

IN THE SUPREME COURT OF THE STATE OF IDAHO

COMMITTEE TO PROTECT AND PRESERVE
THE IDAHO CONSTITUTION, INC.; MORMON
WOMEN FOR ETHICAL GOVERNMENT;
SCHOOL DISTRICT NO. 281, LATAH COUNTY,
STATE OF IDAHO; IDAHO EDUCATION
ASSOCIATION, INC.; JERRY EVANS; MARTA
HERNANDEZ; STEPHANIE MICKELSEN;
ALEXIS MORGAN, on behalf of herself and her
minor children; KRISTINE ANDERSON, on behalf
of herself and her minor children; each of the
foregoing individually and as private attorneys
general on behalf of the public of the State of Idaho,

Petitioners,

v.

STATE OF IDAHO, acting by and through the
IDAHO STATE TAX COMMISSION,

Respondent,

and

IDAHO STATE LEGISLATURE,

Intervenor-Respondent.

Docket No. 53264-2025

INTERVENOR-RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case

Article IV, Section 4 of the United States Constitution guarantees to each state a republican form of government. U.S. CONST. art. IV, § 4. When the Framers of the Idaho Constitution gathered in 1889 to design Idaho’s form of government, they recognized that the “stability of a republican form of government depend[s] mainly upon the intelligence of the people.” IDAHO CONST. art. IX, § 1. So the Framers assigned to the Legislature the “duty . . . to establish and maintain a general, uniform and thorough system of public, free common schools.” *Id.*

This is a duty that the Legislature treats with the gravity it deserves, as demonstrated by the fact that almost half of the state’s general fund appropriations were allocated to public schools in Fiscal Year 2026. LEGIS. SERVS. OFF., SINE DIE REPORT 25 (2025).¹ Idaho’s public schools provide an outstanding education to most of Idaho’s children.

But *most* is not *all*. Under both the federal and state constitutions, Idaho parents have the right to direct the education of their children. *See* I. C. § 32-1010; *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (Fourteenth Amendment fundamental right to “direct the upbringing and education of children”); *Electors of Big Butte Area v. State Bd. of Educ.*, 308 P.2d 225, 232 (Idaho 1957) (“In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.”) (citing IDAHO CONST. art. I, § 21). Some Idaho parents, for reasons of faith, ideology, or circumstance, choose

¹ Available at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2025/sinedie.pdf> (last accessed Nov. 6, 2025).

to educate their children outside the public-school system. This parenting decision is not one that the State can, will, or should interfere with.

But the “stability of our republican form of government” depends on the intelligence of children educated both inside and outside the public-school system. Idaho’s capacity for self-governance hinges on it. The importance of the education of *all* Idaho children to the Legislature is reflected in several ways.

On top of appropriating almost half of the general fund to the public-school system in Fiscal Year 2026, the Legislature enacted House Bill 93. It provides a tax credit for certain educational expenses incurred by parents of students educated outside the public-school system.

In the face of these expanded opportunities for Idaho’s students, Petitioners brought this original action. Petitioners argue that article IX, section 1’s articulation of a duty implicitly strips the Legislature of the power to enact other laws on that topic: education. But the Legislature doesn’t need enumerated grants of power from the State Constitution to act; it has plenary power, limited only by the Constitution. Article IX, section 1 doesn’t stretch beyond its text to tie the Legislature’s hands in facilitating educational opportunities outside the public-school system.

Petitioners also argue that the parental-choice tax credit violates the public-purpose doctrine because it benefits private schools. The facial challenge, however, fails on its own terms because the doctrine doesn’t apply to all applications of the tax credit. And even if it does, education is a valid public purpose.

The Legislature respectfully requests that this Court deny the writ of prohibition.

II. Background

House Bill 93 establishes the parental-choice tax credit. A parent can receive a refundable tax credit of up to \$5,000 per eligible student, or \$7,500 for a child with disabilities, for certain educational expenses incurred during the tax year. I.C. § 63-3029N(3), (7).

The tax credit can be received only when a parent has incurred “qualified expenses.” § 3029N(3)(a).² These expenses allow flexibility for parents to design their child’s education: the range of educational expenses includes K-12 tuition or fees for students attending a private school, microschool, or learning pod that provides at least English language arts, math, science, and social studies; tutoring; nationally standardized assessments (as well as prep courses for those assessments); assessments used to determine college admission; advance placement tests; and industry-recognized certification exams. § 3029N(2)(a), (d), (f). The list goes on: costs for textbooks; K-12 curricula for English language arts, math, science, and social studies; and transportation costs to and from a facility incurred for the purposes of receiving K-12 academic instruction. § 3029N(2)(a), (f). The statute prevents stacking grants or reimbursement received under other programs. § 3029N(2)(f) (excluding grants received under section 33-1031 and reimbursement under section 33-4603).

Parents can receive the credit for qualified expenses incurred for eligible students. § 3029N(3)(a). An “eligible student” is a full-time resident of Idaho between ages 5-18, or ages 5-21 for a child with disabilities as defined by statute. § 3029N(2)(b). The credit can’t be claimed for students enrolled in public school. § 3029N(10)(b).

² Unless otherwise indicated, all section (§) citations refer to Title 63 of the Idaho Code.

The available tax credits are capped at \$50 million.³ § 3029N(12). Families whose adjusted gross income doesn't exceed 300% of the federal poverty level are first-in-line for credits. § 3029N(6). Starting in the 2027 application period, the Tax Commission gives priority status to applications from parents who received a credit in the prior year, followed by parents who fall below the income threshold. *Id.*

Parents can apply for the credit on January 15; the application window will stay open for at least 60 days. § 3029N(4). Within 30 days after the application period closes, the Tax Commission must notify parents if they will receive the tax credit. *Id.*

Process-wise, tax credits are delayed benefits. So a parent who incurs qualified expenses between January 1 through December 31, 2025 typically won't receive a tax benefit for several months, until their tax return is filed in 2026.

The Legislature recognized that “some parents cannot initially afford qualified expenses.” Sess. Laws, Vol. 1, ch. 9, § 1, 68th Leg., 1st Reg. Sess. (Idaho 2025). To alleviate this barrier, a parent can apply for a *one-time* advance payment. § 3029N(9). House Bill 93 also creates a fund to which moneys are continuously appropriated to pay the advance payments. 2025 Idaho Sess. Laws, Vol. 1, ch. 9, § 3 (codified as I.C. § 67-1230).

To be clear, the “advance” in “advance payment” means in advance of the taxpayer's *tax return* which is filed in the subsequent year. The payment is not necessarily in advance of the taxpayer incurring the expense. Parents can apply for the one-time advance payment starting on January 15. § 3029N(4), (9). The Commission will notify the parent if the credit is awarded, and

³ The amount is now capped at \$49,325,100; Senate Bill 1219 reduced the amount available for the parental-choice tax credit under section 3029N by \$674,900 to implement the administration of the tax credit. Sess. Laws, Vol. 2, ch. 338, § 4, 68th Leg., 1st Reg. Sess. (Idaho 2025).

the payment must be paid within 60 days of this notice. § 3029N(9). So a parent may receive the advance payment before or after the expenses are incurred, depending on the facts. Either way, the payment is in *advance* of filing the taxpayer's tax return. This closes the gap between the incurrence of the expense and receipt of the tax benefit.

The credit goes to parents, not schools. So the entity at which a parent incurs qualified expenses isn't transformed into "an agent of the state or federal government" and subjected to government regulation. § 3029N(20).

There are guardrails. § 3029N(2)(d)(i)-(ii). Parents either incur qualified expenses at an accredited school or must document a "portfolio of evidence or learning record that indicates the student's growth and shall be available in the case of any audit by the state tax commission." *Id.* Similarly, if a parent claims the tax credit for expenditures not authorized under section 3029N, the Tax Commission "shall deny or recapture credits." § 3029N(15).

Section 3029N also provides for gathering information to gauge the efficacy of the tax credit. Parents must fill out a satisfaction and engagement survey evaluating the performance of the nonpublic school attended by their child, if the parent wants to be eligible to receive the credit in future years. § 3029N(10)(e), (14). Starting in 2027, the Tax Commission must provide a report to the governor and certain legislative committees that includes information about the demand for and provision of the credit. § 3029N(13)(a).

House Bill 93 is effective retroactively to January 1, 2025. 2025 Idaho Sess. Laws, Vol. 1, ch. 9, § 5.

The tax credit does not take funds earmarked for the public-school budget. Tolman Decl. ¶ 9. In fact, the Legislature has prioritized public-school education. In Fiscal Year 2026, the

Legislature appropriated \$3.4 billion dollars for public-school support. Tolman Decl. ¶ 3. Compare this to Fiscal Year 2021's appropriation of \$2.36 billion. *Id.* ¶ 2. The current budget has grown by 44% over the past five years. *Id.* ¶ 4.⁴ The total cost spent on a student's education in the public school system in Fiscal Year 2024 when factoring in federal, state, and local funding was approximately \$14,000 per student. *Id.* ¶ 7. The State generally provided approximately \$8,400 per student in Fiscal Year 2025. *Id.* ¶ 6. It is undisputed that the Legislature has fulfilled its constitutional duty under article IX, section 1 of the Idaho Constitution to maintain the public-school system.

III. Course of the Proceedings

House Bill 93 was signed into law by the Governor in February 2025. Nearly seven months later, Petitioners ask for a writ of prohibition in an original action filed in this Court. Petitioners challenge House Bill 93 on its face, arguing that it is unconstitutional in all of its applications. Pet'rs. Br. 4, n.2.

