

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 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,

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

Supreme Court No. 158751

Court of Appeals No. 343801

Court of Claims No. 17-000068-MB

DEFENDANTS STATE OF MICHIGAN, GOVERNOR RICK SNYDER, MICHIGAN DEPARTMENT OF EDUCATION, AND INTERIM SUPERINTENDENT OF PUBLIC INSTRUCTION, SHEILA ALLES'S BRIEF IN OPPOSITION TO PLAINTIFFS' COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP), ET AL'S APPLICATION FOR LEAVE TO APPEAL

_____ /

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BRIEF IN OPPOSITION TO
PLAINTIFFS' COUNCIL OF ORGANIZATIONS AND OTHERS FOR
EDUCATION ABOUT PAROCHIAID (CAP), *ET AL'S*
APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF JURISDICTION

On November 27, 2018, Plaintiffs sought leave to appeal an October 16, 2018 published decision of the Michigan Court of Appeals. See *Council of Orgs v State*, 2018 Mich App LEXIS 3330 (Docket No. 343801). Therefore, this Court has jurisdiction to exercise its discretion and review this case in accordance with Michigan law. MCL 600.215(3); MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals remanded this case to the Court of Claims to decide an unresolved constitutional question and conduct fact-intensive analysis to decide the constitutional validity of the statute's anticipated, but unrealized, application. The Court of Claims has not made any decisions yet on remand. Should this Court review this case at this stage?

Appellants' answer: Yes.

Appellees' answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

2. Under this Court's precedent, the Michigan Constitution does not prohibit the State from taking measures that protect the health, safety, and welfare of nonpublic schoolchildren if they are only incidentally related to instruction. The statute at issue, MCL 388.1752b, partially reimburses nonpublic schools for non-instructional costs they incur to comply with state mandates that ensure the health, safety, and welfare of their schoolchildren. Is the statute facially constitutional?

Appellants' answer: No.

Appellees' answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

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

Despite its age, this case is far from mature. At its core, this case is about the viability of MCL 388.1752b, which seeks to reimburse to nonpublic schools the cost of complying with certain non-instructional health, safety, and welfare mandates that are only incidentally related to running a school. The statute defrays the expenses that other state acts impose.

The Court of Appeals did not declare outright that MCL 388.1752b passed constitutional muster. It analyzed only three of the mandates (the purchase of epi pens, the disposal of mercury, and the running of background checks) and left the validity of the remaining mandates, as well as an unresolved constitutional issue, for the Court of Claims to decide on remand. Arguably, the Court of Appeals did not go far enough to validate the statute, because all 38 reimbursable mandates fit well within this Court's precedent allowing the State to provide nonpublic schools with benefits that "have only an incidental relation to the instruction of private school children." *Traverse City Sch Dist v AG*, 384 Mich 390, 419 (1971).

Even so, Plaintiffs do not challenge the Court of Appeals' analysis of the three reviewed mandates. Instead, they argue that the statute, if not entirely stricken, *may* result in payments for essential nonpublic-school functions, over which the State could not exercise control. Ironically, the case was remanded to the Court of Claims to address which, if any, of the *unreviewed* mandates warrant exclusion or limitation under these same objections. This Court should deny Plaintiffs' application and allow the Court of Claims to resolve these issues on remand.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The original statute, 2016 PA 249

On June 27, 2016, Governor Rick Snyder signed into law 2016 PA 249. (See Exh A, codified as MCL 388.1752b and since amended by 2017 PA 108, attached as Exh B.)

Public Act 249 was the 2016 rendition of the School Aid Act, allocating state funding for school-related purposes for the 2016–2017 fiscal year. In § 152a of PA 249 **Error! Bookmark not defined.**, the Legislature appropriated over \$38 million to cover public school districts’ costs of state-mandated data collection, maintenance, and reporting, as required by the Headlee Amendment case, *Adair v State*, 486 Mich 468 (2010). (Exh A, p 2.)

In the next section, 152b of 2016 PA 249, 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. (Exh A, pp 2–3.)

Section 152b(1) of PA 249 specified which costs could be recouped: those costs “incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014.” *Id.* at p 2.

Section 152b(4) limited reimbursable funds to “the nonpublic school’s actual cost to comply” with the covered mandates. *Id.* Section 152b(7) further clarified that the appropriated funds “are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools.” *Id.* at p 2.

