

**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-Appellees,

v.

STATE OF MICHIGAN; RICK SNYDER, Governor, in his official capacity; MICHIGAN DEPARTMENT OF EDUCATION; and SHEILA ALLES, Interim State Superintendent of Public Instruction, in her official capacity,

Defendants-Appellants.

Supreme Court No. 158751

Court of Appeals No. 343801

Court of Claims No. 17-000068-MB

BRIEF FOR PROPOSED AMICUS CURIAE PUBLIC FUNDS PUBLIC SCHOOLS

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INTEREST OF AMICUS CURIAE

Public Funds Public Schools (“PFPS”) is a national campaign to ensure that public funds for education are exclusively used to maintain and support public schools. PFPS opposes all forms of private school vouchers, including Education Savings Accounts and tax credit scholarships, as well as direct aid to private schools and other diversions of public funds from public education.

PFPS uses a range of strategies to protect and promote public education. This includes engaging in litigation challenging school vouchers and other diversions of public funds to private schools, as well as supporting public interest, civil rights, and private bar attorneys in doing so. PFPS also tracks state and federal legislation establishing or expanding voucher and aid diversion programs; provides up-to-date research on the status and effects of school vouchers on public education; and assists local, state, and national partners to advocate for using public funds exclusively for public schools.

PFPS is a collaboration of the Southern Poverty Law Center (“SPLC”) and Education Law Center (“ELC”). SPLC, a nonprofit civil rights organization founded in 1971, is dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society. ELC, a nonprofit organization founded in 1973, serves as a leading voice for public school children and one of the most effective advocates for equal educational opportunity and education justice in the United States. Based on this extensive expertise and experience, SPLC and ELC have participated as *amici curiae* or as counsel in cases promoting public education rights—including cases to prevent the diversion of public funds from public schools—in states across the nation.

SUMMARY OF ARGUMENT

If allowed to stand, the law challenged in this case, Section 152b of 2016 PA 249 (“Section 152b”), will unconstitutionally allocate taxpayer funds from Michigan’s inadequate public education budget to reimburse *nonpublic* schools for a wide range of expenses related to the operation of those schools and the education of their students. PFPS respectfully submits this brief in support of Plaintiffs’ Application for Leave to Appeal to provide the Court with a critical perspective on the history of Michigan’s constitutional prohibition on public funding of private schools and on the current condition of its public education finance.

In reversing the Court of Claims, the Court of Appeals held that Section 152b is valid under the “no aid” clause in Article 8, § 2 of the Michigan Constitution. *Council of Orgs & Others for Ed About Parochiaid v Michigan*, opinion of the Court of Appeals, entered October 16, 2018 (Docket No. 343801) (*CAP II*). That holding was patently erroneous. Article 8, § 2 expressly states that “[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain” any private school. Section 152b would do just that, diverting public funds to reimburse nonpublic schools for expenditures that are essential to the nonpublic schools’ ability to continue providing education. See *CAP II* (GLEICHER, J., dissenting in part), op at 7–8; *Council of Orgs & Others for Ed About Parochiaid v Michigan*, opinion of the Court of Claims, entered April 26, 2018 (Docket No. 17-000068-MZ) (*CAP I*). This is precisely the financial support barred by the no-aid clause’s prohibition on using public funding for private schools.

Amicus urges the Court to grant Plaintiffs leave to appeal and reverse the ruling below. *First*, Plaintiffs meet the grounds for plenary review under MCR 7.305(B) because the Court of Appeals misread Article 8, § 2 and misapplied this Court’s precedent to reach an erroneous conclusion in a case of heightened public significance. Indeed, if the Court of Appeals’ decision is left undisturbed, the fundamental interests of Michigan’s public school students will

be directly impaired through the diversion of limited taxpayer dollars from the state’s underfunded public school system, in contravention of the plain language of the Constitution’s no-aid clause.

Second, Article 8, § 2 reflects the will of Michigan voters to protect public school funding. At the time the no-aid clause was passed in 1970, Michigan’s fiscal deficit had led to the chronic underfunding of public education and growing disparities in education outcomes among students. The no-aid clause was an unequivocal statement by the Michigan electorate that they wanted to constitutionally protect the funding of their public schools and improve those schools by preventing the diversion of taxpayer monies, either directly or indirectly, to nonpublic schools.

Third, the very condition which led Michigan voters to approve the no-aid clause in 1970—woefully underfunded public schools—persists to this day. Lacking adequate funding and essential resources, Michigan’s public schools have struggled to address widening disparities in educational opportunities and outcomes across the State, especially for vulnerable, high-need students. Section 152b will further exacerbate these educational disparities by siphoning public funds from the inadequately funded public education system.

