ANSWER TO QUESTION NO. 5

I. Article IV of the United States Constitution.

A group of people who own property within Michigan but reside outside of Michigan allege they are being discriminated against because of their non-residence status. This argument implicates the Privileges and Immunities Clause of the United States Constitution, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." US Const, art IV, §2. The object of the clause is said to place "the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v New York Tax Appeals Tribunal,* 522 US 287, 296 (1998), quoting *Paul v Virginia,* 75 US 168, 179 (1869). Plaintiffs will argue that they are being "subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to." *Lunding,* 522 US at 296, quoting *Shaffer v Carter,* 252 US 37, 56 (1920).

The school board will argue that the statutory terms under attack do not distinguish between residents and nonresidents of Michigan. Rather, the statute awards a homestead exemption to persons who utilize their property as their principal residence. Thus, Michigan residents who do not utilize their Cherry Hill property as their principal residence are treated the same as the non-resident plaintiffs. *Citizens for Uniform Taxation v Northport Public School Dist,* 239 Mich App 284 (2000). Likewise, persons who utilize their property as "recreational" as that term is defined under the statute would also be entitled to the recreational exemption, regardless of whether they reside within Michigan. The school board's argument has legal merit. Because nonresidents and residents are not treated differently, the Privileges and Immunities Clause is not violated.

Even though plaintiff, under the facts of this question, may correctly assert that the statute "impose[s] substantially the entire tax burden on nonresident property owners," the actual amount of the tax paid by nonresidents is not relevant under the Privileges and Immunities Clause. The relevant question is whether nonresidents do not pay taxes that are "more onerous in effect than those imposed *under like circumstances* upon citizens of [Michigan]" *Lunding,* 522 US at 297 (emphasis added). Here, the statute imposes the very same amount of tax upon Michigan citizens that choose to

purchase a vacation (non-homestead) home within the school district as those residents from other states. Simply because more nonresidents happen to live within the school district does not render the statute violative of the Privileges and Immunities Clause.

II. 14th Amendment of the United States Constitution and Michigan Const 1963, art 1, §2.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions, US Const, AM XIV; Const 1963, art 1, §2. Both guarantees afford similar protection. *Shepherd Montessori Ctr Milan v Ann Arbor Twp,* 486 Mich 311, 318 (2010). The purpose of the equal protection guarantee is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution. *Village of Willowbrook v Olech,* 528 US 562, 564 (2000). The equal protection guarantee requires that persons under similar circumstances be treated alike; it does not require that persons under different circumstances be treated the same. *Shepherd Montessori, supra,* 486 Mich at 318.

When a legislative classification is challenged as violative of equal protection, the validity of the classification is measured by one of three tests. *Crego v Coleman,* 463 Mich 248, 259 (2000). Crucial to the analysis under the Equal Protection Clause is the applicable standard of review to be applied to the challenged statute. *Dep't of Civil Rights ex rel Forton v Waterford Twp,* 425 Mich 173, 190 (1986).

An inherently suspect classification is one encompassing a discrete and insular minority that has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection. *San Antonio Independent School Dist v Rodriguez,* 411 US 1, 28 (1973). Here, the statute does not implicate any of the suspect classifications, which include race, ethnicity, national origin, or alienage.

Neither does the statute implicate other classifications, which are suspect but not inherently suspect, including gender, mental capacity or illegitimacy, which are subject to the middle-level substantial relationship test. *Shepherd Montessori, supra,* 486 Mich at 319.

Accordingly, the statute should be examined under the traditional rational basis test. *Phillips v Mirac, Inc,* 470 Mich

415, 434 (2004). Under the rational basis test, legislation is examined for whether it creates a classification scheme rationally related to a legitimate governmental purpose, and the legislation is presumed to be constitutional. *Shepherd Montessori Ctr Milan v Ann Arbor Twp,* 486 Mich at 318-319. The burden of proof is on the person attacking the legislation to show that the classification is arbitrary. Shepherd *Montessori*, *supra,* 486 Mich 319; *Idziak, supra,* 484 Mich 570; *Clark, supra,* 243 Mich App 427. A rational basis for legislation exists when any set of facts is known or can be reasonably assumed to justify the discrimination.

Under the rational basis test, plaintiff would be hard pressed to show that the exemption for homestead properties is arbitrary. Ownership of a primary residence is an indeed compelling state interest which is promoted by decreasing the burden of property taxes on homesteads. Thus, the exemption from the property tax authorized by the statute is rationally related to a legitimate state interest.

Under the rational basis test, plaintiff would be unable to show that the exemption for the listed recreational properties is arbitrary. Although the promotion of the listed "recreational properties" is certainly not as compelling as government's interest in police power or home ownership, the exemption of those properties from the tax cannot be said to be illegitimate. These facilities are all open to the general public and, widely speaking, can be said to have some benefit, whether educational, physical or social. On the other hand, non-homestead properties can have uses other than recreation and need not be open to the public. Unlike the listed types of property, non-homestead properties can readily be imagined as used for purposes unrelated to social welfare, such as a convenient second home, a private guesthouse, storage area, etc.

Notably, the above analysis does not preclude legitimate argument noting potential weaknesses of a rational basis finding, including that the "recreational purposes" exemption is under inclusive. In other words, the statute does not regulate all those that own property and use it strictly for recreational purposes similarly. Further, there may be argument suggesting that the statute may unfairly exempt those with political clout, despite a real factual basis for this conclusion. However, these arguments have routinely been rejected. For example, in *Railway Express Agency, Inc v New York,* 336 US 106 (1949), the United States Supreme Court upheld an ordinance that banned all advertising from the side of trucks except to advertise the truck owner's business. The Court stated that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

Id., at 110. Given this steady trend toward deference to government regularity, and the strong presumption of constitutionality given to tax legislation under these circumstances, *Citizens for Uniform Taxation,* 239 Mich App at 290, plaintiff's claims have little chance of success.