The referenced November 25, 2014 mandate report identified six categories of 60 different mandates that the Legislature had imposed on nonpublic schools: (1) student/staff safety, (2) building safety, (3) student health, (4) school operations, (5) accountability, and (6) educational requirements. (Mandate Report, Exh C, pp 3–4.)

As these categories suggest, many of the reported mandates (22 of the 60 listed) directly relate to the safety of students and teachers. For example, in the category of student/staff safety, nonpublic schools in Michigan must:

- conduct fire and tornado drills, MCL 29.19;
- ensure their school buses meet or exceed federal motor vehicle safety standards, MCL 257.1810(1);
- conduct criminal history checks before hiring new employees, MCL 380.1230(1);
- satisfy safety standards for playground equipment, MCL 408.684; and
- provide material safety data sheets for hazardous chemicals to employees who ask for them, MCL 29.5p(2).

Similarly, in the building-safety category, nonpublic schools must meet:

- federal standards relating to asbestos, MCL 388.863; and
- construction standards such as using fire-resisting materials, MCL 388.851.

In addition to the 22 safety mandates, 6 of the identified mandates directly relate to student health. For example, nonpublic schools must:

- verify that children have been immunized before allowing them to attend the school, MCL 333.9208(2);
- report to the Michigan Department of Health & Human Services on the immunization status of each student, MCL 380.1177(3);
- notify a student’s teachers if aware that the student has an inhaler or epinephrine auto-injector, MCL 380.1179(5); and
- report on the vision of each child entering kindergarten, MCL 380.1177(3).

Combined, these health and safety mandates account for 28 of the 60 mandates identified in the report. (Mandate Report, Exh C, pp 3–4.)

Another 14 of the identified mandates impose “school operations” requirements related to how schools perform certain administrative tasks, but those administrative tasks also relate to student health and safety. For example, nonpublic schools must keep student work permits on file, MCL 409.104(1), and must employ a food safety manager, Mich Admin Code, R 289.570.2; MCL 289.1107(p); MCL 289.2129. As for the four mandates in the “accountability” category, they include student safety and welfare requirements too. For example, nonpublic schools are required to meet safety and privacy requirements for student information, see MCL 380.1137a, and report to the local public-school superintendent with enrollment information, MCL 380.1578.

The report's remaining mandates (14 of the 60) relate to non-instructional educational requirements involving student welfare. For example, nonpublic schools must:

- compel attendance, MCL 380.1561;
- meet teacher certification standards, MCL 388.553 & MCL 380.1233;
- inform students about the postsecondary enrollment options act, notify qualifying students of their eligibility under the act, and provide counseling to eligible students about the act, MCL 388.514, .519, & .520; and
- take similar steps under the career and technical preparation act, MCL 388.1904, .1909, & .1910.

Nonpublic schools must also notify their school district if they will need auxiliary services, such as health exams or crossing guard services. Mich Admin Code, R 340.293.

Of the report's 14 identified educational requirements, only one relates to the content of a class. Specifically, MCL 380.1166 requires nonpublic schools to give regular courses of instruction "in the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions." That statute also requires high schools to require "a 1-semester course of study of 5 periods per week in civics which shall include the form and functions of the federal, state, and local governments and shall stress the rights and responsibilities of citizens." *Id.*

The original § 152b(2) also set forth a reimbursement process that directed the Michigan Department of Education (MDE) to create a form for nonpublic schools to use when seeking reimbursement. (Exh A, p 2.) The statute also requires MDE to determine the amount of reimbursement 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 [MDE], which shall include a detailed itemization of cost.” *Id.* at p 3. The statute further limits reimbursement to the hourly rate of the lowest-paid employee able to perform the work: “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.” *Id.* For labor calculations, the statute required rounding down time spent to the nearest quarter hour, disallowing costs of health and fringe benefits, disallowing overtime, and expressing fees in an hour/wage format. *Id.*

The reimbursement form developed by MDE in 2017 includes one mandate (regarding permits in emergency situations) that was not listed on the mandate report, but the 2017 form does not include twenty-two other mandates listed on the mandate report, including ten “school operations” mandates, four mandates regarding “education requirements,” two “accounting” mandates, and six safety requirements. (Compare Exh C, p 2.), Mandate Report with (Exh D, 2017 Reimbursement Form.) Notably, the 2017 form’s remaining “educational” mandates relate to noncertificated-teacher mentor restrictions and permits, including

emergency permits; teacher, administrator, and counselor certification; compulsory school attendance; postsecondary enrollment options and information; career and technical prep programs, information, records, and counseling; and notification of auxiliary-service needs. (Exh D, 2017 Reimbursement Form.) The form does not include the mandate regarding the class on constitutional law and government. *Id.*

By limiting reimbursement to the 39 remaining mandates, the 2017 form complied with the statute's directive by eliminating the mandates that did not fit within the Legislature's express intent, in § 152b(7), to limit reimbursement to costs "related to education" but "noninstructional in character." Under § 152b(7), the allocated funds "are intended for the public purpose of ensuring the health, safety, and welfare of children in nonpublic schools."

