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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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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,

vs.

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

Respondent.

Docket No. 53264-2025

RESPONSE BRIEF

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INTRODUCTION

No party in this case claims the Idaho Legislature has breached its constitutional duty to fund the public schools. The question in this case is not whether the Legislature has breached its duty to children in public schools; it is whether the Legislature can help other children, too.

The answer to that question is "yes." Unlike Congress, the Idaho Legislature is not limited to specific enumerated powers; it can pass whatever legislation it wants unless the Constitution specifically prohibits it—which, in this case, no constitutional provision expressly does. Instead of an express prohibition, Petitioners claim there is an implied prohibition in Article IX, § 1, which provides that "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." According to Petitioners, by requiring the Legislature to establish a system of public schools, the Constitution implicitly prohibited the Legislature from providing any support to private schools or the parents who send their children there.

But that is simply not what the provision says. By its plain text, Article IX, § 1 imposes a floor, not a ceiling, on the Legislature's power to promote education—it contains no limiting language whatsoever. Petitioners try to insert limiting language by invoking the notoriously unreliable negative-inference canon of statutory construction (*expressio unius*), but (1) the Court doesn't use canons when the text is clear, (2) the canon doesn't apply here, and (3) Petitioners misapply the canon anyway, drawing a faulty negative implication from the constitutional text.

In other words—as at least six other state supreme courts have held when addressing provisions similar to the one Petitioners cite—as long as the Legislature fulfills its duty to provide a system of K-12 common schools, it is free to promote education through other initiatives as well, as it has done in the past by establishing specialized schools and institutions of higher education. That means the provision poses no obstacle to the Parental Choice Program implemented by House Bill 93.

As to the public purpose doctrine: educating Idahoans *is* a public purpose, no matter who provides the education. And, as this Court has repeatedly held, the Legislature is free to pursue public purposes through means that involve private institutions or incidentally benefit private parties. If it were not—if Petitioners' arguments were correct—then the doctrine would invalidate not only the Parental Choice Program but numerous programs that Petitioners themselves support, like LAUNCH, Medicaid, and SNAP.

H.B. 93 is constitutional, and the petition should be denied.

STATEMENT OF THE CASE

I. States Across the Country Support Private Education.

In America, government support for private schooling is roughly as old as the country itself. For example, in 1783, the Georgia legislature authorized the governor to grant 1,000 acres of land to any person authorized by a county for the erection of a school, which was thereafter run as a private school. Richard J. Gabel, *Public Funds for Church and Private Schools* 242 (1937) (Anglicans, Methodists, and Catholics all received distributions). Legislatures in Massachusetts and Maine likewise gifted land grants and

cash to private institutions to support academics in the early 1800s. *Id.* at 186, 190, 194. Pennsylvania enacted a law in 1802 that reimbursed families at taxpayer expense for the cost of sending their children to "any school in their neighborhood." *See* Act of Mar. 1, 1802, ch. MMCCXLVII, § 1, 17 Statutes at Large of Pennsylvania 81, 81 (1915); *see also Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 480–81 (2020) (discussing this history).

More recently, States have experimented with supporting private education *in addition to* public schools. Wisconsin adopted the first such program in 1990, *Davis v. Grover*, 480 N.W.2d 460, 463 n.2 (Wis. 1992), and by the end of 2024, 30 States and the District of Columbia had implemented some form of school choice—vouchers, tax credits, specialized savings accounts, or some combination. Corkery Decl., Ex. A at 1.

Other States' parental choice programs have yielded a host of benefits. On an individual level, they enable parents—particularly low-income parents—to place their children in educational settings tailored to their individualized needs. *See* Baker Decl. at ¶¶ 10–14; Kuznia Decl. at ¶¶ 10–14; Emerich Decl. at ¶¶ 12–16. In the aggregate, children who receive aid from these programs achieve higher test scores, advanced educational attainment, and better real-life outcomes.[1] And by promoting competition, school-choice programs even improve outcomes for public-school students.[2]

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[1] Corkery Decl., Ex. B at 10 (reviewing over 200 studies on impacts of school choice); *id.*, Ex. C (meta-analysis of the international research on school choice programs).

[2] Corkery Decl., Ex. D at 50 (in every case analyzed, "regular public schools boosted their productivity when exposed to competition" from private schools); *id.*, Ex. B at 22–24 (of the 30 empirical studies on how school choice programs impact public school students' academics, 83% found that public school students were positively affected).

II. Idaho Enacts a Parental Choice Program.

Idaho has implemented various programs to support parents who homeschool their children or send their children to private school. Since 2001, it has allowed an income-tax deduction for parents who contribute to "529 accounts" to help offset their higher education expenses at public and private universities, and since 2018 these accounts can be used to pay for K-12 private school tuition. Idaho Code § 63-3022(n); 26 U.S.C. § 529; Tax Cuts and Jobs Act, 2018, Pub. L. No. 115-97, § 11032, 131 Stat 2054, 2082 (2017). In 2022, the Legislature enacted the Empowering Parents Grant Program, which reimburses parents up to $3,000 for eligible education expenses (including those incurred in private schools or homeschools) like textbooks, educational technology, and fees for standardized examinations—with priority for low-income students. Idaho Code §§ 33-1030, 33-1031.

However, after more than a year of deliberations, *see* H.B. 447, 67th Leg., 2d Reg. Sess. (Idaho 2024), the Legislature decided in 2025 to replace the Empowering Parents Grant Program with a more expansive Parental Choice Program by enacting House Bill 93. 2025 Idaho Sess. Laws ch. 9. The goal was to more fully allow parents to exercise their "fundamental right . . . to nurture and direct their children's education" by "choos[ing] educational services that meet the needs of their individual children." *Id.* § 1. The program became law upon the Governor's signature on February 27, 2025.

The Program works by granting tax credits to parents who incur certain "qualified expenses" to educate their children through "nonpublic schools." Idaho Code § 63-3029N(3). Those "qualified expenses" include tuition, fees, tutoring, textbooks, curricula,

transportation, and the cost of certain examinations or preparatory courses for examinations. *Id.* § 63-3029N(2)(f).

As for the "nonpublic schools," they include private schools (religious and secular), microschools, and learning pods. *Id.* § 63-3029N(2)(d). The schools may be in-person or virtual, but must (1) teach English language arts, mathematics, science, and social studies, and (2) be accredited or document educational instruction in a portfolio of evidence or learning record that indicates the student's growth. *Id.* § 63-3029N(2)(a), (d). Parents who homeschool their children may claim the credit for associated expenses, but they can't be reimbursed for "tuition or fees" associated with their own instruction of their children. *Id.* § 63-3029N(10)(c). In all events, the nonpublic schools that indirectly benefit from their students' parents claiming the tax credit do not become "agent[s] of the state," and no "government agency [can] exercise control or supervision" over nonpublic schools or "regulate the education" of any nonpublic schools as a result of the Parental Choice Program. *Id.* § 63-3029N(20).

Parents can be reimbursed up to $5,000 per eligible student per tax year, or up to $7,500 if the student has a qualifying disability. *Id.* § 63-3029N(3), (7). Before claiming the credit, a parent must apply to the State Tax Commission, which begins receiving applications on January 15 of each year. *Id.* § 63-3029N(3)–(4). The Commission may not issue tax credits exceeding the $50 million the Legislature has devoted to the program—which does not cause any reduction in the State's $3.4 billion budget for K-12 public education. *Id.* § 63-3029N(12).

Because the funds are limited, priority for the credit is given to parent-applicants whose modified adjusted gross income is less than 300% of the federal poverty level. *Id.* § 63-3029N(6). Since these low-income parents may not be able to "initially afford qualified expenses" of attending a nonpublic school, 2025 Idaho Sess. Laws ch. 9, § 1, they may opt to receive "a onetime advance credit" to help them cover their qualified expenses in real time. *Id.* § 63-3029N(9).

III. Opponents of the Parental Choice Program File This Petition.

Petitioners began opposing H.B. 93 early in the 2025 session. Already on January 6, the Committee to Preserve and Protect the Idaho Constitution's director, Jim Jones, emailed every member of the Legislature threatening to pursue "legal action" if the legislation were to pass. Mickelson Decl., Ex. 1. The email argued that the Parental Choice Program would violate Article IX, § 1 of the Idaho Constitution and raised several policy criticisms, including that the Program "could produce [the] troubling result[]" of supporting schools run by disfavored churches while failing to benefit churches like The Church of Jesus Christ of Latter-day Saints that don't "operate a system of religious schools." *Id.* Ironically, the email also argued that the Program would violate the provision of the Idaho Constitution prohibiting aid to religion or religious schools—which was included in the Idaho Constitution in part to *harm* The Church of Jesus Christ of Latter-day Saints. *See* The Proceedings and Debates of the Constitutional Convention of Idaho 1889, 189 (I.W. Hart ed., 1912) (noting that the Idaho Territory "has been universally against Mormonism").