For these reasons, funds appropriated to Michigan’s public schools cannot be used to support nonpublic schools, as mandated by the no-aid clause in Michigan’s Constitution. This Court should grant Plaintiffs leave to appeal and reverse the decision below.

ARGUMENT

As amended in 2017, Section 152b diverts \$2.5 million per year of the money appropriated to Michigan’s budget for public schools for 2016–2017 and 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.” MCL 388.1752b(1) (diverting money “[f]rom the general fund money appropriated under section 11” for public education under the “State School Aid Act of 1979” (see MCL 388.1611)). Eligible categories of reimbursable

expenses are listed on a form created by the Michigan Department of Education (the “Form”). Michigan Department of Education, Section 152b Reimbursement Form, <https://www.michigan.gov/documents/mde/2018.Section.152b.Reimbursement.Form_610867_7.xlsx> (accessed July 16, 2018). The Form identifies 38 expenditure categories characterized as health, safety, or welfare requirements applicable to nonpublic schools, many of which also apply to public schools and to other Michigan workplaces and institutions. *Id.*¹

The Court of Appeals, in a 2–1 decision, erroneously held that Section 152b was facially constitutional under Article 8, § 2. The majority below constructed a wholly new test to allow for the reimbursement of nonpublic school costs related to a “health, safety, or welfare mandate” that “(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.” *CAP II*, op at 2. The majority reasoned that this result was compelled by this Court’s decisions in *In re Certification of Questions Pertaining to Proposal C*, 384 Mich 390; 185 NW2d 9 (1971) (*Traverse City*), and *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41; 228 NW2d 772 (1975). As *Amicus* will explain below, that interpretation misapprehended this Court’s precedent, the constitutional text, and the context in which it was enacted.

¹ The reimbursable expenses listed on the Form, however, clearly encompass more than health, safety, or welfare. See MCL 388.1752b(7) (“The funds appropriated under [Section 152b] are for purposes related to education . . .”). The reimbursable expenses range from disclosure of information about hazardous chemicals, to securing licenses for teachers, to the content of the curriculum taught at nonpublic schools. See, e.g., MCL 29.5p (employee’s right to know about hazardous chemicals); MCL 380.1531 (issuing licenses and certificates for teachers); MCL 380.1561(3)(a) (curriculum requirements).

I. THE COURT OF APPEALS MISAPPLIED CONTROLLING PRECEDENT IN CONTRAVENTION OF THE MICHIGAN CONSTITUTION

The Court of Appeals' erroneous reading of the plain language and intent of Article 8, §2, and its misreading of this Court's precedent, warrant plenary review. Indeed, this case meets several grounds for review under the Court's rules. MCR 7.305(B). Specifically, it presents "a substantial question about the validity of a legislative act," Section 152b, under an amendment to the Constitution intended by the voters to protect public education funding. MCR 7.305(B)(1). In ignoring the plain meaning of Article 8, § 2 and the context in which it was passed, the Court of Appeals also misapplied "legal principle[s] of major significance to the state's jurisprudence," MCR 7.305(B)(3), as well as misreading this Court's prior rulings interpreting the no-aid clause, MCR 7.305(B)(5)(b). See also MCR 7.305(B)(2) (review appropriate when "the issue has significant public interest").

The Court of Appeals relied on this Court's prior rulings in *Advisory Opinion* and *Traverse City* to uphold reimbursement under Section 152b of expenditures characterized as health, safety, and welfare costs. In reaching this conclusion, the court below clearly misread those rulings.

Nothing in this Court's jurisprudence—and nothing in the decisions cited by the majority opinion below—contradicts the "easily parsed" plain meaning of the no-aid clause in Article 8, § 2, that "the public funds may not be used to help nonpublic schools stay in business." *CAP II* (GLEICHER, J., dissenting in part), op at 3. As Judge Gleicher pointed out in her partial dissent, in approving the no-aid clause, "the people meant to entirely curtail public financial support for nonpublic school operations," whether supporting payments "are intended to cover 'education' or any of the myriad costs that a business must bear." *Id.* at 6. Indeed, the best reading of *Advisory Opinion*—a decision prohibiting the State from providing textbooks and

supplies to Michigan students enrolled in nonpublic schools—is that the State may not fund primary benefits to nonpublic schools. Primary benefits are those that are necessary “element[s] required for any school to exist,” such as the very statutory and regulatory mandates with which all Michigan schools must comply to be allowed to run, and for which Section 152b authorizes reimbursement. *Id.* at 7–8 (discussing *Advisory Opinion*, 394 Mich at 48).