Petitioners claim that the refundable tax credit violates article IX, section 1's mandate for the Legislature to establish and create a public-school system, arguing that mandate implicitly bars the Legislature from promoting educational opportunities outside the public-school system. Pet. ¶ 60. And although Petitioners don't pinpoint any constitutional text through which the public-purpose doctrine applies, they argue that the tax credit for parents can't serve the public purpose of education because it benefits private schools. Pet'rs. Br. 26-30. Petitioners also ask

⁴ The increase in appropriations to support public schools (44%) is almost double the pace of inflation (22.4%) in the United States over the same period. Tolman Decl. ¶¶ 4-5. Public school appropriations grew 196% faster than inflation. *See id.*

for attorneys' fees under the private attorney general doctrine and Idaho Code section 12-121.

Pet., Prayer for Relief, ¶¶ 4, 6.

After this Court set a briefing schedule, it granted the Legislature's intervention.

ISSUES PRESENTED

1. Does article IX, section 1's duty for the Legislature to establish and maintain a public-school system implicitly prevent the Legislature from exercising its spending and taxing powers to facilitate educational opportunities outside the public-school system by providing a refundable tax credit to parents for certain educational expenses?

2. Does the facial challenge under the public-purpose doctrine fail on its own terms when the doctrine does not apply to all applications of the parental-choice tax credit, and, if applied, does the tax credit pursue the public purpose of educating Idaho's children?

3. Does the private attorney general doctrine remain a viable basis for an award of fees for Petitioners after the amendment to Idaho Code section 12-121?

STANDARD OF REVIEW

This Court reviews constitutional provisions and statutes de novo. *Ybarra v. Legislature*, 466 P.3d 421, 426 (Idaho 2020).

ARGUMENT

This Court exercises its power to strike down duly-enacted statutes only in "clear cases." *Ybarra*, 466 P.3d at 426. This Court does not sit as a superlegislature, passing on "economic, equitable, or moral effect[s]" of a statute, because those are "matters of policy exclusively for the legislature." *Oneida Cnty. Fair Bd. v. Smylie*, 386 P.2d 374, 376 (Idaho 1963).

Petitioners bear the burden of establishing that House Bill 93 is unconstitutional. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1155–56 (Idaho 2023). To do so, they must overcome “a strong presumption of validity.” *Id.*

On top of that, Petitioners must show that “no set of circumstances exists under which [House Bill 93] would be valid” to succeed on their facial challenge. *In re Doe*, 517 P.3d 830, 838 (Idaho 2022) (citation modified); Pet’rs. Br. 4 n.2 (asserting that “HB 93 is facially unconstitutional”). The question, then, is not whether *some* applications of the tax credit violate the Constitution, but whether *all* applications do. *See id.*

This high bar makes sense: facial challenges “threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *cf. Ex parte Crane*, 151 P. 1006, 1009 (Idaho 1915) (noting that laws reflect “the will of the people as thus expressed by their chosen representatives”). Petitioners’ challenge under both article IX, section 1 and the public-purpose doctrine cannot surmount that high bar. Nor can Petitioners establish standing; the Legislature joins the State’s arguments on standing.

I. To succeed on their facial challenge, Petitioners must establish that (1) article IX, section 1 prevents the Legislature from facilitating educational opportunities outside the public-school system and (2) the parental-choice tax credit establishes and maintains an alternative “system” of education.

In interpreting the State Constitution, this Court’s primary object is to “determine the intent of the framers.” *Planned Parenthood*, 522 P.3d at 1162. So the Court always starts with the text. *Id.* And it reads the text “in context” of the entire Constitution, so that no provision is made void, superfluous, or redundant. *Id.*

The “State Constitution is a limitation, not a grant of power.” *Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 399 (Idaho 2006). The Legislature “has plenary powers in all matters, except those prohibited by the Constitution.” *Id.* Put another way, the Legislature can enact any statute if its power is not specifically limited by the Constitution. *See id.*; *Davis v. Moon*, 289 P.2d 614, 617 (Idaho 1955) (“The legislature has unlimited power to legislate where legislation is not prohibited.”). This Court does not read in “other, unstated limitations.” *See Idaho Press Club*, 132 P.3d at 400.

A. Article IX, section 1 sets a floor but does not prohibit the Legislature from fostering educational initiatives outside the public-school system.

Petitioners argue that the duty to establish and maintain a public-school system implicitly prevents the Legislature from enacting a tax credit for parents that fosters additional educational opportunities for students. Pet’rs. Br. 16-19. In other words, that the *explicit duty* to establish and maintain public schools serves as an *implicit limitation* on the Legislature’s power to foster education through other means.

But this Court does not imply restrictions on legislative power that don’t flow from the text. *Idaho State Athletic Comm’n v. Office of the Admin. Rules Coordinator*, 542 P.3d 718, 736 (Idaho 2024). And “the power to make and determine policy for the government of the State is vested in the Legislature, IDAHO CONST. Art. 2, § 1, and Art. 3, § 1.” *Rich v. Williams*, 341 P.2d 432, 440 (Idaho 1959). The Legislature’s power is particularly strong in the arena of finance and taxes—this Court has “long held that the Legislature has absolute control over the finances of the state, except as limited by the Constitution.” *Ybarra*, 466 P.3d at 432 (citation modified). Article IX, section 1 requires the Legislature to set up and maintain a public-school system. But it doesn’t prevent the Legislature from using its general lawmaking authority, including its plenary

spending and taxing authority, to facilitate other educational opportunities. See IDAHO CONST. art. III, § 1. Facilitating educational opportunities is consistent with the framers' goal: an educated citizenry.

1. *The text doesn't prohibit the Legislature from doing more to facilitate educational opportunities.*

Constitutional interpretation starts with the text. *Planned Parenthood*, 522 P.3d at 1162. Petitioners' drive-by textual argument asserts the article adjective "a" is dispositive. Pet'rs. Br. 16-17. The text as a whole does not bear this out.

Article IX, section 1 provides: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1. So the duty is the Legislature's: no other entity can take its place. What does the duty entail?

It requires the Legislature to create and provide financial support to, and otherwise ensure the continued existence of, a public-school system. Around the time the framers were drafting the Constitution, "establish" was defined as "3. To found, create, to regulate; as: 'Congress shall have power to establish post-roads and post offices.'" *Black's Law Dictionary* 433-34 (1st ed. 1891) (*Black's Law*). It's also defined as "4. To originate and secure the permanent existence of; to found; to institute." *Webster's Complete Dictionary of the English Language* 465 (London, George Bell & Sons 1886) (*Webster's*). "Maintain" is defined as "1. To hold or keep in any particular state or condition; to support; to sustain . . . 4. To bear the expense of; to support; to keep up; to supply with what is needed." *Webster's* 802. To fulfill its "establish and maintain"

job, the Legislature must create and support a system, financially and otherwise, so the system continues to exist.

The word “system” indicates an organized, collective network of schools. Webster’s defines “system” as “[A] complete whole of objects related by some common law or principle, or end; a regular union of principles or parts forming one entire thing” or “the whole scheme of created things regarded as forming one complete plan or whole; the universe.” *Webster’s* 1345. Put another way, the parts (the schools) form one entire thing (the system). The system of schools must have certain attributes: the system must be general, uniform, and thorough; the schools must be public, free, and common. IDAHO CONST. art. IX, § 1.

Precedent reflects this plain-text reading. This section “mandates action by the Legislature.” *Thompson v. Engelking*, 537 P.2d 635, 648 (Idaho 1975). The Legislature must “set up a complete and uniform system of public education for Idaho elementary and secondary school students.” *Id.* And “maintenance” generally refers to providing for “continuing regular expenditures” of the schools. *See Roach v. Gooding*, 81 P. 642, 644 (Idaho 1905) (quoting *Sheldon v. Purdy*, 49 P. 228, 230 (Wash. 1897)). But once satisfied, this duty doesn’t foreclose the Legislature from doing more.

The Constitution is a limitation of power; the Legislature has plenary power unless limited by the Constitution. This Court declines to read in “other, unstated limitations” when the text is clear. *See Idaho State Athletic Comm’n*, 542 P.3d at 736. This is dispositive to the case; Petitioners’ entire argument flows from the premise that the parental-choice tax credit is prohibited by an “unstated limitation[.]” *Id.* Because article IX, section 1 does not prohibit the Legislature from enacting a tax credit for expenses incurred at nonpublic educational

alternatives, the Legislature can exercise its plenary power over the State's finances to do so. *Id.* ("It is not reasonable to assume that the drafters intended to impose other, unstated limitations." (citation modified)).

This is confirmed by other provisions. The framers knew how to prohibit certain actions by the Legislature. They did so in other provisions in article IX. Take section 8: "No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon [school lands]" IDAHO CONST. art. IX, § 8 (amended 1916). Prohibitions in other articles are equally clear. *See, e.g.*, IDAHO CONST. art. V, § 13 ("The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government"). If the framers intended to prohibit tax credits like this, "they could easily have done so," as they did elsewhere in the Constitution. *See Idaho State Athletic Comm'n*, 542 P.3d at 736.

