

STATE OF MICHIGAN  
IN THE SUPREME COURT

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 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,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

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Supreme Court No. 158751

Court of Appeals No. 343801

Court of Claims No. 17-000068-MB

THE APPEAL INVOLVES A RULING THAT A STATUTE IS INVALID

**AMICUS CURIAE BRIEF OF INDIVIDUAL MICHIGAN LEGISLATORS IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 152B OF 2016 PA 249**

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**JURISDICTIONAL STATEMENT AND  
AUTHORITY FOR FILING AMICUS CURIAE BRIEF**

This Court has jurisdiction over this appeal from the Court of Appeals pursuant to MCR 7.303(B)(1). The Court of Appeals entered its order and opinion in this case on October 16, 2018. Thereafter, Plaintiffs filed an application for leave to appeal in the Supreme Court, which this Court granted on June 24, 2019. Amici are filing this amicus curiae brief pursuant to MCR 7.312(H), subject to this Court’s grant of their motion for permission to file under MCR 7.312(H)(1), within the time allowed under MCR 7.212(H).

**STATEMENT OF QUESTION PRESENTED**

Whether the Court of Appeals correctly determined that Const 1963, art 8, § 2 permits reimbursement of actual costs incurred by nonpublic schools in complying with state-mandated health, safety, and welfare measures as authorized by MCL 388.1752b when Const 1963, art 8, § 2 permits public funding of costs that are incidental to nonpublic education?

Amici's answer: Yes.

Plaintiffs-Appellants' answer: No.

Defendants-Appellees' answer: No.

Court of Appeals' answer: Yes.

This Court should answer: Yes.

## STATEMENT OF INTEREST OF AMICI CURIAE

Amici consist of 37 members of the Michigan Legislature, listed below, all of whom support the appropriations for nonpublic schools authorized by Section 152b of 2016 PA 249, MCL 388.1752b, as amended. Because this matter concerns the validity of a duly enacted state law and the scope of the legislative power under the Michigan Constitution, Amici have unique interests at stake in this case not represented by the current parties.

Furthermore, on December 6, 2019, Defendants filed their brief with this Court in which Defendants laid down their arms and conceded the invalidity of Section 152b, a position that starkly contrasts with their position prior to the political change in administration on January 1, 2019. In short, Defendants' refusal to defend the constitutionality of a duly enacted state law leaves an adversarial void in this case. Thus, in addition to asserting their unique legislative interests at stake in this matter, Amici also file this brief in support of the constitutionality of Section 152b.

Individual members of the Michigan Legislature filing this brief as Amici include the following:

Members of the Michigan Senate: Senate Majority Leader Mike Shirkey, Senate District 16; Jim Stamas, Senate District 36; Pete Lucido, Senate District 8; Aric Nesbitt, Senate District 26; Kim LaSata, Senate District 21; Wayne Schmidt, Senate District 37; Curt VanderWall, Senate District 35; Roger Victory, Senate District 30; Dan Lauwers, Senate District 25; and Lana Theis, Senate District 22.

Members of the Michigan House of Representatives: Speaker of the House Lee Chatfield, House District 107; Pamela Hornberger, House District 32; Phil Green, House District 84; James Lower, House District 70; Ann Bollin, House District 42; John Reilly, House District 46; Daire

Rendon, House District 103; Hank Vaupel, House District 47; Kathy Crawford, House District 38; Joe Bellino, House District 17; Eric Leutheuser, House District 58; Mary Whiteford, House District 80; Sarah Lightner, House District 65; Steve Johnson, House District 72; Beau LaFave, House District 108; Mark Huizenga, House District 74; Scott VanSingel, House District 100; Sue Allor, House District 106; Jim Lilly, House District 89; Doug Wozniak, House District 36; Rodney Wakeman, House District 94; Luke Meerman, House District 88; Matthew Maddock, House District 44; Gary Eisen, House District 81; Diana Farrington, House District 30; Brad Paquette, House District 78; and Jack O'Malley, House District 101.

## INTRODUCTION<sup>1</sup>

This case calls into question the constitutionality of Section 152b of 2016 PA 249, MCL 388.1752b, as amended (“Section 152b”), through which the Michigan Legislature appropriated public funds to reimburse nonpublic schools for actual costs incurred to comply with state-mandated health, safety, and welfare measures. Plaintiffs contend that the second paragraph of Const 1963, art 8, § 2 adopted by Michigan voters in 1970 as Proposal C (the “Parochiaid Amendment” or “Proposal C”), prohibits *all* funding to nonpublic schools, whether incidental to the nonpublic schools’ educational missions or of primary importance. Because this matter concerns the validity of a legislative act under the constitution, Amici, who are members of the Michigan Legislature (collectively the “Legislators”), have unique interests at stake in this case. Furthermore, it has become exceedingly important for the Legislators to present their interests in this case because Defendants recently changed their litigation position in their brief filed on December 6, 2019, presumably because of the political change in administration, and refuse to defend the constitutionality of Section 152b, a duly enacted state law. Because there now exists an adversarial void in this case, the Legislators are able to assist this Court by filing a brief in support of the constitutionality of Section 152b.

Plaintiffs—and apparently now Defendants—would have this Court believe that the Legislature lacks authority to appropriate funds for the health, safety, and welfare of more than 100,000 students attending nearly 650 nonpublic schools throughout Michigan, merely because the private schools may derive some *incidental* benefit from the appropriation. Such position smacks of partisan politics and tramples on the will and understanding of the people of Michigan

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<sup>1</sup> Pursuant to MCR 7.312(H)(4), counsel for the individual Michigan legislators attest that they authored the brief in whole and that no counsel or parties made a monetary contribution intended to fund the preparation or submission of the brief.

who, through adoption of Proposal C, sought merely to proscribe aid to nonpublic schools for the purchase of educational services, not the type of incidental health and safety aid at issue in this case. The Court should decline the parties' invitation to ignore judicial precedent and overturn decades of common understanding regarding the Legislature's ability to provide for the public health, safety, and welfare of all residents, including those who choose to attend nonpublic schools.

In support of Section 152b's constitutionality, the Legislators assert a variety of distinct, yet related, interests, which align in favor of narrowly interpreting the Parochiaid Amendment's restriction on legislative power: (1) the Legislature is constitutionally authorized to exercise its broad general appropriations power where the U.S. and Michigan Constitutions do not prohibit legislative appropriation of funds to reimburse nonpublic schools for health, safety, and welfare measures; (2) legislative power includes policy-making discretion, which the Legislature, as the body of duly elected representatives of the people, may exercise when enacting laws through constitutional means; (3) the Legislature's acts are presumed constitutional unless clearly in conflict with the Constitution and no constitutional interpretation is workable; (4) the Legislature has a compelling interest in promoting the means of education in Michigan and in ensuring the health, safety, and welfare of all the state's residents, especially children; (5) this Court's goal in interpreting legislative enactments should be to give effect to the Legislature's intent, which is determined through a statute's plain language, including purpose clauses; and (6) through Section 152b, the Legislature appropriated funds to nonpublic schools for public purposes, and no supermajority approval is required. Each of these legislative interests is at stake in this case along with the constitutionality of Section 152b.