Procedural Developments

Public Act 249, took effect on October 1, 2016, and on October 5, 2016, the Michigan Supreme Court declined the Governor's request to issue an advisory opinion on its constitutionality, leaving the statute intact and fully effective. *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875 (2016).

Plaintiffs filed a lawsuit in the Court of Claims on March 21, 2017, nearly six months after the Supreme Court's original decision and almost nine months after the statute's approval. They did not verify their complaint.

State Defendants agreed in late March 2017 that they would not distribute funds under the statute until at least July 1, 2017. (See Exh E [The statute

required collection of reimbursement applications through June, anyway.]) The parties then filed cross motions for summary disposition, but a set of proposed intervenors were denied intervention, so the Court of Appeals stayed the Court of Claims case on May 22, 2017, pending resolution of the proposed intervenors' appeal. (See Exh F, Court of Appeals Stay Order in Docket Nos. 338258; 338259.) The Court of Appeals' stay order specifically allowed Plaintiffs to seek an extension of the stipulated distribution date of July 1, 2017, but Plaintiffs did not take immediate action. *Id.*

On June 19, 2017, Plaintiffs requested, and were granted, emergency relief from the Court of Appeals' stay order so they could "make a filing(s) in the Court of Claims in accordance with the verification requirements of MCL 600.6431." *Council of Organizations & Others for Ed v State of Michigan*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2017 (Docket Nos. 338258; 338259). Without seeking leave from the Court of Claims, Plaintiffs filed a verified complaint on June 23, 2017.

On June 29, 2017, two days before the stipulation expired, Plaintiffs filed a motion for a temporary restraining order (TRO) to prevent any distribution under the statute. Without a hearing, and in violation of MCR 3.310(A)(1), (3), and (B), the Court of Claims gave State Defendants less than 24 hours to respond to the motion, requiring that any response be submitted by the end of the day on June 29, 2017, in accordance with Plaintiffs' suggestion. The Court of Claims also indicated it would hold an off-the-record telephone conference to determine the matter on

June 30, 2017. (See Exh G, Emails regarding TRO Conference.) Following the conference, the Court granted the TRO and without further hearing, accord MCR 3.310(A)(1), (4), and (B), ordered State Defendants to show cause why it should not enter a preliminary injunction. (See Exh H, TRO.)

The court's preliminary injunction order, entered July 6, 2017, did not contain any analysis or findings beyond listing the criteria for preliminary injunction and finding that Plaintiffs met each criterion except the third (balance of harms), which the court found equally balanced between the parties. (See Exh I, 1st Prelim Inj Ord.) It then asked for more briefing related to the recent U.S. Supreme Court decision in *Trinity Lutheran Church of Columbia v Comer*, 137 S Ct 2012 (2017). *Id.* After briefing, the court issued a follow-up order that merely recited its earlier, conclusory order with the added unexplained finding that *Trinity Lutheran* was distinguishable, and therefore, not applicable. (Exh J, 2nd Prelim Inj Ord, 7/25/17.)

The Amended Statute, 2017 PA 108

On July 14, 2017, the Governor signed 2017 PA 108 into law. Under the new public act, Section 152b(4) was amended to reiterate its limited reimbursement to the nonpublic school's for "actual costs in complying with a *health, safety, or welfare requirement* under a law or administrative rule of this state." (2017 PA 108, with tracked amendments, Exh B, emphasis added.) The amended statute repeats this clarification several times. See MCL 388.1752b(1), (2), (3), (4), & (9). It further emphasizes that it reimburses only a nonpublic school's "actual costs . . . in

complying” with these state law mandates. MCL 388.1752b(1), (2), (3), and (4). And it no longer references the previous “Mandate Report,” instead leaving MDE to categorize and format the requirements for which a nonpublic school may apply for reimbursement. (See Exh B, § 152b(2), pp 1–2.)

The 2017 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); see also Exh B, § 152b(10), pp 4–5.

