGANIZATIONS AND OTHERS  
FOR EDUCATION ABOUT PAROCHIAID,  
AMERICAN CIVIL LIBERTIES UNION OF  
MICHIGAN, MICHIGAN PARENTS FOR  
SCHOOLS, 482FORWARD, MICHIGAN  
ASSOCIATION OF SCHOOL BOARDS,  
MICHIGAN ASSOCIATION OF SCHOOL  
ADMINISTRATORS, MICHIGAN ASSOCIATION  
OF INTERMEDIATE SCHOOL  
ADMINISTRATORS, MICHIGAN SCHOOL  
BUSINESS OFFICIALS, MICHIGAN  
ASSOCIATION OF SECONDARY SCHOOL  
PRINCIPALS, MIDDLE CITIES EDUCATION  
ASSOCIATION, MICHIGAN ELEMENTARY AND  
MIDDLE SCHOOL PRINCIPALS ASSOCIATION,  
KALAMAZOO PUBLIC SCHOOLS AND  
KALAMAZOO PUBLIC SCHOOLS BOARD OF  
EDUCATION,

Supreme Court No. 158751  
Court of Appeals No. 343801  
Court of Claims No. 17-68-MB

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, GOVERNOR,  
DEPARTMENT OF EDUCATION, AND  
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

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**BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL  
DANA NESSEL IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Dana Nessel  
Attorney General

Fadwa A. Hammoud (P74185)  
Solicitor General  
Counsel of Record  
Ann M. Sherman (P67762)  
Deputy Solicitor General  
P.O. Box 30212, Lansing, MI 48909  
(517) 335-7628  
shermana@michigan.gov

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**STATEMENT OF JURISDICTION**

Attorney General Nessel agrees with the parties that this Court has jurisdiction over this appeal.

## STATEMENT OF QUESTIONS PRESENTED

1. Does MCL 388.1752b violate Article 8, § 2 of the Michigan Constitution?

Appellants' answer: Yes.

Appellees' answer: No.

Court of Claims' answer: Yes.

Court of Appeals' majority answer: No.

Court of Appeals' dissent answer: Yes.

Amicus Curiae's answer: Yes.

## INTEREST OF AMICUS CURIAE

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. She is charged with defending both the state and federal constitutions. The Legislature has also authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28; MCL 14.101. Through their constitution, the People of the State have spoken clearly about not wanting public funds to be directed toward nonpublic schools. Their voice must be heard and protected.

## INTRODUCTION

The People spoke loud and clear when they exercised their political power to amend our state constitution to add Article 8, § 2. They meant to preclude public expenditures that aid or maintain nonpublic schools—religious or not.

At issue in this case is whether MCL 388.1752b, which allocates money from the State’s general fund to reimburse nonpublic schools the actual costs of their compliance with certain state health, safety, or welfare mandates, violates Article 8, § 2. It does. The Court of Appeals opinion to the contrary is not supported by this Court’s seminal decision on this issue, *Traverse City School District v Attorney General*, 384 Mich 390 (1971).

Under *Traverse City School District*, § 1752b violates Article 8, § 2 because it permits public funds to be paid directly to nonpublic schools. And it allows nonpublic schools to control those funds, including the necessary hiring, scheduling, and supervision of persons whose work is essential for compliance with the mandates. The payments can even pay the wages of the nonpublic school employees who ensure compliance with the mandates. And they fund a portion of the schools’ overhead, which essentially offsets their “cost of doing business.” The specific health and safety mandates at issue are vastly different from general health, safety, and welfare services such as police and fire, which are provided to the entire community.

At least one member of this Court has questioned whether *Trinity Lutheran Church of Columbia v Comer*, 137 S Ct 2012 (2017), is relevant to this case. (Pls’ App 43a–44a.) While *Trinity Lutheran* may have invited line-drawing as to what

kinds of benefits are more like Missouri’s scrap tire program and which are more like the scholarship at issue in *Locke v Davey*, 540 US 712 (2004), the case neither impacts the validity of *Traverse City School District* nor precludes this Court from concluding that § 1752b is unconstitutional. That is because, for three defined reasons, *Trinity Lutheran* is not in tension with this Court’s analysis in *Traverse City School District*. First, *Traverse City School District* carefully interpreted Article 8, § 2 to avoid any free exercise concerns. Second, Article 8, § 2 draws the line in an acceptable place because it does not do what *Trinity Lutheran* says it cannot—single out people or groups just because they are religious. Instead, it places religious schools on equal footing with other nonpublic schools. In other words, it denies funding based on the distinction between public and private entities, *not* on the distinction between religious or non-religious entities. Third, *Trinity Lutheran*’s reach is limited. The case is not a broad authorization of government funding of religion. It answered the narrow question whether an organization can be excluded from a generally available public benefit program for playground equipment *solely* because of its religious character. Therefore, *Trinity Lutheran* does not dictate that Michigan must abandon its long history of protecting against the use of taxpayer money to “aid and maintain” nonpublic schools.