Nevertheless, the Committee waited until September 17 to file this petition for a writ of prohibition. Its fellow Petitioners include four private citizens, a public school district, a legislator, a teacher's union, and a Utah nonprofit. Petitioners renew the Committee's argument that the Parental Choice Program violates Article IX, § 1 of the Idaho Constitution, and add a new argument that it violates the "public purpose doctrine." They request a writ prohibiting the State Tax Commission from implementing the Program.

ARGUMENT

The petition should be denied. The Court lacks jurisdiction, and Petitioners have come nowhere close to satisfying their "burden of showing the statute's invalidity." *Nelson v. Pocatello*, 170 Idaho 160, 166, 508 P.3d 1234, 1240 (2022) ("It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional.") (cleaned up).

I. Petitioners Lack Standing.

"The writ of prohibition is not a remedy in the ordinary course of law, but is an extraordinary remedy" within the "discretionary power of [the] Court" that is "only issued with caution" on a case-by-case basis. *The Associated Press v. Second Jud. Dist.*, 172 Idaho 113, 120, 529 P.3d 1259, 1266 (2023) (cleaned up). To the extent the Court would be inclined to exercise its discretionary original jurisdiction here, it cannot do so because Petitioners lack standing, and the doctrine of "relaxed standing" does not apply.

To establish standing, a petitioner must show an injury-in-fact, causation, and redressability. *Reclaim Idaho v. Denney*, 169 Idaho 406, 419, 497 P.3d 160, 173 (2021). Organizations can satisfy standing in one of two ways: (1) organizational standing, i.e. "standing in its own right"; or (2) associational standing, i.e. "standing on behalf of its members." *Idahoans for Open Primaries v. Labrador*, 172 Idaho 466, 476, 533 P.3d 1262, 1272 (2023). Either way, the petitioner bears the "burden of establishing standing." *Valencia v. Saint Alphonsus Med. Ctr. - Nampa, Inc.*, 167 Idaho 397, 402, 470 P.3d 1206, 1211 (2020).

Petitioners' opening brief explains only why they believe three Petitioners have standing. But they are wrong on all three.

A. Committee to Protect and Preserve the Idaho Constitution

Petitioners' vanguard is the Committee to Protect and Preserve the Constitution, a legal group dedicated to "ensuring that the Idaho Constitution is not violated." Br. at 11. They argue the Committee has suffered an injury in its own right because it was "forced" to "divert[] resources from its normal practices to specifically challenge the [Parental Choice] program." *Id.* at 11–12.

For starters, an organization's diverting resources from one activity that furthers its mission to another is not an injury that confers standing. This Court never adopted the diversion of resources theory, *BABE VOTE v. McGrane*, 173 Idaho 682, 693–94, 546 P.3d 694, 705–06 (2024), and the U.S. Supreme Court recently rejected it. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024). If "diverting resources" conferred standing,

then "all the organizations in America would have standing to challenge almost every [] policy that they dislike, provided they spend a single dollar opposing those policies." *Id.*

But even if "diversion of resources" were still a valid theory, the Committee's only diverted resources are its litigation expenses in this case, Br. at 12, and every federal circuit to consider the question before the diversion-of-resources theory was rejected held that litigation expenses don't count—otherwise every organizational plaintiff would have standing simply by virtue of being in court. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (organization "cannot manufacture [an] injury by incurring litigation costs").

Moreover, the Committee's incurring litigation costs can't divert resources from the Committee's mission because lawsuits like this *are* the Committee's mission. *See BABE VOTE*, 173 Idaho at 693, 546 P.3d at 705 ("educating voters about the need to produce identification at the polls is not a new harm; it is part of the organizations' mission"). Resources have not been "diverted" from anything—the Committee has resources to bring lawsuits, and it has expended those resources here.[3] It never says what else they would have been used for. Br. at 12.

The Committee is the archetypal "concerned citizen who seeks to ensure the government abides by the law"—just in organizational form. *Young v. City of Ketchum*, 137

[3] *See* Corkery Decl., Ex. E at 2 (Committee leader stating that the "focus" of the organization is "protecting our State Constitution in State courts").

Idaho 102, 105, 44 P.3d 1157, 1160 (2002). As the Court has made clear, such petitioners "[do] not have standing." *Id.*; *Reclaim Idaho*, 169 Idaho at 421, 497 P.3d at 175 ("Mere disagreement with a law is not sufficient to establish standing").

B. School District No. 281

School District No. 281 lacks standing too. As a political subdivision, the District has only the authority granted it by state law, *In re Annexation of Common Sch. Dists. Nos. 18 & 21 to Indep. Sch. Dist. No. 1, Minidoka Cnty.*, 52 Idaho 363, 15 P.2d 732, 733 (1932). And while state law allows school districts to "sue and be sued," *see* Idaho Code § 33-301, it specifically states that "[s]chool districts are agents of the state . . . and they have *no standing* to bring suit against the state for failure to establish and maintain a general, uniform and thorough system of public, free common schools."[4] *Id.* § 6-2205(4) (emphasis added). If Petitioners claim the state is violating Article IX, § 1, then that's exactly what this suit is.

In any event, the District's claim of injury is entirely deficient. Petitioners argue that (1) the Program will cause its enrollment to decrease, (2) which will lead to decreased funding, (3) which will lead to "reduc[ed] [] quality of education for all students in the district." Br. at 12. But the District's "highly attenuated chain of possibilities" does not amount to a "certainly impending" injury that confers standing. *Clapper v. Amnesty Int'l*

[4] This Court has held a school district's standing may not be withdrawn in a pending case, but it has not invalidated statutes limiting districts' standing prospectively. *See Idaho Sch. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 591, 97 P.3d 453, 458 (2004). Nor could it. School districts are not required by the Idaho Constitution—they are statutory creations over which the Legislature has "plenary" control. *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 607, 308 P.2d 225, 228 (1957).

USA, 568 U.S. 398, 410 (2013); *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173 (injury must be "actual or imminent, not conjectural or hypothetical") (cleaned up).

First, there is no evidence that the District's enrollment will decrease. The sole evidence on which Petitioners rely is a "bare allegation[]" from a single paragraph of a declaration predicting the decrease without explaining the prediction. *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 17; Tiegs Decl. ¶ 12. That can't carry Petitioners' burden to prove standing. *See Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 17.

The Parental Choice Program has $50 million of funding, and makes $5,000 available per student per tax year or $7,500 per student with disabilities. Simple division suggests the Program will benefit only about 10,000 students—less than half the number of nondisabled children that are *already* enrolled in private schools. Corkery Decl., Ex. F at 1 (2022 numbers). Even if no current private-school students received a credit and each of the 10,000 beneficiaries represented a new departure from the public school system, that would amount to only 3% of current public-school enrollment, and it's completely unknown whether any of them would come from District No. 281 specifically. *Id.*, Ex. U (total Idaho public school students in 2024). When Florida enacted a similar program in 2023, more than a quarter of school districts saw enrollment *increase*. *See id.*, Ex. J (enrollment changes between 2023 and 2024 school years); Fla. Stat. § 1002.394.

Moreover, even if the District could show an imminent drop in enrollment, it has come nowhere close to showing that the drop would be *caused* by the Parental Choice Program. *Young*, 137 Idaho at 104, 44 P.3d at 1159. Petitioners' own source shows that

Idaho already saw a reduced share of children sent to public schools between 2012 and 2022—before the program was enacted. Br. at 4–5 (citing Catherine Allen, *Public school enrollment falling nationwide, data shows*, NBC News (Apr. 21, 2024), https://tinyurl.com/26mryevu). The District itself was already experiencing a decrease in enrollment year over year before the Program was enacted, too. Corkery Decl., Ex. H.

The other links in the chain of Petitioners' hypothetical injury are far too brittle as well. Decreased enrollment does not necessarily mean decreased funding—the Legislature sets the level of public-school funding (overall and per pupil) every year, and the amount of public-school expenditures has gone up every year even with enrollment declines. *Id.*, Ex. X (aggregate and per pupil spending between Fiscal Years 2018 and 2023). That's why the District's expenditures have been able to *increase* between 2022 and 2024 even though their enrollment *decreased* over that same time frame. *Id.*, Exs. O at 25, P at 25, H. Nationwide, between Fiscal Years 2018 and 2023, none of the school choice States saw a reduction in public school per-pupil spending. *Id.*, Exs. K; A. And Petitioners never explain why their declarant believes lower enrollment or funding will necessarily lead to worse educational outcomes—smaller class sizes can just as easily improve educational outcomes, and nationwide studies show little correlation between educational spending and academic achievement.[5]

[5] Corkery Decl., Ex. Q; *id.*, Ex. R at 2 ("Variations in school expenditures are not systematically related to variations in student performance."); *compare id.*, Ex. S, *with id.*, Ex. M.

C. The Idaho Education Association (IEA)

The IEA also lacks standing. It asserts (at 13–14) associational standing on behalf of its members, meaning it has to "establish[] that at least one identified member had suffered or would suffer harm" from the Parental Choice Program. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). The only member it identifies is Marta Hernandez, a current teacher at Burley Junior High School. Henandez Decl. at ¶ 8.