The 2017 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 2017 version of MCL 388.1752b retains the statutory directive to MDE 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).

In accordance with these amendments, MDE issued a new form for the 2017–2018 school year. 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.” (Exh K, 2018 Reimbursement Form, see also § 152b(2).) The form also dropped the mandate that required nonpublic schools to

request any necessary auxiliary services from a local district, leaving only 38 mandates available for reimbursement. (Exh K, 2018 Reimbursement Form.) To reflect the statute's new instructions regarding fees, the form contains separate columns for claiming the costs of "training fees," "inspection fees," "criminal background check fees," and "epi pen(s) purchase." *Id.*

Post-amendment Proceedings

On August 14, 2017, the Court of Appeals denied State Defendants' emergency application for leave to appeal the Court of Claims' preliminary injunction. State Defendants sought, but were denied, leave to appeal to the Michigan Supreme Court. *Council of Orgs v State*, 501 Mich 1015 (2018).

After the stay was permanently lifted on the Court of Claims matter, State Defendants moved to strike Plaintiffs' improperly filed amended complaint. Plaintiffs then moved to amend again, this time to add the amended statute. After initially denying Plaintiffs' motion to amend, the Court of Claims reversed itself, sua sponte reconsidering its decision without receiving a response or holding a hearing, and granted Plaintiffs' motion to amend on April 12, 2018. (Exh L.)

The following Monday, April 16, 2018, the Court of Claims heard oral arguments on the one-year-old cross-motions for summary disposition. Plaintiffs filed their second amended complaint the following day, and on April 26, 2018, the Court of Claims granted Plaintiffs' motion for summary disposition, striking down the statute (both the amended and previous version) as unconstitutional. (Exh M.)

On October 1, 2018, after State Defendants filed their appeal, the statute was again amended to its present form, MCL 388.1752b. The second amended version did not make any substantive changes to the reimbursement process. It added a \$250,000 allocation for fiscal year 2018–2019 and preserved any unspent 2018–2019 funds as a work project.

On October 16, 2018, the Michigan Court of Appeals issued its published opinion, reversing the Court of Claims in part and remanding the case for further proceedings. *Council of Orgs v State*, 2018 Mich App LEXIS 3330 (Docket No. 343801). The Court of Appeals found that the statute withstood Plaintiff's facial challenge under article 8, § 2, because three of the mandates (the required purchase of epinephrine injectors, the mandatory disposal of mercury products, and the obligation to conduct background checks) clearly fell within the types of health, safety, and welfare provisions to which art 8, § 2 did not apply. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *21–*26. The Court of Appeals followed the guidance set forth in this Court's precedent and determined that reimbursement is constitutionally permissible when an activity "must be undertaken in order to comply with a health, safety, or welfare mandate," and when it satisfies three additional criteria. *Id.* at *21. Specifically, the three additional criteria are that the mandated activity under review "(1) is, at most, merely incidental to teaching and providing educational services to private school students (non-instructional 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.” *Id.* at *21–*22.

The Court of Appeals opinion did not address all 38 mandates in the most recent MDE report, and it did not even resolve all of Plaintiffs’ constitutional challenges to the statute. It remanded this case to the Court of Claims to determine (a) whether the statute was unconstitutionally passed as an appropriation for a private purpose under art 4, § 30, and (b) whether any of the other mandates fit within the constitutional framework it erected in accordance with this Court’s blueprint. *Id.* at *34.

Plaintiffs seek leave to appeal the Court of Appeals’ decision.

STANDARD OF REVIEW

This Court reviews de novo constitutional issues and other questions of law, like the interpretation of statutes. *In re Sanders*, 495 Mich 394, 404 (2014). “Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *Id.* Moreover, “wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does.” *Traverse City Sch Dist*, 384 Mich at 406, citing *Marbury v Madison*, 5 US (1 Cranch) 137 (1803). “To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid.” *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 303 (1998) (cleaned up).

ARGUMENT

I. This Court should not review this case at this stage of the litigation because too many preliminary issues remain unresolved.

On October 5, 2016, this Court declined to take this case “because we are not persuaded that granting the request would be an appropriate exercise of the Court’s discretion.” *In re Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249*, 500 Mich 875 (2016). Despite the two years that have passed, the case is procedurally in the same place it was when this Court declined to review it in late 2016. According to the Court of Appeals decision, two preliminary questions must be answered before the practical issues surrounding the statute’s constitutionality can be finally put to rest.