**STATEMENT OF FACTS AND PROCEEDINGS**

Amicus adopts the statement of facts and proceedings of Defendants-Appellants. (Defendants-Appellants' Br on Appeal, pp 3–9.)

## ARGUMENT

**I. MCL 388.1752b is unconstitutional because it is contrary to Article 8, § 2 of the Michigan Constitution as interpreted by this Court in *Traverse City School District*.**

Article 8, § 2 of Michigan’s 1963 Constitution prohibits any public monies or property to be appropriated or paid “directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school” or to be used “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.” Const 1963, art 8, § 2.

The seminal case interpreting article 8, § 2 is *Traverse City School District v Attorney General*, 384 Mich 390 (1971). When *Traverse City*’s analysis is applied to § 1752b, the statute is unconstitutional because it allows direct aid to nonpublic schools by giving them control over appropriated funds to reimburse for their cost of complying with certain state mandates in a number of areas, including curriculum, teacher and counselor certification, and safety and administrative measures.

**A. Under the reasoning of *Traverse City School District*, § 1752b violates Article 8, § 2 because it gives nonpublic schools control over state funds.**

In *Traverse City School District*, this Court analyzed the effect of article 8, § 2 on two particular programs available to nonpublic schools: shared time and auxiliary services. Shared time involved the public school district making general curriculum courses available to both public and nonpublic students, either at a

public school or at the nonpublic school site. *Traverse City Sch Dist*, 384 Mich at 411 n 3; MCL 388.1766b(2). The auxiliary services at issue in *Traverse City School District* were “special educational services designed to remedy physical and mental deficiencies of school children and provide for their physical health and safety.” They included services such as crossing guards and driver education. *Id.* at 418–419.

Article 8, § 2 provides in pertinent part:

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 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 school.

This Court began by identifying the following five prohibitions within article 8, § 2:

1. No public money “to aid or maintain” a nonpublic school;
2. No public money “to support the attendance of any student” at a nonpublic school;
3. No public money to employ any person at a nonpublic school;
4. No public money to support the attendance of any student at any location where instruction is offered to a nonpublic school student.
5. No public money to support the employment of any person at any location where instruction is offered to a nonpublic school student. [*Traverse City Sch Dist*, 384 Mich at 411.]

The Court considered whether shared time or auxiliary services to nonpublic students were prohibited by any of these five prohibitions. Ultimately, the Court struck the fourth and fifth prohibitions and invalidated article 8, § 2's language "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students" on the grounds that it would violate both the free exercise and the equal-protection provisions of the United States Constitution. *Id.* at 414–415.

This Court then analyzed the shared time and auxiliary time based on the remaining prohibitions. In interpreting article 8, § 2's "no public money" and "indirectly or directly" language, the Court was careful to consider the Free Exercise Clause. 384 Mich at 430. Taken literally, article 8, § 2 would allow no money—not even a dollar—to go to nonpublic schools, even indirectly, save for transportation of students to and from school. But looking ahead to free exercise concerns, this Court instead drew an important line between exclusive control in the hands of a public entity and control in the hands of the nonpublic school.

**1. The touchstone of *Traverse City School District* is control.**

Shared time at the public school was under the *complete* control of the public school district. The funds were paid to a public agency and the public school chose and "control[led] a lay teacher" and the "subjects to be taught." *Traverse City Sch Dist*, 384 Mich at 413–414 (emphasis added). This Court characterized these "differences in control" between the public schools and the nonpublic schools as "legally significant." *Id.* at 414. Likewise, for shared time on leased or other

premises, the premises were “under the authority, control and operation of the public school system.” *Id.* at 415. Even where the instruction was at the nonpublic school, the “*ultimate and immediate control* of the subject matter, the *personnel* and *premises*” had to be “under the public school system authorities.” *Id.* (emphasis added).