History fortifies this conclusion. The framers charged the Legislature to establish and maintain a free public-school system against the backdrop of limited educational opportunities. In deciding that education should not be a constitutional criterion for the right to vote, one delegate noted that "there is many a man and boy who has grown up here without having the opportunity of attending school." PROCEEDINGS & DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, Vol. 1, 400 (I.W. Hart ed., 1912). Even though the territorial legislature attempted to establish a common school system, Act of Dec. 17, 1864, ch. VI, 1864 Idaho Terr. Sess. Laws 377–83, "most schools, both private and public, had to rely on parental funding until after statehood." U.S. DEP'T OF THE INTERIOR, *Public Education in Idaho from Early Settlement to 1947*, § E at 5 (1991). Article IX, section 1 shows the framers' intent to make

education available to all. Reading it to implicitly bar the Legislature from fostering other educational opportunities would thwart the framers' overall goal: educated citizens.

That the framers simply wanted educated citizens (not exclusively public-school educated citizens) is confirmed by their provision for education "by other means." IDAHO CONST. art. IX, § 9. Section 9 ensures that Idaho's children will be educated, either in its public-school system or "by other means." *Id.*

This express acknowledgment that nonpublic means of education accomplishes the ultimate goal (educated citizens) belies Petitioners' assertion that section 9 "indicated a strong preference for using the publicly-financed school system to educate Idaho children." Pet'rs. Br. 20. The framers' acknowledgment of "other means" of nonpublic education in section 9 shows that the framers were aware of nonpublic means of education but did not bar legislative aid to those means. And Petitioners haven't marshaled any evidence that the framers implicitly intended to preclude support for education of a child outside the public-school system.⁵ Section 9 buttresses the conclusion that the framers wanted educated citizens, whether by public or nonpublic means.

Petitioners also claim that public money hasn't been allowed "to finance or support private education" in the "135 years since Idaho achieved statehood." Pet'rs. Br. 20. That's wrong. For example, parents homeschooling their children can receive a \$2,500 grant for certain educational expenses, like textbooks, curriculum, and fees for AP exams. *See* I.C. § 33-1030(3)

⁵ Petitioners strain to read this provision, as well as subsequent statutes and constitutional amendments, to reaffirm "the framers' obvious intent to place public schools over every other means of education in the State." Pet'rs. Br. 20. But these provisions and statutes recognize that education can and does occur by nonpublic means; they do not somehow establish that the Legislature can't facilitate educational opportunities through nonpublic means.

(defining “eligible education expenses”); I.C. § 33-1301 (establishing the “empowering parents grant program”).⁶ Similarly, seventh through twelfth grade students attending nonpublic schools can receive up to \$2,500 to use for “dual credits, postsecondary credit-bearing examinations, and career technical education certificate examinations.” I.C. § 33-4603 (advanced opportunities program).⁷

Tax breaks for expenses incurred at private educational institutions have also been available. Idaho allows a deduction for interest paid on student loans for expenses at a private educational institution. See I.C. § 63-3011A (Idaho’s term “adjusted gross income” references 26 U.S.C. § 62); 26 U.S.C. § 62(a)(17) (deducting interest paid on education loans from gross income as allowed by 26 U.S.C. § 221). Tax exemptions that indirectly benefit all schools, including private schools—that would otherwise “ultimately increase the cost of education, a matter of public interest”—have been upheld. *Smallwood v. Jeter*, 244 P. 149, 155–56 (Idaho 1926) (rejecting argument that the statute unlawfully discriminated by exempting private schools when “schoolbuses, or other motor vehicles, used exclusively for the transportation of children to and from schools” were exempted from license tax and other regulations imposed on every auto transportation company). Petitioners’ sweeping statements selectively and incompletely read the history here.

⁶ Sections 33-1030 and -1031 are effective until July 1, 2028. See Sess. Laws, Vol. 2, ch. 328, § 2, 68th Leg., 1st Reg. Sess. (Idaho 2025). That the grant program is now being phased out doesn’t change the history; Idaho has previously expended state money on nonpublic methods of education.

⁷ And school districts have had to reimburse parents for the private-school tuition of a child with disabilities as part of the obligation to provide a free appropriate public education. *Thornock by Baugh v. Boise Ind. Sch. Dist. No. 1*, 767 P.2d 1241, 1249–51 (Idaho 1988).

The Legislature has fulfilled its article IX, section 1 mandate. Idaho’s system is general, uniform, and thorough. And the schools in that system are free and open to all comers. The existence—and satisfaction—of that duty does not stop the Legislature from providing additional educational opportunities to Idaho’s children, as it has with the parental-choice tax credit.

2. Article IX, section 1 sets a floor, not a ceiling.

Article IX, section 1 speaks only to creating and maintaining a general and uniform public-school system.

So long as the Legislature creates and maintains the system of uniform public schools, it is not forbidden from facilitating other educational opportunities. Indeed, in the first legislative session after Idaho became a state, the Legislature passed a law permitting private schooling and homeschooling. Sess. Laws, § 39, 1st Leg., 1st Sess. (Idaho 1891). Petitioners don’t assert that the Legislature hasn’t fulfilled “its mandate under Article IX, section 1 in funding public education.” Pet’rs. Br. 25. Petitioners instead argue that article IX, section 1 does something more: that it prohibits the Legislature from taking action regarding nonpublic education. Pet’rs. Br. 25 (arguing the “express limitations and qualifications contained in article IX, section 1 are a constitutional bar to the creation of the Program”).

But this Court has rejected arguments that the section does something more, like create a fundamental right to education or dictate a central state system of expenditures per student. *Thompson*, 537 P.2d at 648; *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993) (education is not a fundamental right “because it is not a right directly guaranteed by the state constitution”). In effect, the education clause operates as a floor, not a ceiling. The

Legislature must satisfy the article IX, section 1 mandate, but section 1 does not prohibit the Legislature from enacting additional educational measures.

Nor does *Evans v. Andrus* require otherwise. *Evans* held that the statutory creation of three boards of education violated article IX, section 2. 855 P.2d 467, 471 (Idaho 1993). Section 2 provides that “[t]he general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education” IDAHO CONST. art. IX, § 2. The Court held that section 2 “clearly vests *in the Board of Education* governance” of public education in Idaho. *Evans*, 855 P.2d at 471 (emphasis in original). Section 2 vests governance in a particular constitutional entity. *Id.* So no other entity, including three boards of education, could govern. *Id.*

Petitioners overread *Evans*. They assert that the Court reached this outcome “because the use of the article ‘a’ required a ‘single’ board of education.” Pet’rs. Br. 17. But the *Evans* Court did not discuss the article “a.” *Evans*, 855 P.2d at 471–72. The Court italicized “a” (as well as “general supervision”) in quoting section 2. *Id.* at 471. Elsewhere, the Court replaced Section 2’s “a” with the definite article “the,” reasoning that section 2 “clearly vests *in the Board of Education* governance.” *Id.* (emphasis in original).

The clear takeaway from *Evans* is that specific roles for specific constitutional entities can’t be reassigned. As applied to section 1, *Evans* teaches that the Legislature is the specific constitutional entity with the duty to establish and maintain the public-school system. *Id.* at 471–72. That duty can’t be handed off to another entity or split among several.

To succeed, Petitioners would need *Evans* to stand for much more: that section 1’s requirement for the Legislature to establish “a . . . system” prevents the Legislature from doing

anything more to facilitate educational opportunities in Idaho and curtails its general lawmaking authority, including its spending and taxing powers that are normally limited only by article VII. Pet'rs. Br. 16-18. *Evans* cannot support that weight.

Reading the uniformity section as a floor, not a ceiling, is consistent with the majority of other states, which have held that the state legislature is free “to do more than that which is constitutionally mandated” in its uniformity clause. *See Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (holding that a school-choice program did not violate its state constitutional educational provision); *State v. Beaver*, 887 S.E.2d 610, 627, n.17 (W. Va. 2022) (citing the floor-not-a-ceiling holding in North Carolina, Wisconsin, and Nevada). The North Carolina Supreme Court held that the uniformity clause “does not prohibit” its legislative body “from funding educational initiatives outside of th[e] [public school] system.” *Hart v. State*, 774 S.E.2d 281, 290 (N.C. 2015). Because article IX, section 1 establishes a floor, not a ceiling, for the Legislature, the parental-choice tax credit complies with the Constitution.

3. *The parental-choice tax credit does not violate the Legislature’s article IX, section 1 duty.*

Petitioners also assert that the parental-choice tax credit does—or more appropriately, that it *might*—detrimentally impact the existing public-school system. It’s not clear precisely what role this assertion plays in their argument. Petitioners argue that the tax credit exceeds the Legislature’s authority under article IX, section 1. Pet. ¶ 60. Not that the tax credit undermines public schools to such a degree that the Legislature has failed to create and maintain a public-school system.

In any case, the parental-choice tax credit does no such thing. The tax credit does not close the public schools. It does not make the public-school system non-uniform. It does not

change the existence or structure of the public-school system. It does not divert funding appropriated to the public-school system. See I.C. § 67-1230. A school-choice program “in no way deprives any student of the opportunity to attend a public school with a uniform character of education.” See *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998).

Petitioners assert that “[m]any students will withdraw from public schools to take advantage of the tax credit,” Pet’rs. Br. 4, but as a matter of pure economics, the Legislature incentivizes students to remain in public school. No tuition is required to attend public school. On the other hand, private schools require tuition; aside from the *one-time* advance payment, parents will incur educational expenses and will not receive a tax benefit until the following year when their tax return is filed. And private-school parents will probably still be out some money; the \$5,000 tax credit limit is unlikely to cover all educational expenses. Similarly, a homeschooling parent puts in the labor of homeschooling, incurs the costs of curriculum, learning supplies, and co-ops, and will not receive a tax benefit for the eligible expenses until the following year when the tax return is filed. If economics are the measure of incentive, the Legislature incentivizes students to stay in the free, public school. Not to withdraw. The parental-choice tax credit doesn’t violate the Legislature’s article IX, section 1 duty.