First, the Court of Appeals remanded to the Court of Claims to determine whether the statute violated article 4, § 30 of the Michigan Constitution, which addresses local or private acts. Resolution of this constitutional issue may obviate any further review of the statute’s viability. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *34. With an unresolved constitutional issue pending, there is no pressing “substantial” question of the act’s validity, MCR 7.305(B)(1), or a final decision of clear “significan[ce].” MCR 7.305(B)(2) and (3). This Court should deny Plaintiffs’ application.

Second, the Court of Appeals remanded so the Court of Claims could review, mandate by mandate, the various reimbursable costs allowed by MDE. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *34. The Court of Appeals charged the Court of Claims with analyzing each mandate on its own merits after the Court of Appeals

reviewed only 3 of the 38 mandates (epi pens, mercury products, and background checks) and found them clearly constitutional. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *21–*26, *34. The Court of Appeals’ limited review stemmed, in part, from the Court of Claims’ limited review, which substantially consisted of a decision issued after cross-motions for summary disposition—motions filed in the case’s infancy. Although Plaintiffs eventually raised an “as applied” challenge in addition to the facial challenge the Court of Appeals rejected, the Court of Claims’ entry of a preliminary injunction prevented MDE from ever applying the statute.

Under the circumstances, there has been no development of a record from which this Court could determine whether the remaining 35 mandates raise “significan[t]” legal issues. MCR 7.305(B)(2) and (3). Therefore, it makes sense to forego review at this stage in favor of weighing the statute’s constitutional validity on the firm ground of a complete record. Otherwise, this Court risks rendering a decision on untested facts or further delaying final resolution by meting out constitutional conclusions piecemeal. Accordingly, Plaintiffs’ application for leave to appeal is premature, and this Court should deny it.

II. This Court does not need to review this case, because the Court of Appeals correctly determined that the statute is facially valid.

The correct application of constitutional language requires this Court to “seek the “common understanding” of the people at the time the constitution was ratified,” which is identified “by applying the plain meaning of the text at the time of ratification.” *UAW v Green*, 498 Mich 282, 287 (2015), quoting *Goldstone v*

Bloomfield Twp Pub Library, 479 Mich 554, 558–559 (2007). The goal is to apply the interpretation that “reasonable minds, the great mass of the people themselves, would give it.” *Adair v Michigan*, 497 Mich 89 (2014) (cleaned up). “Interpretation of a constitutional provision also takes account of ‘the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.’” *UAW*, 498 Mich at 287, quoting *People v Tanner*, 496 Mich 199, 226 (2014).

Plaintiffs raise three arguments to suggest that review of the Court of Appeals’ decision is needed at this time. First, Plaintiffs argue that this Court should abandon its nearly fifty years of precedent, dating back to the time of ratification, in favor of an interpretation of art 8, § 2 that never permits any public benefits to nonpublic schools. Second, Plaintiffs argue that the nature of the activities as legal mandates renders them essential, as opposed to incidental, to the nonpublic school’s ability to function. Third, Plaintiffs argue that the Michigan Constitution prohibits any scenario in which money could flow from public coffers directly to nonpublic schools, because such a scenario relinquishes the State’s control over the funds. None of these arguments justify this Court’s review at this stage, so it should deny Plaintiffs’ application for leave to appeal.

A. Plaintiffs have not presented any valid reason to overturn nearly fifty years of established precedent.

Plaintiffs first argue that the text of § 2 of article 8 requires this Court to review its long-established precedent and overrule it. Article 8, § 2 uses expansive language to prohibit the use of public funds to aid or maintain nonpublic schools, so

Plaintiffs argue this Court should review its former decisions and overrule them in favor of a blanket “ ‘no benefits, primary or incidental’ rule.” See *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 104 (1970).

Section 2 states, “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.” Const 1963, art 8, § 2, ¶ 2.

These words are comprehensive enough to be deemed all-encompassing, which creates serious problems if they are read as broadly as Plaintiffs suggest. Their expansive interpretation would prohibit government assistance for nonpublic schools that is not only reasonable, but morally and legally obligatory. See *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich at 104. Such an interpretation would render nonpublic schools outlaws, unable to assert a claim in state court, register a deed, receive public utilities, or rely on basic police and fire protection. See *id.* It would be hard to believe that a state or local government in the United States would deliberately withhold police and fire protection from its children, and even harder to believe that the great mass of people in Michigan intended such a result. This Court has long decided that the Michigan Constitution does not lend itself to such an interpretation. *Id.*