Like shared time instruction, “private schools exercise[d] no control over” auxiliary services. *Id.* at 420. Those services were “performed by public employees under the *exclusive* direction of public authorities.” *Id.* This Court specifically noted that Proposal C’s prohibition against placing “private funds into private school hands *for purposes of running the private school operation*” was not applicable to auxiliary services. *Id.* at 419–420 (emphasis added). See also *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48 (1975) (holding that shared time programs and auxiliary services could be provided to private schools “if properly controlled by the public school system.”)

In this Court’s analysis of both these services, control was the touchstone.<sup>1</sup>

The bottom line: public control is acceptable; private control is not. And this Court emphasized the importance of control rather than “adopt[ing] a strict no benefits, primary, or incidental rule.” *Id.* at 413.

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<sup>1</sup> Even the Court of Appeals’ majority recognized that one of the “pertinent conclusions” of *Traverse City School District* was that “Proposal C *above all else* prohibits state funding of purchased educational services in the nonpublic school where the *hiring and control* is in the hands of the nonpublic school.’” (Majority, Pls’ App 23a, emphasis added.)

**2. Section 1752b impermissibly places control in the hands of the nonpublic school, supporting the employment of nonpublic school personnel and helping the school meet the costs of doing business.**

In contrast to shared time and auxiliary services, § 1752b involves direct payments to a nonpublic school.<sup>2</sup> And it impermissibly puts the nonpublic school in control of decisions related to the funds, in contravention of *Traverse City School District*. That control allows nonpublic schools to go so far as to support the employment of their personnel and to meet their cost of doing business.

**a. Section 1752b impermissibly places control in the hands of the nonpublic school.**

The Court of Appeals majority opinion lists the dozens of subjects encompassed by the reimbursement form—from pesticide application (MCL 324.8316) to teacher and counselor certification (MCL 380.1539b & Mich Admin Code, R 390.1147), school building construction (MCL 388.851), and mentor teachers for noncertified instructors (Mich Admin Code, R 390.1146). (Pls’ App at 18a.) Despite the wide variation in subject matter, these provisions have one thing in common: reimbursement for their costs gives the nonpublic school impermissible control over state dollars, in contravention of *Traverse City School District*.

For example, § 1752b reimburses a private school for maintaining basic quality standards in its core curriculum and teachers. Michigan Administrative

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<sup>2</sup> Under MCL 388.1752b(3), a school that completes a timely form can seek reimbursement for “actual costs incurred in complying with a health, safety, or welfare requirement under a law or administrative rule of this state. . .”

Code R 390.1146 allows the nonpublic school to choose and supervise the mentor teachers for noncertified instructors, including structuring their work hours and procedures. The same is true for MCL 380.1233, which mandates teacher certification and counseling requirements, and MCL 380.1531–380.1538, provisions that govern teacher certification requirements. MCL 388.1752b(9) likewise reimburses nonpublic schools for the time teachers spend working toward these certification requirements or mentoring noncertified teachers. Not only does certification directly relate to education but § 1752b cedes to the nonpublic school all personnel and operational decisions related to certification.

Other mandates, while non-instructional in nature, nevertheless place the arrangements in the hands of the nonpublic school. MCL 380.1230 and MCL 380.1230, for example, mandate criminal background checks. The school must select and make arrangements for someone to perform this service. MCL 380.1274b(3) governs the disposal of instruments containing mercury, and the nonpublic school must decide who to hire, when they should come, and how the work must be done. The nonpublic school can control these services however they see fit.

There is *not one* listed service or action that is performed by public employees or structured in the way the public school system believes is best. The operation of these mandates is left wholly in the hands of the nonpublic school. Thus, the Court of Appeals majority was plainly wrong when it concluded that, with respect to the mandates, the nonpublic school was exercising “little, if any, discretion or

independent control” and that “the state, and not a nonpublic school, is effectively dictating and controlling the action or performance needed to comply with the law.” (Majority at 15, Pls’ App 30a.)