This Court’s *Traverse City* holding likewise fails to support the conclusions reached by the Court of Appeals. *Traverse City* did not categorically exclude “police officers, firefighters, counsellors, and others” from Article 8, § 2’s prohibition on the support of private school employment, as the State claims. See Br in Opp’n to Pls’ Appl for Leave to Appeal, *Council of Orgs & Others for Ed About Parochial v Michigan*, No. 158751, at 22 (Mich December 26, 2018) (discussing 384 Mich at 420–21). Rather, the excluded persons were “public employees” performing their tasks “under the exclusive direction of public authorities.” *Traverse City*, 384 Mich at 420. Indeed, the counsellors and nurses in *Traverse City* were engaged in “health and general welfare activities” *at the behest of the board of education*—not the nonpublic school—and were compensated using “state school aid funds of the district.” *Id.* at 417.

That does not mean school nurses and security officers paid by a nonpublic school to work at such school fall within the *Traverse City* holding. And even if *Traverse City* were read to exclude “police officers, firefighters, counsellors, and others” from the employment support prohibition of Article 8, § 2, the indirect wage reimbursement mechanism in Section 152b would independently run afoul of the separate ban on public money “to aid or maintain” a nonpublic school. See *Traverse City*, 384 Mich at 411 (explaining that Article 8, § 2 contains “five prohibitions,” including two relating to employment and one general ban on the use of “public

money ‘to aid or maintain’ a nonpublic school”). *Traverse City* did not reach this possibility because there, unlike here, public funds were being expended by school boards and never went into the hands of nonpublic school authorities.

In the present case, as the Court of Claims explained, the funds allocated by Section 152b “are expressly linked to wages owed to nonpublic school employees.” *CAP I*, unpub op at 10.² In light of this, “it is impossible to avoid concluding that in enacting [Section 152b], the Legislature created a mechanism for direct wage reimbursement” in plain contravention of the constitutional prohibition on “support[ing] . . . the employment of any person” at a nonpublic school. *CAP II* (GLEICHER, J., dissenting in part), op at 9. Moreover, “[t]he nonpublic school also has control over the type of activities—some of which touch on curriculum and specific courses to be taught—to which the funds can be applied” and “has complete control of the funds after they are dispersed.” *CAP I*, unpub op at 11. Thus, even if the scheme envisaged by Section 152b were analogous to the shared-time classes and auxiliary services that this Court upheld in *Traverse City*,³ the surrender of absolute control over the funds and activities subsidized by them to nonpublic school employees would be fatal to Section 152b. *See CAP II* (GLEICHER, J., dissenting in part), op at 5.

² Indeed, under Section 152b, nonpublic schools would be entitled to reimbursement of the “hourly wage for the employee or employees performing a task” associated with each of the mandated requirements. *See* MCL 388.1752b(9).

³ As Judge Gleicher explained, the Section 152b framework is not comparable to shared-time classes because, in the latter, the funds are appropriate to benefit *students*, not schools. Under those circumstances, unlike here, the funding scheme was consistent with “Article 8, § 2’s command that no public aid enrich nonpublic school coffers, even indirectly.” *CAP II* (GLEICHER, J., dissenting in part), op at 5.

For these reasons, the Court of Claims correctly held that Section 152b is unconstitutional because it conflicts with the plain language of Article 8, § 2, which unequivocally prohibits what Section 152b would authorize: “the diversion of public school funding to nonpublic schools.” *CAP I*, unpub op at 10. This Court should, therefore, grant leave to appeal and reverse the Court of Appeals’ decision that departed from the Court of Claims’ correct reasoning.

II. THE NO-AID CLAUSE IN ARTICLE 8, § 2 WAS APPROVED BY MICHIGAN VOTERS TO PROTECT THE STATE’S PUBLIC SCHOOL SYSTEM

In analyzing Article 8, § 2, the Court of Appeals completely ignored a central aim of the voters who approved the no-aid clause in 1970—to protect and safeguard funding for public education by prohibiting the direct or indirect diversion of public funding to private schools. This conspicuous error warrants review and reversal of the decision below.

The Michigan Legislature had authorized various forms of indirect aid to nonpublic schools in the decades preceding the enactment of Article 8, § 2 in 1970. See, e.g., 1948 CL 352.20 (permitting transportation for nonpublic school students); 1965 PA 343 (requiring that auxiliary services, such as health services and examinations, be provided on an equal basis to students of public and nonpublic schools). In the 1970 legislative session, the Legislature enacted a provision in the State School Aid Bill that allowed broad funding of nonpublic schools. 1970 PA 100. The provision was declared constitutional in an advisory opinion issued by this Court. *In re Legislature’s Request for an Opinion on the Constitutionality of Chapter 2 of Amendatory Act No 100 of Pub Acts of 1970*, 384 Mich 82; 180 NW2d 265 (1970). Public funds then began to be disbursed by the State to nonpublic schools. See *Traverse City*, 384 Mich 390, 406 n2; 185 NW2d 9 (1971).