4. *The canons don’t aid in interpretation here, but even if applied, they confirm that the tax credit complies with the Constitution.*

This Court generally turns to canons of construction only when the text is ambiguous. See *Idaho State Athletic Comm’n*, 542 P.3d at 735–36. Petitioners nod to the rule on ambiguity but don’t actually argue that article IX, section 1 is ambiguous. See Pet’rs. Br. 19. And it’s not. The text is clear. So the Court doesn’t need to reach Petitioners’ arguments about canons of construction. See *Idaho State Athletic Comm’n*, 542 P.3d at 735–36.

- a. *Even in interpreting ambiguous text, the Court doesn't automatically apply any and all canons.*

Even if the Court holds that the text is ambiguous, it still considers which canons actually aid in interpreting the text at issue. Petitioners assert that the *expressio unius* canon applies to article IX, section 1 to “exclude any establishment, financing, or support of other types of schooling” besides public school. Pet’rs. Br. 22. But Petitioners fail to engage with the actual text and apply the canon. Pet’rs. Br. 21-22.

The canon *expressio unius est exclusio alterius*—to express or include one thing implies the exclusion of the other—generally applies only to a listing or grouping of two or more terms or things. Even then, the canon doesn’t automatically apply; “it has force only when the items expressed are members of an associated group or series.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003). Put another way, the terms “should be understood to go hand in hand.” *Id.* (quoting E. CRAWFORD, CONSTRUCTION OF STATUTES 337 (1940)). This Court has used *expressio unius* in that context: *Idaho Press Club*’s identification of two or more terms in article

III, section 12 (“each house” and the “committee of the whole”) is consistent with the canon’s acknowledged use.⁸ *Idaho Press Club*, 132 P.3d at 400.

But there is no list of associated terms in article IX, section 1 relevant here. Petitioners fail to identify the particular text, much less a grouping, to which *expressio unius* applies. Pet’rs. Br. 21-22. They appear to apply the canon to the constitutional text: “a . . . system.” But “a . . . system” is not a listing or grouping of an associated group or series. Because there isn’t a list of two or more terms, *expressio unius* doesn’t aid in interpretation. *See Barnhart*, 537 U.S. at 169.

Setting aside the lack of a series of associated terms, *expressio unius* also isn’t helpful in interpreting a constitutional provision that requires the Legislature to fulfill a duty, like article IX, section 1. Enumerating a specific legislative duty in a State Constitution cannot imply that all other laws on a subject are prohibited.

The Court also hasn’t addressed *expressio unius*’ application to this type of constitutional provision. While the Court won’t apply the canon to constitutional provisions that enumerate

⁸ This Court has referenced *expressio unius* at times in interpreting constitutional provisions that do not contain a series of two or more terms. But the text of those provisions, not the canon, dictated the outcome. *See Clayton v. Barnes*, 16 P.2d 1056, 1058 (Idaho 1932) (constitutional provision providing that the “county commissioners may employ counsel when necessary” dictated holding that county assessor could not hire counsel when county officials have only the authority given by statute or constitution); *Shoshone Cnty. v. Profit*, 84 P. 712, 714 (Idaho 1906) (constitutional provision that the annexed portion of a county must pay its ratable proportion of the existing liabilities of the county from which it was taken dictated holding that the annexed portion—not any other entity—pay). The reference to *expressio unius* in these cases does not counsel toward applying the canon outside the context in which it aids in interpreting the text: a series or list of associated things or terms.

And the use of canons of construction with plain text almost a century ago does not suggest that the Court should abandon its current rules of constitutional interpretation. As its constitutional interpretation has evolved, this Court has made clear that it does not reach canons of construction when the text is unambiguous. *Idaho State Athletic Comm’n*, 542 P.3d at 735–36. Nor can canons be appropriate simply because the argument is that the limitation is implicit; that would give any plaintiff making an implicit argument a golden ticket. But this Court adheres to the clear text.

powers and will apply it to constitutional provisions of limitation, *Idaho Press Club*, 132 P. 3d at 400, a constitutional provision setting out a legislative duty doesn't cleanly fit into either category. Because the Legislature has plenary power, *expressio unius* doesn't aid in interpreting a provision giving the Legislature a duty in the Idaho Constitution. Theodore Steinmeyer, *Legal Choices: The State Constitutionality of School Voucher Programs*, Note, 47 HARV. J.L. & PUB. POL'Y 231, 241–43 (2024) (discussing why *expressio unius* does not aid in interpreting state constitutional educational articles). Most other states do not apply *expressio unius* to their education clauses.⁹ See, e.g., *Beaver*, 887 S.E.2d at 627–28 (declining to apply *expressio unius* to clause requiring Legislature to provide “for a thorough and efficient system of free schools”).

Expressio unius just doesn't fit. It certainly doesn't help the Court resolve some ambiguity in the text.

b. *Canons confirm that the Legislature can exercise its plenary spending and taxing authority.*

If the Court reads article IX, section 1 as a limiting provision, *expressio unius* confirms that the Legislature retains plenary power to facilitate educational opportunities on top of satisfying its constitutionally mandated duty to establish and maintain a public-school system. This Court has applied the *expressio unius* canon to broadly interpret the Legislature's authority. Because the Constitution is a document of limitation, limitations must be express.

⁹ One outlier state has applied *expressio unius* to its education provision to hold that it created both a floor and a ceiling, but it is not persuasive here. See *Bush v. Holmes*, 919 So. 2d 392, 407–08 (Fla. 2006). First, that holding was premised on the Florida Constitution's vesting of a “paramount duty,” and Florida-specific precedent. *Id.* Second, Florida's program directly paid funds to private schools that would otherwise have gone to the public school for that student, *id.* at 408–09; House Bill 93 does not take money appropriated to Idaho's public-school system, Tolman Decl. ¶ 9.

Idaho Press Club reflects this. “When the framers drafted a provision expressly limiting certain powers, there is no reason to believe that they intended the limitation to be broader than they drafted it.” *Idaho Press Club*, 132 P.3d at 400. There, article III, section 12 provided that “[t]he business of each house, and of the committee of the whole shall be transacted openly and not in secret session.” IDAHO CONST. art. III, § 12. The Court applied *expressio unius* to find that because the provision expressly limited “each house” and “the committee of the whole” from transacting business in secret session—but did not specify legislative committees—the requirement to transact business “openly” did not apply to legislative committees. Put another way, the Court used *expressio unius* in limitation provisions to *reject* extratextual limitations.

So too here. If *expressio unius* plays any role at all, it rejects extratextual limitations. Article IX, section 1 requires the Legislature to establish and maintain the public-school system but does not prohibit it from facilitating other educational opportunities.

Finally, Petitioners repackage their argument that any indirect beneficiary of state funds related to an educational expense must be “subject to the requirements of Article IX, section 1,” by invoking the principle that the Legislature cannot do indirectly what it cannot do directly.¹⁰ Pet’rs. Br. 22-23. But as discussed below, Petitioners’ facial challenge fails because (1) the entities at which eligible expenses may be incurred are not part of an alternative system of schools established and maintained by the Legislature and (2) a tax credit to parents doesn’t implicate article IX, section 1. And as discussed in Section II.C, below, this Court has not

¹⁰ In rejecting this argument about a state-contracted cancer-research program with a private university, the Nebraska Supreme Court reasoned that “overworked expression about circumvention by indirectness, if subjected to the test of ultimate application, would necessitate that a fire in a nonpublic school be extinguished by a nonpublic bucket brigade, not by a publicly funded fire department.” *State ex. rel. Creighton Univ. v. Smith*, 353 N.W.2d 267, 272 (Neb. 1894).

invalidated legislative action because of the benefit to an indirect beneficiary. *See, e.g., Davis*, 289 P.2d at 619 (benefit to “a private individual or organization” from government spending does not invalidate the law).

B. The tax credit does not “establish and maintain” a “system” of schools.

Petitioners claim that the Legislature—through the tax credit—is “maintain[ing] a system of education separate from the one required under Article IX, section 1 of the Idaho Constitution” because “[b]y limiting qualified expenses to nonpublic education only, public funds will go directly to private schools.” Pet’rs. Br. 18. As established above in Section I.A, article IX, section 1 simply sets a floor; it does not prohibit the Legislature from doing more to facilitate educational opportunities. Even so, the tax credit doesn’t “maintain” an alternative “system” of schools.

First, the facial challenge must fail because Petitioners don’t argue that *all* applications of the tax credit set up an alternative system of nonpublic schools. *See In re Doe*, 517 P.3d at 838 (facial challenge succeeds only when petitioners establish that “no set of circumstances exists under which [House Bill 93] would be valid”). Petitioners focus entirely on tuition paid at private schools. *See* Pet’rs. Br. 18 (“public funds will go directly to private schools”); Pet’rs. Br. 22 (characterizing the parental-choice tax credit as “appropriated public funds being used to pay private school tuition and fees”).

