

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 (CAP); AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU); 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 ASSOCIATIONS OF SECONDARY SCHOOL PRINCIPALS; MIDDLE CITIES EDUCATION ASSOCIATION; MICHIGAN ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS ASSOCIATIONS; KALAMAZOO PUBLIC SCHOOLS; AND KALAMAZOO PUBLIC SCHOOLS BOARD OF EDUCATION,

Supreme Court No. 158751  
Court of Appeals No. 343801  
Michigan Court of Claims  
No. 17-000068-MB

**The appeal involves a ruling that a provision of a statute is invalid.**

Plaintiffs-Appellants,

v

STATE OF MICHIGAN; GRETCHEN WHITMER, Governor, in her official capacity, MICHIGAN DEPARTMENT OF EDUCATION; and MICHAEL RICE, Superintendent of Public Instruction, in his official capacity,

Defendants-Appellees.<sup>1</sup>

\_\_\_\_\_ /

**BRIEF OF APPELLEES**

**ORAL ARGUMENT REQUESTED**

<sup>1</sup> The current state officials substitute for the original defendants, which occurs without a formal order of substitution. See MCR 2.202(C), (D).

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## **COUNTER-STATEMENT OF JURISDICTION**

On June 24, 2019, this Court granted the application for leave of the Council of Organizations and other appellants. Therefore, this Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1).

**COUNTER-STATEMENT OF QUESTION PRESENTED**

1. The Michigan constitution prohibits the payment of any public money, directly or indirectly, to aid or maintain a nonpublic school or support attendance of any student or employment of any person at a nonpublic school, except for transportation. The statute at issue, MCL 388.1752b, pays public funds directly to the nonpublic schools for those schools' essential operational expenses, including costs related to transportation and other services that support student attendance and employees at the nonpublic schools. Does this statute facially – in all its applications – violate Michigan's constitution?

Appellants' answer: No.

Appellees' answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: No.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### Article 8, § 2 of Michigan's 1963 Constitution

Sec. 2. 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.

#### **Nonpublic schools, prohibited aid.**

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.

### **MCL 388.1752b [as enacted by 2016 PA 249]**

Sec. 152b. (1) From the general fund money appropriated under section 11 [MCL 388.1611], there is allocated an amount not to exceed \$2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2).

(2) By January 1, 2017, the department shall publish a form containing the requirements identified in the report under subsection (1). The department shall include other requirements on the form that were enacted into law after publication of the report. The form shall be posted on the department's website in electronic form.

(3) By June 15, 2017, a nonpublic school seeking reimbursement under subsection (1) of costs incurred during the 2016-2017 school year shall submit the form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section unless the nonpublic school submits the form described in subsection (2) in a timely manner.

- (4) By August 15, 2017, the department shall distribute funds to nonpublic schools that submit a completed form described under subsection (2) in a timely manner. The 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 cost to comply with requirements under subsections (1) and (2). The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.
- (5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.
- (6) The department has the authority to review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection for this limited purpose, the nonpublic school is not eligible for reimbursement under this section.
- (7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.
- (8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.
- (9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing the reported task regardless of whether that individual is available and regardless of who actually performs the reported task. Labor costs under this subsection shall be estimated and charged in increments of

15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

**MCL 388.1752b [as amended by 2017 PA 108]**

Sec. 152b. (1) From the general fund money appropriated under section 11, there is allocated an amount not to exceed \$2,500,000.00 for each fiscal year for 2016-2017 and for 2017-2018 to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state.

(2) By January 1 of each applicable fiscal year, the department shall publish a form for reporting actual costs incurred by a nonpublic school in complying with a health, safety, or welfare requirement mandated under state law containing each health, safety, or welfare requirement mandated by a law or administrative rule of this state applicable to a nonpublic school and with a reference to each relevant provision of law or administrative rule for the requirement. The form shall be posted on the department's website in electronic form.

(3) By June 30 of each applicable fiscal year, a nonpublic school seeking reimbursement for actual costs incurred in complying with a health, safety, or welfare requirement under a law or administrative rule of this state during each applicable school year shall submit a completed form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section if the nonpublic school does not submit the form described in subsection (2) in a timely manner.

(4) By August 15 of each applicable fiscal year, the department shall distribute funds to each nonpublic school that submits a completed form described under subsection (2) in a timely manner. The 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. The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.

(5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.

(6) The department may review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection, the nonpublic school is not eligible for reimbursement under this section.

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

(9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement under a law or administrative rule of this state identified by the department under subsection (2) and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of costs. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing a specific task regardless of whether that individual is available and regardless of who actually performs a specific task. Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

(10) For the purposes of this section, the actual cost incurred by a nonpublic school for taking daily student attendance shall be considered an actual cost in complying with a health, safety, or welfare requirement under a law or administrative rule of this state. Training fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state.

(11) The funds allocated under this section for 2016-2017 are a work project appropriation, and any unexpended funds for 2016-2017 are carried forward into 2017-2018. The purpose of the work project is to continue to reimburse nonpublic schools for actual costs incurred in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state. The estimated completion date of the work project is September 30, 2019.

## INTRODUCTION

This lawsuit began in 2017, but the State defendants now named in it – Governor Gretchen Whitmer and Superintendent of Public Instruction Michael Rice – did not hold office until 2019, when the matter was already pending in this Court. This brief is their first opportunity to speak to the core question presented in this case: whether MCL 388.1752b’s appropriation of funds to reimburse nonpublic schools for certain costs violates the Michigan constitution’s prohibition against using public monies to aid or maintain nonpublic schools.

When Governor Whitmer took office, she assumed responsibility for the “executive power” of this state and, with it, the duty to “take care that the laws be faithfully executed.” Const 1963, art 5, §§ 1, 8. As a precondition to assuming these powers and duties, she “solemnly sw[ore]” to “support the Constitution of the United States and the constitution of this state.” Const 1963, art 11, § 1. Accordingly, she, as Governor, “has no less a solemn obligation . . . than does the judiciary to consider the constitutionality of [her] every action.” *Lucas v Bd of Cty Rd Comm’rs of Wayne Cty*, 131 Mich App 642, 663 (1984). Superintendent Rice took this same oath when he assumed office.