**b. Section 1752b impermissibly supports the employment of nonpublic school personnel.**

Some of the mandates also violate article 8, § 2’s prohibition against supporting the employment of teachers at nonpublic schools. Article 8, § 2 states that “[n]o 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 employment of any person* at any such nonpublic school.” 1963 Const, art 8, § 2 (emphasis added). Yet, the mandates unabashedly reimburse wages for employees at nonpublic schools. Section 1752b(4) states that “[t]he superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school’s actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state.” MCL 388.1752b(4). And “actual cost[s]” for reimbursement are calculated in part based on “the hourly wage of [the nonpublic school’s] lowest-paid *employee* capable of performing the reported task.” MCL 388.1752b(9) (emphasis added). The public school system is not selecting and dispatching someone to complete the tasks designated in the mandates. Instead, nonpublic schools are directly receiving public funds to pay for those who perform the various reported tasks—which, in some cases, means subsidizing the wages of

the nonpublic school employee who perform the given task. This occurs despite the Legislature’s attempted disclaimer that the funds allocated under § 1752b are not “intended” to “employ any person at a nonpublic school[.]” MCL 388.1752b(8). Helping nonpublic schools “meet[ ] their payroll” (Concurrence/Dissent at 8-9, Pls’ App 40a–41a), is exactly what the People prohibited in Article 8, § 2.

**c. The mandates are “the cost of doing business.”**

Although the mandates relate to health, safety, and welfare, many are not even specifically related to the school setting. And all are properly characterized as simply the “cost of doing business.” Examples include compliance building codes and asbestos regulations (MCL 388.851 to MCL 388.855b & MCL 388.863); handling of hazardous chemicals (MCL 29.5p); and compliance with state food laws (MCL 289.1101 to MCL 289.8111). As the Court of Appeals’ concurrence/dissent noted, “[b]y passing [§ 1752b(1)], the Legislature opened the door to direct payments to nonpublic schools intended to help those schools *do business* as private institutions.” (Concurrence/dissent at 2, Pls’ App 34a, emphasis added.)

That is exactly what this Court prohibited in *Traverse City School District*, when it held that Proposal C prohibited “the passage of public funds into private school hands for purposes of *running the private school operation*.” 384 Mich at 419–420 (emphasis added). See also *Council of Organizations & Others for Education About Parochial Inc v Governor*, 455 Mich 557, 583 (1997) (noting that “the common understanding of the voters in 1970 was that no monies would be

spent *to run*” a nonpublic school) (emphasis added); (Accord concurrence/dissent at 3, Pls’ App 35a.)

Many private, non-school businesses have similar costs associated with their compliance with documentation requirements, environmental standards, building codes, and certifications for workers. Yet public funds do not similarly assist those businesses to stay in business. The common understanding of the People who amended the Constitution to add article 8, § 2 would not and could not have been that they were giving special treatment to one kind of private business—a private school—over other types of private businesses.

**3. The Court of Appeals focused on its own three-part test without adequately considering the crucial element of control.**

There is no support for the Court of Appeals’ unique three-part test (incidental-not a primary function-no entanglement) for when a health, safety, or welfare mandate is not a constitutional violation under Article 8, § 2. See *Council of Organizations* slip op at 11–12 (Majority, Pls’ App 26a–26b.) It is not a test set forth in *Traverse City School District*. (Concurrence/dissent, Pls’ App 33a) (noting that the Court of Appeals majority “[a]pp[lied] a three-part test of its own making”); see also *id.* at 162 (“[T]he majority hangs its hat on two phrases *loosely derived* from *Traverse City Sch. Dist.*: ‘incidental aid’ and ‘primary function.’”) (emphasis added).

It is true that both *Traverse City School District* and *Advisory Opinion re Constitutionality of 1974 PA 242* discuss whether services or items are “incidental”

to a private school's establishment and existence (*Traverse City Sch Dist*, 384 Mich at 413–416, 419), or instead are “primary” features of the educational process or “primary” elements necessary for the school to survive as an educational institution (*Advisory Opinion*, 394 Mich at 48–49, 50–51). But those concepts cannot be divorced from control—the touchstone of *Traverse City School District*. See 384 Mich at 413–414, 416. The nonbinding concurrence in *In re Advisory Opinion re Constitutionality of 1974* was remiss in neglecting to place any—let alone adequate—focus on the question of control when it purported to summarize the “rule” of *Traverse City School District*. See 394 Mich at 48 n 2 (Swainson, J., concurring).