That is just one type of educational expense for which the tax credit can be claimed. Other applications of the tax credit are unquestionably constitutional even under Petitioners’ argument. § 3029N(2)(f) (range of educational expenses). No one thinks, and Petitioners don’t argue, that a bookstore is converted into an alternative “system” of nonpublic education when it

sells curriculum to a homeschooling parent, or that a tutor becomes an alternative “system” when she tutors a student, just because the parent later receives a refundable tax credit for these qualified expenses.

This plainly constitutional application defeats Petitioners’ facial challenge. *See In re Doe*, 517 P.3d at 838.

Second, even when the tax credit is claimed for expenses incurred at private schools, the Legislature hasn’t established and maintained an alternative system of schools. To “establish” a system is to create one. *Black’s Law* 433–34. “Maintain” means that the Legislature ensures that the school system is “suppl[ied] with what is needed,” i.e., it receives sufficient funds to continue operating. *Webster’s* 802; *Roach*, 81 P. at 644 (reasoning that maintenance required support to continue normal operating expenditures). A “system” means a cohesive organization of “created things” that together “form[] one complete plan or whole.” *Webster’s* 1345.

The parental-choice tax credit does none of these. Private schools are “established” by the institutions that create them. Not by the tax credit.

Indirect benefit to nonpublic institutions does not “maintain” those institutions. The amount is far below what would be considered “maintenance”—a cap of \$50 million compared to the \$3.4 billion appropriated to maintain the public-school system. § 3029N(12) (\$50 million cap); Tolman Decl. ¶ 3. Any indirect financial benefit is piecemeal rather than systematic—parents choose where the funds go, not the State. § 3029N(2)(f). And the amount of the credit is not calculated to meet the needs of the nonpublic school or continue its existence.

The tax credit is tailored to support parental choice in education, just as the bill itself says. The tax credit is not designed to—and does not—“establish” and “maintain” a system of nonpublic schools.

Nor does indirect financial benefit go to a “system” of nonpublic schools. Parents can incur—at a wide range of institutions—qualified expenses for which the tax credit can be claimed. § 3029N(2)(d), (f). Indirect financial benefit will thus be widely distributed among separate entities throughout the state. This does not create an alternate “system” of nonpublic schools—that is, an alternate cohesive organization of parts working together.

In short, the parental-choice tax credit does not “establish” nonpublic schools; it does not “maintain” nonpublic schools; and it does not (even indirectly) support a “system” of nonpublic schools. Petitioners’ argument fails at every step.

The argument fails on other grounds, too. Public funds (1) do not go “directly to private schools.” Pet’rs. Br. 18, and (2) do not necessarily go even indirectly to private schools. The tax credit can be claimed by *parents* for certain educational expenses, including tutoring, nationally standardized assessments, assessments used to determine college admissions, and advanced placement examinations. § 3029N(2)(f). A parent *may* incur qualified expenses on private school tuition. *Id.* Or a parent may incur a variety of other qualified expenses, like tutoring. *Id.*; see Parent Pet’rs Intervention Br.; Dagostino Decl. ¶ 10 (planning to homeschool eligible child and engage services of tutors for core subjects).

Regardless, parents and students are the direct beneficiaries. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2002) (rejecting similar arguments because the school-choice program provided “aid directly to a broad class of individuals, who, in turn, direct

the aid to . . . schools or institutions of their own choosing”); *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015) (holding that tax credit “was designed for the benefit of parents and students, and not for the benefit of religious schools”); *Meredith v. Pence*, 984 N.E.2d 1213, 1228–29 (Ind. 2013) (holding that the “direct beneficiaries” of the school-choice program were “families of eligible students” rather than the “schools selected by the parents for their children to attend”). When parents choose how and where eligible expenses will be incurred, the Legislature has not established and maintained an alternative school system.

1. *Because the tax credit doesn’t create a “system” of schools within the meaning of article IX, section 1, the constitutional qualitative requirements don’t apply to entities at which qualified expenses can be incurred for the tax credit.*

Petitioners argue that the tax credit is unconstitutional because parents can incur qualified expenses at entities that are not “uniform, thorough, public, free and common.” Pet’rs. Br. 23-26. Section 1 doesn’t reach this far. It requires the Legislature to establish a system that is general, uniform, and thorough, and the schools *in that system* must be public, free, and common. IDAHO CONST. art. IX, § 1. But those qualitative requirements don’t apply here.

Put another way, section 1 is “clearly directed at maintaining uniformity *within* the public school system.” *Schwartz v. Lopez*, 382 P.3d 886, 897 (Nev. 2016) (rejecting argument that use of public funds for an education savings account program subsidized an alternative system of education that included non-common, non-uniform private schools in violation of Nevada’s uniformity clause). It does not require entities *outside* that system to be public, free, and common.

This seems obvious, but to be clear, the parental-choice tax credit does not convert entities at which a parent incurs expenses into public schools. Neither the bookshop nor the tutor

nor the SAT-prep-course-provider nor a nonpublic school becomes part of the public-school system when a parent incurs expenses for which a tax credit can later be claimed. The statute is explicit on this point. § 3029N(20).

Because entities at which qualified expenses can be incurred for the tax credit aren't part of the public-school system, section 1's qualitative requirements do not apply.

2. The Board of Education's constitutional authority to supervise public schools isn't implicated when parents incur eligible expenses at nonpublic schools.

Petitioners argue that a public-school system under article IX, section 1 must be supervised by the State Board of Education; so the administration of the tax credit by the Tax Commission is unconstitutional. Pet'rs. Br. 19. Article IX, section 2 vests the State Board of Education with governance over "all *state* educational systems and *public* schools." IDAHO CONST. art. IX, § 2. But this does not grant the Board authority over initiatives existing outside the "state educational systems" or "public schools." *See, e.g., Beaver*, 887 S.E.2d at 633 (rejecting argument that State Board of Education's constitutional authority to supervise the State "free schools" extended to supervise an educational initiative enacted "outside of the free school system"). So it is not constitutionally problematic that eligible expenses can be incurred at institutions that aren't public schools. Because the entities at which qualified expenses can be incurred are not state or public schools, the Board's constitutional governance is not implicated.

II. A facial challenge under the public-purpose doctrine fails on its own terms, but even on the merits, the tax credit serves the public purpose of educating Idaho's children.

The Legislature exercised its "absolute control over the finances of the state," including its "plenary" power over "the expenditure of state funds," *see State v. Banks*, 198 P. 472, 477 (Idaho 1921), and to "classify, define, and exempt for taxation purposes," *Diefendorf v. Gallet*,

10 P.2d 307, 313 (Idaho 1932), in enacting House Bill 93. That plenary power is subject only to constitutional limitations.

Petitioners’ facial challenge stumbles out of the gate: they argue the doctrine applies to “spending,” which they also describe as “activities . . . funded by tax revenues.” Pet’rs.

Br. 26-28. In other words, state expenditures. Here, in some instances—when tax liability exceeds the credit amount—no funds will be expended by the State. So the public-purpose doctrine does not apply to *all* applications, and the facial challenge fails on its own terms.

Even if the public-purpose doctrine does apply, Petitioners have identified no express limitation in the Constitution’s text. This Court has never applied the public-purpose doctrine unmoored from any constitutional text. It should not expand the doctrine to strike down a tax credit. What’s more, educating the citizenry—whether through public schools or supporting parents’ educational expenditures on non-public schools—is a public purpose. So the argument fails on the merits.

A. The public-purpose doctrine does not apply when the tax credit simply reduces an individual’s tax liability, so the facial challenge fails.

Petitioners advocate for a rule that the public-purpose doctrine applies to “activities engaged in by the state, *funded by tax revenues*.” Pet’rs. Br. 26 (emphasis in original). But under that formulation, the public-purpose doctrine would apply *only* when the tax credit is funded by tax revenues. That is not universally the case here. In some (or many) instances, the tax credit will simply reduce an individual’s tax liability to the State. Reduction of tax liability is not an activity funded by tax revenues. *See Idaho Water Res. Bd. v. Kramer*, 548 P.2d 39, 59 (Idaho 1976) (considering state financing as activity funded by tax revenues); *see, e.g., Ariz. Christian*

Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) (money not paid to the state due to tax credit is not government property when it never came into the tax collector's hands).

Application of the credit to the calculation of an individual's personal income tax highlights this. First, adjusted gross income is calculated by combining all sources of income (gross income) and subtracting certain deductions, like interest paid on education loans. I.C. § 63-3011A (Idaho's term "adjusted gross income" references 26 U.S.C. § 62); 26 U.S.C. § 62(a)(17) (deducts interest on education loans from gross income as allowed by 26 U.S.C. § 221). The taxpayer then subtracts deductions available under the federal Internal Revenue Code to calculate taxable income. I.C. § 63-3011B.

Idaho taxable income is reached by excluding certain sources of income and deducting other eligible expenses available under Idaho Code, Title 63, Chapter 30. I.C. §§ 63-3011C, -3022. Certain income is excluded from "Idaho taxable income." *E.g.*, I.C. § 63-3022G (excluding from Idaho taxable income amounts paid to Japanese-Americans for reparations for World War II displacement). Other expenses can be deducted. *E.g.*, I.C. § 63-3022C (individual taxpayer may deduct percentage of amount spent to install an alternative energy device). The result is Idaho taxable income. I.C. § 63-3026.

The taxpayer then computes the tentative tax liability by multiplying the tax rate of 5.3% by Idaho taxable income. I.C. § 63-3024. The taxpayer subtracts nonrefundable credits and refundable credits from the tentative tax liability to calculate the net tax. I.C. § 63-3029P.