This “solemn obligation” has compelled the State defendants to look closely and carefully at the constitutional issues presented. This review has left the State defendants unable to adopt their predecessors’ understanding of the scope of MCL 388.1752b’s constitutionality. The statute is constitutional, but only as to some applications. The Court of Appeals majority was correct insofar as it reached this conclusion, but misidentified what applications of MCL 388.1752b are constitutional.

In 1970, the People of Michigan used their constitutionally reserved initiative power to add article 8, § 2's prohibition to their constitution. The People spoke in no uncertain terms: "no public monies" shall be appropriated or paid by the Legislature "directly or indirectly to aid or maintain any private, denominational or other nonpublic . . . school," and "no payment," "subsidy, grant or loan of public monies" shall be provided, directly or indirectly, "to support the attendance of any student or the employment of any person at any such nonpublic school[.]" This language is simple, straightforward, and sweeping, and admits only one exception to its prohibition: "[t]he legislature may provide for the transportation of students to and from any school." As this plain language makes clear, MCL 388.1752b constitutionally provides reimbursement for certain transportation-related costs. The statute, however, would also directly fund the nonpublic schools to pay for their costs of implementing various other mandates. For those reimbursements, this statute violates the constitution.

This Court's prior decisions in *Traverse City School District v Attorney General*, 384 Mich 390 (1971) and *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975) do not call for a different conclusion. The application of article 8, § 2's prohibition as written to MCL 388.1752b does not implicate any federal constitutional imperatives, and thus does not require the limited reading of article 8, § 2 reflected in those cases. Instead, article 8, § 2's plain-terms control. And by appropriating public funds to reimburse nonpublic schools for their costs in complying with the health, safety, or welfare mandates,

MCL 388.1752b impermissibly aids nonpublic schools and supports student attendance and employment of staff at nonpublic schools. Thus, other than transportation-related costs, these reimbursements are unconstitutional.

The same conclusion holds even under the alternative construction of article 8, § 2 identified in *Traverse City* and *Advisory Opinion*. Applying that limited reading, MCL 388.1752b's reimbursements remain prohibited, as they place public monies directly into the hands of nonpublic schools to aid those schools in performing tasks essential to their lawful operation. Such direct funding of nonpublic schools is materially distinct from the provision of shared time and auxiliary services, and is not permissible under any reading of article 8, § 2.

Therefore, and in view of their solemn constitutional obligation, the State defendants have concluded that MCL 388.1752b can be "faithfully executed," Const 1963, art 5, § 8, but only to the extent it reimburses transportation-related costs, as the People of Michigan plainly provided under article 8, § 2. This Court should so rule and reverse.

## STATEMENT OF FACTS AND PROCEEDINGS

### **The original statute, Public Act 249 of 2016 PA 249**

The original version of MCL 388.1752b was signed into law by Governor Snyder on June 27, 2016, as part of Public Act 249 of 2016. The public act was the latest rendition of the School Aid Act, allocating state funding for school year 2016-2017. In § 152a, the public act appropriated over \$38 million to cover school districts' costs of mandatory state reporting required by the Headlee Amendment

case, *Adair v State*, 486 Mich 468 (2010). MCL 388.1752b (2016). This appropriation is not being disputed.

In the next section, § 152b of the Act, the Legislature also allocated \$2.5 million for fiscal year 2016-2017 to reimburse nonpublic schools for costs they would incur as a result of all state mandates they were required to follow. The original § 152b(1) specified which costs could be recouped: those costs “incurred by nonpublic schools as identified in the nonpublic school mandate report published by the [Department of Education] on November 25, 2014.” MCL 388.1752b(1) (2016). Section 152b(4) of the Act limited the reimbursement funds to “the nonpublic school’s actual cost to comply” with the covered mandates. *Id.* at § 152b(4).

Section 152b(7) of the original statute further stated that the appropriated funds “are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools.” MCL 388.1752b(7) (2016). The Legislature also attempted to insulate the statute from legal challenge by characterizing the services as both “incidental to the operation of a nonpublic school” and “non-instructional in character” as well as “not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, support the attendance of any student where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.” MCL 388.1752b(7), (8) (2016).

The original § 152b(2) implemented its reimbursement process by directing the Department of Education to create a form for nonpublic schools to use when they sought reimbursement. The statute also required the Department to determine the amount of reimbursement to nonpublic schools for employees performing mandate-related tasks, by defining “actual cost” as “the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by [the Department], which shall include a detailed itemization of cost.” MCL 388.1752b(9) (2016).

### **The plaintiffs’ suit and the preliminary injunction**

The original statute, 2016 PA 249, took effect on October 1, 2016, and on October 5, 2016, this Court declined Governor Snyder’s request to issue an advisory opinion on its constitutionality. *In re Request for Advisory Opinion re Constitutionality of 2016 PA 249*, 500 Mich 875 (2016).

Plaintiffs brought suit in the Court of Claims on March 21, 2017, alleging that MCL 388.1752b violated two provisions of the Michigan Constitution: (1) article 8, § 2, which prohibits appropriating, paying, or using public monies to aid or maintain nonpublic schools or to support the attendance of any student or the employment of any person at any such nonpublic schools; and (2) article 4, § 30, which requires two-thirds approval of each legislative house for appropriations of public funds for private purposes. On June 29, 2017, plaintiffs filed a motion for a temporary restraining order to prevent any distribution of funds under the statute, which the Court of Claims granted. Plaintiffs then sought a preliminary injunction, which the Court of Claims also granted.

**The amended statute, Public Act 108 of 2017**

On July 14, 2017, Governor Snyder signed Public Act 108 of 2017 into law. Under the new public act, § 152b(4) was amended to reiterate its reimbursement to the nonpublic schools for “actual costs in complying with a *health, safety, or welfare requirement* under a law or administrative rule of this state.” MCL 388.1752b(4) (emphasis added). It further emphasizes that it reimburses a nonpublic school’s “actual costs . . . in complying” with these state law mandates. MCL 388.1752b(1), (2), (3), and (4). It also no longer references the previous “mandate report,” instead leaving the Department to categorize and format the requirements for which a nonpublic school may apply for reimbursement. MCL 388.1752b(2).