Even under “incidental” and “primary” inquiries, the mandates are not incidental. Nonpublic schools simply cannot function without teacher certifications, safety checks, proper permits, and the necessary inspections of equipment. These are primary features of the private school education and are “required” for those schools to exist. See *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48–49 (characterizing incidental benefits as those that are “useful only to an otherwise viable school”). Indeed, they are essential to a nonpublic school's very existence and operation. Accordingly, they “aid or maintain” a nonpublic school in violation of Article 8, § 2.

The Court of Appeals' dissent noted the flaw in the majority's characterization of mandates such as criminal background checks, maintaining epinephrine injectors, and disposing of instruments containing mercury as

unnecessary “for a nonpublic school’s existence, operation, and survival.” (Concurrence/dissent, Pls’ App at 39a.) And as the dissent pointed out, by virtue of being “a mandate,” it is “a primary element necessary for a school’s operation.” *Id.*; see also Black’s Law Dictionary, 7th ed. (1999) (defining “mandate” as “[a] written *command* given by a principal to an agent.”) (emphasis added). They are neither incidental to nor outside of a school’s primary function. (Concurrence/dissent, Pls’ App at 39a.)

The Court of Appeals majority also focused on whether the mandates could cause entanglement with religion. (Majority, Pls’ App 26a–27a.) In doing so, it relied on *Traverse City School District* and its quick reference to unconstitutional entanglement. See *Traverse City Sch Dist*, 384 Mich at 417. But again, that reference was made in the context of control. In analyzing whether shared time was constitutional, this Court had already explained that “the ultimate and immediate control of the subject matter, the personnel and premises”—in other words, the operation—could not be under the control of the nonpublic school. This Court also emphasized that the shared time programs vested control in the hands of the public school system authorities. *Id.* at 416–417. It was in that context that this Court noted, in so many words, that not all public instruction to a nonpublic school would pass constitutional muster. The entanglement inquiry was yet another potential limitation on public funds to nonpublic schools, not a dividing line that made all educational instruction impermissible and all noneducational instruction permissible.

4. **The mandates are distinguishable from police and fire and other general services provided to the community.**

For purposes of Article 8, § 2, there is a significant difference between the services of a local police or fire department and a playground inspection or teacher certification. While both may relate to health and safety, the police and fire services do not place funds in the hands of nonpublic schools. In that crucial way they are similar to shared time and auxiliary services. The nonpublic schools do not hire police and fire employees, supervise their work, or purchase and maintain their necessary equipment. All of those functions are controlled by the local government in order to provide services to the general community. The same is true for other community services such as electricity, water, and sewage. Indeed, the provision of ordinary governmental services is unrelated to nonpublic schools. That is why Article 8, § 2 does not require that the government exclude nonpublic schools from general community services.

In contrast, the mandates in § 1752b are not designed and operated by the government. They require schools to be involved in the operation of the mandates, including choosing services and staff.

Again, the most important concern in *Traverse City School District* was prohibiting state funding where the control is in the hands of the nonpublic school. *Traverse City Sch Dist*, 384 Mich at 416 (referring to the “control” construction of the amendment). The Court of Appeals’ majority acknowledged the element of control when it summarized this Court’s conclusions from *Traverse City School District* (Majority at 8, Pls’ App 23a), yet it did not make control a part of its “test.”

And when the majority addressed control, it concluded that the nature or character of the health, safety, and welfare laws at issue meant that the State “was effectively dictating and controlling the action or performance needed to comply with the law.” *Id.*, Pls’ App 30a.) This is incorrect. The State may have been “dictating” that it be done, but it was not “controlling the action or performance.” Even the three examples the Court of Appeals’ majority used to bolstered its conclusion—criminal background checks, disposing of instruments containing mercury, and maintaining epinephrine autoinjectors—require nonpublic schools to make decisions, assign necessary personnel, order necessary equipment, and schedule and monitor the activity to be performed. In other words, they require the nonpublic school to control the action or performance. And many of the mandates—for example, compliance with food law (MCL 289.1101 to MCL 289.8111), vision screening (MCL 380.1177a), and postsecondary enrollment information and counseling (MCL 388.519)—require greater decision-making, hiring of personnel, and ongoing monitoring than the purchase of an epi pen.

The Court of Appeals’ majority seemed to suggest that *any* health and safety mandate that is noninstructional in nature passes muster under Article 8, § 2, (Majority op at 14, Pls’ App 29a.) But *Traverse City School District* did not make that type of blanket statement with respect to health and safety mandates. It focused on the *general* nature of the health and safety mandates at issue—special educational services and drivers training. 384 Mich at 419 (“Functionally, [auxiliary services] are *general* health and safety measures.”) (emphasis added).