In response, citizens who favored retaining public funds for public schools circulated a “no-aid to private schools” petition. *Id.* The petition gathered sufficient support for

inclusion on the next election ballot, but the Secretary of State blocked the measure. See *Garman v Hare*, 26 Mich App 403; 182 NW2d 563 (1970), vacated sub nom *Carman v Hare*, 384 Mich 443 (1971). A legal challenge ensued, resulting in a Court of Appeals ruling that validated the petition and directed the no-aid question be placed on the ballot. See *Garman*, 26 Mich App at 406.

Michigan voters decisively approved the no-aid proposal, which became Article 8, § 2. A central issue in the debate surrounding the vote focused on the urgent need to ensure sufficient public school funding. See, e.g., Cordray, *School Reform Panel Hears Parochial, Financing Pleas*, Ann Arbor News (July 17, 1969) <<http://oldnews.aadl.org/node/78060>> (accessed July 17, 2018) (“[T]he overriding issue—at least the one most important to the taxpayer—will be the one of financing educational reform.”). At the time, many school district budgets were facing stress from growing deficits, increases in student needs, and fulfillment of teacher contracts. See, e.g., Citizens Research Council of Mich, *Detroit School District Finances, Council Comments No 829* (March 19, 1970). An overreliance on local property taxes to fund public education underscored the importance of State funding. See Dykes, *The Search for Community: Michigan Society and Education, 1945–1980s*, in Hathaway, ed, *Michigan Visions of Our Past* (East Lansing, Mich: Mich St Univ P, 1989), pp. 300–301 (discussing the Legislature’s reluctance to increase aid to meet education needs statewide and the resulting rise in dropout rates).

Proponents of the no-aid clause were concerned that the use of public funds for nonpublic schools would divert and deplete already scarce state funds from public schools. As noted in the *Ann Arbor News*, “[t]he basic issue is that of direct aid to non-public schools. It is the fact that one-half the cost of teachers’ salaries which non-public schools receive in 1970–71 . . . will provide more state aid for non-public schools than for many public schools.” *Proposal C Goes Too Far? Ianni Says No*, Ann Arbor News (October 17, 1970)

<<http://oldnews.aadl.org/node/76419>> (accessed July 17, 2018). These concerns were exacerbated by the Legislature's delay in distributing the annual appropriations for public schools in 1970. See *Delays in State Aid Bring Out Blind Spots*, Ann Arbor News (May 23, 1970) <<http://oldnews.aadl.org/node/78090>> (accessed July 17, 2018). At the same time that public schools were awaiting their state aid appropriations, the Legislature was proposing to allocate millions to private schools.

In approving the no-aid clause, Michigan voters clearly expressed their will regarding the use of public funds. They wanted to ensure sufficient funding for public schools by preventing the continuing diversion of taxpayer dollars to nonpublic schools. This intent was reconfirmed decades later in 2000 when more than 69% of voters overwhelmingly rejected an initiatory petition that would have amended the Constitution to allow for indirect support of nonpublic schools. State of Michigan, Terri Lynn Land, Secretary of State, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, <https://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf> (accessed July 17, 2018). Article 8, § 2 vindicates the will of the Michigan electorate that state funds be used to support public education.

III. THE CHRONIC UNDERFUNDING OF MICHIGAN PUBLIC SCHOOLS THAT LED VOTERS TO APPROVE ARTICLE 8, § 2 HAS PERSISTED AND WORSENERD

A. Chronic Underfunding Has a Direct Impact on Michigan Students

Public school underfunding was a pivotal concern for voters when they approved Article 8, § 2 in 1970. That underfunding not only persists today—it has worsened. Thus, the very same conditions that led voters to prohibit nonpublic school funding exist with even greater force now.

Numerous studies and reports have shown that Michigan’s funding of public schools remains “woefully insufficient and grievously inequitable.” Rowe, *Study: Michigan School Funding Is Inadequate and Inequitable*, <<http://aftmichigan.org/study-michigan-school-funding-is-inadequate-and-inequitable/>> (accessed July 17, 2018). State funding shortfalls have the greatest impact on cities and districts serving large numbers of “high-need” students, i.e., those with increased needs due to household and neighborhood poverty, status as English Language Learners (“ELLs”), and/or disabilities. See *id.* Although its schools were once among the nation’s best-funded, Michigan’s financing of public school education has fallen to 38th—a plummet “nothing short of shameful.” *Id.* Between 1995 and 2015, Michigan’s education revenue growth ranked last in the country. Arsen, Delpier & Nagel, *Michigan School Finance at the Crossroads: A Quarter Century of State Control* (2019), pp 30–31, <<http://education.msu.edu/ed-policy-phd/pdf/Michigan-School-Finance-at-the-Crossroads-A-Quarter-Center-of-State-Control.pdf>> (accessed January 28, 2019). Michigan’s per-pupil spending ranks near the bottom for the Midwest. See Binelli, *Michigan Gambled on Charter Schools. Its Children Lost*, New York Times (September 5, 2017) <<https://nyti.ms/2x7whOQ>> (accessed July 17, 2018).