Petitioners have not established the Program will affect Ms. Hernandez at all. They summarily assert that she will be harmed because the Program "redirects funds that would otherwise be allocated to public education" (not even to Burley Junior High specifically). Br. at 13. But that's not enough—a pocketbook harm to a school is not a pocketbook harm to a teacher. Petitioners never suggest that *Ms. Hernandez's* salary might be decreased.

Nor do Petitioners ever attempt to explain why Burley Junior High will incur a reduction in funding. They don't argue that the funding will decrease as a result of reduced enrollment—in fact, they cite statistics implying that schools in Cassia County are *less* likely than schools in other counties to lose students. Br. at 13. And, as explained, the Parental Choice Program doesn't cut funding to public schools—it just spends more state money on other educational opportunities. Perhaps Ms. Hernandez would prefer that the additional money be used on public education, but if that were enough to confer standing, then Ms. Hernandez could also challenge Medicaid (for example) because its funding was not spent on public education. Indeed, any taxpayer could challenge any government program

because they would rather see the funds spent on a different program. *But see Reclaim Idaho*, 169 Idaho at 419 & n.7, 497 P.3d at 173 & n.7 (taxpayers generally lack standing).

Eventually Petitioners allege that Ms. Hernandez's "job will be made materially harder as a result of the Program." Br. at 14. But again, Petitioners never explain *how*. Petitioners must explain what it is about the Program that affects Ms. Hernandez's workday. While her declaration describes current difficulties with her job, Hernandez Decl. at ¶¶ 16–25, it never describes what "distinct palpable injury" to Ms. Hernandez that is "easily perceptible, manifest, or readily visible" will occur as a result of the Program. *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173 (cleaned up); *see also* Hernandez Decl. at ¶¶ 15, 18, 30 (underscoring speculative nature of injury with language like "may cause" or "threatens").

D. Remaining Petitioners

Petitioners have forfeited any argument that any other Petitioner has standing by summarily asserting "in passing" that they have standing, *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010), but they are wrong in any event.

- Like the Committee, Petitioner Evans lacks standing because being "opposed to the Program" doesn't confer standing. Pet. at ¶ 21. The same goes for Petitioner Mickelson—she may have voted against the law in the Legislature, but her policy opposition to the law doesn't give her a right to keep fighting it in court. *Id.* at ¶ 23 (claiming Mickelson has standing based on her opposition to the Program and its alleged impact on third parties).

- Petitioner Mormon Women for Ethical Government's associational standing fails for the same reason as the IEA—it does not concretely allege any way in which public schools (or the children in those schools) will be harmed by the Parental Choice Program. *See* Pet. at ¶ 18; Wilson Decl. (containing no explanation). It independently lacks standing because it does not identify by name any member who would suffer harm. *Summers*, 555 U.S. at 498.

- Petitioners Anderson and Morgan lack standing because their allegations that certain private schools would not admit their children do not assert any actual or impending injury caused by the Program. Pet. at ¶¶ 24–25.

E. Relaxed Standing

Because all the Petitioners lack standing, the petition could only go forward under the Court's recently articulated "relaxed standing doctrine," which allows the Court to hear controversies where "(1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 514, 387 P.3d 761, 767 (2015). Petitioners fail the second requirement.

In *Hawkins Companies, LLC v. State by & through Dep't of Admin.*, 174 Idaho 1023, 554 P.3d 74 (2024), a business brought a constitutional challenge to a state statute that prevented it from purchasing real property owned by the Idaho Transportation Department (ITD). *Id.* at 1027–28, 554 P.3d at 78–79. The Court rejected the business's claim of relaxed standing because two state agencies—the Department of Administration and ITD—"would have standing to bring the constitutional claim." *Id.* at 1033, 554 P.3d at 84. The law at issue "directly affected [both agencies]" and allegedly "interfere[d] with the authority granted to them by law." *Id.*

Here, according to Petitioners' own allegations, the State Board of Education (SBOE) would have standing to challenge H.B. 93. Petitioners allege that "[p]lacing the administration of the Program under the State Tax Commission diminishes the role of the [SBOE]," thereby affecting SBOE and interfering with its statutory authority. Pet. at

¶ 21; Br. at 19 (arguing that the Program would have to be under the purview of the SBOE to be constitutional); Br. at 15 (suggesting that SBOE has the authority to "uphold Article IX, section 1 of the state constitution"). The fact that another entity has standing means Petitioners cannot invoke relaxed standing.

Petitioners insist that relaxed standing still applies because the SBOE is not "ready or willing" to challenge H.B. 93. Br. at 15. But that was the case for the state agencies in *Hawkins* too, and relaxed standing failed all the same. 174 Idaho at 1033, 554 P.3d at 84 ("While both agencies would likely have standing to bring a lawsuit against the legislature for the alleged constitutional violations . . . they have not done so"). It would erase the "fundamental tenet" of standing if the fact that nobody else *has already* sued meant that the party before the Court must be allowed to sue. *Young*, 137 Idaho at 104, 44 P.3d at 1159. It would mean that a "mere disagreement with a law" *is* enough to bring a lawsuit. *Reclaim Idaho*, 169 Idaho at 421, 497 P.3d at 175.

If the SBOE chooses not to sue, that doesn't mean any provision has been "deleted from the Constitution." Br. at 15 (quoting *Coeur D'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767 (cleaned up)). It just means that adhering to the Constitution in this case has been entrusted to the "political branches," and any redress will come through the "political process" rather than the courts. *United States v. Richardson*, 418 U.S. 166, 179 (1974). After all, it's highly unlikely that Idaho's Framers "intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the [State] Government by means of lawsuits in [state] courts." *Id.*

II. H.B. 93 Complies with Article IX, § 1 of the Idaho Constitution.

Moving to the merits, Petitioners' first claim fundamentally misunderstands Article IX, § 1 of the Idaho Constitution ("Section 1"). That provision provides a floor, not a ceiling, on the educational opportunities the Legislature may promote.

A. Section 1 Imposes a Duty to Establish and Maintain a System of Public Schools, Which the Legislature Has Undisputedly Done.

Unlike the federal Congress, whose "authority is limited to those powers enumerated in the [United States] Constitution," *United States v. Lopez*, 514 U.S. 549, 566 (1995), the Idaho Legislature has "plenary power over all subjects of legislation not prohibited by the federal or state constitution." *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 406–07, 522 P.3d 1132, 1164–65 (2023) (quoting *Wilson v. Perrault*, 6 Idaho 178, 180, 54 P. 617, 617 (1898)). The default rules are switched—while Congress *can't* act unless a provision of the U.S. Constitution *authorizes* it to do so, the Legislature *can* act unless a provision of the Idaho or U.S. Constitution *prevents* it from doing so. *Utah Oil Ref. Co. v. Hendrix*, 72 Idaho 407, 413, 242 P.2d 124, 127 (1952) ("It is rather axiomatic that under our Constitution unless legislation is prohibited the Legislature has unlimited power in its field.") (cleaned up).

Any challenge that the Legislature has exceeded its authority must therefore be based on some limitation contained in the Idaho Constitution. Such limitations are generally not hard to identify. Article III, § 19 contains a whole list of "local or special laws" that "[t]he legislature shall not pass," like those "[g]iving effect to invalid deeds, leases, or other instruments." Other provisions prohibit specific types of legislation—"The legislature shall not in any manner create any debt or debts" except in certain

circumstances, and laws authorizing gambling are "strictly prohibited" except in certain circumstances. Idaho Const. art. VIII, § 1; Idaho Const. art. III, § 20.

Section 1, however, is plainly not a limitation—it's a duty. It states, "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." (emphasis added). That means, of all the things the Legislature can use its general legislative power to accomplish, it has a "specific mandate" to at least use its power to make a system of free public schools that "every child of school age" in Idaho can attend. *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957) (first quote); The Proceedings and Debates, VII (second quote). The clear text of the provision—which contains no limiting language whatsoever—shows that it is a floor, not a ceiling, on the Legislature's power to promote education. *See Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990) (if a "constitutional provision is clear we must follow the law as written").

And Petitioners do not dispute that the Legislature has complied with its duty to establish and maintain a system of public schools. The State has K-12 public schools throughout the State that all children in Idaho can attend for free. *See* Moriarty Decl. at ¶¶ 6–7. Unlike previous cases this Court has seen, there are no allegations here that anything is insufficient about the Idaho public schools. *See* Br. at 25 ("To be clear, Petitioners are not claiming, as the ISEEO cases did, that the Legislature is not otherwise meeting its mandate under Article IX, section 1 in public education").

Once the Legislature has complied with its duty to establish a system of free and uniform public schools, it is free to promote educational advancement in other ways as it sees fit—as it has done with the Parental Choice Program, and as it has done previously by regulating or establishing other schools and programs like magnet schools, the Idaho School for the Deaf and Blind, a quasi-military school (Idaho Youth Challe*NG*e Academy), and the Idaho Digital Learning Alliance (which offers public-school students supplemental online courses for a fee), or by funding higher education initiatives like the LAUNCH Program (which grants money to Idaho residents to apply for certain in-demand university programs) and the WWAMI program (which reserves seats at, and partially subsidizes, the University of Washington School of Medicine for Idaho residents).[6] "To sustain [such] legislation, it is not necessary that the Constitution authorize it; it is sufficient if the Constitution does not prohibit it." *State v. Johnson*, 50 Idaho 363, 296 P. 588, 590 (1931).