See also OAG, 1969–1970, No. 4715, p 185 (November 3, 1970) (enumerating various auxiliary services). Although this Court made the distinction between those general health and safety measures and educational matters, it did so in a broader context, noting that auxiliary services “only incidentally involve the *operation* of educating private school children.” *Traverse City Sch Dist*, 384 Mich at 420 (emphasis added). And again, in that same discussion this Court noted that private schools “exercise no control over” auxiliary services, *id.*, signaling that even a noninstructional health and safety measure could violate Article 8, § 2 if the nonpublic school exercised control over the operation of the service.

## **II. *Traverse City* is not in tension with the U.S. Supreme Court’s decision in *Trinity Lutheran*.**

Although *Traverse City School District* predates the U.S. Supreme Court’s recent decision in *Trinity Lutheran*, this Court’s analysis is not in tension with *Trinity Lutheran*. Thus, *Traverse City School District* is still the controlling case in determining whether a state statute violates Article 8, § 2.

*Trinity Lutheran* held that a Missouri state agency’s denial of the ability of a religious learning center to compete for an otherwise available grant to purchase rubber playground surfaces (based on Missouri’s constitutional provision that prevented any direct or indirect aid to any church, sect or denomination of religion) violated the Free Exercise Clause. 137 S Ct at 2017, 2025. That decision, which focused almost exclusively on the Free Exercise Clause, does not disturb this Court’s analysis in *Traverse City*. There are a number of reasons why this is so.

The overarching one is that this Court was careful to harmonize Article 8, § 2 with the Free Exercise Clause in order to avoid “serious constitutional problems,” 384 Mich at 430, so it already addressed many of the Supreme Court’s concerns. Second, the agency action at issue in *Trinity Lutheran* is distinguishable from § 1752b. Third, a majority of the Court limited *Trinity Lutheran* to its facts.

1. ***Traverse City School District* already addressed the free-exercise concerns raised in *Trinity Lutheran*, and under *Traverse City School District*, nullifying § 1752b would not be in tension with the Free Exercise Clause.**

This Court was wise—perhaps even prescient—when it focused on free exercise concerns in *Traverse City School District*. 384 Mich at 433. The Court began by noting that the “constitutionally protected right of the free exercise of religion is violated when a legal classification has a coercive effect upon the practice of religion without being justified by a compelling interest.” *Id.* (internal citations omitted). This Court then held that denying a private school student from participating in publicly funded shared time courses or auxiliary services offered at the public school merely because he is a nonpublic school student and attends a private school out of religious conviction, burdens the student’s “right to freely exercise his religion.” *Id.* The Court found no compelling state interests that would justify that burden. *Id.* Significantly, the Court noted that “bar[ring] nonpublic school students from shared time or auxiliary services at a public school” was “unnecessary to achieve the [State’s] purpose of prohibiting public monies to nonpublic schools,” *id.* at 432.

Applying *Traverse City School District's* free-exercise analysis here compels the conclusion that nullifying § 1752b would not be in tension with the Free Exercise Clause. (See Markman, J.'s concurrence, Pls' App 43a, querying whether § 1752b "would perhaps be in tension with the Free Exercise Clause.") The Free Exercise Clause " 'protect[s] religious observers against unequal treatment' and applies the strictest scrutiny to laws that target the religious for 'special disabilities' based on their 'religious status.' " *Trinity Lutheran*, 137 S Ct at 2019, quoting *Church of Lukami Babalu Aye, Inc v Hialeah*, 508 US 520, 533 (1993); *Trinity Lutheran*, 137 S Ct at 2020, quoting *Everson v Bd of Education of Ewing Twp*, 330 US 1, 16 (1947) (noting that the State "cannot exclude" individuals, "because of their faith," from "receiving the benefits of public welfare legislation."). Article 8, § 2 is neutral in that it applies to all nonpublic schools, not just religious ones. Therefore, it does not target religious schools because of their religious status. Accordingly, it can be the basis for striking down § 1752b without offending the Free Exercise Clause.