**STATEMENT OF FACTS  
AND PROCEDURAL HISTORY**

This case considers whether Section 152b, which authorizes reimbursement of “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,” violates the Parochiaid Amendment to Const 1963, art 8, § 2. Prior to 1970, Const 1963, art 8, § 2 provided only that “[t]he 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.” However, in November 1970, voters approved Proposal C, which added a second paragraph to Const 1963, art 8, § 2, known as the Parochiaid Amendment, which prohibits certain public funds from reaching nonpublic schools:

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.

Shortly after Proposal C was approved, on November 3, 1970, the Michigan Attorney General issued an opinion, “which construe[d] Proposal C . . . as forbidding public monies for shared time and auxiliary services.” *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 403; 185 NW2d 9 (1971) (“*Traverse City*”). The Traverse City School District then brought suit against the Attorney General for a declaratory judgment against the validity of the opinion. *Id.* Because the issues were of great public importance, the Governor requested that the Michigan Supreme Court “consider seven specific questions . . . relating to the construction of Proposal C.”

*Id.* The Court ordered the circuit court to certify the questions, which this Court decided after thorough consideration. See *id.*

In *Traverse City*, this Court followed the primary rule of constitutional construction, the rule of common understanding, to interpret the Parochiaid Amendment. *Id.* at 405. This rule provides that, because “[a] constitution is made for the people and by the people,” “[t]he interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.” *Id.* The Court also considered “the circumstances surrounding the adoption” of the proposal and “the purpose sought to be accomplished.” *Id.* Last, the Court recognized “that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does.” *Id.* at 406. Applying these rules of constitutional construction, the Court held 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, otherwise known as ‘parochiaid.’” *Id.* at 435 (emphasis added). The Court further held that Proposal C does not impact or prohibit shared time and auxiliary services provided to nonpublic school students, even though such services may *incidentally* aid nonpublic schools. As a contemporaneous interpretation of a constitutional provision, the Court’s interpretation of Proposal C in *Traverse City* is entitled to great deference. *McPherson v Blacker*, 92 Mich 377, 383; 52 NW 469 (1892).

A few years later, the Court reaffirmed *Traverse City* when it found that “Proposal C 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 school’s support and maintenance.” *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48, 48 n 2; 228 NW2d 772 (1975) (“*Advisory Opinion re 1974 PA 242*”). In that case, the Court determined that providing school

supplies and textbooks to private schools violates Const 1963, art 8, § 2 because “[t]extbooks and supplies are essential aids that constitute a ‘primary’ feature of the educational process and a ‘primary’ element required for any school to exist.” *Id.* at 49. In making such determination, *Advisory Opinion re 1974 PA 242* clarified that *Traverse City*’s rationale—its construction of Proposal C—applies not just to the shared-time and auxiliary services at issue in *Traverse City*, but to any type of proposed aid, as well.

Respecting the limitations articulated in these prior decisions, in 2016, the Legislature enacted Public Act 249, which amended the State School Aid Act of 1979, in part by adding Section 152b to reimburse nonpublic schools for actual costs incurred in complying with health, safety, and welfare mandates. Since that time, the Legislature has authorized the following appropriations through Section 152b: for fiscal year 2016-2017, \$2,500,000; for fiscal year 2017-2018, \$2,500,000; and for fiscal year 2018-2019, up to \$250,000.

Following the initial appropriation, Plaintiffs commenced this challenge in the Court of Claims, alleging that Section 152b violates the Parochiaid Amendment. The Court of Claims determined that Section 152b violates the Parochiaid Amendment, citing three reasons: (1) reimbursement under Section 152b was a prohibited direct payment to nonpublic schools and impermissible employment of nonpublic school employees; (2) funds reimbursed to nonpublic schools were under the control of nonpublic schools; and (3) the aid authorized under Section 152b was for primary functions of nonpublic schools and not incidental to school operations. (Ct of Claims Ord, pp 10-12). In ruling Section 152b facially unconstitutional, the court must have determined that “no set of circumstances exists under which the act would be valid.” *Council of Orgs & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

Defendants appealed, and the Court of Appeals reversed, finding that “without offending Const 1963, art 8, § 2, the Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws.” (Ct of App Ord & Op, pp 1-2).<sup>2</sup> Applying this Court’s prior decisions, the Court of Appeals articulated three conditions that must be satisfied to constitutionally allocate funds to nonpublic schools: (1) the funding or services provided must be merely *incidental* to teaching and providing educational services to nonpublic school students (i.e., noninstructional); (2) the funding or services may not constitute a *primary* function or element necessary for a nonpublic school to exist, operate, and survive; and (3) the funding or services may not involve or result in excessive religious entanglement. The Court of Appeals then affirmed the constitutionality of one specific type of reimbursement—fees for criminal background checks (Ct of App Order & Op, pp 12-13)—and remanded to the Court of Claims to examine each of the reimbursements authorized by Section 152b under the specified criteria. This Court granted leave to appeal on June 24, 2019.

### **ARGUMENT**

This Court should affirm the decision of the Court of Appeals that Section 152b does not violate the Parochial Aid Amendment. Section 152b authorizes reimbursement only of costs incurred by nonpublic schools for state-mandated health, safety, and welfare measures that have a strictly incidental relation to the instruction of school children, like the aid that this Court previously upheld in *Traverse City* and *Advisory Opinion re 1974 PA 242*. Moreover, such decision most appropriately respects the breadth of legislative power and the role of the Legislature under the Michigan Constitution.

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<sup>2</sup> Prior to the change in administration in January 2019, the State defendants vigorously defended the constitutionality of Section 152b.

By its terms, Section 152b “reimburse[s] 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,” MCL 388.1752b(1), and provides funds only “for purposes *related* to education” that are “*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.” MCL 388.1752b(7) (emphasis added). Contrary to the current position of all parties in this case, who claim that the state constitution’s ban on public funding for nonpublic schools is absolute, “[t]he prohibitions of Proposal C have no impact upon” the reimbursements authorized under Section 152b. See *Traverse City*, 384 Mich at 419.

Not only did the Court of Appeals correctly rule on the merits of the question, but its decision also respects the breadth of legislative power under the Michigan Constitution and the Legislature’s role as the duly elected extension of the citizenry. First, the Legislature has broad authority to appropriate state funds to meet the ever-changing—and often pressing—needs of the state, an interest that commands judicial deference, particularly in the context of student health and safety. Second, Section 152b’s purpose clauses explicitly state that the funds appropriated are “*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 that the funds “are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school.” MCL 388.1752b(7), (8) (emphasis added). Courts should afford such statements of intent appropriate deference when interpreting statutes. Third, the subject appropriation does not constitute a local or special act, as Plaintiffs would contend, and no supermajority approval is required; holding otherwise would cast doubt on numerous legislative acts and appropriations and

would unnecessarily impose restrictions on the Legislature’s authority. For these reasons, taken together with the presumption of the constitutionality of duly enacted laws, this Court should affirm the decision of the Court of Appeals.