Persistent school funding shortfalls have a direct impact on students. See, e.g., *id.* (lack of funds led Highland Park school authorities to place buckets on the floor and garbage bags over blackboards instead of repairing a leaking roof); Sparks, *Parents Outraged After Picture of Crowded School Bus Surfaces Online*, WWMT-TV (October 10, 2014) (budget constraints led several schools to use a single bus per school, forcing students to sit in aisles and atop one another). A class action lawsuit alleges egregious conditions in Detroit, including an eighth-grade student teaching math classes when a teacher quit mid-year. See Compl *Gary B. v Snyder*, No 16-CV-13292 (ED Mich September 13, 2016). Another class action lawsuit documents severe

deficiencies in services for students with disabilities in Flint. See *Compl DR v Mich Dep't of Ed*, No 16-CV-13694-AJT-APP, 2016 WL 6080952 ¶¶ 76–88 (ED Mich October 18, 2016) (explaining that the Flint school district's budget is inadequate to provide special education services for students with disabilities).

The State's own studies confirm the severity of public school underfunding, as well as its impact on student outcomes. A school finance consultant retained by the State, Augenblick, Palaich and Associates ("APA"), found significant deficiencies in Michigan's school finance system, resulting in the need for additional resources to meet the State's own student proficiency benchmarks. See APA, *Michigan Education Finance Study* (2016) (the "Finance Study"), pp xi–xiv, <https://www.michigan.gov/documents/budget/Michigan_Education_Finance_Study_527806_7.pdf>.

Subsequently, the School Finance Research Collaborative—a group of Michigan education experts and business executives—hired APA and another consultant, Picus, Odden, and Associates ("POA"), to conduct a more comprehensive study of public school funding in Michigan. See APA & POA, *Costing out the Resources Needed to Meet Michigan's Standards and Requirements* (2018) (the "Resources Report"), pp 1–3, <<https://www.fundmischools.org/wp-content/uploads/2018/01/School-Finance-Research-Collaborative-Report.pdf>>. The Resources Report found that Michigan's public education funding was substantially inadequate, particularly for high-need students. *Id.* at 60–62, 171–172.

1. Most Michigan Students Perform Below State Proficiency Benchmarks

The State-commissioned Finance Study demonstrates that most Michigan public school students perform below State-established proficiency levels in most subjects. In the Finance Study, APA collected performance data by grade level for each state standardized test and for each school district in Michigan. *Finance Study*, p 4. It used this data to identify districts in

which the percentage of students scoring at or above the proficient level for all subjects was above the state average (the “successful districts”). *Id.* at 7.⁴

The Finance Study revealed that, in most districts, a majority of students are performing below the level considered proficient according to Michigan’s “merit standard.”⁵ See *id.* at 9. It noted that “[a]verage proficient and above levels were relatively low for most test areas, with all subjects but Reading below 50%.” *Id.* Despite this low bar, only 186 districts, or 34.4%, consistently performed above these levels in each of the five subject areas measured and were therefore categorized as “successful districts.” *Id.* Because the proficiency standard is set in terms of relative performance rather than an objective metric, these so-called “successful” districts typically had a majority of their students performing at non-proficient levels in up to four of the five core subjects. See *id.* at 10 (showing that only 34 districts had more than 50% of their students scoring at proficient levels in math, writing, and reading, while still exceeding 20% proficiency in science and 29% proficiency in social studies). And even the “high-performing” districts—the highest category—still had a majority of their students performing at non-proficient levels in science and social studies.⁶ *Id.* at 9–10.

⁴ In “successful” districts the percentage of students scoring at or above the proficient level exceeded 36% for math, 65% for reading, 20% for science, 29% for social studies, and 47% for writing. *Id.* at 7–8.

⁵ Student performance under Michigan’s “merit standard” is assessed annually through the standardized Michigan Merit Examination, which measures student proficiency in five core areas: reading, writing, math, science, and social studies. See Michigan Department of Education, *Guide to State Assessments*, <http://www.michigan.gov/documents/mde/Spring_2017_Guide_to_State_Assessments_jl_536062_7.pdf> (accessed July 17, 2018).