When tentative tax liability exceeds the amount of the parental-choice tax credit, no funds flow from the State. Put another way, the taxpayer simply writes a *smaller* check to the State. That is not funding by the State. *See, e.g., Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 144.

This dooms Petitioners' facial challenge *even if* their funded-by-tax-revenues argument were persuasive (and it is not). *See In re Doe*, 517 P.3d at 838 (facial challenge to constitutionality of statute can succeed only when the statute is unconstitutional in all of its applications).

B. There is no textual hook for the public-purpose doctrine to apply to the tax credit, and the Court should not expand the doctrine to new circumstances.

Petitioners admit that their public-purpose argument is not grounded in constitutional text. Pet'rs. Br. 26. And they acknowledge that the public-purpose doctrine is most often applied to evaluate municipal bonds¹¹ yet ask the Court to use the doctrine as a sword to invalidate the tax credit. This is not consistent with historical use or constitutional text.

First, the Court has frequently used the public-purpose doctrine as a shield to uphold State or municipal financing or creation of debt (giving or loaning credit). The doctrine is part of the analysis under these constitutional prohibitions. IDAHO CONST. art. VIII, §§ 2, 4; art. XII, § 4. Even when the State, for example, loans money to an individual for use on private land, it is not “in aid of” that individual within the meaning of the constitutional text when it serves a broad public purpose. *See Nelson v. Marshall*, 497 P.2d 47, 52–53 (Idaho 1972) (considering public purpose in context of Art. VIII, § 2);¹² *see also Idaho Falls Consol. Hosps., Inc. v. Bingham*

¹¹ In those contexts, the public-purpose doctrine is tied to constitutional text. The public-purpose doctrine analyzes whether the government acts “in aid of” an individual (unconstitutional) or the public (constitutional). The Constitution prohibits bonding or loaning credit “in aid of” private individuals or entities. IDAHO CONST. art. VIII, § 2. So, for example, this Court held that a loan to a private individual to develop irrigation wells on private land did not violate article VIII, section 2 because the loan served a public purpose and was not “in aid of” an individual within the meaning of article VIII, section 2. *Nelson*, 497 P.2d at 52–53. Petitioners' argument, by contrast, is not moored to any constitutional text.

¹² The Court has also considered whether government action has a public purpose when analyzing other constitutional claims not raised here. *Kramer*, 548 P.2d at 59 (rejecting article I section 13 due-process challenge to government financing for construction of a dam to be leased to a private entity when that financing served a public purpose).

Cnty. Bd. of Cnty. Comm'rs, 642 P.2d 553, 556 (Idaho 1982) (same in context of art. VIII, § 4 and art. XII, § 4 claims).

Second, the Court should decline Petitioners' invitation to expand the doctrine to use as a sword to strike down a tax credit. Petitioners cite instances in which a gift to a particular private individual or entity was unconstitutional. *State ex rel. Walton v. Parsons*, 80 P.2d 20, 22 (Idaho 1938); *Fluharty v. Bd. of Cnty. Comm'rs of Nez Perce Cnty.*, 158 P. 320, 321 (Idaho 1916). Those cases (1) did not involve a tax credit for which any taxpayer that meets the eligibility requirements can apply and (2) relied on express constitutional text.

In *Parsons*, the Court held that an appropriation of \$3,000 to an individual (a car accident victim due to State employees' negligence) violated *both* article 11, section 12's prohibition on a retroactive law for the benefit of an individual and an implied constitutional prohibition on gifting public money. 80 P.2d at 22. The Court reasoned that the Legislature didn't identify "any public policy" and the gift didn't support a public purpose. *Id.* Fair enough—*Parsons* involved a flat-out giveaway, to one individual, for a wholly past incident, with no strings attached. That's a far cry from a tax credit for qualified educational expenses.

Fluharty actually passes a public-purpose test; the statute authorizing counties to appropriate funds to an agricultural fair association served a "good and useful purpose." 158 P. at 321. But it violated article XII, section 4 because that provision prohibited all gifts of money, property, or credit to or in aid of, any corporation; the direct donation to a private enterprise violated the constitutional text. *Id.* Even though the private fair served a public purpose, the Court stuck to the constitutional text, holding that the "Constitution makes no distinction

between purposes.” *Id.* Here, the tax credit is not directed to one specific individual, and there is no violation of constitutional text.

C. Regardless, education is a public purpose.

If the Court applies the public-purpose doctrine to the parental-choice tax credit, the tax credit passes with flying colors. “The furtherance of education is universally regarded as a public purpose.” *Davis*, 289 P.2d at 618; *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 353 P.2d 767, 775 (Idaho 1960) (“[E]ducation is a public purpose.”). And the “cost of education”—even outside the public-school system—is “a matter of public interest.” *Smallwood*, 244 P. at 155–56 (rejecting argument that exemption from license tax for transportation to all schools unlawfully discriminated by exempting private schools). All Idahoans benefit from an educated citizenry; facilitating additional educational opportunities for Idaho children benefits the entire public.

That education may be furthered through nonpublic means does not lessen the public purpose of education. While Idaho hasn’t squarely addressed this question, other states find that nonpublic educational alternatives serve a valid public purpose. The Wisconsin Supreme Court held that “private schools may be employed to further” the “valid public purpose” of education. *Jackson*, 578 N.W.2d at 628–29. Similarly, a tax credit in Illinois for expenses incurred in nonpublic education served the public purpose of ensuring that “Illinois children are well educated.” *Toney v. Bower*, 744 N.E.2d 351, 363 (Ill. Ct. App. 2001).

Idaho’s “interest is education, broadly; its method, comprehensive,” so nonpublic means of education (whether private school, microschool, learning pod, or homeschool) can be used to pursue that purpose. *See Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968). Indeed, Idaho’s framers contemplated that education could occur “by other means” than public

school. IDAHO CONST. art. IX, § 9. Facilitating educational opportunity promotes an educated citizenry, which in turn promotes the “stability of our republican form of government.” *Id.* § 1.

Petitioners can’t quite nail down how to apply the public-purpose doctrine, perhaps because their arguments aren’t grounded in constitutional text. Petitioners struggle to articulate three “general principles” but then pivot to a two-prong test articulated in *Kramer*, a 1976 due-process case. Pet’rs. Br. 27-28. But the *Kramer* Court itself didn’t apply both prongs, instead summarily concluding that development and conservation of the state’s water resources is a public purpose even when a private electric company would indirectly benefit from a government-financed dam. *See Kramer*, 548 P.2d at 59.

Here, the public generally benefits from increased educational opportunities for children. *Kramer* is satisfied, if it applies in the first instance. And even if the Court were to apply both *Kramer* prongs, the parental-choice tax credit serves a public purpose.

1. *The tax credit is aimed at improving education of Idaho’s children by facilitating educational opportunities; education benefits the community in several ways.*

The tax credit promotes the education of children, in the form designed by their parents, who know their children best. The Legislature intended for Idaho parents “to be able to choose educational services that meet the needs of their individual children.” 2025 Idaho Sess. Laws, Vol. 1, ch. 9, § 1. In doing so, the Legislature “affirm[ed] that parents have a fundamental right, recognized in Section 32-1010, Idaho Code, to nurture and direct their children’s education.” *Id.*

The tax credit gives parents flexibility to customize their children’s education based on their child’s unique needs. Parents can incur qualified expenses not only on tuition but also for microschooling, learning pods, instructional materials for homeschooling, tutoring, advanced placement tests, standardized tests (and prep courses for those tests), and certain transportation

expenses. § 3029N(2)(f). Contrary to Petitioners’ assertion that the benefit flows directly to private schools, Pet. ¶ 5, Br. 30-31, the tax credit entrusts parents to choose qualified expenses. § 3029N(2)(f). Those are not limited to private school tuition. *Id.* And the tax benefit flows directly to the *parent*, not the entity at which the parent chooses to incur qualified expenses. § 3029N(3) (tax credit “for any *parent*” who meets certain eligibility requirements (emphasis added)).

So both the range of qualified educational expenses and the design of the tax credit—putting the parents in the driver’s seat for their child’s education—evinced the valid public purpose of fostering education.

What’s more, the “ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry.” *Hart*, 774 S.E.2d at 292 (holding that appropriations for school voucher program served the valid public purpose of education). Idaho’s framers recognized that the “stability of a republican form of government” depends “mainly upon the intelligence of the people.” IDAHO CONST. art. IX, § 1. When children can be educated in the right setting for their unique needs, Idaho as a whole benefits.

The public schools and the state’s budget may benefit too. By easing the financial burden for parents sending children to nonpublic school, the tax credit “might relieve the burden placed on [Idaho’s] public schools.” *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 137. This could produce an “immediate and permanent cost savings for the State.” *Id.* Indeed, by “educating a substantial number of students, [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.” *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (rejecting Establishment Clause challenge); *accord Gaddy v. Ga. Dep’t of Rev.*, 802 S.E.2d 225,

230 (Ga. 2017). When Idaho generally provides approximately \$8,400 per student, per year, Tolman Decl. ¶ 6, but limits the tax credit at \$5,000, the State ultimately saves around \$3,400 per child if parents choose nonpublic school options.

What's more, the total cost spent on a student's education in the public-school system is approximately \$14,000. Tolman Decl. ¶ 7. Public schools receive about one-third of their funding from other sources besides the State. *Id.* ¶ 8. Educating a child outside the public-school system likely reduces the need for some local funding as well. For these reasons, Illinois held that "maintaining the financial health of private schools" is a valid public purpose. *Toney*, 744 N.E.2d at 363.