**I. The Court of Appeals Correctly Determined That the Parochiaid Amendment Does Not Prohibit Reimbursement of Actual Costs Incurred by Nonpublic Schools in Complying With State-Mandated Health, Safety, and Welfare Measures.**

The Court of Appeals’ October 16, 2018 Order and Opinion correctly determined that Section 152b does not violate Const 1963, art 8, § 2. First, the Parochiaid Amendment does not prohibit *all* aid to nonpublic schools; as previously acknowledged by this Court, the Parochiaid Amendment allows incidental aid, precisely the type authorized under Section 152b. Second, a total ban on public aid to nonpublic schools violates the Free Exercise Clause. Third, the Court of Appeals appropriately relied on *Traverse City* and *Advisory Opinion re 1974 PA 242*.

**A. The Parochiaid Amendment Does Not Prohibit All Aid to Nonpublic Schools.**

As this Court determined in *Traverse City*, “Proposal C above all else prohibits state funding of *purchased educational services* in the nonpublic school where the hiring and control is in the hands of the nonpublic school, otherwise known as ‘parochiaid.’” *Traverse City*, 384 at 435 (emphasis added). However, *incidental* aid to nonpublic schools does not violate Proposal C, and this Court has “refused to adopt a strict no benefits, primary or incidental rule and found no evidence . . . that the people intended such a rule when they adopted this . . . provision of the Constitution.” *Id.* at 413 (internal quotation marks and citations omitted); see also *Advisory Opinion re 1974 PA 242*, 394 Mich at 48. Indeed, if this Court had interpreted Proposal C as a complete ban on aid to nonpublic schools, Proposal C would “violate[] both the free exercise of religion and the equal protection provisions of the United States Constitution,” a result the Court considered “shocking.” *Id.* at 412. The Court specifically recognized: “An interpretation of Proposal C that nonpublic school children are barred from shared time in the public schools and

from auxiliary services and drivers training at public and nonpublic schools is unconstitutional under the United States Constitution.” *Id.* at 436. The Court’s interpretation of Proposal C was therefore carefully crafted as “an alternative constitutional construction . . . which also preserves the purpose of Proposal C of proscribing parochial aid and . . . is consonant with a common understanding of the language used in Proposal C.” *Id.* at 412-413.

The Court’s subsequent decision in *Advisory Opinion re 1974 PA 242* reinforced its interpretation of Proposal C as prohibiting “public funding for primary and essential elements of a private school’s existence,” but permitting services that are merely incidental to a nonpublic school’s operations. 394 Mich at 48-49. “Such programs as shared time and auxiliary services, to be sure, do help a private school compete in today’s harsh economic climate; but, they are not ‘primary’ elements necessary for the school’s survival as an educational institution. These incidental services are useful only to an otherwise viable school and are not the type of services that flout the intent of the electorate expressed through Proposal C.” *Id.* Likewise, the health, safety, and welfare mandates reimbursed under Section 152b are also not primary elements necessary for a private school’s survival as an educational institution—they are additional compliance measures mandated by the state of Michigan that are only incidentally related to private school education. Therefore, Proposal C does not prohibit state funding to reimburse nonpublic schools’ actual costs of compliance with those measures.

**B. A Total Ban on Public Aid to Nonpublic Schools Would Violate the Free Exercise Clause of the First Amendment to the U.S. Constitution.**

In *Traverse City*, this Court recognized that a complete ban on public aid to nonpublic schools would violate the Free Exercise and Equal Protection Clauses under the United States Constitution. 384 Mich at 412, 436. That holding is consistent with the United States Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc v Comer*, 137 S Ct 2012; 198 L Ed

2d 551 (2017), in which the Supreme Court considered the impact of the Free Exercise Clause on government benefits. In *Trinity Lutheran*, the Court examined what the Free Exercise Clause requires of states that authorize generally available benefits to a group of recipients. The Court held that a government agency violated the Free Exercise Clause when it determined that a preschool and daycare center was ineligible under a state constitution to receive a public grant solely due to its religious character. *Id.* According to the Supreme Court, the Free Exercise Clause “protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.” *Id.*, quoting *Church of Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 533; 113 S Ct 2217; 124 L Ed 2d 472 (1993) (internal quotation marks omitted). This echoes the Supreme Court’s “repeated[] confirm[ations] that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.*, quoting *McDaniel v Paty*, 435 US 618, 628; 98 S Ct 1322; 55 L Ed 2d 593 (1978). Because the state agency could not justify its discriminatory policy other than by asserting its preference for separating church and state to avoid religious establishment concerns, the Court held that the policy violated the Free Exercise Clause. *Id.*

Under *Trinity Lutheran*, an interpretation of the Parochial Aid Amendment that prohibits nonpublic schools from receiving incidental aid authorized by the Legislature would similarly violate the Free Exercise Clause because in Michigan, nonpublic schools essentially equate to religious schools. See, e.g., *Traverse City*, 384 Mich at 433-434 (recognizing that although “Proposal C does not deal with religious schools as such but rather with all private schools whether sectarian or non sectarian, . . . the [United States] Supreme Court . . . looks to the ‘impact’ of the classification. . . . [H]ere with 98 percent of the private school students being in church-related

schools[,] the ‘impact’ is nearly total.”). *Traverse City* appropriately construed the Parochiaid Amendment to avoid this unconstitutional result. In short, if the Parochiaid Amendment is interpreted as prohibiting all public benefits to nonpublic schools, then that Amendment itself unconstitutionally violates the Free Exercise Clause.

**C. The Court of Appeals Appropriately Relied on *Traverse City* and *Advisory Opinion re 1974 PA 242*.**

Although *Traverse City* resulted from certified questions to the Supreme Court and *Advisory Opinion re 1974 PA 242* is advisory, both are entitled to great deference because they are well-reasoned and contemporaneous with the adoption of the Parochiaid Amendment, which must be construed according to common understanding and the circumstances surrounding its adoption. See *Kearney v Bd of State Auditors*, 189 Mich 666; 155 NW 510 (1915); *McPherson*, 92 Mich at 383. This Court has previously emphasized the importance of a contemporaneous and long-standing practical constitutional construction:

Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, *or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way*. In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always of necessity be vague and indecisive. *But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction* sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, *where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention*.

*McPherson*, 92 Mich at 383, quoting Cooley, *Constitutional Limitations* (6th ed), pp 67, 81 (emphasis added). *Traverse City* was decided mere months after Proposal C was adopted, and its

interpretation of Proposal C upholding shared time and auxiliary services to nonpublic school students is entitled to deference as a correct interpretation.

## **II. The Court of Appeals' Decision Appropriately Respects the Legislature's Authority and Role Under the Michigan Constitution.**

Not only did the Court of Appeals correctly decide the merits of the question, but its decision also respects the Legislature's role under the Michigan Constitution. Under the state constitution, the Legislature has plenary authority to enact policy into law, subject only to limitations in the federal or state constitutions. When the Legislature exercises this broad legislative power, its legislative acts are clothed with a strong presumption of constitutionality. Therefore, courts will generally interpret the act according to legislative intent as expressed through statutory language and purpose clauses. The Court of Appeals properly deferred to the Legislature's constitutional exercise of discretion to appropriate funds for the public purpose of ensuring the health, safety, and welfare of nonpublic school students, as expressed in the Legislature's purpose clauses. Where possible, courts should respect the role of coordinate branches of state government under the Constitution.