⁶ To be considered a “high-performing” district, at a minimum, 51% of the students must be proficient in math, 80% in reading, 31% in science, 43% in social studies, and 63% in writing. *Finance Study*, p 10. In contrast, to be considered a “successful” district, only 36% of the students must be proficient in math, 65% in reading, 20% in science, 29% in social studies, and 47% in writing. *Id.* at 7–8.

2. Public School Underfunding Limits Opportunity and Harms Outcomes

The Finance Study and other reports demonstrate that Michigan public schools are underfunded and that the levels of expenditures in those schools correlate with performance outcomes. After categorizing school districts based on their students' performance, the Finance Study analyzed their revenues and expenditures. *Id.* at 15–29. These data revealed significant discrepancies in per-student spending across the State and showed that increased funding had a positive impact on educational outcomes. The Study also analyzed the level of funding needed to afford all Michigan students a meaningful opportunity to achieve the proficiency levels of students in “high-performing” districts.

The Finance Study found that “successful” districts, on average, spent more on a per-student basis than those that were not “successful”—not only on core instruction, but also on support services such as transportation. *Id.* at 22. The spending gap was even larger when comparing “high-performing” and “non-high-performing” districts: “High-performing” districts spent, on average, \$1,589 more per student each year than even “successful” districts,⁷ a 17.4% increase over the “successful” districts' average spending of \$9,158 per student. See *id.* at 26.

The Resources Report confirmed that the average amount spent per student is woefully inadequate.⁸ One of the studies in the report found that school districts would need a

⁷ The difference persisted, albeit less starkly, even when APA excluded the 13 districts in Michigan that spend substantially above the state average (\$21,030 or more per student annually). *Id.* at 6. When those 13 districts are excluded, the remaining high-performing districts still outspend successful districts by \$817 per student per year. *Id.* at 26. In any event, even these outlier high-performing districts demonstrate the dramatic inequity in Michigan's public education system.

⁸ Differences in the data and the regression model used to calculate per-pupil spending likely explain the numerical differences between the level of funding reported in the Finance Study and other reports, including the Resources Report and studies published by the Education Law Center.

base spending level of \$9,590 per pupil to provide students an adequate education, see *Resources Report*, pp 60–62, which would require an increase of \$3.63 billion in education funding, *Michigan School Finance at the Crossroads*, pp 74–76. The Resources Report’s second study, based on evidence gathered from schools and districts across the nation, recommends a base spending level of \$10,136 per student, before accounting for additional funds required for high-need students and for transportation and food costs.⁹ See *Resources Report*, pp 171–172.

These spending patterns reflect stark disparities in the level and allocation of state and local funding to school districts across the state. Differences in local revenue alone—primarily property taxes—provide the 34 “high-performing” districts an extra \$1,311 to spend per student each year, as compared to the lower-performing “successful” districts. See *Finance Study*, p 20. Wealthier districts are also able to provide better school facilities and equipment, which are funded entirely by local property tax revenues. *Michigan School Finance at the Crossroads*, pp 21, 46–51. Because Michigan fails to provide enough state revenue to offset these gaps, levels of funding among school districts vary widely, leaving districts with low property wealth and large numbers of high-need students with far less funding than their more affluent counterparts.

These funding disparities are confirmed by national studies. One study ranked Michigan 24th in the nation for school funding as of 2015. Baker, Farrie & Sciarra, *Is School Funding Fair? A National Report Card* (Newark: Education Law Center, 2018), pp 10, 32. The State does not provide additional funding to those schools that cannot avail themselves of stable

⁹ These two studies join the wealth of existing literature that shows increased funding is needed in underperforming public schools. See, e.g., Jackson, Johnson & Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*, Nat’l Bureau of Economic Research Working Paper No 20118 (2014) (analyzing data on per-pupil spending from 1967–2010 and finding that there is a significant causal relationship between school funding and improvements in long-term educational outcomes).

local funding streams through taxation or have higher levels of student need. *Finance Study*, pp 20–21. Further, the share of Michigan’s gross domestic product that corresponds to public education costs was only \$36 for every \$1,000 generated in economic productivity in 2015, earning Michigan a “C” for its fiscal efforts towards funding public education. See *A National Report Card*, pp 15–16. As the deficiencies in public school funding continue to grow, “Michigan has gone from being a fairly average state in elementary reading and math achievement to the bottom ten states.” The Education Trust–Midwest, *Michigan’s Talent Crisis: The Economic Case for Rebuilding Michigan’s Broken Public Education System*, <<https://files.eric.ed.gov/fulltext/ED570142.pdf>> (accessed July 16, 2018). Alarming, Michigan ranked last among the fifty states in the growth of education revenue between 2003 and 2015. *Michigan School Finance at the Crossroads*, pp 7, 86. During that same period, Michigan also ranked last in the improvement of student proficiency in reading and math. *Id.*

3. Michigan’s High-Need Students Require Higher Levels of Funding

The Finance Study also demonstrates that the chronic underfunding of Michigan’s public schools disproportionately affects districts serving large numbers of high-need students. See *Finance Study*, p 13. The study identified only 9 of Michigan’s 541 districts in which *both* the general student population and those with additional needs performed above their respective state averages. *Id.* at 12–13. The difference in spending was stark between those 9 districts and the “successful” districts in which high-need students did not perform as well, with the 9 districts spending an average of \$3,918 more per student each year. *Id.* at 26.