While Petitioners allege that public schools will be harmed by the decrease in State funding associated with lower attendance, Pet. ¶ 19, that funding should relate to the cost associated with educating a child. The public school no longer incurs those costs. And Petitioners don't account for the schools receiving around one-third of their funding from local and federal funding sources. Tolman Decl. ¶ 8. Public schools may also experience other benefits: smaller class sizes and the associated increased, individualized attention for students may invigorate learning and improve academic achievement at public schools.

Petitioners assert that nonpublic education cannot benefit the community as a whole because nonpublic schools don't admit all applicants. Pet'rs. Br. 28.¹³ Petitioners cite *Kramer* for the proposition that a public purpose "(1) serves the community as a whole." *Id.* But *Kramer* states that a public purpose "(1) serves *to benefit* the community as a whole." 548 P.2d at 59. Petitioners recast *Kramer* to tee up their argument that private schools fail the test because they don't "serve" all-comers. This Court has never required an indirect beneficiary to "serve" all-comers, instead evaluating whether the state action serves *to benefit* the community as a whole. *E.g., Nelson*, 497 P.2d at 52 (loan to individual for use on private land benefited the community as a whole).

This argument is also flawed from the start: private schools are not the direct beneficiary of the tax credit. *Parents* receive the benefit and choose how to use it. § 3029N(3).¹⁴ It may be used for private school tuition, or it may be used for a tutor. Or perhaps advanced placement examinations. The guaranteed, direct beneficiaries are the parent and student. State money is not directed to a particular private school.

¹³ Petitioners rely on *Fannin v. Williams*, 655 S.W.2d 480, 482 (Ky. 1983) for the proposition that nonpublic schools cannot provide a public benefit because they are not required to admit all comers. Pet'rs. Br. 28. There, Kentucky's Constitution expressly provided that "taxes shall be levied and collected for public purposes only." *Fannin*, 655 S.W.2d at 481 (quoting KY. CONST. § 171). Kentucky Supreme Court caselaw interpreted the public-purpose requirement as requiring a benefit available to everyone in the state, and struck down a statute supplying textbooks to nonpublic schools on that basis. *Id.* at 484–85. Idaho's caselaw is not similar; nor are the benefits here administered "by the chief administrator of each eligible school," as they were in *Fannin*. 655 S.W.2d at 483; I.C. § 63-3029N(3) (tax credit available for "any parent").

¹⁴ Petitioners' argument that the tax credit must be unconstitutional because it "primarily benefits private schools," Pet'rs. Br. 30-31, fails for the same reasons. Parents receive the credit and decide where to incur qualified expenses. § 3029N(3). Courts across the country have rejected the argument that an indirect benefit to private schools transforms the private schools into the primary beneficiary. *See, e.g., Kotterman v. Killian*, 972 P.2d 606, 614 (Ariz. 1999) (reasoning that the "decision-making process is completely devoid of state intervention or direction" in the context of an Establishment Clause claim).

The fact that the indirect beneficiary of a tax benefit need not admit all-comers does not invalidate other tax benefits. For example, the Federal American Opportunity Credit is a partially refundable tax credit available for tuition and other expenses at eligible educational institutions, which include institutions that do not admit all applicants. 26 U.S.C. § 25A. Idaho, too, allows a deduction for interest paid on student loans for expenses at a private institution. *See* I.C. § 63-3011A (Idaho’s term “adjusted gross income” references 26 U.S.C. § 62, and 26 U.S.C. § 62(a)(17) allows deduction of interest on education loans from gross income as allowed by 26 U.S.C. § 221). So both the federal and state government have historically allowed tax benefits for costs incurred at private institutions. Even those that aren’t open to all-comers. Under Petitioners’ reasoning, these long-accepted tax breaks would also be on the constitutional chopping block.

An appropriation does not benefit the community when it benefits a single individual, *see Parsons*, 80 P.2d at 22, or confers “favored status” on a particular enterprise. *Boise Redevelopment Agency v. Yick Kong Corp.*, 499 P.2d 575, 582 (Idaho 1972). But public benefit is often achieved through “private commercial interests.” *Id.* at 579. Here, the State doesn’t pick winners and losers among educational options. Instead, the State offers a tax credit to parents, who in turn choose the best educational option for their children. This does not benefit a single individual or confer favored status on a particular business; it builds an educated populace.

That the tax credit is not available to all parents of children enrolled in public school does not drain all public benefits. Tax classifications are generally reviewed for a rational basis, *see Diefendorf*, 10 P.2d at 316; the Legislature rationally tied eligibility to the *extra* educational expenses incurred by parents choosing to educate a child in a nonpublic school. And the

Legislature classified parents of children with disabilities differently; the credit limit is increased to \$7,500 per eligible student. § 3029N(7). Again, that increased amount is reflected to the increased costs of education; that classification is rationally related to a legitimate government purpose.

The tax credit also serves a public purpose by prioritizing families with less income. The Legislature recognized that the additional expense associated with nonpublic school options may foreclose the option for lower-income families. 2025 Idaho Sess. Laws, Vol. 1, ch. 9, § 1 (making applications available for one-time advance payment option to parents whose taxable income does not exceed 300% of the federal poverty level because “some parents cannot initially afford qualified expenses”). The tax credit helps alleviate this barrier for families whose taxable income does not exceed 300% of the federal poverty level by (1) putting them first-in-line for the credit and (2) providing the one-time advance payment option. § 3029N(6), (9). “The result is a direct benefit to these lower-income families—the provision of a wider array of education options, a valid secular purpose.” *Meredith*, 984 N.E.2d at 1227–29 (rejecting challenge to Indiana’s school-voucher program under the Indiana Constitution’s provision prohibiting expenditures “for the benefit of any religious or theological institution” where the “primary beneficiary” of the school-voucher program is “the public, both the public affiliated with the religious or theological institution, and the general public”).

The tax credit’s design reflects the Legislature’s recognition that lower-income families face a significant barrier to entry for additional educational opportunities. First, the refundable nature of the credit prioritizes those who are less well off. A nonrefundable tax credit is typically

worthless to a family that has little to no income tax liability. But a refundable credit can actually facilitate educational opportunities.

Second, a tax credit is a delayed benefit. For example, a family may choose to homeschool a child and provide tutoring. The family incurs those expenses in January 2026. But the family does not receive any assistance for those expenses until filing its 2026 tax return in April 2027: a delay of 16 months. The one-time advance payment alleviates that barrier for lower- to middle-income families.

Petitioners misapply the statute by claiming that “advance payments are given to the taxpayer *before the expense is incurred*.” Pet’rs. Br. 30 (emphasis in original). That’s not necessarily correct. The “advance” in “advance payment ” means in advance of *the taxpayer’s tax return*. Not in advance of incurring the expense.

Process-wise, parents can apply for the advance payment starting in January 2026. The Commission will notify the parent if the credit is awarded. The credit must be paid within 60 days of this notice. § 3029N(9). The credit must be used for eligible educational expenses, which can be incurred at any time starting in January 2026.

So a parent *could* receive the payment in, say, March 2026 and not incur eligible expenses until April. But it’s equally possible that the parent incurs expenses in January or February and receives payment in March. What’s certain is the parent *will* receive the tax credit before filing their 2026 tax return in early 2027. And for good reason—the advance payment will benefit parents who cannot wait over a year to receive the funds. 2025 Idaho Sess. Laws, Vol. 1, ch. 9, § 1.

In sum, the parental-choice tax credit benefits the community as a whole by promoting education, benefiting the entire citizenry through better educated participants in democracy, relieving the burden on Idaho's public schools, and alleviating barriers for lower-income families to choose alternative education options.

2. *Education is directly related to a governmental function.*

Education is a “governmental function.” *State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 612 (Idaho 1959) (describing this Court's holding in *Davis v. Moon* that the appropriation of money to pay principal and interest on dormitory bonds did not violate article VIII, section 2's prohibitions on lending credit). This isn't a close call; “[e]ducation ranks at the apex of a state's function.” *Jackson*, 578 N.W.2d at 628–29 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) and *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Petitioners' half-hearted assertion that “it is not clear that private education is ‘directly related’ to the functions of government”—relying on “the novelty of the Program” and “tradition of funding only public schools”—cannot transform education into a non-governmental function. Pet'rs. Br. 29.

That the tax credit is new tells nothing about whether education is directly related to a government function. The absence of any citations in Petitioners' argument is telling. Pet'rs. Br. 29. The tradition of funding public schools simply reflects the government's obligation to provide an education to Idaho children. The means by which that education is accomplished does not affect the public purpose: education.

Instead, the Court considers whether the government otherwise has a duty to provide a service to its citizens. See *Utah Power & Light Co. v. Campbell*, 703 P.2d 714, 719 (Idaho 1985) (holding that “Idaho Falls has the obligation to continue to provide electrical energy to its

citizens and residents” when contracting with a private entity for electricity).¹⁵ In other contexts, the Court considers whether the private entity performs a function which might otherwise be an obligation of government. *In re Sunny Ridge Manor, Inc.*, 675 P.2d 813, 817 (Idaho 1984).¹⁶ In other words, if the private entity assists individuals who would normally require government funds, the service is directly related to a government function, or obligation. *See id.*

Because education is compulsory for children aged seven through sixteen in Idaho, *see* I.C. § 33-202, a parent educating their child (an individual who would normally require government funds) in a nonpublic school relieves the government of an obligation; the parent pays costs that the government would otherwise have to pay to educate the child.