B. Section 1 Is Not a Limitation on the Legislature's Power.

Petitioners argue that Section 1 is actually a limitation on the Legislature. Although the provision speaks only to what the Legislature *must do* with its plenary power—and includes no limiting language like the word "only"—Petitioners attempt to draw a negative inference to convert the provision into one that speaks to what the Legislature *may not do*

[6] Idaho Code § 33-5203 (charter schools); Idaho Code § 33-3402 (Idaho School for the Deaf and Blind); Idaho Code § 46-805 (Idaho Youth Challe*NG*e Academy); Idaho Code § 33-5501 (Idaho Digital Learning Alliance); Idaho Code § 72-1205 (LAUNCH Program); Idaho Code § 33-3731 (WWAMI program).

with its power. According to Petitioners, Section 1 requires "that only one type of education [can] be financed or otherwise supported with public money—public schooling." Br. at 22.

Petitioners' argument immediately runs into several insuperable problems.

1. *Expressio Unius* Doesn't Apply.

Petitioners attempt to write some limiting language into the Legislature's "duty . . . to establish and maintain a general, uniform and thorough system of public, free common schools" by invoking a "rule of construction" called *expressio unius est exclusio alterius*, which indicates that "where a constitution or statute specifies certain things, the designation of such things excludes all others." *Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978) (cleaned up). The canon doesn't mean that a negative inference can *always* be drawn from statutory text—rather, "[t]he force of any negative implication . . . depends on context," and *expressio unius* "applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) (cleaned up); *Noble v. Glenns Ferry Bank, Ltd.*, 91 Idaho 364, 367, 421 P.2d 444, 447 (1966) (the canon "is not an unimpeachable rule of law").

There is no need to "turn to the canons of construction" at all here "because the language is unambiguous." *Wall & Assocs., Inc. v. Dep't of Fin.*, 574 P.3d 807, 816 (Idaho 2025). But *expressio unius* would be a particularly dangerous canon to resort to anyway. The canon has been widely "recognized as unreliable." *Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab. v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) (collecting

sources); Scalia & Garner, *Reading Law: The Interpretation of Legal Text*, 107–11 ("Virtually all authorities who discuss [*expressio unius*] emphasize that it must be applied with great caution, since its application depends so much on context."). As former Chief Justice Jim Jones (the director and spokesman for the lead Petitioner) once explained, "[n]ot every silence is pregnant," so *expressio unius* is "an uncertain guide." *Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 649, 132 P.3d 397, 406 (2006) (Jones, C.J., dissenting) (quoting *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)); *see also id.* at 642–43 132 P.3d at 399–400 (majority opinion) (because the Legislature "has plenary powers," *expressio unius* applies to constitutional provisions "that expressly limit power," but not to "provisions that merely enumerate powers").

Section 1 has none of the context that would suggest the Framers meant to imply something by negative implication. Invoking *expressio unius* generally "depends on identifying *a series of two or more terms or things* that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (emphasis added); *e.g.*, *SW Gen., Inc.*, 580 U.S. at 302 ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."). Here, however, Section 1 imposes a single duty that does not contain any limitations at all.

In fact, the context provided by other provisions of the Constitution confirms that Section 1 does not carry a negative implication. Most notably, reading Section 1 as a limitation on the Legislature's power would turn Idaho's Blaine Amendment into surplusage. That provision prohibits the Legislature from funding "any school . . . controlled by any church, sectarian or religious denomination whatsoever." Idaho Const. art. IX, § 5. But Petitioners' interpretation would mean that Section 1 *already* prohibits funding religious private schools. Clearly, the Framers did not understand Section 1 to impose such a limitation, or else its inclusion of schools in the Blaine Amendment was superfluous. *Idaho Press Club, Inc.*, 142 Idaho at 643, 132 P.3d at 400 ("We should avoid an interpretation which would render terms of a constitution surplusage.").[7]

Article X, § 1 also rebuts any negative inference. It states, "Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law." The section therefore presumes that the Legislature can create other educational institutions that are not "uniform" to the other public schools, like a school for the blind and deaf. *Davis v. Moon*, 77 Idaho 146, 153, 289 P.2d 614, 618 (1955) ("The Constitution makes it the

[7] Petitioners do not argue that H.B. 93 is unconstitutional based on the Blaine Amendment. Sensibly so—the U.S. Supreme Court has held that schools cannot be excluded from public benefit programs "solely because of their religious character" notwithstanding a state's Blaine Amendment. *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 484 (2020) (cleaned up); *id.* at 488 (noting that "no-aid provision[s]" like Idaho's Blaine Amendment should be "disregarded" when they conflict with the Federal Constitution (cleaned up)).

mandatory duty of the legislature to establish and maintain a general, and thorough system of public, free common schools, also to establish and support educational institutions as the public good may require.").

Indeed, consider how nonsensical it would be to apply *expressio unius* as Petitioners urge to any other of the Legislature's constitutional duties. The Legislature has the "duty . . . to cause [proposed constitutional amendments] to be published without delay for at least three times in every newspaper qualified to publish legal notices," Idaho Const. art. XX, § 1, but nobody would suggest that the amendment can't also be published on the Legislature's website or in a television advertisement. The same holds true even for duties containing a series of items—the Legislature has the "duty . . . to provide by law for the safekeeping of" "[a]ll military records, banners, and relics of the state," Idaho Const. art. XIV, § 4, but that surely doesn't mean the Legislature couldn't also pass laws for the safekeeping of a recently developed military tank or non-military relics.

2. Petitioners Draw the Wrong Negative Inference.

Even if *expressio unius* did apply to Article IX, § 1, Petitioners draw the wrong negative inference. Petitioners' confusion as to what exactly should be negatively inferred illustrates just how "unreliable" *expressio unius* is, *Bethlehem Mines*, 669 F.2d at 197, and just how poor a candidate Section 1 is for applying the canon.

Article IX, § 1 says the Legislature has a "duty . . . to establish and maintain a general, uniform and thorough system of public, free common schools." If that clause has a negative implication, it would be that the Legislature *doesn't have a duty* to establish

and maintain any other schools or system of schools. Idaho Const. art. IX, § 1. The negative inference wouldn't be that the Legislature *can't* establish and maintain other schools or systems of schools.

And even if Section 1 did mean that the Legislature can't establish and maintain other schools or system of schools, that still wouldn't be enough for the Parental Choice Program to be unconstitutional because the Program does no such thing. The terms "establish" and "maintain" must be given their "plain and ordinary meaning." *State v. Thiel*, 158 Idaho 103, 108, 343 P.3d 1110, 1115 (2015) (cleaned up). Since the time the Constitution was ratified, to "establish" has meant "to originate and secure the permanent existence of; to found; to institute; to create and regulate." *Establish*, Webster's International Dictionary of the English Language 511 (1907), https://tinyurl.com/56juv4rs. To "maintain" has meant to "hold or keep in any particular state or condition." *Maintain*, Webster's International Dictionary of the English Language 884 (1907), https://tinyurl.com/hn4swmm2.

The Parental Choice Program does not originate, found, institute, or create any school or system of schools ("establish"), and it also doesn't keep any school or system of schools in a particular condition ("maintain"). Instead, the Program gives money to parents (whether through a tax credit or advance payment), who use that money (or are being refunded) for tuition, fees, or expenses incurred by their child attending schools that have already been created by independent actors. Idaho Code § 63-3029N(2)(f), (3); *compare with* Idaho Code § 33-4001 ("The college now known as Boise state college . . .

shall be *established* in the city of Boise, Idaho, as an institution of higher education of the state of Idaho") (emphasis added).

Moreover, these already-existing schools cannot be characterized as being "established" as public schools by virtue of their indirectly benefitting from the tax credits issued to their students' parents. H.B. 93 is clear that all nonpublic schools retain their nonpublic nature—the schools do not become "agent[s] of the state," and no "government agency [can] exercise control or supervision" over nonpublic schools or "regulate the education" of any nonpublic schools. Idaho Code § 63-3029N(20). Nor does H.B. 93 otherwise create any network or system of schools that indirectly benefit from the Program—these schools have no connection to each other whatsoever under the statute, nor any coordination with the State. *See Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015) (rejecting as "inaccurate" the "characterization" that a similar North Carolina school-choice program creates "an alternate system of publicly funded private schools").[8]

Petitioners cannot even bring themselves to say that H.B. 93 "establishes" anything. They elide the distinction by substituting "fund" for "establish" throughout their brief—even though the ordinary meaning of "establish" does not include "fund." Br. at 14 (H.B. 93 "funds and maintains an alternative education system"); *id.* at 15 ("it Funds a Separate System"); *id.* at 39 ("The Program is in direct violation of the Idaho Constitution by

[8] The nonpublic nature of the schools indirectly benefitting from the Program also dooms Petitioners' abrupt argument that the board of education must administer the Program pursuant to its authority to govern "all *state* educational systems and *public* schools." Br. at 19 (quoting Idaho Const. art. IX, § 2) (emphases added).

publicly funding and maintaining a separate system of education"). Indeed, the Constitution does not use the term "establish" anywhere else where it intends to prohibit funding. For example, the Blaine Amendment prohibits the Legislature from funding religious schools, but does so without using the word "establish." Idaho Const., art. IX, § 5 (the Legislature shall not "pay from any public fund or moneys whatever, . . . to help support or sustain any school . . . controlled by any church, sectarian or religious denomination whatsoever").