The new version of the statute clarifies that a nonpublic school’s time for taking attendance should be considered an actual cost, and it adds the following language regarding fees: “Training fees, inspection fees, and criminal background check fees are considered actual costs in complying with a health, safety, or welfare requirement under a law or administrative rule of this state.” MCL 388.1752b(10).

The new version of the statute also deems the legislative appropriation for 2016-2017 a “work project appropriation,” § 152b(11), meaning that the funds did not lapse into the state school aid stabilization fund at the end of the fiscal year 2017. See MCL 18.1451a. The new version of MCL 388.1752b retains the statutory directive to the Department to distribute the funds set aside for fiscal year 2016-2017 by August 15, 2017, and the funds for fiscal year 2017-2018 by August 15,

2018. See MCL 388.1752b(4). The statute was again amended for the 2018-2019 fiscal year, but its substantive provisions went unchanged.<sup>2</sup>

### **The rulings of the Court of Claims and the Court of Appeals**

On April 26, 2018, the Court of Claims granted plaintiffs' motion for summary disposition, striking down MCL 388.1752b (both the amended and previous version) as facially unconstitutional under article 8, § 2. The Court of Claims did not reach the argument of plaintiffs under article 4, § 30.

The State defendants appealed, and the Court of Appeals reversed in a 2-to-1 published decision. The majority relied on *Traverse City* and *Advisory Opinion* in its construction of article 8, § 2 and concluded that statute is constitutional as “the Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws.” Slip op, p 2. In reaching this conclusion, the majority specified that the mandate was constitutional only if it was “undertaken to comply with a health, safety, or welfare mandate” and three considerations were met:

[T]he reimbursement may only occur if the action or performance that must be undertaken to comply with a health, safety, or welfare mandate

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<sup>2</sup> In accordance with these amendments, the Department of Education issued a new form for the 2017-2018 school year, and the form presents a formula for each mandate that includes completing columns for “total hours to complete the mandate,” next to the column “hourly rate, least capable employee.” App 51a, 52a. The form also contains separate columns for claiming the costs of “training fees,” “inspection fees,” “criminal background check fees,” and “epi pen(s) purchase.” *Id.*

(1) is, at most, merely incidental to teaching and providing educational services to nonpublic school students (noninstructional in nature),

(2) does not constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive, and

(3) does not involve or result in excessive religious entanglement.  
[Slip op, p 2.]

The majority identified the “criminal background check fees” as one of the clear cases in which the nonpublic school would be subject to reimbursement. *Id.* The Court remanded the case to the Court of Claims, directing it to examine each of the actual costs “under the proper criteria outlined.” *Id.* at 16. The Court of Appeals also ruled that the Court of Claims should address the claim raised under article 4, § 30 (requirement of two-thirds support for an appropriation of public money for “local or private purposes”) on remand.<sup>3</sup>

The nine-page dissent indicated that the constitution was plain in “forbidding direct aid” as provided by MCL 388.1752b. Slip op, p 2. The dissent also evaluated *Traverse City* and *Advisory Opinion*, concluding that the shared time and auxiliary services found constitutional in *Traverse City* were different in kind from the direct reimbursements at issue here. *Id.* at 2–8, 8–9.

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<sup>3</sup> Notably, the majority acknowledged that Michigan’s constitutional text, taken alone, might require a different outcome:

The partial dissent takes us to task for supposedly ignoring the plain language of Const 1963, art 8, § 2. Were we restricted to solely examining and contemplating the language of Const. 1963, art. 8, § 2, absent any other considerations and on a clean slate, we might very well agree with our colleague’s position. But *Traverse City Sch Dist* and *Advisory Opinion re Constitutionality of 1974 PA 242* were issued and cannot be ignored. [Slip op, p 16.]

On November 27, 2018, plaintiffs filed an application seeking this Court’s review. The State defendants responded in opposition on December 26, 2018, before Governor Whitmer and Superintendent Rice took office.<sup>4</sup> On June 24, 2019, this Court issued an order granting plaintiffs’ application, directing the parties to “include among the issues to be briefed whether MCL 388.1752b violates Const 1963, art 8, § 2.”

### STANDARD OF REVIEW

This Court reviews constitutional questions – which are questions of law – de novo. *Winkler v Marist Fathers of Detroit*, 500 Mich 327, 333 (2017). The same is true for issues of construction, both constitutional and statutory; they are reviewed de novo. *Fluor Enterprises, Inc v Dep’t of Treasury*, 477 Mich 170, 174 (2007).

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<sup>4</sup> Superintendent Rice was the superintendent of Kalamazoo Public Schools, one of the named plaintiffs, before being appointed by the Board of Education to this state office.

## ARGUMENT

### I. **The statute, MCL 388.1752b, is constitutional with regard to the reimbursement of transportation-related costs but violates Michigan’s constitution for non-transportation-related costs.**

The People of Michigan have provided, in article 8, § 2 of their constitution, that “no public monies” shall be appropriated or paid by the Legislature “to aid or maintain” the nonpublic schools, and no grant of public monies shall be provided “to support the attendance of any student or the employment of any person at any such nonpublic school[.]” The constitution allows one exception: “[t]he legislature may provide for the transportation of students to and from any school.” *Id.* Otherwise, the ban is absolute: no public money for nonpublic schools. Thus, the statute at issue, MCL 388.1752b, may reimburse transportation-related costs, but its reimbursement of the costs of complying with other state mandates for health, safety, or welfare contradicts the common understanding of the constitutional provision’s plain language. The constitution did not create an exception from its prohibition for compliance with health, safety, or welfare requirements.

Any effort to save this statute for non-transportation-related reimbursements – contrary to the Michigan constitution – is untenable. The limited reading of article 8, § 2 from *Traverse City* and *Advisory Opinion* is only implicated where the application of that provision’s prohibition might violate the U.S. Constitution’s Free Exercise Clause or the Equal Protection Clause. Nothing in federal constitutional law calls into question the prohibition of MCL 388.1752b’s reimbursements to non-public schools, religious and secular alike. And even applying these cases’ limited reading of

article 8, § 2, the standards they embrace make clear that such direct funding for essential services, placed in the control of the nonpublic schools, is prohibited.