### **A. The Legislature Is Vested With Broad Legislative Power Under the Michigan Constitution.**

Under the Michigan Constitution, "the legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. The Legislature may exercise its plenary legislative authority in any manner that is not constitutionally prohibited. *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 327-328; 685 NW2d 221 (2004), citing *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936); see also *Oakland Co Taxpayers' League v Oakland Co Supervisors*, 355 Mich 305, 323; 94 NW2d 875 (1959) ("[The Michigan Legislature is] the repository of all legislative power subject only to limitations and restrictions imposed by the State or Federal Constitutions."). "Unlike the federal constitution, our Constitution

‘is not a grant of power to the legislature, but is a limitation upon its powers.’” *Taxpayers of Mich*, 471 Mich at 327-328, quoting *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939). Stated differently:

A different rule of construction applies to the Constitution of the United States than to the Constitution of a State. The Federal government is one of delegated powers, and all powers not delegated are reserved to the States or to the people. When the validity of an act of congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to congress. ***The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.***

*Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) (emphasis added); see also *Sears v Cottrell*, 5 Mich 251 (1858). Therefore, if the Legislature’s power has not been constitutionally limited in a particular circumstance, then the Legislature may exercise that power to its full extent.

“‘[L]egislative power’ has been defined as the power to pass rules of law for the government and regulation of people or property, or as the power to enact laws . . . .” Michigan Law & Practice Encyclopedia (2d ed), Constitutional Law, §111, quoting 16 CJS, Constitutional Law, §113 (1984). Legislative power involves the exercise of discretion as to the policy behind and content of statutes. *Id.* The Legislature may exercise its discretion in the selection of constitutionally permissible means in the discharge of an admitted power, and courts must not interfere with that exercise of discretion or substitute their judgment for that of the Legislature.<sup>3</sup>

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<sup>3</sup> The courts have plenary authority to interpret the Constitution and laws of the state, while the legislative branch holds plenary lawmaking power. *In re Court of Appeals*, 372 Mich 227, 228; 125 NW2d 719 (1964) (“In full acknowledgment of our respective constitutionally divided powers, and in full recognition of your sole and exclusive right to the law-making power in the government of our State, we direct ourselves now to our separate duty of constitutional construction as it relates to legislation . . . .”).

*Kull v Mich State Apple Comm*, 296 Mich 262, 267; 296 NW 250 (1941). In other words, courts do “not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. . . . [Courts] will not substitute [their] own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws.” *O’Donnel v State Farm Mutual Auto Ins Co*, 404 Mich 524, 543; 273 NW2d 829 (1979) (internal quotation marks and citations omitted).

Because the Michigan Constitution confers broad power and discretion upon the Legislature, courts must decline the invitation to invalidate a legislative act unless it is clearly unconstitutional. *Id.* In other words, courts must afford legislative acts a strong presumption of constitutionality. *Young*, 267 Mich at 243 (“Statutes are enacted by the Legislature, presumably after consideration, and all presumptions are in favor of the constitutionality of the deliberate acts of a co-ordinate department of government. It is only when the rule established and declared in the Constitution by the people conflicts with the rule of a statute enacted by the people’s public servants, the Legislature, that the latter must give way.”). Even if tension exists between a statute and the Constitution, the Court “has a duty to interpret statutes as being constitutional whenever possible.” *In re Sanders*, 495 Mich 394, 412-413; 852 NW2d 524 (2014). In those cases, the “presumption in favor of constitutionality . . . justifies a construction which is rather against the natural interpretation of the language used, if necessary to sustain the law.” *Osborn v Charlevoix Circuit Judge*, 114 Mich 655, 660; 72 NW 982 (1897).

Therefore, even if the Parochial Amendment and Section 152b appear in tension, this presumption of constitutionality requires this Court to interpret Section 152b in a manner consistent with the Constitution. This Court’s prior decisions in *Traverse City* and *Advisory Opinion re 1974 PA 242* provide a path by interpreting the Parochial Amendment narrowly to

permit incidental aid to nonpublic schools for health, safety, and welfare measures. The Legislature's plenary authority to make laws, with the accompanying judicial presumption of constitutionality, is no less sound in the context of direct appropriations.

Indeed, this power is at its height when the Legislature exercises its discretion over the purse strings—through appropriations of state funds—to address the ever-changing and often pressing policy needs of the state. The Michigan Constitution grants the Legislature this express authority, Const 1963, art 9, § 17, the full breadth of which this Court has acknowledged:

Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system. . . . The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power.

*Civil Serv Comm v Auditor General*, 302 Mich 673, 682-683; 5 NW2d 536 (1942). In this case, the Legislature duly exercised its legislative prerogative to control the purse strings by enacting Section 152b to provide funds for compliance with health, safety, and welfare mandates that ultimately benefit students and only incidentally supports private schools in Michigan. The Legislature's exercise of its power should be afforded great deference.

In fact, this appropriation should be afforded another measure of deference because it was made to protect the educational environment of Michigan's schoolchildren, and the Michigan Constitution specifically directs the Legislature, along with the state government as a whole, to

promote the means of education for all. The Michigan Constitution, borrowing a line from the Northwest Ordinance, described the state’s relationship with education in these terms: “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Const 1963, art 8, § 1. “The reassertion of this doctrine . . . coupled with the fact that legislation in this State upon the subject of education has from the beginning been of the most liberal character, *indicates a settled purpose on the part of the State to provide, foster, and protect educational facilities for all.*” *Dennis v Wrigley*, 175 Mich 621, 625; 141 NW 605 (1913) (emphasis added); see also *Mich Female Seminary v Secretary of State*, 115 Mich 118, 120; 73 NW 131 (1897) (“It has always been the policy of this State, as indicated by the provisions of its Constitution and a long line of legislative enactments, to encourage the cause of education. Liberal provision has been made for the purpose of establishing and sustaining schools.”).

Encouragement of education, pursuant to this constitutional directive, has not been restricted to education in public schools. For example, in *Michigan Female Seminary*, this Court held that certain government benefits such as exemptions from property taxes and franchise fees applied equally to private schools as to other educational institutions.<sup>4</sup> 115 Mich at 120. This holding makes sense, given that Michigan regulates private schools based on the state’s compelling interest in supporting the means of education. Both the United States and Michigan Supreme Courts have held that the “strong state interest in the education of its youth extends to private as

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<sup>4</sup> Notably, in *Traverse City* this Court held that “Proposal C does not change Michigan’s longstanding policy of tax exemption for religious, charitable, and educational institutions.” 384 Mich at 436. The Court found that Proposal C prohibits parents of nonpublic school children from receiving tax exemptions or vouchers for paying nonpublic school tuition, but it held that “a tax exemption granted to a nonpublic school is not unconstitutional, even though it may directly or indirectly ‘aid or maintain’ the nonpublic school.” *Id.* at 429. This demonstrates the Court’s position that incidental aid to nonpublic schools does not violate Proposal C.

well as public schools.” *Sheridan Rd Baptist Church v Dep’t of Ed*, 132 Mich App 1, 14-15; 348 NW2d 263 (1984), aff’d, 426 Mich 462 (1986), citing *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925).