Thus, to the extent Petitioners could convert Section 1 into a prohibition, it wouldn't be a prohibition on funding schools—which, again, the Parental Choice Program does not do because it awards tax credits to parents. *Contra* Br. at 18 (claiming that "public funds will go directly to private schools"). Instead, it would be a prohibition on both establishing and maintaining schools, which H.B. 93 doesn't do.

3. Petitioners Appeal to Inapposite Precedent.

Petitioners also try to draw an analogy to this Court's decision in *Evans v. Andrus*, but to no avail. 124 Idaho 6, 855 P.2d 467 (1993). There, the Court held that the Legislature could not divide the board of education into three bodies because the Constitution requires that "general supervision of the public schools of the state shall be vested in *a* board of education." *Id.* at 10–11, 855 P.2d at 471–72 (quoting Idaho Const. art. IX, § 2).

The provision of the Constitution at issue in *Evans* uses an indefinite article like Section 1 ("a" general and uniform system), but that's where the parallels end. The provision in *Evans* affirmatively requires that the power of general supervision of public

schools be vested in one body, which necessarily means that it cannot be vested in any other body. It therefore operates to limit the Legislature's power, and the Legislature violates the provision by trying to give that authority to anyone else.

Section 1, on the other hand, does not vest anything in anybody. By its plain text, it merely gives the Legislature a duty to do one ("a") thing, without speaking to what else it can or cannot do with its power. *Evans* does not inform whether Section 1 is a limitation; it just shows what the consequence would be if it were.

4. The Intent of the Framers Does Not Help Petitioners.

Petitioners also seek to transform Section 1 into a limitation on the Legislature's power by invoking the "intent of the framers," Br. at 19—another tool that is not necessary where, as here, the text is "clear and unambiguous." *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) ("Where the language of a constitutional provision is ambiguous, the debates from the constitutional convention may be resorted to for the purpose of interpretation"). Still, the history of Section 1 supports Respondent's interpretation, not Petitioners'.

In the territorial days, Idaho schools, both public and private, were funded by parents. *Public School Buildings in Idaho*, U.S. Dep't of the Interior, at 7 (1991), https://tinyurl.com/4zs4fdsv. Idaho did not have "common schools nor the subscription schools nor the means for education" that existed "in the east." The Proceedings and Debates, 378. Understanding "the blessings of education," and the importance of "dissemination of knowledge and of the arts and sciences," the Framers believed it

essential to create a system of public schools that would ensure that "every child of school age" in Idaho would have the opportunity to receive an education. The Proceedings and Debates, VII, 377–78.

All of this is consistent with Section 1 supplying a floor, not a ceiling, on the Legislature advancing education. The Framers' discussion of Section 1 demonstrated no hostility toward private education or intent to diminish it. Instead, their goal was merely to ensure that all would have the chance to be educated, even those without means. It beggars belief that those who placed such a high value on education intended to cap the Legislature's ability to promote the advancement of learning. *See* Idaho Const. art. IX, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people . . .").

Petitioners' evidence of the Framers' intent doesn't refute any of this.

First, Petitioners cite to the provision of the Constitution (and related statutes and amendments) stating that the Legislature may require compulsory attendance at public schools unless children are "educated by other means," Idaho Const. art. IX, § 9, arguing that it shows the Framers "indicated a strong preference for using the publicly-financed school system to educate Idaho children." Br. at 20. That's not true—that provision equally respects a parent's choice to send their children to private schools. But it's also simply the wrong proposition—whatever the Framers preferred, the compulsory attendance provision is not evidence that the Framers intended to *prohibit* the Legislature from supporting nonpublic forms of education.

Second, Petitioners imply that because one of the Framers referred to the school fund as "sacred," the Framers must have intended to prohibit the Legislature from funding nonpublic schools. Br. at 21–22. Not so. The sacred-fund comment was made while discussing the public-school endowment fund outlined in Article IX, § 3, and expressed merely that the Legislature should make wise investments with the fund so that public schools would not be wholly reliant on local taxation. The Proceedings and Debates, 647–48. It has nothing to do with the Legislature's power to spend money outside the fund.

Third, Petitioners mention that programs supporting K-12 private education have not existed in Idaho until now. Wrong again—Idaho has indirectly supported private schools in years past through the Empowering Parents Grant Program and through tax-advantaged 529 accounts. *See supra* Background. Moreover, laws are not unconstitutional simply because they are novel—just because something *hasn't* been done doesn't mean the Framers thought it *couldn't* be done. Such logic would stifle any legislative innovation. *See Sturges v. Crowninshield*, 17 U.S. 122, 173 (1819). In any event, Petitioners haven't connected any supposed lack of historical practice to beliefs about the scope of Article IX, § 1.

* * *

Had the Framers intended to prohibit the Legislature from funding private education, it could have said so expressly, as at least eight other state constitutions have done. *See* Cal. Const. art. IX, § 8 ("No public money shall ever be appropriated for the support of . . . any school not under the exclusive control of the officers of the public

schools").[9] But they didn't, and it is not the role of this Court to write that language into the Constitution anyway, as Petitioners urge.

C. Other State Supreme Courts Have Rejected Petitioners' Argument.

Idaho is not the only State with a constitutional provision requiring its legislature to establish a uniform system of public schools, and it is not the only State to enact a program empowering parental school choice. As a result, the same arguments Petitioners raise here have been passed on by several other state supreme courts—and they have been almost unanimously rejected.

Wisconsin enacted a program in 1990 funding low-income students' attendance at private schools in Milwaukee. *Davis v. Grover*, 480 N.W.2d 460, 462 (Wis. 1992). The program was challenged as violating the Wisconsin Constitution's requirement that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free . . ." *Id.* at 473 (quoting Wis. Const. art. X, § 3). But the Wisconsin Supreme Court rejected the challenge, explaining that the constitutional provision "clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin," and did not prohibit the legislature from "do[ing] more than that which is constitutionally mandated." *Id.* at 473–74; *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (the provision "provides not a ceiling but a floor upon which the legislature can build additional opportunities for school

[9] *See* S.C. Const. art. XI, § 4; Miss. Const. art. 8, § 208; Alaska Const. art. VII, § 1; Haw. Const. art. X, § 1; Neb. Const. art VII, § 11; Mich. Const. art. VIII, § 2; N.M. Const. art. XII, § 3.

children"). The school-choice program did not violate the provision as properly interpreted because it "in no way deprive[d] any student the opportunity to attend a public school with a uniform character of education." *Davis*, 480 N.W.2d at 474.

Indiana enacted a school-choice program in 2011 "providing vouchers to eligible parents for use in sending their children to private schools." *Meredith v. Pence*, 984 N.E.2d 1213, 1216 (Ind. 2013). The Indiana Supreme Court considered whether the program violated the constitutional provision directing that "it shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Ind. Const. art. 8, § 1. The court unanimously held that the program was constitutional, explaining that the provision was "not implicated by the school voucher program"—"so long as a uniform public school system, equally open to all and without charge, is maintained, the [legislature] has fulfilled the duty imposed." *Meredith*, 984 N.E.2d at 1223, 1225 (cleaned up). The court's analysis rejected the challengers' invocation of *expressio unius*, reasoning that resorting to canons was "unnecessary" because the plain text led to an "unmistakabl[e]" result, and that the canon didn't apply anyway. *Id.* at 1224 n. 17.

Next was ***North Carolina*** in 2014, which enacted a program allowing "a small number of students in low-income families to receive scholarships from the State to attend private school." *Hart v. State*, 774 S.E.2d 281, 285 (N.C. 2015). The North Carolina Supreme Court quickly disposed of the argument that the program violated the requirement in the North Carolina Constitution that "[t]he General Assembly shall provide by taxation and

otherwise for a general and uniform system of free public schools," N.C. Const. art. IX, § 2(1), explaining that the plain text "requires that provision be made for public schools of like kind throughout the state," but "does not prohibit the General Assembly from funding educational initiatives outside of that system." *Hart*, 774 S.E.2d at 289–90.

Nevada enacted a program in 2015 allowing "public funds to be transferred into private savings accounts . . . to pay for [] private schooling, tutoring, and other non-public educational services and expenses." *Schwartz v. Lopez*, 382 P.3d 886, 891 (Nev. 2016). The Nevada Supreme Court held that the program did not violate the Nevada Constitution's directive that "[t]he legislature shall provide for a uniform system of common schools." *Id.* at 898 (quoting Nev. Const. art. 11, § 2). As it explained, the provision is "clearly directed at maintaining uniformity *within* the public school system," so "as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate . . . is satisfied, and the Legislature may encourage other suitable educational measures." *Id.* at 896–97 ("If . . . the framers had intended [the] requirement for a uniform school system to be the *only* means by which the Legislature could promote educational advancements . . . they could have expressly stated that").