**A. MCL 388.1752b’s appropriation of public funds is valid to the extent it reimburses nonpublic schools for the costs of complying with transportation-related state mandates, but it otherwise violates Michigan’s constitution.**

In reviewing the meaning of a statute, courts look to the statute’s text itself. “The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most ‘reliable evidence’ of that intent, the language of the statute itself.” *Fairley v Dep’t of Corrections*, 497 Mich 290, 296–297 (2015). The same is true for reviewing the constitution, as this Court looks to know the intent of the People by seeking their “common understanding” at the time the constitution was ratified. *Goldstone v Bloomfield Twp Public Library*, 479 Mich 554, 558 (2007), citing 1 Cooley, *Constitutional Limitations* (6th ed), p. 81. This is accomplished by “applying the plain meaning of each term used at the time of ratification.” *Id.* While it is true that “[s]tatutes are presumed to be constitutional,” that presumption must yield when a statute’s “unconstitutionality is clearly apparent.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6 (2003).

The text of MCL 388.1752b apportions money to be used to aid nonpublic schools in paying for the costs of meeting the State’s health, safety, or welfare mandates, which support student attendance and employment at the nonpublic schools. It states, in relevant part, that the state general fund will reimburse the nonpublic schools the cost of complying with health, safety, or welfare mandates, including the actual costs of the hourly wage of employees who perform these tasks.

**1. Under a plain reading of MCL 388.1752b, the state may constitutionally reimburse transportation-related costs.**

As an initial matter, § 152b begins with an appropriation of general fund money up to \$2.5 million to reimburse nonpublic schools for costs associated with their compliance with state mandates, i.e., requirements that must be complied with in order for the school to lawfully operate. Even though unaddressed by the lower courts, some of these obligations relate to transportation costs.

It is worth reiterating that the People of Michigan provided an important exemption from article 8, § 2's general prohibition: "The legislature may provide for the transportation of students to and from any school." Const 1963, art 8 § 2. Thus, to the extent MCL 388.1752b's appropriation is devoted to reimbursing costs related to transporting students to and from nonpublic schools, it may be given effect. For instance, Michigan law requires that school buses meet or exceed federal motor vehicle safety standards, which specifically relates to pupil transportation. See MCL 257.1807–1873 generally. Nonpublic schools are subject to such transportation-related mandates, including the following:

- (1) meeting annual school bus inspections, see Mich Admin Code, R 257.955;
- (2) meeting federal school bus safety standards, see MCL 257.1810(1); and
- (3) allowing state police inspections of motor vehicles accommodating more than 12 passengers, see MCL 257.715a.

Funding nonpublic schools' costs for complying with mandates such as these is consistent with the express exception provided in article 8, § 2.

**2. The rest of the statute cannot be constitutionally applied.**

Beyond its reimbursement of transportation-related costs, MCL 388.1752b violates article 8, § 2. While the Legislature disclaimed any intent “to aid or maintain any nonpublic school,” MCL 388.1752b(8), it acknowledged the statute helps nonpublic schools specifically. MCL 388.1752b(7). A comparison of the constitution’s and the statute’s respective terms lays bare the “clearly apparent” and inescapable conflict between the two:

Const 1963, art 8, § 2	MCL 388.1752b
<ul style="list-style-type: none"> <li>• <b>“no public monies shall be appropriated or paid or any public credit utilized”</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>“[f]rom the general fund money appropriated under section 11, there is allocated an amount not to exceed \$2,5000,000.00” § 152b(1).</b></li> </ul>
<ul style="list-style-type: none"> <li>• prohibits public monies <b>“to aid or maintain any private, denominational or other nonpublic . . . school”</b></li> </ul>	<ul style="list-style-type: none"> <li>• allocates general fund money <b>“to reimburse actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state”</b> for the intended purpose of <b>“ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools”</b> §§ 152b(1), (7).</li> </ul>
<ul style="list-style-type: none"> <li>• <b>“[n]o payment . . . shall be provided . . . to support the employment of any persons at any such nonpublic school”</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>reimburses</b> <b>“‘actual costs’ [which] means the hourly wage for the employee or employees performing a task or tasks required to comply with a health, safety, or welfare requirement”</b> § 152b(9).</li> </ul>
<ul style="list-style-type: none"> <li>• <b>“[n]o payment . . . shall be provided . . . to support the attendance of any student . . . at any such nonpublic school”</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>“taking daily student attendance shall be considered a [reimbursable] actual cost in complying with a health, safety, or welfare requirement”</b> § 152b(10).</li> </ul>

Given these contradictions, § 152b’s non-transportation-related reimbursements cannot stand. The plain text of article 8, § 2 forbids the appropriation of public money to aid or maintain, directly or indirectly, nonpublic schools. It is difficult to see how the People could have stated this prohibition more clearly, or with more sweeping effect. And yet the Legislature, through MCL 388.1752b, “appropriated” money from the general fund specifically for nonpublic schools. Const 1963, art 8, § 2; MCL 388.1752b(1). The Department of Education – an “agency of the state,” Const 1963, art 8, § 2 – must “distribute [these public] funds to each nonpublic school.” Const 1963, art 8, § 2; MCL 388.1752b(4). And these public funds are to help nonpublic schools cover the costs incurred to comply with the State’s mandates, as necessary for the schools’ lawful operation. This falls squarely within the scope of the plain language of article 8, § 2’s prohibition, and contradicts Michigan’s constitution. See, e.g., *The American Heritage Dictionary of the English Language*, pp 26, 787 (1969) (defining “[a]id” as “[t]o help; assist,” or “[t]o give help or assistance to,” and defining “maintain” as “[t]o continue; carry on; keep up”; “[t]o preserve or retain”; “[t]o keep in a condition of good repair or efficiency”; or “[t]o provide for; bear the expenses of”). In this way, the reimbursements for non-transportation-related costs under § 152b are unconstitutional.

Even so, this conclusion does not affect the validity of MCL 388.1752b’s reimbursements for costs of complying with transportation-related mandates, as they may be disentangled from the unconstitutional, non-transportation-related ones.

See MCL 8.5 (“If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application”).

**B. This Court’s decisions in *Traverse City* and *Advisory Opinion* confirm that MCL 388.1752b is constitutional only insofar as it provides for reimbursement of transportation-related costs, a conclusion which is consonant with the federal constitution.**

Under a proper reading of *Traverse City* and *Advisory Opinion*, § 152b conflicts with the constitution for the reimbursement of non-transportation-related costs, so it cannot be given effect for these applications.