Finally, Petitioners cite a fifty-year-old Ohio federal case for the proposition that the tax credit funds private schools because it incentivizes certain behavior. *See* Pet’rs. Br. 30 (citing *Kosydar v. Wolman*, 353 F. Supp. 744, 763–64 (S.D. Ohio 1972)). *Kosydar* involved a federal Establishment-Clause challenge—not at issue here—and applied the now-rejected *Lemon* test to boot. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (noting the Court “long ago abandoned *Lemon* and its endorsement test offshoot”). *Kosydar* adds nothing to Petitioners’ argument here.

¹⁵ To be clear, the “directly related” test has never been thoroughly explained or applied. As previously noted, the *Kramer* Court did not apply the two-prong test. 548 P.2d at 59. In *Campbell*, the Court held that the ground lease and power sales contract with a single private entity served a public purpose; the “accrual of incidental benefits” to a private entity wouldn’t invalidate an otherwise constitutional transaction. 703 P.2d at 719. All the more reason to eschew the two-prong test and fall back on the constitutional text, which does not support a free-floating “public purpose” test as it relates to education. *Supra* Section II.B.

¹⁶ In *Sunny Ridge*, the ability of the Legislature to authorize the tax exemption was not at issue. Instead, the question was whether a nonprofit corporation provides a general public benefit so as to meet eligibility requirements for a property-tax exemption. 675 P.2d at 814.

The parental-choice tax credit benefits the community as a whole and is directly related to education, which is a government function. The Court should reject this challenge.

III. Attorneys’ fees cannot be awarded because (1) section 12-121 no longer provides a basis for the private attorney general doctrine and (2) the elements of the doctrine cannot be satisfied when a public entity, the Moscow School District, is a petitioner.

Petitioners ask for an award of attorneys’ fees under the private attorney general doctrine and Idaho Code section 12-121.¹⁷ Pet., Prayer for Relief ¶¶ 4, 6; Br. 31-39. But Idaho follows the American Rule: “each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Miller Tr. of Glen Miller & Cynthia Anderson Revocable Living Tr. v. Rocking Ranch No. 3 Prop. Owners’ Ass’n, Inc.*, 541 P.3d 1279, 1291–92 (Idaho 2024) (citation modified). None does so here: the private attorney general doctrine no longer has a statutory basis following the 2017 amendment to Idaho Code section 12-121. And even if the doctrine were still viable, private enforcement is unnecessary because a public entity, the Moscow School District, is a petitioner here.

The private attorney general doctrine was grounded in the text of section 12-121. Until 1978, Idaho did not award fees under the private attorney general doctrine. At that time, section 12-121 provided that a judge “may award reasonable attorney’s fees to the prevailing party or parties.” In *McKay Construction Co. v. Ada County*, the Court exercised the discretion inherent in that version of section 12-121, reasoning that a litigant acted as a private attorney general in protecting the public interests expressed in statute. 580 P.2d 412, 417 (Idaho 1978).

¹⁷ Petitioners do not seek an award of fees against the Legislature under section 12-117. See Pet’rs. Br. 36 (citing I.C. §§ 12-117(6) & 67-5201(2)).

The Court later reaffirmed Idaho’s adherence to the American Rule, awarding fees under the private attorney general doctrine when section 12-121 provided the required “statutory basis.” *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984). The Court expressly grounded its recognition of the private attorney general doctrine in the text of section 12-121. *Id.* As the Court recognized in *Hellar*, Idaho Rule of Civil Procedure 54(e)(1) did not limit or override the judiciary’s then-existing statutory discretion to award fees under section 12-121, using the private attorney general doctrine to guide the exercise of that discretion. *Id.*

But that statutory discretion was removed in 2017, when section 12-121 was amended to allow fees only in frivolous litigation. H.B. 97, 64th Leg., 1st Reg. Sess. (Idaho 2017) (codified as I.C. § 12-121) (allowing an award of fees “when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation”). The judiciary does not have today what it did in 1978 and 1984: statutory discretion to award fees on a basis other than frivolousness. The separation of powers prevents the judiciary from creating, or recognizing, an exception to the statute in its current form. IDAHO CONST. art. III, § 1; *e.g.*, *In re Doe*, 484 P.3d 195, 200 (Idaho 2021) (“It is the province of the Legislature to make and amend laws and this Court lacks the authority to amend laws enacted by the Legislature.” (citation modified)); *cf.* *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 265 P.3d 502, 509 (Idaho 2011).

So the 2017 statutory amendment controls. And it replaced judicial discretion—previously exercised with the private attorney general doctrine—with an unambiguous standard:

fees can be awarded only when the case was litigated “frivolously, unreasonably or without foundation.” I.C. § 12-121.¹⁸

Because the private attorney general doctrine no longer has a basis in statute, it is inconsistent with the American Rule and inconsistent with this Court’s refusal to amend statutes by judicial fiat. It is not currently a viable basis for a fee award in Idaho.

This Court appears to have awarded fees under the private attorney general doctrine just once since the 2017 amendment, in *Reclaim Idaho v. Denney*, 497 P.3d 160, 193–94 (Idaho 2021). The issue of the ongoing viability of the private attorney general doctrine was not raised in that case, so it cannot be interpreted as resurrecting the doctrine after it was abolished by statute.

Petitioners argue that a fee award is good policy to incentivize private parties to vindicate significant constitutional issues. Pet’rs. Br. 35. Maybe so, but this is an argument for the Legislature, not the judiciary. See IDAHO CONST. art. III, § 1; *e.g.*, *State v. Bujak*, 551 P.3d 771, 776 (Idaho 2024) (“Policy arguments for altering unambiguous statutes must be advanced before the legislature.” (citation modified)); *accord Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269–71 (1975) (rejecting judicially-created private attorney general exception because it is for Congress, not the judiciary, to fashion exceptions to the “American Rule”). And history shows otherwise: for almost a century, Idahoans challenged constitutional issues without the incentive of fees under the private attorney general doctrine. Because the statutory discretion to

¹⁸ It is no answer that the private attorney general doctrine was inadvertently invalidated because the Legislature didn’t intend to enact a sea change in Idaho law on attorneys’ fees. Sess. Laws, Vol. 1, ch. 47, § 1, 64th Leg., 1st Reg. Sess. (Idaho 2017). This Court adheres to the unambiguous text of a statute, *Bedke v. Ellsworth*, 480 P.3d 121, 135 (Idaho 2021), and section 12-121’s frivolous-litigation requirement is an unambiguous predicate for a fee award.

award fees no longer exists under section 12-121, Petitioners cannot be awarded attorneys' fees under the private attorney general doctrine.

Even if the Court finds a statutory basis for an award of fees under the private attorney general doctrine, Petitioners fail to satisfy the elements. An award of fees under the private attorney general doctrine requires that (1) the litigation vindicates a strong or important public policy; (2) private enforcement was necessary and imposed a significant burden on the plaintiff; and (3) the decision benefits the public widely. *Reclaim Idaho*, 497 P.3d at 193.

The second element—the necessity of *private* enforcement—cannot be met. Petitioner Moscow School District is a political subdivision of the State of Idaho. *E.g.*, I.C. § 33-301 (providing that each school district is “a body corporate and politic”); *Daleiden v. Jefferson Cnty. Joint Sch. Dist. No. 251*, 80 P.3d 1067, 1071 (Idaho 2003) (holding that “school districts are political subdivisions of the state itself”). When a public entity initiates litigation, private enforcement is unnecessary. Petitioners argue that “[n]o one from the public sector has stepped up to challenge HB 93,” Pet’rs. Br. 37, but that’s not true: Moscow School District has. Its participation precludes a fee award.

The Court has not squarely addressed the presence of a public-entity plaintiff along with private co-plaintiffs. The Court has granted fees to private-party plaintiffs with co-plaintiff government entities twice. *See Smith v. Idaho Comm’n on Redistricting*, 38 P.3d 121, 124–25 (Idaho 2001); *Hellar*, 682 P.2d at 530–31. The necessity of private enforcement, however, was not raised or examined in either case. *Cf. Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 145 (reasoning that a decision does not stand for a proposition when the issue is neither noted or discussed in an earlier decision). And this Court has reversed a trial court’s award of fees under

the private attorney general doctrine when the plaintiff failed to present evidence that no governmental entity would challenge the ordinance at issue. *Boundary Backpackers v. Boundary Cnty.*, 913 P.2d 1141, 1148–49 (Idaho 1996). Here, a public entity, the Moscow School District, challenges House Bill 93. So the private parties cannot show that no governmental entity will challenge House Bill 93. Private enforcement cannot be necessary. *See id.*

Finally, Petitioners invite the Court to award fees under section 12-121 by disregarding section 12-121’s requirement that the action is “defended frivolously, unreasonably or without foundation.” Pet’rs. Br. 38-39. This Court “cannot ignore or re-write the plain language of a statute simply to reach a more desirable result.” *See Bedke*, 480 P.3d at 135 (citation modified). Petitioners’ request for fees under section 12-121 should therefore be denied.

REQUEST FOR COSTS

If the Legislature prevails, it requests an award of costs under Idaho Appellate Rule 5.

CONCLUSION

For these reasons, the Legislature respectfully requests that this Court deny the writ of prohibition.

Dated: November 10, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2025, I filed the foregoing electronically through the iCourt System, which caused the following parties or counsel to be served by electronic means:

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