

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,

and

IDAHO STATE LEGISLATURE,

Intervenor-Respondent.

Docket No. 53264-2025

PETITIONERS' CONSOLIDATED REPLY BRIEF

Marvin M. Smith, ISB No. 2236
Marvin K. Smith, ISB No. 6978
Craig L. Meadows, ISB No. 1081
Brandon Helgeson, ISB No. 11615
Jean Schroeder, ISB No. 12205
HAWLEY TROXELL ENNIS & HAWLEY LLP
2010 Jennie Lee Drive
Idaho Falls, ID 83404
Telephone: 208.529.3005
Facsimile: 208.529.3065
Email: mmsmith@hawleytroxell.com
mksmith@hawleytroxell.com
cmeadows@hawleytroxell.com
bhelgeson@hawleytroxell.com
jschroeder@hawleytroxell.com

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	5
A. Standing.	7
1. The Committee to Protect and Preserve the Idaho Constitution has standing.	7
2. School District No. 281 has standing.	7
3. IEA has associational standing.	9
4. Remaining petitioners.	10
5. Relaxed standing is appropriate in the unlikely event the Court concludes no Petitioner has established standing.	11
B. The Program Violates Article IX, Section 1 of the Idaho Constitution.	14
1. The plain text of the Idaho Constitution prohibits the Program.	15
2. Article IX, section 1 sets a ceiling.	19
3. The Program maintains a separate and unequal system of schools.	23
4. Article IX, section 1 does not jeopardize other programs that support education, and those programs are factually distinguishable.	24
C. The Program Violates the Public Purpose Doctrine Implicit in Idaho’s Constitution.	25
1. HB 93 does not serve a public purpose because it funds educational institutions that do not benefit the public.	25

2.	Advancing private education through the Program does not serve a public purpose, and is not directly related to the functions of government.	27
3.	The manner of implementing the Program matters for a public purpose analysis.	33
D.	Petitioners Are Entitled to be Awarded Attorneys' Fees.	39
III.	CONCLUSION	43

TABLE OF CASES AND AUTHORITIES

	Page
Cases	
<i>31 Foster Child. v. Bush</i> , 329 F.3d 1255 (11th Cir. 2003)	9
<i>Aldridge v. Miss. Dep’t of Corr.</i> , 990 F.3d 868 (5th Cir. 2021)	2
<i>Az. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125, 144 (2011).....	30, 31, 32
<i>Bach v. Bagley</i> , 148 Idaho 784, 229 P.3d 1146 (2010)	10
<i>Bd. of Cty. Comm’rs of Twin Falls Cty. v. Idaho Health Facilities Auth.</i> , 96 Idaho 498, 531 P.2d 588 (1974)	27
<i>Book People, Inc. v. Wong</i> , 91 F.4th 318 (5th Cir. 2024)	8
<i>Bush v. Holmes</i> , 919 So. 2d 392, 407 (Fla. 2006)	2, 18, 21, 22
<i>Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.</i> , 520 U.S. 564, n.22 (1997).....	31
<i>Coeur d’Alene Tribe v. Denney</i> , 161 Idaho 508, 387 P.3d 761 (2015)	13, 14
<i>Commonwealth, ex rel. Cameron v. Johnson</i> 658 S.W.3d 25, 31 (Ky. 2022).....	22, 31
<i>Davis v. Grover</i> , 166 Wis. 2d 501, 480 N.W.2d 460 (1992).....	21
<i>Davis v. Moon</i> , 77 Idaho 146, 289 P.2d 614 (1955)	18, 25, 27
<i>Evans v. Andrus</i> , 124 Idaho 6, 855 P.2d 467 (1993)	16, 17

<i>Fannin v. Williams</i> , 655 S.W.2d 480 (Ky. 1983)	27, 29
<i>Hawkins Cos., LLC v. State by & through Dep’t of Admin.</i> , 174 Idaho 1023, 554 P.3d 74 (2024)	11, 12
<i>Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.</i> , 471 U.S. 707 (1985).....	2
<i>Idaho Falls Consol. Hosps. Inc. v. Bingham Cty. Bd. of Cty. Comm’rs</i> , 102 Idaho 838, 642 P.2d 553 (1982)	27
<i>Idaho Sch. for Equal Educ. Opportunity v. State</i> , 132 Idaho 559, 976 P.2d 913 (1998)	20
<i>Idaho Water Res. Bd. v. Kramer</i> , 97 Idaho 535, 548 P.2d 35 (1976)	4, 25, 28
<i>Idahoans for Open Primaries v. Labrador</i> , 172 Idaho 466, 533 P.3d 1262 (2023)	10
<i>In re Doe</i> , 170 Idaho 901, 517 P.3d 830 (2022)	5
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	10
<i>Manzara v. State</i> , 343 S.W.3d 656 (Mo. 2011)	32
<i>Nelson v. Marshall</i> , 94 Idaho 726, P.2d 47 (1972)	28
<i>Planned Parenthood Great Nw. v. State</i> , 171 Idaho 374, 522 P.3d 1132 (2023)	6, 15
<i>Reclaim Idaho v. Denney</i> , 169 Idaho 406, 497 P.3d 160 (2021)	40, 41
<i>Regan v. Taxation with Representation of Wash.</i> , 461 U.S. 540 (1983).....	32
<i>Smith v. Idaho Comm’n on Redistricting</i> , 136 Idaho 542, 38 P.3d 121 (2001)	40, 41