In *Traverse City*, this Court examined Chapter 2 of Public Act 100 of 1970 as well as other state programs against article 8, § 2. *Traverse City* found that Chapter 2 of 1970 PA 100, a statute similar in nature to § 152b, was unconstitutional based on the straightforward application of the “common understanding” of article 8, § 2. 384 Mich at 406–408. This same simple analysis is applicable here. After addressing Chapter 2 of 1970 PA 100, *Traverse City* went on separately to analyze the constitutionality of certain state programs, but under a different, narrowing framework because it found that a complete prohibition of the programs would infringe upon federal constitutional rights. 384 Mich at 410–421, 433. Such a narrowing framework, however, is not warranted here because no federal constitutional considerations are implicated by a prohibition against reimbursing nonpublic schools for their costs of complying with state-law mandates.

Instead, the common understanding of article 8, § 2 controls, and prohibits § 152(b)'s appropriation of public monies to fund nonpublic schools' non-transportation-related compliance costs. This Court's subsequent review of article 8, § 2 in *Advisory Opinion* does not change this conclusion. And even if this Court applied the narrowing framework from *Traverse City* and *Advisory Opinion*, § 152(b) would still be unconstitutional as it pays public monies directly to nonpublic schools to fund those schools' essential operation expenses. But again, there is no need to apply this framework here, because the federal constitution – including the decision in *Trinity Lutheran v Comer*, 137 S Ct 2012 (2017) – does not call for it.

**1. Under *Traverse City* and *Advisory Opinion*, § 152b is unconstitutional to the extent it authorizes reimbursement for non-transportation-related costs.**

The statute's appropriation of public funds to aid nonpublic schools violates article 8, § 2, both under its plain text and as this Court has interpreted that constitutional amendment in *Traverse City* and *Advisory Opinion*.

This Court's opinion in *Traverse City* may be distilled into two sections, a short one invalidating Chapter 2 of 1970 PA 100 under article 8, § 2, and the second addressing the effect of that newly adopted constitutional amendment on various state programs involving nonpublic schools, most notably shared time<sup>5</sup> and

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<sup>5</sup> “[S]hared time is an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students normally on the premises of the public school.” *Traverse City*, 384 Mich at 411 n 3. Since 1971, shared time has been expanded to include instruction provided by a district at a nonpublic school site. See MCL 388.1766b(2).

auxiliary services<sup>6</sup> for nonpublic school students. *Traverse City* remains the seminal decision, and *Advisory Opinion* is governed by its system of analysis.

**a. *Traverse City* invalidated Chapter 2 of Public Act 100 of 1970 by directly applying the Michigan constitution, and likewise invalidates § 152b.**

The decision in *Traverse City* explained the setting in which the People passed article 8, § 2. The provision was enacted by the People through an initiative amendment, and was passed in response to the Legislature’s efforts “to give tax relief to tuition paying parents of children attending private schools.” 384 Mich 390, 406 n 2. These efforts resulted in the passage of Public Act 100 of 1970, which was termed “parochiaid”<sup>7</sup> and which “generated heated controversy both inside and outside the legislature.” *Id.* In response, concerned citizens petitioned to place what was called Proposal C on the ballot for the general election in November 1970. By vote, the People of this State adopted the amendment, which became article 8, § 2. *Id.*

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<sup>6</sup> Auxiliary services at the time included “health and nursing services and examinations; street crossing guards services; national defense education act testing services; speech correction services; visiting teacher services for delinquent and disturbed children; school diagnostician services for all mentally handicapped children; teacher counsellor services for physically handicapped children; teacher consultant services for mentally handicapped or emotionally disturbed children; remedial reading; and such other services as may be determined by the legislature.” *Traverse City*, 384 Mich at 417–418. See also MCL 380.1296 (current definition).

<sup>7</sup> “Parochiaid” was a term used for aid authorized by Chapter 2 of 1970 PA 100. Public Act 100 of 1970 provided \$22,000,000 of public monies for participating nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students. *Traverse City*, 384 Mich at 413.

As described in *Traverse City*, Chapter 2 of Public Act 100 of 1970 “pa[id] public monies to eligible nonpublic schools to pay a portion of the salaries of lay teachers who taught secular subjects in the nonpublic school.” 384 Mich at 406 n 1. The chapter governed the “private schools” and ran 13 sections, MCL 388.655 through 388.666a (repealed). When evaluating this chapter under article 8, § 2, the *Traverse City* Court explained that the constitutional provision “prohibits the purchase, with public funds, of educational services from a nonpublic school.” *Id.* at 407. Given the “common understanding of the words used” in article 8, § 2 and “the circumstances leading up to and surrounding its adoption,” *id.* at 406, the Court offered a straightforward analysis in explaining that the chapter violated the constitution:

[W]e hold Chapter 2, Act 100, PA 1970, unconstitutional as of December 19, 1970, the effective date of the amendment, and any credits accumulated on or after that date are invalid. [*Traverse City*, 384 Mich at 408.]

And in finding the entire chapter invalid, the Court barred the funding of up to \$22 million for “participating nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students.” 384 Mich at 413; MCL 388.658 (repealed).

For the other significant statutory provisions, shared time and auxiliary services, the Court in *Traverse City* concluded that further analysis was needed, because a straightforward application of article 8, § 2’s terms to those services would violate “both the free exercise of religion and the equal protections provisions of the United States Constitution.” *Id.* at 412.

In its later analysis, the Court in *Traverse City* again reiterated the conclusion that a “literal” application of the provision to shared time and auxiliary services would violate the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Free Exercise Clause. *Id.* at 430 (“This literal perspective on Proposal C’s [i.e., art 8, § 2’s] mandate of no public funds for nonpublic schools would place the state in a position where it discriminates against the class of nonpublic school children in violation of the equal protection provisions of the Fourteenth Amendment of the [U.S.] Constitution. In the case of parochial or other church-related school children (and some 270,000 of the 274,000 nonpublic school students in Michigan attend church-related schools), Proposal C [i.e., art 8, § 2] would violate the free exercise of religion clause of the First Amendment[.]”).