The Finance Study recommended an increase in proportional funding for “at-risk” or economically disadvantaged students and ELLs. *Id.* at xi. For every \$1,000 in baseline per-student spending on a general population student, even successful districts were spending only an extra \$110 on each economically disadvantaged student and an extra \$240 on each ELL. *Id.* The

Finance Study recommended that, for every \$1,000 in baseline per-student spending, Michigan school districts should spend an additional \$300 for each economically disadvantaged student and \$400 for each ELL. *Id.*

The Resources Report corroborated these findings. In that report, experienced Michigan educators agreed that significant extra resources were required beyond the base cost to address the needs of economically disadvantaged students, ELLs, and students with disabilities. *Resources Report*, p 60. For medium-sized districts, these educators recommended spending an additional \$290 to \$430 per student living in poverty for every \$1,000 spent on a general population student. *Id.* at 60–61. Similarly, for ELLs in medium-sized districts, they recommended additional spending of \$220 to \$510 for every \$1,000 spent on a general population student. *Id.*

The need for increased funding is also imperative given the U.S. Department of Education’s 2018 determination that Michigan is the only state in need of federal intervention to ensure students with disabilities are provided an education in compliance with federal law. U.S. Department of Education, *2018 Determination Letters on State Implementation of IDEA* (2018), p 3, <<https://sites.ed.gov/idea/files/ideafactsheet-determinations-2018.pdf>> (accessed January 28, 2019). A Special Education Task Force chaired by Michigan Lieutenant Governor Brian Calley concluded that Michigan lagged far behind other states in the performance of students with disabilities and echoed concerns about insufficient funding to meet these students’ needs. See Special Education Funding Subcommittee, *Special Education Funding Subcommittee Report* (2017), pp 3, 12. The report documented severe deficits in funding of special education services mandated by state and federal law, finding “a \$692 million shortfall in the special education

finance system” across the state and recommending steps “be taken today to ensure a brighter tomorrow for *all* students and families in Michigan.” *Id.* at 12 (emphasis in original).

Both the Finance Study and Resources Report surveyed the research to identify best practices for spending in support of Michigan’s high-need students. For example, they noted various studies have shown that hiring additional school counselors, full-time nurses, and instructional coaches for teachers is statistically correlated to improved student attendance and performance. See, e.g., Smith & Sherrod, *School Nurses and Student Absenteeism: The Role of School Nurse Staffing Levels in NC’s Efforts to Turn Around Low-Performing Schools* (Raleigh: Public School of North Carolina, 2013); Lapan, Whitcomb & Aleman, *Connecticut Professional School Counselors: College and Career Counseling Services and Smaller Ratios Benefit Students*, 16 Prof Sch Counseling 117, 119–120, 122 (2012); Allen et al., *An Interaction-Based Approach to Enhancing Secondary School Instruction and Student Achievement*, 333 Sci 1034, 1035–1036 (2011). The Finance Study recommended adding these crucial support resources as an essential strategy to improve the performance of economically disadvantaged students and ELLs. *Finance Study*, pp 48–49. And the Resources Report identified the need for one full-time instructional coach for every 200 students in a school, from the elementary to high school level. *Resources Report*, pp 72, 88–90. Thus, evidence-based research demonstrates an urgent need for significantly increased resources for Michigan’s high-need students.

4. Michigan Fails to Equitably Allocate Funding Among Districts

The Finance Study analyzed whether Michigan’s school finance system equitably allocates funding and resources after accounting for differences in student need, district characteristics such as population density and enrollment rate, and district revenue-raising capacity. The Finance Study concluded that Michigan has considerably more variation in per-student revenues and expenditures across districts than is considered equitable, both in treating

students equally when they have equivalent characteristics and in allocating greater resources to high-need students. *Id.* at ix, 79. Even more troubling, the Finance Study found that the trend toward greater inequity was increasing over time. *Id.* Since 2011, Michigan has received a “C” for funding distribution due to its failure to allocate more resources for students in high-poverty districts. *A National Report Card*, pp 9, 33.