Even so, Plaintiffs argue that this Court should revisit its previous decisions and substitute this Court’s interpretation with an expansive interpretation of the

language found in article 8, § 2. But Plaintiffs do not offer a workable alternative interpretation. Instead, they merely ask this Court to overturn more than 45 years of constitutional analysis and the stability it has engendered in favor of an overly-broad (indeed, universal) application of the section's prohibition against providing aid to nonpublic schools. Plaintiffs' present-day arguments fall into the same analytical quagmires that this Court avoided when it first disposed of the "strict 'no benefits, primary or incidental' rule" in *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich at 104, and then again in *Traverse City School District v Attorney General*, 384 Mich at 413. In *Traverse City School District*, this Court quoted its earlier refusal to adopt such a rule as clearly antithetical to the intention of the people. For good reason. The alternative rule is unconscionable.

Suppose the Michigan State Police responded to a call about an active shooter at a nonpublic school. Surely a response by the MSP would fit within the strict language of § 2: the MSP is an entity to which "public monies" are "paid," and its response would certainly "aid" (i.e., help or give support to) that nonpublic school and the children who attend it. Const 1963, art 8, § 2. Similarly, if a fire department that received any public funding responded to a call that a nonpublic school had caught fire, that emergency response too would "aid" the nonpublic school, and the public's employees, services, and property (water) would, ideally and quite literally, "maintain" the private school's structural integrity. Interpreting § 2 so broadly would ban everyday services like public water hookups, public sewer hookups, public lighting along the sidewalk, and repairs to public roads that lead to

the school entrance or parking lot. As found in *Traverse City School District*, such an interpretation would have serious Equal Protection and Free Exercise implications, as the vast majority of nonpublic schools are religious in nature, and the Supreme Court of the United States evaluates the discriminatory “impact” of legal requirements and not just their neutral wording. 384 Mich at 433–434; see also *Wisconsin v Yoder*, 406 US 205, 220–221 (1972).

According to the Center for Educational Performance and Information (commonly known as CEPI), 686 nonpublic schools served over 113,000 students in Michigan in 2015. See CEPI, *School Year 2014–15 Nonpublic School Data*, http://www.michigan.gov/documents/cepi/15-CEPI-06_NonPublics_496243_7.xlsx (accessed June 5, 2018). Of these, 595 identify as religious schools (about 87%), with the remaining 91 (about 13%) identifying as secular schools. *Id.* As this shows, religious schools still comprise a large portion of the nonpublic school population, and the analysis in *Traverse City School District* applies with equal force today.

Moreover, taking such a broad view of § 2 would arguably prevent the Legislature from imposing any mandates on nonpublic schools. Legislative mandates require publicly funded oversight and ultimately “aid” a private school, however “indirectly,” by requiring it to maintain a safe, wholesome, and healthy learning environment. As determined by this Court, article 8, § 2 must not be read in this fashion. This Court should reject Plaintiffs’ invitation to revisit its

established and time-honored precedent and should, instead, deny Plaintiffs' application for leave.

B. This Court has already adopted a reasonable interpretation of § 2 that focuses on educational services, and the Court of Appeals correctly applied that interpretation below.

Plaintiffs next argue that the Court of Appeals erred by determining that the three reimbursements the Court found valid, or any reimbursements under the statute, could be “incidental.” According to Plaintiffs, reimbursement for a mandated activity is, by its nature, reimbursement for an activity necessary and integral to a nonpublic school's functions. Plaintiffs' arguments mischaracterize *Traverse City School District's* use of the term “incidental” and how this Court has applied the term to school functions.

Within two months after Michigan voters added article 8, § 2 to the Michigan Constitution, this Court answered seven certified questions regarding the new amendment, and within three months of hearing, it issued *Traverse City School District*. There, this Court reviewed the history of the amendment and its purpose and held that the provision prohibits the purchase only of *educational* services from a nonpublic school with public funds, stating, “The language of this amendment, read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, prohibits the purchase, with public funds, of educational services from a nonpublic school.” *Traverse City Sch Dist*, 384 Mich at 406–407.

This Court focused on the key word in § 2—“school”—and on what makes a school a school—the education and instruction it provides.

In contrast to “educational services,” this Court recognized that § 2 does not prohibit what a statute called “auxiliary services” and what the Court recognized as “[f]unctionally” being “general health and safety measures.” *Traverse City Sch Dist*, 384 Mich at 417–418.