In this way, the *Traverse City* decision set forth a system of analysis hinging on federal constitutional concerns. Where the application of article 8, § 2’s plain terms *did not* give rise to the infringement of federal constitutional rights, this Court applied the Michigan constitution in a simple and direct way, barring the public funding of the nonpublic schools. Where the application of article 8, § 2’s plain terms *did* give rise to such infringement of federal constitutional rights, the Court then applied an “alternative constitutional construction” of the provision, *id.* at 412, which is a narrowing framework that would enable article 8, § 2’s prohibition to “withstand [federal] constitutional scrutiny” as applied to the specific matter at issue, *id.* at 431–432.

The Court then concluded in *Traverse City* that shared time and auxiliary services called for this latter approach and that, under it, Michigan’s constitution permits the funding of those services to the extent they are only “incidental” to the operation of the nonpublic school and are not within the “control” of the nonpublic school. See, *id.*, 384 Mich at 420 (for auxiliary services: “only incidentally involve the operation of educating private school children;” and “private schools exercise no control over [auxiliary services]”); at 435 (for shared time: “Proposal C [i.e., art 8, § 2] has no prohibitory impact upon shared time wherever offered provided that the ultimate and immediate control of the subject matter, the personnel and the premises are under the public school system”). This case falls on the first side of *Traverse City*’s analytical hinge – article 8, § 2’s text should be applied plainly and directly to MCL 388.1752b.

This is one of the central missteps of the majority decision of the Court of Appeals below. That decision took the “alternative constitutional construction” of article 8, § 2 that *Traverse City* adopted specifically for shared time and auxiliary services, and created from it a three-part test to supplant the plain language of the constitution without regard to whether federal constitutional concerns required it. See slip op, p 2. But MCL 388.1752b does not call for such an alternative construction of article 8, § 2, as the prohibition of the statute’s reimbursements does not infringe upon any federal constitutional rights. Article 8, § 2’s limitation on reimbursing all nonpublic schools for their costs in complying with state health, safety, or welfare mandates does not violate the U.S. Constitution. See I.B.2 below.

Thus, the same simple analysis that invalidated chapter 2 of 1970 PA 100 applies equally here, invalidating MCL 388.1752b's non-transportation-related reimbursements provisions that similarly provide direct aid to the nonpublic schools. Because these reimbursements are not distinguishable in kind from the aid to the nonpublic schools found unconstitutional in *Traverse City*, § 152b should also be found to be unconstitutional. Any other result would not be consistent with *Traverse City*.

**b. *Advisory Opinion* does not change this conclusion.**

Five years after *Traverse City*, this Court issued an advisory opinion addressing the constitutionality of Public Act 242 of 1974, which provided students of nonpublic schools with textbooks and school supplies free of charge. *In re Advisory Opinion regarding the Constitutionality of 1974 PA 242*, 394 Mich at 49 (Swainson, J., concurring but writing for a majority of the Court). In concluding this legislation violated article 8, § 2, the Court explained why the provision of textbooks and school supplies could not survive the narrowing framework *Traverse City* adopted for shared time and auxiliary services. The Court offered this explanation without reference to the fact that the funding of textbooks and supplies is in no way required by the U.S. Constitution. *Cf. Traverse City*, 384 Mich at 431 n 19 (in relation to shared time and auxiliary services, the Court stated that “the question is whether in certain situations state aid to nonpublic schools or their pupils is mandatory”).

*Advisory Opinion* did not expressly address why it was proper to consider *Traverse City*'s narrowing framework without first considering, as the *Traverse City* Court did, whether federal constitutional concerns compelled the application of that framework. The Court did, however, open its analysis by explaining that federal constitutional questions were beyond the scope of the specific advisory opinion that had been requested. See *id.* at 46-47. The Court also fully embraced *Traverse City* as binding precedent throughout its opinion. Indeed, the decision in *Advisory Opinion* could in no way override or restrict the proper application of *Traverse City*. As an advisory opinion, it is not binding and cannot change precedent. See, e.g., *Cassidy v McGovern*, 415 Mich 483, 497 (1982) (“advisory opinions are not precedentially binding”). As a result, *Traverse City*'s system of analysis governs unmodified, and *Advisory Opinion* is best read in alignment with it. From this, it is apparent that the *Advisory Opinion* Court assumed without deciding that *Traverse City*'s narrowing framework applied, explaining why the legislation at issue was unconstitutional even under that framework.

**c. The statute violates *Traverse City* and *Advisory Opinion* even if applying the narrowing framework.**

As noted already, the Court should find under the case law that it may apply Michigan's constitution here directly. No intervening prism is necessary. But the Court will reach the same result even in applying the “alternative constitutional construction” the *Traverse City* Court deemed necessary for shared time and auxiliary services.

In analyzing these programs, the *Traverse City* Court recognized that “[t]he plain meaning” of article 8, § 2 would withhold public money from public schools that host nonpublic school students for shared time programs, and concluded that such a result would contravene the federal constitution. It accordingly struck from the constitutional provision the language of “or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.” *Id.* at 414.

With respect to the provision’s other prohibitions, the Court “refused to adopt a strict no benefits, primary or incidental rule” based on its federal constitutional analysis. *Id.* at 413 (citation and internal quotations omitted). Instead, in examining and upholding shared time, which inherently involves the education and instruction of students, the Court focused on three main distinctions between that program and the prohibition on funding the nonpublic schools. A fair reading shows that the public school’s *control* was a necessary element for shared time’s constitutionality. The Court emphasized that shared time was materially different from the aid given to the nonpublic schools by chapter 2 of 1970 PA 100, which impermissibly provided “public monies for participating nonpublic school units to pay a portion of the salaries of private lay teachers of secular nonpublic school courses in the nonpublic school for nonpublic school students.” *Id.* at 413.

In contrast, “shared time provides public monies for local public school districts to use to hire public school teachers to teach public school courses in public or nonpublic schools to public or public and nonpublic school students.” *Id.* The

Court explained that “a shared time program offered on the premises of the public school is *under the complete control of the public school district*”; under such circumstances, the shared time program “provides only incidental aid, if any” to the nonpublic school. *Id.* at 413–414, 416 (emphasis added).