Finally, ***West Virginia*** implemented a program in 2021 that funded "education-savings accounts that may be only used for specific educational purposes," including tuition at private schools. *State v. Beaver*, 887 S.E.2d 610, 620 (W. Va. 2022) (cleaned up). Challengers argued that the program violated the West Virginia Constitution's mandate that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free

schools." W. Va. Const. art. XII, § 1. But the West Virginia Supreme Court observed that "[t]he word 'only' does not appear" in the constitutional provision. *Beaver*, 887 S.E.2d at 619. Since the West Virginia Legislature "has the authority to enact any law unless expressly forbidden to do so by [the] Constitution," the fact that the provision "does not contain any restrictive language" meant the legislature could "enact[] educational initiatives in addition to its duty to provide for a thorough and efficient system of free schools." *Id.* at 626, 628 ("the 'free schools' clause operates as a floor, not a ceiling"). The court also rejected the challengers' "argument that the word 'only' should be inserted into" the constitutional provision through *expressio unius* because the provision was not ambiguous and because it contained no "series of two or more terms." *Id.* at 627–28 & n.19.

The only state supreme court to reach a contrary result under ostensibly similar circumstances was **Florida's**, but Florida's Constitution is distinguishable. Unlike the Idaho Constitution, the Florida Constitution expressly prohibited the legislature from using money from the State School Fund to support private schools. *Bush v. Holmes*, 919 So. 2d 392, 410 (Fla. 2006); (citing Fla. Const. art. IX, § 6). In any event, Florida doesn't even follow that widely criticized decision anymore.[10] In 2019, Florida enacted a school-choice program that is plainly incompatible with *Holmes*, yet nobody has even attempted to challenge the program. Fla. Stat. § 1002.394. Florida's school choice program has since

[10] *E.g.*, Theodore Steinmeyer, *Legal Choices: The State Constitutionality of School Voucher Programs*, 47 Harv. J.L. & Pub. Pol'y 231, 238, 244 (2024) ("*Holmes* does not provide a cogent explanation for why the state legislature's plenary power does not extend to its responsibilities concerning education.").

become the most successful in the nation. Alli Aldis, *America's School Choice Programs Ranked by Participation, 2025 Edition*, Ed Choice (Jan. 6, 2025), https://tinyurl.com/4vdmpras.

* * *

When faced with constitutional provisions analogous to Section 1, these jurisdictions were able to apply the plain text. *See also Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (reaching the same result). Here, as there, the Legislature has a "constitutional mandate" to fund a uniform system of public schools, *Idaho Sch. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 459, 129 P.3d 1199, 1208 (2005), but is not prohibited from promoting additional educational opportunities too.

D. Petitioners' Interpretation—Not Respondent's—Would Lead to Significant Consequences for Public Schools.

Because the duty to "establish and maintain a general, uniform and thorough system of public, free common schools" creates a floor and not a ceiling on the Legislature's power to advance education, there is no need to analyze (as Petitioners do, Br. at 23–26) whether the schools that will indirectly benefit from the Parental Choice Program are free, thorough, or uniform with respect to public schools. As long as the Legislature fulfills its duty to adequately maintain the uniform system of public schools—and there's no dispute that it has, Br. at 25—it's free to support other education opportunities that are outside that system.

Still, while Petitioners aren't arguing that the Parental Choice Program will cause the quality of public schools to dip below constitutionally mandated standards, Petitioners

consistently suggest that upholding the constitutionality of the Program will harm public education. *See* Br. at 4–5, 13; Hernandez Decl. at ¶¶ 23–24.

At the risk of delving into "policy consideration[s]" that can't alter the constitutional analysis, *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009), the weight of the available data indicates that school choice initiatives create better outcomes for students in public schools. A 2013 analysis of 23 empirical studies conducted in the United States observed that 22 of the studies found improvement in academic outcomes at public schools in states that introduced school choice initiatives. Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, The Friedman Foundation for Educational Choice 11 (3d ed. 2013), https://tinyurl.com/3493ynhc. A more recent analysis confirmed this result, and also noted that all eight studies examining school choice's effect on safety found that school safety improved. Cargill, *There are 187 studies on impact of education choice – and the results are overwhelming*, Mountain States Policy Center (Jan. 24, 2024), https://tinyurl.com/4are3bdp.

In reality, it's the Petitioners' interpretation that would be disruptive for public education. Assume that Petitioners are right about the negative inference they seek to draw from Article IX, § 1—i.e., that "the Legislature *may not establish and maintain* other educational systems outside of this single system." Br. at 17 (emphasis added).

That would spell trouble for charter schools and magnet schools. It's questionable whether these schools have a curriculum that is uniform to that of standard public schools. *E.g.*, *About TVMSC*, Treasure Valley Math and Science Center,

https://tinyurl.com/y3va5crn (magnet school that doesn't teach English or social studies). Moreover, some of these schools discriminate in admissions on the basis of academics and therefore aren't "public" as Petitioners describe that requirement. Br. at 18 ("open to all students in the state"); *e.g.*, *Student Entrance Requirements*, Renaissance High School, https://tinyurl.com/5ajsvje9. It's unclear how the State could establish and maintain these schools (as a separate system overseen by the State or within the broader public school system) under Petitioners' interpretation of Section 1.

In fact, it's also unclear how the Legislature could create institutions of higher education under Petitioners' interpretation. The system that Section 1 directs the Legislature to create extends through high school only, *Pike v. State Bd. of Land Comm'rs*, 19 Idaho 268, 113 P. 447, 447 (1911), and if the Legislature "may not establish and maintain other educational systems outside of this single system," Br. at 17, then the Legislature would be prohibited from establishing a system of universities. And if Petitioners are right that indirectly funding schools is equivalent to "establish[ing] and maintain[ing]" them, then the State's programs funding higher education for Idaho residents—like Launch or WWAMI—are likewise unconstitutional.

Petitioners never acknowledge the implications of their argument. They try to reframe the argument as claiming "that only one type of education [can] be financed or otherwise supported with public money—public schooling." Br. at 22. But they never explain how a public vs. private line can be negatively inferred from a constitutional provision directing a *specific system* of public schools to be established and maintained.

* * *

What was already clear from Section 1's plain text is only confirmed by considering canons of construction, other States' precedent, and practical consequences. Section 1 requires the Legislature to establish and maintain a system of public schools, but does not limit it from doing more to advance education. Here, there is no dispute that Idaho's public schools are adequate, and that's where the constitutional analysis should end.

III. H.B. 93 Complies with the Public Purpose Doctrine.

Petitioners' other constitutional challenge fares even worse. Petitioners argue that H.B. 93 violates the Idaho Constitution's implied "public purpose" doctrine, but their argument distorts the scope of that limitation.

The public purpose doctrine requires "that activities engaged in by the state, funded by tax revenues, must have primarily a public rather than a private purpose." *Idaho Water Res. Bd. v. Kramer*, 97 Idaho 535, 558, 548 P.2d 35, 59 (1976). By its very nature, the inquiry centers on what ends (i.e., "purpose") the government seeks to attain, not the means used to achieve those ends. Thus, "where the primary purpose of a program is public, any incidental benefits to profit-making enterprises[] will not invalidate the program." *Id.* at 558 n.46, 548 P.2d at 59 n.46 (cleaned up). Moreover, this Court generally does not second-guess the Legislature's determination that a law will serve the public interest—a "declaration by the Legislature of public purpose is normally afforded great deference" and it "will not be overturned unless it is found to be arbitrary or unreasonable. *Id.* at 558, 548 P.2d at 59.

Here, H.B. 93 plainly serves at least two public purposes.

First, H.B. 93 promotes Idahoans' education, which is "universally regarded as a public purpose." *Davis*, 77 Idaho at 153, 289 P.2d at 618. The Framers themselves emphasized that our very form of government depends upon having an educated populace. Idaho Const. art. IX, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people . . ."). H.B. 93 advances education by providing parents—particularly those from low-income families—access to "educational services that meet the needs of their individual children." 2025 Idaho Sess. Laws ch. 9, § 1. Moreover, research shows that parental choice programs raise the quality of education statewide, even in public schools. *See supra* Section II.D.

Second, H.B. 93 promotes parents' "fundamental right" to "direct the upbringing and education of children under their control." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (cleaned up). This right is "one of the highest known to the law," *Martin v. Vincent*, 34 Idaho 432, 201 P. 492, 493 (1921), and the State is bound by statute—and perhaps by the Constitution, *see Planned Parenthood Great Nw.*, 171 Idaho at 409, 522 P.3d at 1167—to protect it. Idaho Code § 32-1010(4); *see also id.* § 32-1012 (discussing the "fundamental right and duty to make decisions concerning their education"). H.B. 93 enhances parents' ability to "nurture and direct their children's education" by selecting the appropriate educational setting for their children's individualized needs. 2025 Idaho Sess. Laws ch. 9, § 1 ("affirm[ing] that parents have a fundamental right").