At issue in the case were services that included “health and nursing services and examinations; street crossing guard 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; [and] remedial reading” *Id.* at 417–418. They thus included some of the same services addressed by § 152b—auxiliary services, such as licensing requirements for school speech pathologists under MCL 333.17609, or other health measures, like maintaining immunization records under MCL 333.9028 or providing vision-screening reports under MCL 380.1177(3). Importantly, in *Traverse City School District*, this Court did not evaluate whether these services were integral to the functioning of a school, or whether state or federal law required these services. Instead, the Court gauged the activities’ “incidental” nature by their proximity to “general health, safety, and welfare measures” on one side of the scale as opposed to

their proximity to the school’s instructional function on the other. 384 Mich 417–420.

This Court further emphasized the instructional-incidental distinction by clarifying article 8, § 2’s employment restrictions. Keeping in mind its obligation to adopt a reasonable interpretation of § 2 that coincided with the common understanding of the provision, this Court reiterated its earlier “refus[al] to adopt a strict ‘no benefits, primary or incidental’ rule” because it found “no evidence . . . that the people intended such a rule” when they adopted the terms “support” and “aid or maintain” in § 2. *Traverse City Sch Dist*, 384 Mich at 413 (cleaned up; ellipsis in original). Instead, this Court concluded that the purpose behind the amendment (known at the time as Proposal C) was simply to prevent public money from being used to run instructional programs in the parochial schools. As this Court recognized in 1971, “[e]veryone agreed the proposed amendment was designed to halt parochiaid”—i.e., “state funding of purchased educational services in the nonpublic school”—“and would have that effect if adopted.” *Id.* at 407 n 2 & 435 (emphasis added).

This Court recognized that no one would have understood § 2 to prohibit police officers, firefighters, counsellors, and others from providing aid or even being employed by the schools: “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.” *Id.* at 420. “Since the employment stricture

is a part of the educational article of the constitution, we construe it to mean employment for *educational* purposes only.” *Id.* at 421 (emphasis added).

In short, since § 2’s second paragraph was first instituted, this Court has continuously recognized the line between the forbidden funding of the instructional process itself and permissible measures that provide for the health, safety, and welfare of nonpublic schoolchildren. Not surprisingly, the Court of Appeals followed *Traverse City School District* and held that any health, safety, and general welfare mandate subject to reimbursement must be “at most, merely incidental to teaching and providing educational services to private school students (non-instructional in nature)” *Council of Orgs*, 2018 Mich App LEXIS 3330 at *21–*22.

Although Plaintiffs do not directly attack this standard as an inaccurate distillation of the guidance set forth in *Traverse City School District*, they argue that no payment could qualify as incidental if it reimburses an activity required by the State. Plaintiffs argue that a nonpublic school must comply with mandates to be “viable,” so any reimbursement for mandates unconstitutionally benefits the nonpublic school.

In support of their claim, Plaintiffs point to language from *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975), which involved whether requiring school districts to purchase textbooks and other school supplies for nonpublic schoolchildren violated art 8, §2. That opinion states, “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." *Id.* at p 49. Plaintiffs' viability argument stems from this Court's statement that "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.* But Plaintiffs ignore that this Court went on to contrast bona fide auxiliary services with the provision of "textbooks and supplies," which it deemed "essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist." *Id.*

But the Court of Appeals did not ignore Plaintiffs' argument or the language in *Advisory Opinion re Constitutionality of 1974 PA 242*; it simply disagreed with Plaintiffs' simplistic analysis. See *Council of Orgs*, 2018 Mich App LEXIS 3330 at *29–*30. The Court of Appeals second criterion, that a reimbursable mandate must not "constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive," *id.* at *22, essentially restates the "primary" and "viability" elements adopted in *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 49. Rather than disregard the issues of "primary" functions and the independent "viability" of the school in the absence of the benefit, the Court of Appeals correctly applied these touchstones to the three mandates it reviewed. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *29–*30. It correctly determined that none of the mandatory actions—background checks, the disposal of mercury products, or the maintenance of epi pens—qualified as primary to a school's education process or essential to its continued existence. *Id.* The Court correctly

distinguished textbooks and school supplies from these health and safety measures, and it correctly found that “any comparison is strained and unreasonable.” *Id.* at 30. Ultimately, the Court correctly determined that the “primary” and “otherwise viable” issues did not turn on the mandatory nature of the activity, but on its proximity and value to the heart of the educational process. *Id.* Because the Court of Appeals’ correctly analyzed and applied precedent to the facts here, Plaintiffs’ arguments do not warrant this Court’s review.