To drive home the importance of public control, the Court required that shared time held on the premises of a nonpublic school “can be provided . . . only under conditions appropriate for a public school”:

[T]he ultimate *and immediate control* of the *subject matter, the personnel, and premises must* be under the public school system authorities[.] [*Id.* at 415 (emphasis added).]

Under these conditions of control, the shared time at a nonpublic school provides only “incidental aid” to the nonpublic school.” *Id.* at 416.

Further, “*under such conditions of control as a public school,*” shared time at the nonpublic school does not “support . . . the employment of any person at any such nonpublic school.” *Id.* (emphasis added). Thus, control must remain in public hands for the shared time program that occurred on the premises of the nonpublic school to survive the amendment. The Court explained that “[t]his *conforms to our ‘control’ construction of the amendment* and the purposes . . . for which it was adopted.” *Id.* (emphasis added). The concept of control was central to the analysis.<sup>8</sup>

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<sup>8</sup> The Court additionally recognized that there might be instances of shared time instruction that lack complete public control but are nonetheless so “‘incidental’ or casual” that they do not violate the Court’s “alternative constitutional construction” of article 8, § 2. *Id.* at 416-417. And the Court broadly qualified the permissibility of any shared time instruction on the absence of “unconstitutional religious entanglements,” which shared time does not inherently create but which may arise in “special circumstances.” *Id.* at 417.

This same principle undergirded the analysis of the constitutionality of auxiliary services, like crossing guards and driver education, for nonpublic school students. The Court held that the services were “general health and safety measures,” as a kind of “special educational service,” and found they “only incidentally involve[d] the operation of educating private school children.” *Id.* at 418, 419. In so reasoning, the Court expressly evaluated the concepts of control and who receives the funds:

Consequently, the prohibitions of [article 8, § 2] 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.* at 419–420 (emphasis added).]

The Court highlighted that nonpublic schools “exercise no control over” auxiliary services: “They are *performed by public employees under the exclusive direction of public authorities* and are given to private school children by statutory direction, not by an administrative order from a private school.” *Id.* at 420 (emphasis added). While the Court did state that these services had only an “incidental relation” to the instruction of nonpublic school children, *id.* at 419, even so it held that the Michigan constitution prohibited funding of services “where the hiring and control is in the hands of the non-public school.” *Id.* at 435. It was significant to the Court that the auxiliary services were under the exclusive control of the public schools.

Such control is absent from MCL 388.1752’s reimbursement mechanism. Unlike shared time and the auxiliary services evaluated in *Traverse City*, under § 152b the public school system does not dispatch public employees to perform a service. Instead, the Act singles out nonpublic schools and provides money directly to them to help them comply with their statutory mandates.

Indeed, the statute directly helps pay the wages of nonpublic-school-chosen personnel with public money. This both impermissibly aids nonpublic schools by giving them public money and control, and it impermissibly supports employment at the nonpublic schools. Even under *Traverse City*'s "alternative constitutional construction," article 8, § 2 bars this funding for non-transportation-related costs.<sup>9</sup>

The same is true under *Advisory Opinion*, which accepted *Traverse City*'s framework. To reiterate, the *Advisory Opinion* – as an advisory opinion – cannot change the governing legal standards adopted by this Court in *Traverse City*. But its application of *Traverse City*'s narrowing framework only further confirms the impermissibility of MCL 388.1752b's non-transportation-related reimbursements. Rather than mirroring *Traverse City*'s emphasis on "control," the Court in *Advisory Opinion* focuses on *Traverse City*'s secondary point – whether the services are "incidental" – and makes it the central distinction:

Since [article 8, § 2] speaks broadly in terms of the support and maintenance of all private schools, I think it is a proper interpretation of the *Traverse City School Dist v. Attorney General* rule to state that [article 8, § 2] forbids aid that is a 'primary' element of the support and maintenance of a private school *but permits aid that is only 'incidental' to the private schools support and maintenance.* [*Advisory Opinion*, 394 Mich at 48 n 2 (emphasis added, citations omitted).]

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<sup>9</sup> *Traverse City* also identified another characteristic of shared time and auxiliary services that supported their constitutionality, and that further distinguishes them from MCL 388.1752b's reimbursements. As the *Traverse City* Court noted, shared time and auxiliary services had a long and established history in Michigan, which article 8, § 2 was not intended to disrupt. See 384 Mich at 409 n 2 & 411 n 3. MCL 388.1752b's reimbursements enjoy no such history; instead, they fall comfortably within the core purpose of article 8, § 2's prohibition, which *Traverse City*'s narrowing framework leaves intact: "the passage of public funds into private school hands for purposes of running the private school operation." *Id.* at 419.

Under the primary/incidental dichotomy, the Court advised that the funding of school textbooks and supplies would violate Michigan's constitution in funding "essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist." *Id.* at 49, quoting *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 702 (1970).

MCL 388.1752b's direct funding of nonpublic schools' compliance with state mandates falls squarely on the "primary" or "essential" side of this dichotomy. The dissent in the court below persuasively addressed this point in addressing criminal background checks:

Criminal background checks of school personnel (public and private) are a safety measure mandated by state law. *Because they are a mandate, they are, by definition, a primary element necessary for a school's operation.* Nor can I agree that criminal background checks are merely "incidental" to providing educational services. A school may not employ a teacher who has been convicted of a listed sex offense, as a teacher convicted of a listed sexual crime is not legally qualified to teach Michigan children. See MCL 380.1230(9). Employing legally qualified teachers is a primary function of a school. I cannot agree that criminal background check costs are either "incidental" to a school's existence or fall outside a school's primary function. [Slip op, pp 7–8.]

The same analysis may be applied to the other non-transportation-related costs that are state mandated. Compliance with these mandates is essential because the nonpublic school may not otherwise lawfully operate.

In the end, neither *Traverse City* nor *Advisory Opinion* can displace the plain operation of the Michigan constitution's language here. Even under the narrowing framework reflected in these cases, MCL 388.1752b is only constitutional insofar as it reimburses nonpublic schools for transportation-related compliance costs.

As discussed, however, there is no need to reach this narrowing framework in the first place here. As *Traverse City* duly reflects, where the funding at issue is not constitutionally required, nothing in law prevents Michigan's constitution from barring such funding. And there are no such federal constitutional requirements that impede article 8, § 2's bar against MCL 388.1752b's non-transportation-related reimbursements.