<i>State v. State Bd. of Educ.</i> , 33 Idaho 415, ___, 196 P. 201, 206 (1921)	19
<i>Thompson v. Engelking</i> , 96 Idaho 793, 537 P.2d 635 (1975)	36
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	38
<i>Utah Power & Light Co. v. Campbell</i> , 108 Idaho 950, 703 P.2d 714 (1985)	28
<i>Village of Moyie Springs, Idaho v. Aurora Mfg. Co.</i> , 82 Idaho 337 P.2d 767 (1960)	28
<i>Weinberger v. Bd. of Pub. Instruction</i> , 112 So. 253 (Fla. 1927)	2, 18
Statutes	
26 U.S.C. § 25A.....	42
I.C. § 1031(1).....	28
I.C. § 12-117(1).....	48
I.C. § 12-117(4).....	45
I.C. § 12-121	48
I.C. § 33-1030(3).....	28
I.C. § 33-1030(4).....	28
I.C. § 33-138	34
I.C. § 33-141	34
I.C. § 33-202	37
I.C. § 33-3731	28
I.C. § 33-3802	30
I.C. § 33-5202	28

I.C. § 39-4606	40
I.C. § 56-267(1).....	40
I.C. § 6-2202	9
I.C. § 6-2203	9
I.C. § 6-2205(4).....	8
I.C. § 63-3029N	6
I.C. § 63-3029N(12).....	36
I.C. § 63-3029N(2)(f).....	5
I.C. § 63-3029N(20).....	39
I.C. § 63-3029N(3).....	34
I.C. § 63-3029N(4).....	41
I.C. § 63-3029N(7).....	34
I.C. § 63-3029N(9).....	41
I.C. § 67-1230	6
I.C. § 67-1230(2)(b)	35
I.C. § 67-1401(1).....	8
I.C. § 67-23460	34
I.C. § 67-2347A	34
I.C. § 67-2359	34
I.C. § 72-1205	28
I.C. § 72-1205	43
 Constitutional Provisions	
IDAHO CONST. art. IV, § 10	15

IDAHO CONST. art. IX	2, 18, 23
IDAHO CONST. art. IX, § 1	passim
IDAHO CONST. art. IX, § 2	3, 21
IDAHO CONST. art. IX, § 3	3
IDAHO CONST. art. IX, § 4	3, 4, 17, 33
IDAHO CONST. art. IX, § 5	3, 4, 17, 21
IDAHO CONST. art. IX, § 6	4, 17
IDAHO CONST. art. IX, § 7	4, 17
IDAHO CONST. art. IX, § 8	4, 17
IDAHO CONST. art. IX, § 9	4, 17
IDAHO CONST. art. XII, § 4	33
WIS. CONST. art. X, § 3	24

Other Authorities

https://myschoolchoice.idaho.gov/about-the-program/	37
Idaho Dep’t of Health and Welfare (Oct. 2025), https://healthandwelfare.idaho.gov/services-programs/food-assistance/about-wic	40
<i>Public Funds Public Schools Report: The Fiscal Consequences of Private School Vouchers</i> , EDUCATION LAW CENTER (March 2023), https://pfps.org/assets/uploads/SPLC_ELC_PFPS_2023Report_Final.pdf	11
<i>The Dangers of Private School Vouchers for Idaho Students, Schools, and Communities</i> , IDAHO CENTER FOR FISCAL POLICY (January 2024), https://pfps.org/assets/uploads/Danger_of_Private_School_Vouchers_Compressed_.pdf	9
WEST VIRGINIA WATCH (Nov. 13, 2024, 6:03 pm), https://westvirginiawatch.com/2024/11/13/wv-school-board-oks-closing-kanawha-schools-amid-statewide-struggle-with-student-funding-loss/	10

Rules

I.A.R. 35(c)	10
--------------------	----

I. INTRODUCTION¹

The Tax Commission opens its responsive brief by stating that “government support for private schools is roughly as old as the country itself” and then cites to examples on the East Coast. Resp’t Br. at 2. That statement misses the mark. This case is not about what some East Coast states did in colonial times. Land grants in Georgia, Maine, and Massachusetts have no bearing on the meaning of the Idaho Constitution. *See id.* at 2–3 (citing Richard J. Gabel, *Public Funds for Church and Private Schools* (1937) (Ph.D. dissertation, Catholic University of America) (on file with Corette Library Carroll College). Constitutions of states admitted to the union after 1865, including Idaho, “were adopted after the controversies of earlier times had given form to the determination of the majority group to restrict state funds to public or ‘non-sectarian’ institutions.” Gabel, *Public Funds for Church and Private Schools* 681. Idaho’s history greatly differs from colonial history.