C. The Court of Appeals correctly applied this Court’s precedent when it rejected Plaintiffs’ arguments that any type of “direct” payment, even reimbursement, unconstitutionally relinquishes “control” to nonpublic schools.

Rather than confront the integrity of the legal framework adopted and applied by the Court of Appeals, Plaintiffs argue that the statute could not possibly fit within that framework because any “direct” payment to nonpublic schools would relinquish “control” over how the funds are spent. Plaintiffs argue that failure to maintain constant control over the reimbursed funds runs afoul of the requirements set forth in *Traverse City School District*. But the Court of Appeals did not misstate the law, it merely disagreed with Plaintiffs’ overgeneralized analysis. See *Council of Orgs*, 2018 Mich App LEXIS 3330 at *30–*31. Plaintiffs insist that the State must maintain of constant “control” over the reimbursed funds, which forecloses any possibility of direct reimbursement. This is neither established law nor the correct approach. Thus, this Court should reject Plaintiffs’ arguments and leave

undisturbed the thorough and well-reasoned analysis reflected in the Court of Appeals decision.

Plaintiffs misinterpret *Traverse City School District* as requiring the State to maintain constant “control” over any benefits provided to nonpublic schools, foreclosing any possibility of direct reimbursement. But *Traverse City School District’s* “control” requirement relates to instructional issues, such as control over curriculum and content. See 394 Mich at 419–420, 435; see also *Council of Orgs*, 2018 Mich App LEXIS 3330 at *30. Here, the Court of Appeals properly contrasted this type of control with the control the State exercised over the process of promulgating and enforcing health and safety mandates. *Council of Orgs*, 2018 Mich App LEXIS 3330 at *30.

The Court of Appeals applied the question of “control” to the three mandates it reviewed and found that the “action or performance needed to comply with the law” was “effectively dictat[ed] and controll[ed]” by the State. *Id.* As further observed by the Court of Appeals, this Court’s analysis in *Advisory Opinion re Constitutionality of 1974 PA 242* did not foreclose the possibility of “direct” aid. To the contrary, it “expressly noted that Proposal C ‘permits aid’ to nonpublic schools when the aid is merely incidental to a school’s operation.” *Council of Orgs*, 2018 Mich App LEXIS 3330 at *30, quoting *Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich at 48 n 2.

D. The Court of Appeals correctly determined that the statute does not facially violate article 8, § 2.

“To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid.” *Judicial Attorneys Ass’n*, 459 Mich at 303 (cleaned up).

Plaintiffs do not challenge the legal framework outlined by the Court of Appeals, and they do little to challenge the Court of Appeals’ application of the three reviewed mandates to that framework. The Court of Appeals correctly determined that reimbursing a nonpublic school for its costs to comply with mandatory background checks, mercury disposal, or epi pen purchases falls well outside article 8, § 2’s prohibitions against aiding a nonpublic school’s primary or instructional functions. The Court of Appeals further correctly found that the existence of at least three sets of circumstances “under which the act would be valid” undermined Plaintiffs’ facial challenge. *Judicial Attorneys Ass’n*, 459 Mich at 303. The Court of Appeals stopped short of applying its analysis to all the mandates, however, and instead remanded the case to the Court of Claims for a decision on the mandates.

Under the circumstances, Plaintiffs have not demonstrated a “significan[t]” flaw in the legal framework employed by the Court of Appeals, and they have not raised a straightforward challenge to the Court of Appeals’ application of the three mandates to that framework. See MCR 7.305(B)(2) and (3). Of course, the statute’s viability also depends on the Court of Claims’ determination of the remaining constitutional question—whether the statute was an appropriation for a public or

private purpose under article 4, § 30—an issue the Court of Appeals did not address. It follows that this case is not ready for this Court’s review, and this Court should deny Plaintiffs’ application for leave to appeal.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals remanded this matter to the Court of Claims to resolve a pending constitutional claim and determine which of the unreviewed mandates, if any, run afoul of article 8, § 2. The Court of Appeals evaluated the statute using time-honored legal principles developed by this Court in its interpretation of art 8, § 2, and Plaintiffs do not allege any error in the legal framework, much less error of public or jurisprudential significance. Under the circumstances, Plaintiffs have not demonstrated any justification why this Court should review this case at this stage of the litigation. Accordingly, this Court should deny Plaintiffs' application for leave to appeal and allow the Court of Claims to continue, without further interruption, its completion of the record and review of each challenged mandate.

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