Petitioners' primary argument is that "*private* education is not a public purpose." Br. at 28 (emphasis added). But that misunderstands the relevant inquiry—as explained,

the public purpose doctrine asks whether there is a public-benefitting end, not whether the end is accomplished by privately controlled means or means that benefit private parties. Thus, the Court has previously upheld government action:

- Issuing bonds to fund private hospitals, because "improv[ing] the caliber of health care available to the public" in "health facilities throughout the state, when operated by either public or private non-profit entities, is [] a public purpose," *Bd. of Cnty. Comm'rs of Twin Falls Cnty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974);

- Requiring counties to pay hospitals—including private hospitals—for the medical care of indigent residents, *Idaho Falls Consol. Hosps., Inc. v. Bingham Cnty. Bd. of Cnty. Comm'rs*, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982);

- Loaning money to a private individual to develop irrigation wells, because "[t]he irrigation of arid land is a public purpose," *Nelson v. Marshall*, 94 Idaho 726, 731–32, 497 P.2d 47, 52–53 (1972) (the fact that the "loan made here will enable its recipient to make a profit for himself" did not defeat the public purpose because "the loaning of funds by the State is always presumably of some benefit to the recipient of the funds");

- Building dams to be leased "to a privately owned and operated company"—who would then build and operate generating facilities on the land—because "[t]he development and conservation of the state's water resources" and the "enhancing the production and availability of electrical power" are public purposes, *Kramer*, 97 Idaho at 559, 561, 548 P.2d at 59, 61; and

- Building a generating facility (1) on land that would be leased from a private company, and (2) with a promise to remit energy generated to the private company, because ensuring a sufficient supply of energy is a public purpose. *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 955, 703 P.2d 714, 719 (1985).

By contrast, when the Court has invalidated a government action under the implied public purpose doctrine—which it appears has only happened twice—it has done so based on the action's private-oriented *objective*, not the means.

In one of those cases, the Legislature passed a law appropriating $3,000 to a specific family that had been injured in a car accident caused by state construction workers'

negligence, citing a "moral obligation" owed to the family. *State ex rel. Walton v. Parsons*, 58 Idaho 787, 80 P.2d 20, 20–22 (1938). The Court held that the payment amounted to a "gift"—the law contained "no declaration of any public policy," and there was no "legitimate inference" that the Legislature aimed to serve any public purpose beyond fulfilling a "moral obligation" to compensate a single family. *Id.* at 23.

In the other case, a village issued bonds to acquire a site that it would immediately lease to a private manufacturing company. *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 342, 353 P.2d 767, 770 (1960). Again, the Court held that the problem was the ultimate *aim* of the government's action, which was to promote "a private corporation for private profit and private gain." *Id.* at 347. The fact that supporting a private business could "incidental[ly]" be a "general benefit to the economy of a community" was not good enough—the same could be said of any transfer of funds to a private enterprise. *Id.* at 346–47 (cleaned up); *see Bradbury v. City of Lewiston*, 172 Idaho 393, 410, 533 P.3d 606, 623 (2023) (describing *Moyie Springs* as involving "a donation made to a private enterprise").

These cases show that accomplishing public-oriented goals through private means is not unconstitutional. The government can properly develop the supply of electricity, promote irrigation, improve healthcare, or even cultivate education through private actors and organizations, who may be subject to different regulations than public actors and organizations doing the same thing. *E.g.*, *Bd. of Cnty. Comm'rs of Twin Falls Cnty.*, 96 Idaho at 502, 531 P.2d at 592 (funding private hospitals operating in the heavily regulated healthcare sector). It's only when the goal itself is private-oriented that problems arise,

and that's not the case with H.B. 93 because it promotes the "universally" recognized public purpose of educating Idahoans. *Davis*, 77 Idaho at 153, 289 P.2d at 618; *see* Idaho Code § 63-3029N(2)(a), (d) (children whose parents claim the tax credit must attend a school that teaches "English language arts, mathematics, science, and social studies" and is "accredited" or documents the student's growth).

Petitioners' final attempt to shift the focus away from H.B. 93's purpose and onto the means by which it accomplishes its purpose is to cite an Attorney General opinion (and not precedent from this Court) stating that "the 'how' matters" in assessing public purpose. Idaho Att'y Gen'l Opinion No. 24-01, 10. But the "how" is only relevant inasmuch as it illuminates the "why." And in the situation addressed by the Attorney General opinion, the University of Idaho was contemplating buying a private online university; running it as a private university with private employees, officers, and directors; educating almost exclusively non-Idahoans; and apparently receiving no guaranteed share of the profits. *See Moyie Springs*, 82 Idaho at 342, 353 P.2d at 770 (incidental economic benefits are not a public purpose). All of that showed that the project did not seek any benefit for the Idaho public, but merely sought to promote a private enterprise.

As for whether H.B. 93's ends are permissible, Petitioners don't deny that education generally is a public purpose, but apparently dispute whether H.B. 93 will ultimately promote education. They suggest that private schools may raise their tuition so parents will not actually see expanded educational options for their children. But (1) it's not plausible that all private schools (who also educate students that won't receive the Parental Choice

tax credit) will raise their price to completely cancel out the Program's intended impact, Kuznia Decl. at ¶ 15, (2) Petitioners' argument ignores qualified expenses other than private school tuition that are covered by the Program, like tutoring, homeschooling expenses, and standardized-test preparation, *see* Idaho Code § 63-3029N(2)(f), and (3) Petitioners overlook the observed benefits to education seen by States that have implemented parental choice programs. *See supra* Background. In any event, the Court gives "great deference" to the Legislature's forecast of public benefit, and it not "arbitrary or unreasonable" that the Program will promote learning. *Kramer*, 97 Idaho at 559, 548 P.2d at 59.

Petitioners also argue that the Program does not fall within the description of a public purpose set forth in this Court's decision in *Kramer*—"A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government." 97 Idaho at 559, 548 P.2d at 59. That description has never been applied as a two-part test as Petitioners urge (not even in *Kramer*), and has never been repeated by any case since *Kramer*. Still, Petitioners' argument is meritless.

First, the Parental Choice Program absolutely serves to benefit the community as a whole because "any parent" incurring qualified expenses can apply for the credit. Idaho Code § 63-3029N(3). In contrast to *Walton*, where the State essentially "gift[ed]" money to a specific family, the Parental Choice Program is a "law of general application operating prospectively" that is available to all. 58 Idaho at ___, 80 P.2d at 23.

Petitioners seem to contend that a government program does not benefit the community as a whole unless all citizens are equally likely to take advantage of it. Br. at

28. They note that some parents may have children who are not accepted to a private school for academic or religious-fit reasons[11]—even though these parents could still claim the credit for other qualified expenses like homeschool, virtual school, or tutoring. Other parents may prefer that their children attend public schools.

Petitioners themselves don't fully buy into their argument. They suggest that a program helping "all parents of school-aged children" would serve the community as a whole, Br. at 28, but that *still* excludes (under Petitioners' understanding) childless adults.

In any event, the Court has never suggested that programs must be equally likely to be used by all to have a public purpose. It has identified a public purpose where the government transacts with a single party to derive benefits that would benefit many but not all citizens. *E.g.*, *Nelson*, 94 Idaho at 732, 497 P.2d at 53 (irrigation wells in Payette); *Bd. of Cnty. Comm'rs of Twin Falls Cnty.*, 96 Idaho at 502, 531 P.2d at 592 (three hospitals). The Court has also upheld a statute entitling only indigent residents to government-funded healthcare. *Idaho Falls Consol. Hosps., Inc.*, 102 Idaho at 841, 642 P.2d at 556. Here, the Program is available to all—even if not all will ultimately satisfy the criteria to claim the credit or be approved to receive it—and the benefits of a better-educated populace will redound to the State writ large. Idaho Const. art. IX, § 1; *Hart*, 774 S.E.2d at 292 (upholding school-choice program against North Carolina's public purpose doctrine,

[11] According to one source, there are 56 nonsectarian private schools in Idaho, and 104 religiously affiliated private schools. *Best Idaho Nonsectarian Private Schools (2025-26)*, Private School Review, https://tinyurl.com/mr3k6vtw (last visited Oct. 29, 2025).

noting that the "ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry").

If the Court were to adopt Petitioners' conception of benefiting "the community as a whole," the result would decimate Idaho's benefit programs. *But see Newland v. Child*, 73 Idaho 530, 538, 254 P.2d 1066, 1070 (1953) ("public purpose" of promoting "the common welfare . . . saves the entire public assistance law"). The State currently offers programs that condition eligibility on:

- indigency (like Medicaid or SNAP, Idaho Code § 56-267(a); IDAPA 16.03.04.000 *et seq.*);
- age (like Medicare or the Senior Services and Older Americans Act programs, IDAPA 18.04.10.000 *et seq.*; IDAPA 15.01.01.001 *et seq.*);
- sex (like the Women, Infants, & Children (WIC) Program, *see* Idaho Dep't of Health and Welfare (Sep. 2025), https://tinyurl.com/27ydddmc);
- disability status (like the Idaho Developmental Disabilities Services and Facilities Act, Idaho Code § 39-4606);
- familial status (like the Idaho Child Care Program, IDAPA 16.06.12.000 *et seq.*);
- occupation (like various grant and loan programs for farmers, *see* Financial Assistance Resources, Idaho Dep't of Agric. (Apr. 2025), https://tinyurl.com/569mvwzf); and
- locality (like the Idaho Rural Health Care Access Program, Idaho Code § 39-5907).