In *Sheridan Road Baptist Church*, this Court held that the state has a compelling interest in the education of its citizens that justifies the imposition of certain regulations on all schools, including private and religious schools, regarding teacher certification requirements. 426 Mich at 478-485. The United States Supreme Court also explicitly recognized states’ interests in private schools as part of their duty to promote good educational outcomes:

[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. . . . [If] the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

*Central Dist No 1 Bd of Ed v Allen*, 392 US 236, 245-247; 88 S Ct 1923; 20 L Ed 2d 1060 (1968). Because the state of Michigan has “a proper interest in the manner in which [private] schools perform their secular educational function,” *id.*, it is appropriate for the Legislature to provide funding for mandatory health, safety, and welfare measures that only incidentally support student learning by ensuring a safe educational environment—without violating Proposal C’s prohibition against paying for private education itself.

Examples of Michigan’s regulation of private schools to ensure general health, welfare, and safety abound. Under Public Act 302 of 1921, the Private, Denominational, and Parochial Schools Act, MCL 388.551 *et seq.* (the “Private Schools Act”), the Superintendent of Public Instruction is responsible for supervising all private, denominational, and parochial schools in Michigan. MCL 388.551. The intent of the Private Schools Act is to ensure that “the sanitary

conditions[,] the courses of study[,] and the qualifications of the teachers” in private schools are of the same standard as those required in public schools in Michigan. *Id.* This Court upheld the Private Schools Act’s teacher certification requirement as constitutional in *Sheridan Road Baptist Church*, 426 Mich at 486. Private schools are also subject to inspection by the Department of Education and reporting requirements under the Private Schools Act. MCL 388.555. This Court has recognized that nonpublic schools are “subject to state inspection and control over most nonsectarian aspects of their existence.” *Advisory Opinion re Constitutionality of PA 1970, No. 100*, 384 Mich 82, 100; 180 NW2d 265 (1970).

In all, the state regulates nonpublic schools’ teacher certification, building construction and safety, sanitary conditions, fire drills and equipment, instruction of students with disabilities, textbooks, language of instruction, attendance and immunization records, and curriculum. *Id.* at 100-101. No one could reasonably argue that these regulations are invalid or do not support the public health, safety, and welfare. In the same way, appropriations to support health, safety, and welfare measures are valid public purposes that encourage “schools and the means of education” that are “necessary to good government and the happiness of mankind.” Const 1963, art 8, § 1.

As such, the Legislature routinely appropriates funds to nonpublic schools for public health, safety, and welfare reasons. For example, 2014 PA 252 appropriated \$4,550,000 to the Department of State Police for local public safety initiatives, with 80% to be “disbursed in the form of competitive grants to K-12 schools, without bias toward public or private educational institutions” to “support the purchase and implementation of safety-related acquisitions such as enhanced 9-1-1 abilities, malicious call tracing, physical deterrents, real-time location systems, emergency alert software, other technologies, equipment, school building security enhancements, or employee training.” More than \$630,000 from that amount was granted to 15 private schools.

2016 PA 268 appropriated \$2,000,000 to the Department of State Police for competitive school safety grants “to public or nonpublic schools, school districts, and intermediate school districts to purchase technology and equipment and to conduct assessments to improve the safety and security of school buildings, students, and staff.” 2016 PA 268, art XVI, § 901(1). From this amount, approximately \$500,000 was granted to 24 private schools. As another recent example, 2018 PA 207 appropriated \$25,000,000 to the Department of State Police for competitive school safety grants, and public and nonpublic schools were eligible recipients. Additionally, for fiscal years 2017-2018 and 2018-2019, nonpublic schools were eligible to receive grants in an amount not to exceed \$300,000 to “provide pupils in grades K-12 with expanded opportunities to improve mathematics, science, and technology skills by participating in events hosted by a science and technology development program known as FIRST (for inspiration and recognition of science and technology) Robotics . . . [or] other competitive robotics programs.” 2018 PA 265, § 99h; 2017 PA 108, § 99h.<sup>5</sup>

These appropriations, like others, have gone unchallenged for good reason—the aid to private schools does not violate the Parochial Aid Amendment because it is incidental to private school education and the core instructional curriculum. The appropriations have valid public purposes because they promote health, safety, welfare within the educational environment. The appropriations under Section 152b are no different in terms of their purposes or impact on nonpublic schools.

This Court—recognizing the primacy of legislative discretion—has already determined that Proposal C permits incidental public aid to nonpublic schools. *Traverse City*, 384 Mich at

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<sup>5</sup> In addition, statute requires state-provided transportation for public and nonpublic school students. MCL 380.1321, 1322. To the best of the Legislators’ knowledge, no one challenges the wisdom of providing transportation for public and nonpublic students alike.

435-436; *Advisory Opinion re 1974 PA 242*, 394 Mich at 48-49. It came to this deliberate conclusion after careful consideration of alternate interpretations at a time when the common understanding of the people could best be discerned. See generally *Traverse City*, 384 Mich 390. Under the doctrine of stare decisis, the Court must follow its own precedent absent a compelling reason to depart from it. *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014), quoting *People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998) (“[P]rinciples of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed.”). To reverse the Court of Appeals’ decision in this case, this Court would have to overrule *Traverse City* and *Advisory Opinion re 1974 PA 242*, because those cases explicitly uphold incidental aid to nonpublic schools for health, safety, and welfare measures like that authorized by Section 152b.

However, “[b]efore this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.” *Tanner*, 496 Mich at 250, quoting *Graves*, 458 Mich at 480-481. Any argument to overrule *Traverse City* fails on both points.

First, not only was *Traverse City* correctly decided, but the Court’s interpretation of Proposal C in that case was *required* under the Equal Protection and Free Exercise Clauses. *Traverse City*, 384 Mich at 412, 436. If the Court wished to overrule *Traverse City* and instead interpret Proposal C as a complete ban on public aid to nonpublic schools, such decision would run afoul of the United States Constitution. *Id.*; see also *Trinity Lutheran*, 137 S Ct at 2019-2021. Accordingly, the Parochial Aid Amendment cannot be interpreted other than as a narrow prohibition on primary aid to nonpublic schools for educational services. Therefore, the Court should respect its prior decisions and uphold the constitutionality of Section 152b.

Second, *Traverse City* should not be overruled because *more* “injury would result from overruling than from following it.” See *Tanner*, 496 Mich at 250, quoting *Graves*, 458 Mich at 480-481. Disregarding the constitutional issues at hand, if this Court were to hold that no funds may be appropriated to nonpublic schools (i.e., a complete ban on public aid), a variety of public resources and programming currently available to nonpublic school students would be severely disrupted or eliminated. Shared time and auxiliary services, which incidentally aid nonpublic schools, would no longer be permitted, and children whose parents send them to nonpublic schools—for religious or other reasons—would be negatively impacted. Public schools have long provided shared time, auxiliary services, and other public benefits to nonpublic schools students, and the state also has awarded school safety and robotics grants directly to nonpublic schools. If these types of benefits were prohibited under Proposal C, then nonpublic school students’ health, safety, and welfare would be diminished. The Legislature appropriately exercised its legislative discretion for the express “public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools,” MCL 388.1752b(7), and the judiciary should not second-guess the wisdom of its policy preferences. Because injury would result from overruling *Traverse City*, it should be upheld.