**B. Article 8, § 2 is distinguishable from the Missouri constitutional provision that drove the state agency decision's in *Trinity Lutheran*.**

As Justice Markman noted in his concurrence in the order granting the application for leave to appeal, "the Missouri provision expressly required the denial of state funds based on the religious classification of a putative recipient, whereas Const 1963, art 8, § 2 is facially neutral on the matter." (Pls' App 43a.) Exactly. And that is a crucial distinction for purposes of free exercise analysis. Additionally,

the statute at issue here is about use, not status as was the agency action at issue in *Trinity Lutheran*. Even if it could be characterized as about status, it is about status as a private school, not a religious entity.

**1. Article 8, § 2 is facially neutral and does not discriminate on the basis of religion.**

Article 8, § 2 states that “[n]o 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.” Const 1963, art 8, § 2.

In determining what this constitutional provision means, this Court does not apply the technical rules of statutory construction. *Traverse City Sch Dist*, 384 Mich at 405, citing *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407 (1819). Instead, it applies the rule of “common understanding,” determining the intent of the people who ratified the Constitution. *Traverse City Sch Dist*, 384 Mich at 405 (internal quotation omitted). And if clarification of meaning is needed, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered. *Id.* at 405, citing *Kearney v Bd of State Auditors*, 189 Mich 666, 673 (1915). Finally, wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. *Traverse City Sch Dist*, 384 Mich at 405.

Applying these rules, the language of Article 8, § 2 is neutral and does not discriminate on the basis of religion. It would have been the common understanding of the people who amended the Constitution to add article 8, § 2, that the provision prohibits public funds to *any* nonpublic school, not just religious schools. That is clear from the plain language—“[n]o monies or property . . . directly or indirectly to aid or maintain *any . . . nonpublic* [ ] pre-elementary, elementary, or secondary school.” Const 1963, art 8, § 2 (emphasis added). On the other hand, Missouri’s constitutional provision, which drove the Missouri Department of Natural Resource’s decision to exclude religious entities and which was at issue in *Trinity Lutheran*, expressly prohibits financial assistance, directly or indirectly, “in aid of any church, sect, or denomination of religion . . .” Missouri Const, art 1, § 7.

Under Article 8, § 2, religion is not being singled out from among other nonpublic schools for disfavored treatment. And the Free Exercise Clause does not forbid the government from treating private schools differently than public schools; it merely forbids the government to do so based on religious status. See *Everson*, 330 US at 16 (a State “cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude . . . the members of any . . . faith, *because of their faith*, or lack of it, from receiving the benefits of public welfare legislation.”) (emphasis added); *Locke*, 540 US at 729 (Scalia, J., dissenting) (pointing out the difference between a program that facially discriminates and one that just happens not to subsidize it and stating that Washington State could replace the challenged

program with one that does not subsidize religion, such as making the scholarships at issue redeemable only at public universities (where it sets the curriculum), or only for select courses of study).

Justice Breyer underscored this crucial dividing line in his concurrence in the judgment in *Trinity Lutheran*. He focused on the “religious distinction” itself, noting that “[t]he *sole* reason advanced” in explaining the difference between the way church schools were treated and the way other potential applicants to the scrap-tire reimbursement program were treated, “is faith.” *Trinity Lutheran*, 137 S Ct at 2027 (Breyer, J., concurring in the judgment) (emphasis added). And that fact, he said, was what “call[ed] the Free Exercise Clause into play.” *Id.* Finally, he noted that “public benefits come in many shapes and sizes” and left for another day the application of the Free Exercise Clause to other kinds of public benefits. *Id.*

Justice Markman’s concurrence asked whether Article 8, § 2 is “effectively indistinguishable from the Missouri provision” at issue in *Trinity Lutheran*, since most nonpublic schools are religious schools. (Pls’ App 43a, 44a.) The two are distinguishable. Article 8, § 2 does not depend on the percentage of nonpublic schools that are religious—a percentage that is constantly changing. See *200 private schools have closed in Michigan in the last decade*, Detroit Free Press, May 28, 2019 (citing data showing that 168 of Michigan’s 200 private school closures of the past decade have been religious schools).<sup>3</sup> Article 8, § 2 is a neutral law of

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<sup>3</sup> Available at <https://www.freep.com/story/news/education/2019/05/28/michigan-private-schools-closing-catholic/3757380002/> (accessed Oct 4, 2019).

general applicability that, at most, only incidentally burdens religion. See *Employment Div Dep't of Human Resources v Smith*, 494 US 872, 878–879 (1990) (explaining that the First Amendment is not offended if prohibiting the exercise of religion is not the object but “merely the incidental effect of a generally applicable and otherwise valid provision.”)