**2. The bar on directing public monies to support the nonpublic schools does not violate the federal constitution as article 8, § 2 protects scarce state resources and is facially neutral, applying to all nonpublic schools.**

In prohibiting MCL 388.1752b's non-transportation-related reimbursements, it is clear that the Michigan constitution does not violate the federal constitution. These reimbursements are not constitutionally compelled or protected. Indeed, there is no fundamental right to an education at a *state-funded* nonpublic school, nor is there a fundamental right to choose between a public school and a *state-funded* nonpublic school.

None of the seminal cases about a parent's right to direct a child's education involved a positive right to enlist public monies to fund nonpublic schools. See *Wisconsin v Yoder*, 406 US 205 (1972) (overturning state law that mandated compulsory school attendance for Amish until age 16); *Pierce v Society of Sisters*, 268 US 510 (1925) (identifying fundamental right to send child to school of parent's choosing, but not a right to state funding of nonpublic school); *Meyer v Nebraska*, 262 US 390 (1923) (overturning state law restricting foreign-language education).

Denying reimbursement for essential business operation expenses of nonpublic schools does not violate the Equal Protection Clause. See, e.g., *Norwood v Harrison*, 413 US 455, 462 (1973) (“In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. *It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.*”) (emphasis added). Nor does it violate the Free Exercise Clause. See *Locke v Davey*, 540 US 712, 720 (2004) (no Free Exercise Clause violation for state constitution prohibition on scholarships for post-secondary education for degree in pastoral ministry).<sup>10</sup> As noted in *Everson v Bd of Ed*, the State could if it wished “provide transportation only to children attending public schools” without violating free-exercise rights protected under the federal constitution. 330 US 1, 16 (1947). That is true here too.<sup>11</sup>

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<sup>10</sup> Like the State of Washington’s constitution at issue in *Locke*, Michigan also prohibits the use of public funds for education in a seminary. Const 1963, art 1, § 4.

<sup>11</sup> It is worth noting that this Court in *Traverse City* rightly concluded that article 8, § 2 does not foreclose nonpublic schools from partaking in general services. *Id.* at 420 (“We do not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities. Such an interpretation would place nonpublic schools outside of the sovereign jurisdiction of the State of Michigan.”). The Attorney General had reached the same conclusion in his formal opinion. OAG, 1970, No. 4715, p 186. This Court agreed. *Traverse City*, 384 Mich at 420.

Recent U.S. Supreme Court case law, in particular *Trinity Lutheran Church of Columbia, Inc v Comer*, 137 S Ct 2012 (2017), only confirms this point.

The *Trinity Lutheran* Court was clear that it has routinely rejected free exercise challenges where “the laws in question have been neutral and generally applicable without regard to religion.” *Id.* at 2020. In fact, it is the ordinary rule that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 531 (1993). Michigan’s constitution is of this stock of law. It is neutral in character and applies generally to all nonpublic schools without regard to their religious nature.<sup>12</sup>

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Otherwise, our constitution might implicate the U.S. Supreme Court’s analysis in *Everson*, which noted that “parents might be reluctant to permit their children to attend [parochial] schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.” 330 US at 17–18. The U.S. Supreme Court noted that “cutting off church schools from these services . . . would make it far more difficult for the schools to operate.” *Id.* But the Michigan constitution does not purport to exclude nonpublic schools from universally accessible general government services, and state reimbursement of a private entity’s essential business operation expenses is by no means such a general service.

<sup>12</sup> Significantly, when this Court decided *Traverse City* in 1971, it did not have the benefit of the now-controlling authority cited above regarding the proper interpretation of the First and Fourteenth Amendments of the U.S. Constitution. Shared time and auxiliary services are not at issue here, and the resolution of this case does not require this Court to revisit *Traverse City*’s federal constitutional analysis. It is enough here to confirm *Traverse City*’s system of analysis, which first examines what the common understanding of article 8, § 2 requires, and then whether federal constitutional law demands a different outcome. Applying this system here resolves this case as argued above.

In this Court’s order granting leave, Justice Markman’s concurrence noted that “if Const 1963, art 8, § 2 is deemed to be effectively indistinguishable from the Missouri provision addressed in *Trinity Lutheran*, the denial of state funds in this case may well raise Free Exercise concerns under *Trinity Lutheran*.” 929 NW2d 281 (2019). *Trinity Lutheran* found that applications for a state program to reimburse organizations for the cost of resurfacing a playground could not be denied on the sole basis that the applicant is a religious organization. *Trinity Lutheran*, 137 S Ct at 2021. The U.S. Supreme Court explained that “denying a generally available benefit solely on account of a religious identity imposes a penalty on the free exercise of religion[.]” *Id.* at 2019. The Missouri constitution expressly excluded religious organizations, and no others, from receiving state funding: “[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.” *Id.* at 2017, quoting Mo Const, art I, § 7. That provision served as the basis for the application denials at issue in *Trinity Lutheran*.

That is not at issue here. Article 8, § 2 is neutral and generally applies to every “private, denominational or other nonpublic, pre-elementary, elementary, or secondary school.” Const 1963, art 8, § 2. Religious schools are not singled out, as the constitutional provision applies to both religious and nonreligious schools alike without distinction.

In that way, the constitution mandates that if a school is nonpublic, it cannot receive public money for its non-transportation-related expenses. Article 8, § 2 is distinguishable from the constitutional provision at the heart of *Trinity Lutheran*, and its application to MCL 388.1752b presents no free exercise violation.<sup>13</sup>

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<sup>13</sup> The case currently pending before the U.S. Supreme Court in *Espinoza v Montana Dep't of Revenue*, No. 18-1195 (U.S.) will not affect this analysis. Like Missouri, but unlike Michigan, the Montana constitution singles out religious organizations for special limitations: “The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.” Mt Const, art 10, § 6. As noted, the Michigan constitution does not single out religious schools for disfavored treatment, but bars funding to all nonpublic schools.

## CONCLUSION AND RELIEF REQUESTED

This Court should hold that the reimbursement for transportation-related costs under MCL 388.1752b is constitutional but reimbursement for non-transportation-related costs violates article 8, § 2 and is invalid. This Court should remand the matter to the Court of Claims for further review under article 4, § 30.

Respectfully submitted,

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