All these programs would be at risk if the Court held the Parental Choice Program violates the public purpose doctrine because not all Idahoans are likely to claim it.

Indeed, Petitioner Mickelson has championed a program that is indistinguishable from the Parental Choice Program from a public-purpose perspective—the Idaho

LAUNCH program provides financial aid only to college students pursuing certain degrees at certain educational institutions (which may consider academics and religion in deciding admission). Idaho Code § 72-1205.[12] Mickelson may prefer LAUNCH as a matter of policy, but wisdom of policy doesn't affect the public-purpose analysis.

Second, H.B. 93 is "directly related to the functions of the government." *Kramer*, 97 Idaho at 559, 548 P.2d at 59. The Constitution gives the Legislature multiple duties to establish educational institutions, and promoting learning is essential to "[t]he stability of [our] republican form of government." Idaho Const. art. IX, § 1; *see also* Idaho Const. art. X, § 1. Moreover, the Legislature has a duty to safeguard parents' right to direct the education of their children. Idaho Code §§ 32-1010, 32-1012. Petitioners' only basis for asserting that the Parental Choice Program isn't directly related to the functions of government is merely a rehashing of its flawed arguments about the scope of Article IX, § 1, which should be rejected for the same reasons explained above.

* * *

Under any articulation of the public purpose doctrine, the Parental Choice Program passes with flying colors. The Court should reject Petitioners' challenge so that the public can receive the Program's intended benefits.

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[12] *See Opinion: Proud to support Idaho Launch, a game-changer*, Post Register (Feb. 18, 2023) https://tinyurl.com/mw983av2; Idaho Launch Providers as of 10/1/2025, https://tinyurl.com/yc26ef9n (including religious institutions).

IV. Respondent Is Entitled to Attorney Fees, and Petitioners Are Not.

Because Respondent should prevail in this proceeding, it is entitled to its attorneys' fees as of right. Under Idaho Code § 12-117(4), "[i]n any civil judicial proceeding involving as adverse parties a governmental entity and another governmental entity, the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses." This proceeding involves governmental entities—that is a "any state agency or political subdivision," *id.*—as adverse parties: the Tax Commission is a state agency, and School District No. 281 is a political subdivision. *Daleiden v. Jefferson Cnty. Joint Sch. Dist. No. 251*, 139 Idaho 466, 470, 80 P.3d 1067, 1071 (2003) ("[S]chool districts are political subdivisions of the state"); Br. at 39 (agreeing that the subsection applies). Since Section 12-117(4) does not indicate which nonprevailing party must pay the fees, it is left to the Court's discretion how to allocate them among Petitioners. *See Fletcher v. Lone Mountain Rd. Ass'n*, 165 Idaho 780, 786, 452 P.3d 802, 808 (2019).

Petitioners, on the other hand, are not entitled to fees. They claim fees under Section 12-117(4), the private attorney general doctrine, Section 12-117(1), and Section 12-121, which all require that a party prevail to obtain fees. Since Petitioners should not prevail, they should not obtain fees.

Each potential basis for fees presents other problems as well.

Section 12-117(4). Petitioners claim fees only for School District No. 281 under Section 12-117(4). If the District is a prevailing party, then Petitioners are correct that it would be entitled to its fees. However, the District lacks standing. *See supra* Section I.B. To

the extent Petitioners were to prevail based on someone else's standing, the District would not be able to recover attorneys' fees (though the proceeding would remain one between governmental entities as adverse parties).

Private attorney general doctrine. The private attorney general doctrine is no longer a valid basis for attorneys' fees under Idaho law.

"Idaho follows the 'American Rule' of attorney fees," meaning fees may be awarded only if a statute or contract authorizes fee shifting. *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 447, 235 P.3d 387, 397 (2010). Previously, this Court held that Section 12-121 served as the basis for the private attorney general doctrine because it allowed courts to award fees in their discretion. *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). The Court concluded that Idaho Rule of Procedure 54's limitation that the fees be awarded only in cases "defended frivolously, unreasonably, or without foundation" did not undermine that statutory basis. *Id.* (cleaned up).

However, in 2017, Section 12-121 was amended to insert Rule 54's limitation into the statute so that fees could be awarded only "when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." 2017 Idaho Sess. Laws ch. 47. That means the statute can no longer serve as the basis for the private attorney general doctrine, which "looks to the value of the prevailing party's contribution" and not the strength of a party's position. Br. at 34, 38.

None of Petitioners' other arguments defeat this logic. The intent section of the 2017 amendment states that the Legislature intended the amendment to be "construed in

harmony with Idaho Supreme Court decisions on attorney's fees that were issued before" *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016). 2017 Idaho Sess. Laws ch. 47, § 1. But that would include the longstanding Idaho principle that fees must be awarded pursuant to a statute because "there is no equitable authority to award attorney fees generally." *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999) (cleaned up). And in any event, the amendment *does* remove any textual basis for the private attorney general doctrine, whether the Legislature intended that or not. *See Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892–93, 265 P.3d 502, 505–06 (2011).

Moreover, the private attorney general doctrine was invoked following the 2017 amendment, *see Reclaim Idaho*, 169 Idaho at 439–40, 497 P.3d at 193–94, but the parties there did not address whether the amendment changed anything. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *N. Side Canal Co. v. Idaho Farms Co.*, 60 Idaho 748, 96 P.2d 232, 236 (1939) (cleaned up).

There are other reasons the private attorney general doctrine shouldn't apply. Petitioners give no sound reason why the Court should overrule its decision in *Roe v. Harris*, 128 Idaho 569, 573, 917 P.2d 403, 407 (1996), *abrogated on other grounds*, that the doctrine "is not available as the basis for an award of attorney fees in a case against a state agency"—especially not when the Court has reaffirmed twice in the last two years that Section 12-117 "is the exclusive basis for awarding attorney fees" where a governmental entity is a party. *Hastings v. Idaho Dep't of Water Res.*, 173 Idaho 704, 716, 547 P.3d 1190, 1202 (2024) (cleaned

up); *Idahoans for Open Primaries*, 172 Idaho at 491, 533 P.3d at 1287. Petitioners contend that not applying the doctrine would work injustice, but the reality is that the private attorney general doctrine has never fit within the Court's model of impartial decision-making, as it asks the Court to assess the "strength or societal importance of the public policy" advanced by a particular party to a lawsuit. *Hellar*, 106 Idaho at 577, 682 P.2d at 530 (cleaned up); *see Verska*, 151 Idaho at 896, 265 P.3d at 509 ("The public policy of legislative enactments cannot be questioned by the courts . . .") (cleaned up).

To that point, the doctrine shouldn't apply here in all events because "a significant number of people" do not "stand to benefit from the decision." *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 545, 38 P.3d 121, 124 (2001). If Petitioners prevail, thousands of Idahoans will lose access to Program funds that could make all the difference in their children's education, and no additional funds will be re-routed to public schools.

Section 12-117(1) and Section 12-121. Finally, Petitioners seek fees under Section 12-117(1), which awards fees in cases between a person and a state agency where the nonprevailing party acted "without a reasonable basis in fact or law," and Section 12-121 (assuming that statute can even apply to Respondent), which awards fees if a party defends a case "frivolously, unreasonably or without foundation." Br. at 37–38. The standard is "substantially similar" under either statute—"the test is whether the losing party's position is not only incorrect, but also plainly fallacious." *Skehan v. Idaho State Police*, 173 Idaho 321, 333, 541 P.3d 679, 691 (2024) (first quote); *Tolley v. THI Co.*, 140 Idaho 253, 263, 92 P.3d 503, 513 (2004) (second quote).

For the reasons explained above, Respondent's arguments regarding the constitutionality of H.B. 93 are not only reasonable, but correct. It's Petitioners' arguments that are unreasonable. They brought this suit even though they "do[] not appear to have suffered actual harm" from the Program (*see supra* Section I), and advanced arguments that "contradict[] the plain reading" of the Constitution (*see supra* Sections II and III). *Ada Cnty. v. Browning*, 168 Idaho 856, 861, 489 P.3d 443, 448 (2021).

CONCLUSION

Everyone benefits from good public schools, but public schools are not necessarily the best choice for everyone. Tens of thousands of Idahoans have chosen other options for their children, often at great personal expense and inconvenience. Thousands more might like to do the same but are prevented by limited means.

If the Legislature chooses to support the parents making that choice, and help the ones who feel unable, then the Idaho Constitution does not stand in its way. After all, "the stability of our republican form of government depend[s] . . . upon the intelligence" of all Idahoans—not just the ones who choose public schools.

The petition should be denied.

DATED: November 10, 2025

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