In sum, because Article 8, § 2 does not target religion, but simply prohibits public funding of all nonpublic schools, it does not offend the Free Exercise Clause. MCL 388.1752b can therefore be struck down as unconstitutional without offending the Free Exercise Clause.

**2. The benefit in *Trinity Lutheran* was denied based on status as a church, whereas the mandate reimbursements here would be denied based on private use or on status as a private school, neither of which implicates the Free Exercise Clause.**

The Court in *Trinity Lutheran* explained that Trinity Lutheran was denied a grant for its playground “simply because of what it is—a church.” 137 S Ct at 2016. See also *id* at 2022 (explaining that conditioning a benefit on willingness to surrender religiously impelled status violates free exercise guarantees, and noting that express discrimination by the Missouri...was not the denial of the grant for playground equipment, but instead the “refusal to allow the church---solely because it is a church—to compete with secular organizations for a grant.”). In other words, it was denied a benefit because of its status as a religious organization. As the Supreme Court described it, “The rule [wa]s simple: No churches need apply.” *Id.* at 2024.

The Court distinguished the scholarship at issue in *Locke*, 540 US at 712, which was denied not because of status but “because of what [Davey] proposed to do” and was therefore constitutional. *Trinity Lutheran*, 137 S Ct at 2016, 2022. Although this distinction between status and use might prove difficult in application (and certainly Justice Gorsuch criticized it in his concurrence in *Trinity Lutheran*, 137 S Ct at 2025), nevertheless, article 8, § 2 denies a benefit because of uses that are private, not public—in other words, uses that benefit a special segment of the public, not the public at large.

But even if article 8, § 2 is viewed as prohibiting funds based on status, it does so based on status as a nonprofit school, not on status as a religious organization. The Free Exercise Clause does not demand that a religious school never suffer a disability—only that it not be denied a “generally available benefit *solely* on account of religious identity” without a state interest “of the highest order.” *Trinity Lutheran*, 137 S Ct at 2019 (emphasis added). That is what offends the Free Exercise Clause.

Missouri’s scrap-tire program, although it was specifically geared toward reimbursements for nonprofit organizations, targeted *only* applicants owned or controlled by a church, sect, or other religious entity by expressly denying them the opportunity to participate in the grant program. *Id.* at 2017. The U.S. Supreme Court noted that the “Department’s policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit *solely* because of their religious character.” *Id.* at 2021 (emphasis added). And the Court

explained that its case law made clear that “*such a policy* imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Id.* (emphasis added). Article 8, § 2 is not “such a policy.”

**C. The majority in *Trinity Lutheran* severely limited the case’s reach.**

Although there has been some speculation about the reach of *Trinity Lutheran* and its application beyond the factual setting of playground equipment at a preschool and daycare center run by a church, the case was decided on explicitly narrow grounds. Footnote 3, which has garnered considerable attention, states the following: “This case involves *express discrimination based on religious identity* with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Trinity Lutheran*, 137 S Ct. at 2024 n 3 (emphasis added). Although Justices Gorsuch and Thomas refused to join footnote 3 (*id.* at 2025–2026 (Gorsuch, J., concurring); 137 S Ct at 2025 (Thomas, J., concurring)), that still leaves four Justices united in that limiting footnote—Justices Roberts, Kennedy, Alito, and Kagan. And Justice Breyer (who concurred only in the judgment) and dissenting Justices Sotomayor and Ginsburg would likely agree with footnote 3’s limiting principle. Accordingly, it is speculative—indeed, doubtful—that *Trinity Lutheran* will be extended beyond its factual context.

## CONCLUSION AND RELIEF REQUESTED

For these reasons, Attorney General Dana Nessel respectfully requests that this Court reverse the Court of Appeals' opinion and hold that MCL 388.1752b is unconstitutional under article 8, § 2 of the Michigan Constitution.

Respectfully submitted,

Dana Nessel  
Attorney General

Fadwa A. Hammoud (P74185)  
Solicitor General  
Counsel of Record

/s/ Ann M. Sherman  
Ann M. Sherman (P67762)  
Deputy Solicitor General  
ShermanA@michigan.gov  
P.O. Box 30212  
Lansing, MI 48909  
(517) 335-7628

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