**B. The Court Should Accord Great Deference to Legislative Intent as Expressed in the Purpose Clause.**

It is axiomatic that when the Supreme Court interprets a statute, its chief “goal is to give effect to the Legislature’s intent, focusing first on the statute’s plain language.” *People v Pinkney*, 501 Mich 259, 272 n 27; 912 NW2d 535 (2018) (quotation marks and citation omitted). Enacted statements of legislative purpose are statutory language and, therefore, are clearly relevant to questions of legislative intent. Indeed, there is no better bellwether of legislative intent than a statutory section explicitly stating the purposes of the Legislature in enacting the statute. Purpose

clauses guide the courts by clarifying the motivations, aims, and objectives and resolving any potential ambiguities.

Of course, a legislative label is not dispositive; the Court must still do statutory interpretation. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 35 (“While such provisions as a preamble or purpose clause can clarify an ambiguous text, they cannot expand it beyond its permissible meaning. If they could, they would be the purposivists’ playground.”).<sup>6</sup> But statements of legislative intent—and especially purpose clauses like those in MCL 388.1752b—must play a leading role in statutory interpretation. That is why this Court has relied on purpose clauses in the past to help interpret ambiguous statutes and discern legislative intent. See, e.g., *Bukowski v City of Detroit*, 478 Mich 268, 286; 732 NW2d 75 (2007) (using purpose clause in statutory interpretation); *Dep’t of Natural Resources v Hermes*, 101 Mich App 517, 527; 301 NW2d 307 (1980) (basing interpretation of a statute largely on purpose clause); *Local 1518, Council No 55, American Federation of State, Co & Muni Employees, AFL-CIO v St Clair Co Sheriff*, 407 Mich 1, 15 n 12; 281 NW2d 313 (1979) (approving of use of purpose clause to interpret statute).

This parallels the courts’ use of other prefatory materials—such as statutory preambles—to divine legislative intent. See *Brown Plumbing & Heating, Inc v Homeowner Constr Lien Recovery Fund*, 442 Mich 179, 187; 500 NW2d 733 (1992); *Malcolm v East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991) (holding that preambles are not dispositive of legislative intent but should be used as a tool to discern legislative intent); *Mich Council 55 v McKervey*, 62 Mich App 689, 693; 233 NW2d 836 (1975) (using preamble to discern legislative intent). Likewise,

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<sup>6</sup> Notably, Justice Scalia and Garner, like most scholars, considered purpose clauses and preambles two sides of the same prefatory-materials coin, treating them as conceptually interchangeable.

many scholars believe a statute must be understood *primarily* in light of its “formally enacted statement of purpose.” Hart Jr & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (St Paul: Foundation Press, Eskridge Jr & Frickey ed, 1994), p 1377. At the very least, most agree that purpose clauses must play a central role in statutory interpretation. See Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1st ed, 1833) § 459 (holding that preambles and purpose clauses are a “key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute”); Singer, *Sutherland Statutory Construction* (St Paul: Thomson/West, 5th ed, 1992), § 47.04 (same).

Federal courts have similarly relied on purpose clauses and preambles in their statutory interpretations. See, e.g., *Fidelity Fed S&L Ass’n v de la Cuesta*, 458 US 141, 158, 158 n 13; 102 S Ct 3014; 73 L Ed 2d 664 (1982) (using preamble to remove any ambiguity in the statute at issue); *Udall v Tallman*, 380 US 1, 16; 85 S Ct 792; 13 L Ed 2d 616 (1965) (stating that when considering prefatory materials, “deference is . . . clearly in order”); *United States v Spears*, 697 F3d 592, 597 (CA 7, 2012) (holding that courts should use prefatory material to resolve ambiguities).

Purpose clauses are also extremely helpful because they fill the role of legislative history. Of course, many judges find legislative history informative and, depending on their judicial philosophy, useful in deciding a particular case. But purpose clauses double as legislative history and enacted law. In using legislative history, lawyers and judges examine committee reports, floor statements, and similar materials to discern *why* the law was passed—i.e., the trouble prompting the law and the law’s aims. Purpose clauses provide the same answers, yet are also enacted law.<sup>7</sup>

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<sup>7</sup> For any textualist who wishes their judicial philosophy allowed consideration of contextualizing legislative history, a purpose clause provides a satisfying alternative. Textualist judges can, without reservation, rely heavily on a purpose clause because it is enacted law.

This Court has recognized the difference between legislative history and purpose clauses. *Bukowski*, 478 Mich at 286. And the late Justice Scalia did the same. *Samantar v Yousuf*, 560 US 305, 329; 130 S Ct 2278; 176 L Ed 2d 1047 (2010) (SCALIA, J., concurring) (citations omitted) (“Third, and finally, the Court points to legislative history to establish the purpose of the statute. This is particularly puzzling, because the enacted statutory text itself includes findings and a declaration of purpose—the very same purpose (surprise!) that the Court finds evidenced in the legislative history.”).

Finally, examining the purpose clause is part of the Whole Act canon of statutory construction. The United States Supreme Court has stated that the ultimate goal of that canon is to “give effect, if possible, to every clause and word of a statute.” *Montclair v Ramsdell*, 107 US 147, 152; 2 S Ct 391; 27 L Ed 431 (1883). The Whole Act canon is crucial because “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.” *United Savings Ass’n of Tex v Timbers of Inwood Forest Assoc, Ltd*, 484 US 365, 371; 108 S Ct 626; 98 L Ed 2d 740 (1988). Treating a purpose clause as an integral piece of the overall statutory analysis gives effect to every clause and word of the statute. Indeed, applying the Whole Act canon goes a long way to resolving the statutory interpretation questions.

In this case, the Court should pay special attention to the purpose clauses in Section 152b; to the extent the appropriation is ambiguous, the Court should use those purpose clauses to clarify the statute. Subsections (7) and (8) of Section 152b contain its purpose clauses:

(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.

MCL 388.1752b(7), (8). Section 152b's purpose clauses explicitly state that the funds appropriated are "incidental to the operation of a nonpublic school"—a purpose that, under this Court's precedent, ensures the appropriation does not run afoul of Proposal C. MCL 388.1752b(7). By clarifying that the appropriations are "incidental," the Legislature communicated that it did not consider these appropriations to violate Proposal C and intended any construction of the statute to reflect that intent. Even more importantly, the language demonstrates that the Legislature specifically considered the questions now before this Court and intended that the appropriation would not transgress Proposal C. To the extent this Court can interpret Section 152b as consistent with the Parochial Amendment, it should do so because such interpretation best effectuates the Legislature's unambiguous intent. In sum, the appropriations at issue are clearly incidental to school operations, but even if that question is ambiguous, the purpose clauses clarify that the Legislature intended that the reimbursements be authorized to the extent they are not integral to nonpublic schools' operations.