B. Section 152b Will Exacerbate Chronic Public School Underfunding

As the Court of Claims correctly held, the diversion of public funds to Michigan’s nonpublic schools under Section 152b would violate the plain constitutional command that “[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain” nonpublic schools. Const 1963, art 8, § 2. That violation is particularly harmful in light of the numerous studies and reports that overwhelmingly document the severe and chronic underfunding of Michigan’s public schools and the persistent failure to provide all public school students with a meaningful opportunity for academic success. To make matters worse, Section 152b would divert public funds—from the State’s budget for public schools—to support *nonpublic* schools’ provision of the same essential education resources that their underfunded public counterparts cannot afford.

For example, the Finance Study recommended that Michigan school districts improve student performance by hiring more nurses and counselors and providing coaching for new teachers. See *Finance Study*, pp 47–49. Section 152b would reimburse nonpublic schools for similar costs, such as expenditures related to “[t]eacher certification,” “[c]ertification of [s]chool [c]ounselors,” and “[m]entor teachers for noncertified instructors,” as well as health-related costs, such as “[i]mmunizations,” “[i]mmunization statements and vision screening,” and “[p]ossession/[u]se of inhalers/epinephrine auto-injector.” Michigan Department of Education, *Section 152b Reimbursement Form*, <https://www.michigan.gov/documents/mde/2018.Section.152b.Reimbursement.Form_610867_7.xlsx> (accessed July 16, 2018). Additionally,

Section 152b would divert funds to compensate nonpublic schools for the “hourly wage for the employee or employees performing a task” associated with each of the mandated requirements. See MCL 388.1752b(9); *CAP*, unpub op at 10 (“[T]he funds [allocated under Section 152b] are expressly linked to wages owed to nonpublic school employees.”); *CAP II* (GLEICHER, J., dissenting in part), op at 9 (“[I]t is impossible to avoid concluding that in enacting [Section 152b], the Legislature created a mechanism for direct wage reimbursement.”). Yet recent data show that Michigan public school teachers are paid 80% of the salary paid to other professionals of similar age in the same labor market—a figure that placed Michigan in the lower half of the states for teacher wage competitiveness relative to comparable professions in 2015, a precipitous fall from a rank of 8th in 2012. See *A National Report Card*, pp 26, 38. The same study linked teacher wage competitiveness with “[a] state’s ability to attract and retain high quality teachers,” which is, in turn, “a fundamental component of a strong and equitable school system.” *Id.* at 23. In the face of a steep decline in the wage competitiveness of Michigan public school teacher salaries, Section 152b would divert funds that could be used to improve that compensation to instead augment the salaries of nonpublic school teachers.

This Court has acknowledged that “the continuing effect that underfunding has on the continuing operation” of underfunded school districts results in “innumerable consequences” students must endure. *Durant v Michigan*, 456 Mich 175, 219–220; 566 NW2d 272 (1997). The Court has also recognized that the harm to students from underfunding is “real and deserving of relief.” *Id.* at 220. Courts across the country have similarly recognized that increased funding is correlated to improved student outcomes. See, e.g., *Brigham v Vermont*, 166 Vt. 246, 256; 692 A2d 384 (1997) (“[T]here is no reasonable doubt that substantial funding differences significantly affect opportunities to learn.”); *Abbott v Burke*, 136 NJ 444, 455; 643 A2d 575 (1994) (“[T]here

is a significant connection between the sums expended and the quality of the educational opportunity.” (quoting *Robinson v Cahill*, 62 NJ 473, 481; 303 A2d 273 (1973)); *Rose v Council for Better Ed, Inc*, 790 SW2d 186, 197 (Ky. 1989) (“The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district.”); *Edgewood Indep Sch Dist v Kirby*, 777 SW2d 391, 393 (Tex. 1989) (“The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.”).¹⁰

Article 8, § 2 expressly prohibits the diversion of public funds to nonpublic schools regardless of the performance or quality of Michigan’s public schools. But given the severe resource deficits in far too many of Michigan’s underfunded public schools—indeed, deficits in the very resources Section 152b would fund in nonpublic schools—Section 152b’s violation of the no-aid clause could not be more stark.

CONCLUSION

For the foregoing reasons, *amicus* PFPS respectfully requests that this Court grant Plaintiffs leave to appeal and reverse the Court of Appeals’ erroneous holding that Section 152b of 2016 PA 249 passes constitutional muster.

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¹⁰ The New Jersey Supreme Court recently acknowledged that the increased funding provided by the state to support the public education of students in the state’s high poverty urban districts “has enabled” those students “to show measurable educational improvement.” *Abbott v Burke*, 196 NJ 544, 549; 960 A2d 360 (2008).

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the MiFILE system, which will automatically send notice of electronic filing (NEF) to all registered users listed below:

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