**C. Section 152b Serves a Valid Public Purpose and Is Not Subject to Approval by a Supermajority Vote of the Legislature.**

Although the Court did not grant leave to appeal the question of whether 2016 PA 249 violates Const 1963, art 4, § 30, Plaintiffs have consistently raised that issue in the proceedings below, and the Court of Appeals remanded the case in part for consideration of that question. Moreover, this issue is of particular interest to the Legislators, is in the same vein as the other issues raised in this brief, and is an important ancillary consideration for the Court. It therefore deserves a thorough analysis.

Const 1963, art 4, § 30, states: “The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes.” Michigan courts have articulated three elements for purposes of analyzing whether an appropriation requires supermajority approval under this provision: (1) “whether the act is an ‘appropriation bill’”; (2) “whether the act contains an appropriation of public money” or “public property”; and (3) “whether the act contains an appropriation of public property for [local or] private purposes.” *Grebner v State*, 277 Mich App 220, 228; 744 NW2d 203 (2007) (WHITBECK, C.J., dissenting),<sup>8</sup> rev’d 480 Mich 939 (2007). Only the third element would be in dispute here.

This Court has defined a public (as opposed to private) purpose as having “for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within” a designated area. *Hays v Kalamazoo*, 316 Mich 443, 454; 25 NW2d 787 (1947) (quotation marks and citation omitted). The plaintiff carries the burden to show a violation of § 30, a burden these Plaintiffs cannot overcome. *Highland Recreation Defense Foundation v Natural Resources Comm*, 180 Mich App 324, 329; 446 NW2d 895 (1989). The relevant case law reveals three principles crucial to this analysis.

First, the Legislature has significant discretion in determining what are public and private purposes. As this Court summarized just a few years after the 1963 Constitution was ratified, “determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. *Such determinations should*

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<sup>8</sup> Although this is language from a dissenting Court of Appeals opinion, on appeal, the Michigan Supreme Court reversed the majority holding and adopted the dissent’s reasoning. *Grebner v State*, 480 Mich 939, 940; 744 NW2d 123 (2007) (holding that it “REVERSE[D] the judgment of the Court of Appeals, generally for the reasons stated in the Court of Appeals dissenting opinion”). It is, therefore, appropriate to use the dissent’s specific language here.

be made by the elected representatives of the people.” *Gregory Marina, Inc v City of Detroit*, 378 Mich 364, 394; 144 NW2d 503 (1966) (emphasis added). Put differently, the public-private purpose distinction should “not be narrowly construed by the courts” because “the determination of what constitutes a public purpose for which an appropriation of public money may be made is primarily the responsibility of the Legislature.” *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 495-496; 242 NW2d 3 (1976) (“*Advisory Opinion on 1975 PA 227*”). See also *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962) (holding that considerable deference is due the Legislature’s determination of whether an appropriation of funds is public or private); *Grebner*, 277 Mich App at 248 (holding that “determinations of public purpose are primarily the obligation of the Legislature, and the courts should accord considerable deference to those determinations”). Rather, the terms “public” and “private” should be construed “reasonably” so as to afford the Legislature maximum flexibility in exercising its lawmaking power. *Grebner*, 480 Mich at 941.

Section 30’s text provides the clearest evidence of its inherently discretionary nature. It allows the Legislature to sometimes appropriate money for local or private causes, but only with a two-thirds majority vote. Within that authority, though, is the implicit authority to decide *whether* such an appropriation qualifies as for a local or private purpose; after all, to determine whether to require a two-thirds vote, the Legislature must first decide whether an appropriation is public or private. Clearly no other body could make that decision for the Legislature, so the power must rest with it. In sum, § 30 is an intentional, significant grant of discretion, and courts should respect that discretion. See 37 Am Jur, *Municipal Corporations*, § 120, p 734 (explaining that because the Legislature has discretion to appropriate funds for public or private purposes, “[t]he courts as a

rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances”).<sup>9</sup>

Second, the test to determine whether an appropriation is for a public or private purpose is whether society as a whole benefits from the appropriation. *Advisory Opinion on 1975 PA 227*, 396 Mich at 496 (“The question is whether *society at large* has an interest in having those individuals benefited.” (emphasis added)), citing *Gaylord v Gaylord City Clerk*, 378 Mich 273, 299-300; 144 NW2d 460 (1966). This dovetails nicely with the first principle; as the Michigan Supreme Court noted, because of the Legislature’s “broad powers” to “determine public purpose,” so long as there is a “clear relationship between the goals of” the statute at issue “and the public welfare,” the statute at issue does not violate § 30. *Id.* at 499. Accordingly, “that certain individuals benefit from the appropriation does not necessarily imply that the appropriation is lacking a public purpose.” *Id.* Even when a private individual receives appropriation money directly, the question is still whether society as a whole benefits. *Grebner*, 277 Mich App at 248 (“[E]ven though private individuals may benefit from a given appropriation—whether it is money, as was the case in *Advisory Opinion*, or property, as is the case here—the basic question is whether society at large has an interest in having those individuals benefited.”); *Hays*, 316 Mich at 454 (“The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right

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<sup>9</sup> The history of § 30 shows that this grant of discretion was no accident. Michigan first adopted this provision in its 1850 Constitution. That provision read functionally the same as § 30 does now: “The assent of two-thirds of the members elected to each house of the Legislature shall be requisite to every bill appropriating the public money or property for local or private purposes.” Const 1850, art 4, § 45. Before adopting that version, the Constitutional Convention considered and rejected another version of this provision that would have functionally stripped all discretion from the Legislature. See Swegles, Jr., *Journal of the Constitutional Convention of the State of Michigan* (Lansing: R.W. Ingals, 1850), 70 (noting that a rejected alternative § 45 read, “The Legislature shall have no power to appropriate the public moneys or property for local or private purposes.”). In other words, the Convention explicitly chose to give the Legislature the authority to decide when an appropriation was public or private.

of the public to receive and enjoy the benefit of the use determines whether the use is public or private.” (citation and quotation marks omitted)).

This makes sense: Nearly every law benefits the citizenry at an individual level in some fashion. For example, an income tax cut is not a private or local act, yet the benefits of the act would be realized at an individual level. Analogously, money appropriated to repair or replace roads will eventually be expended in specific, local communities. But no one would decry that appropriation as “local” or “private” requiring supermajority approval in the Legislature—this Court certainly would not under long-standing precedent.

For example, the Court in *Gaylord* held that a legislative financing program that allowed the issuance of bonds to finance construction of a private factory had a public purpose. In its decision, the Court listed several factors to use in determining what constitutes public purpose: whether the benefit is equally available; whether a large number of the public need the service; whether the benefit is directly or only tangentially related to the public welfare; whether the government should be providing the service rather than private enterprise; whether, to the extent it benefits individual persons, society as a whole is interested in those individuals benefits. 378 Mich at 299-300, citing *Allydonn Realty Corp v Holyoke Housing Auth*, 304 Mass 288, 292; 23 NE2d 665 (1939). The Court then explained: “It can scarcely be questioned that the benefits resulting from a plywood plant . . . would be general to the public in the Gaylord area, thereby meeting the test of public use . . . . The legislature, in enacting Act No 62, has concluded that the public health and welfare will be served.” *Id.* at 300-301.<sup>10</sup> Therefore, even if the appropriation benefits a single or very few persons in a geographically small area, so long as the Legislature has

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<sup>10</sup> *Gaylord* admittedly considered different constitutional provisions than § 30, but those other provisions dealt with the same public/private use distinction at issue here, and other Michigan cases have relied on *Gaylord* in interpreting § 30.

determined that the public health and welfare will be served, and there is no reason to doubt that determination, the Court will not strike down such an appropriation under § 30.

Third, fostering a safe educational environment for students—whether enrolled in public or private schools—advances the public welfare and undeniably constitutes a public purpose. The Supreme Court in *Brown v Bd of Ed of Topeka*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954), famously said that “education is perhaps the most important function of state and local governments.” See also *Sheridan Rd Baptist Church*, 426 Mich at 478 (“There is no doubt that a state has a compelling interest in the education of its citizens.”), quoting *Pierce*, 268 US at 534; *SS ex rel LM v State*, 307 Mich App 685, 714; 862 NW2d 246 (2014) (SHAPIRO, J., dissenting) (quoting *Brown*, 347 US at 493).

Indeed, our own constitution states: “Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and *the means of education shall forever be encouraged.*” Const 1963, art 8, § 1 (emphasis added). That provision “evidences a settled state purpose of providing, fostering, and protecting educational facilities *for all.*” *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517, 526; 365 NW2d 151 (1984) (emphasis added), citing *Dennis v Wrigley*, 175 Mich 621, 625; 141 NW 605 (1913). See also *Sheridan Rd Baptist Church*, 426 Mich at 480 (“It is clear that Michigan’s interest in education is long-standing and of the highest importance.”); *Mich Female Seminary v Secretary of State*, 115 Mich 118, 120; 73 NW 131 (1897) (“It has always been the policy of this State, as indicated by the provisions of its Constitution and a long line of legislative enactments, to encourage the cause of education.”). And one of the most effective ways to encourage education for all students is to provide the safe environment necessary to effective education.

Crucially, public schools are not the only educational institutions that promote the general welfare and benefit society at large. The Supreme Court, in discussing the societal benefits and need for education, has held that a state may “satisfy its interest in secular education through the instrument of private schools.” *Central Dist*, 392 US at 245-247. In other words, nonpublic schools advance the public good of education. Accord Const 1963, art 8, § 1 (encouraging all education, public and nonpublic). And, by extension, so does building and maintaining a safe, healthy educational environment.

Keeping these three principles in mind, several cases already cited help illustrate the difference between public and private appropriations. In *Advisory Opinion on 1975 PA 227*, 396 Mich at 495, this Court considered whether allowing for the public financing of gubernatorial elections violated § 30 as an appropriation of public money for a private purpose. Notwithstanding the fact that all of the public funds would flow to just a few gubernatorial candidates, the Court held that 1975 PA 227 did not violate § 30. *Id.* at 497. The Court recognized that it was well within the Legislature’s powers to determine that public financing would lessen gubernatorial candidate support from special-interest groups, encourage greater public participation in elections, and “promote the dissemination of political ideas to the electorate.” *Id.*

In *Highland Recreation*, 180 Mich App at 326, the state issued an exclusive permit to a private organization to use the Highland State Recreation Area for a convention. The plaintiff, a local interest group, sued under § 30, arguing that the state should not have allowed the private organization “exclusive use of the facilities.” *Id.* at 328-329. The court found this argument unpersuasive. *Id.* at 329. It reasoned that temporarily granting exclusive use was a “reasonable” use of state resources that “would be to the benefit of everyone seeking to use the park.” *Id.*

Indeed, *Gaylord* stated that the Michigan courts had “steadily broadened the concept of public purpose” and provided the following examples:

In *Miller v. Michigan State Apple Commission*, 296 Mich 248, a State tax on apples, which was used to promote sale of Michigan apples, was upheld because stimulation of the State’s apple industry would be beneficially reflected throughout the State. In *Hays v. City of Kalamazoo*, 316 Mich 443 (169 ALR 1218), the expenditure of general funds of a city for membership in the Michigan Municipal League, a private nonprofit corporation established to advise and lobby for cities and villages in the State, was upheld as being for a public purpose. In *Sommers v. City of Flint*, *supra*, a transfer of city property to the Federal government, without consideration, for use as an armory was upheld, based upon mutuality of obligation between the United States and the city in the field of national defense.

378 Mich at 299.

Section 152b does not appropriate funds for a private or local purpose, but rather a public purpose. Again, the statute merely provides state money to reimburse nonpublic schools for the actual costs of state-mandated health, safety, and welfare requirements incidental to the operation of the schools, e.g., costs associated with criminal background checks, purchasing EpiPens, and performing emergency drills, among other mandates. Applying the factors articulated in *Gaylord* shows that these sorts of costs are incontrovertibly for the public good. First, the benefits are equally available to all nonpublic schools. Second, a large number of the public need the service; there is no child in Michigan who does not need a safe educational environment. Third, the physical health and safety of schoolchildren is unarguably and directly related to the public welfare. Fourth, education and the safety of those being educated are core governmental concerns that the government has a right and duty to provide. And fifth, society has an interest in ensuring that the private schools provide a safe learning environment for students. Section 152b has all of the markers of being for a public purpose.

Further, that Section 152b may directly benefit some private persons directly does not matter. As explained in *Advisory Opinion on 1975 PA 227* (where public funding went to just a few gubernatorial candidates) and *Highland* (where just one organization was given access to state property), although the resources themselves went to a few parties, society at large benefited. The question is not whether the funds go to a few, but whether the benefits are enjoyed by society as a whole. Here, the answer is a resounding yes. Society has an interest in the health and safety of all children in all schools, regardless of their character as public or nonpublic. As in *Gaylord* where the state appropriated funds to build a factory, funds appropriated under Section 152b will incidentally benefit certain nonpublic schools located in specific areas, but in both cases society as a whole benefits, and the appropriation therefore constitutes a public purpose.

The Legislature has already determined that the funds at issue “are for purposes related to education” 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” public safety costs. MCL 388.1752b(7). The promotion of a safe educational environment constitutes a public good, even if involving nonpublic schools; and ensuring the general health, safety, and welfare is the very definition of a public purpose. This Court should have no reason to doubt that Section 152b will serve those legitimate ends. The language of subsection (7) expressly places Section 152b outside the bounds of § 30, and the Court owes deference to this legislative policy determination. No supermajority approval is required for an appropriation such as this.

### **CONCLUSION**

For the reasons examined above, Amici respectfully request that this Court affirm the judgment of the Court of Appeals and hold that Section 152b does not violate the Parochiaid Amendment, Const 1963, art 8, § 2.

Dated: December 23, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of December, 2019, I caused true and correct copies of the foregoing document to be served via electronic mail upon all counsel of record, by operation of the Court's ECF system.

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