In the territorial days, public schools generally had five sources of funding: the Territorial School Fund, the County School Fund, special district school levies, pupil rate bills, and private subscriptions. Virgil M. Young, *The Development of Education in Idaho Territory: 1863-1890*, 142 (1967) (Ed.D. dissertation, University of Idaho) (on file with Boise State College Library). As early as 1864, private schools began operating in Idaho. *Id.* at 136. The Fourth Territorial Legislature introduced the Catholic School Bill, which sought to issue \$30,000 of bonds to establish and maintain Catholic schools in Idaho. *Id.* at 38. The governor vetoed the bill, and the

¹ This is a consolidated Reply Brief responding to the response briefs filed by both the Respondent Idaho State Tax Commission and Intervenor-Respondent Idaho State Legislature.

legislature’s attempt to override the veto fell one vote short. *Id.* at 38–39. In 1887, two years before the Constitutional Convention, seven sectarian schools operated within Idaho. *Id.* at 137. Non-sectarian schools funded by tuition or private subscription were also common. *See id.* at 136–39. However, there is no evidence that private schools in Idaho received any public funds. The Idaho framers’ understanding of the system of public schools mandated by article IX, section 1, included only public schools, not private schools as indicated by the plain language of the Idaho Constitution.

The Tax Commission argues that article IX, section 1 is unambiguous; therefore, this Court should follow the words as written without regard to rules of construction. Resp’t Br. at 18, 20–23. The text and structure of article IX make clear that the public school system mandated by section 1 was meant to be exclusive. An analogy to the doctrine of field preemption helps illustrate the point. Field preemption is a doctrine arising under the Supremacy Clause of the federal constitution and exists when “the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation[.]” *Aldridge v. Miss. Dep’t of Corr.*, 990 F.3d 868, 874 (5th Cir. 2021) (quoting *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). In the same way, article IX comprehensively addresses the “system” of education mandated by section 1. *See Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (“[W]hen the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.” (quoting *Weinberger v. Bd. of Pub. Instruction*, 112 So. 253, 256 (Fla. 1927))). As a result, it can

be reasonably inferred that the framers left no room for the use of public funds to support a parallel, nonpublic education system.

Section 1 sets forth the duty of the legislature to “establish and maintain” the state’s education system. IDAHO CONST. art. IX, § 1. It also set forth how the legislature was to fulfill that duty—by providing for a general, uniform, and thorough *system* of public, free common schools. *Id.* Section 2 created a governing body, the State Board of Education, to supervise the constitutionally mandated system. IDAHO CONST. art. IX, § 2. Sections 3 and 4 established a permanent endowment fund and required that the money be used solely for public education. IDAHO CONST. art. IX, §§ 3–4. Section 5 specifically prohibited using state money to help support religious schools or for religious purposes. IDAHO CONST. art. IX, § 5. Section 6 prohibited teaching religious doctrines in public school or requiring a religious test or qualification as a condition of admission to public schools. IDAHO CONST. art. IX, § 6. Sections 7 and 8 established the Board of Land Commissioners, who were responsible for administering and obtaining the maximum possible amount from the sale of public lands for the benefit of the public school system and state universities. IDAHO CONST. art. IX, §§ 7–8; *see also* IDAHO CONST. art. IX, § 4. Section 9 authorized the legislature to compel attendance at the system of public schools just established. IDAHO CONST. art. IX, § 9.

The text is clear and unambiguous. The Idaho Constitution provides a comprehensive framework for the “system” established by section 1. There is no room to fund a parallel, nonpublic education system.

Second, the Tax Commission and Intervenor² attack Petitioners’ arguments under the public purpose doctrine. However, despite what they would like to believe, House Bill 93 (“HB 93”), by design, operation, and effect, reveals itself to be a program whose primary purpose is private, not public.

Idaho law has long held 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) (emphasis added). As a result, a constitutionally permissible public program must (1) serve the community as a whole, and (2) [be] directly related to the functions of government. *Id.* HB 93 fails both requirements. The Tax Commission argues, “the inquiry centers on what ends (i.e., ‘purpose’) the government seeks to attain, not the means used to achieve those ends.” Resp’t. Br. at 37.

The Tax Commission’s assertion that any statute involving “education” automatically satisfies the public purpose doctrine ignores Idaho’s long history in education and misreads its own authorities. The Idaho Parental Choice Tax Credit program (the “Program”) is a private benefit program that funnels state resources, via refundable tax credits and advanced payments, to parents to pay for private school tuition, microschooling, learning pods, instructional materials for homeschooling, tutoring, advanced placement tests, standardized tests (and prep courses for those tests), and certain transportation expenses. *See* I.C. § 63-3029N(2)(f). The private schools (and other private entities) consist of private actors who select whom they serve, can impose

² “Intervenor” is used when referring to the Idaho Legislature as a party.

private admissions and religious criteria, operate outside Idaho’s public education system, and owe no duties to the public or the community as a whole. Unlike what the Tax Commission would have the public believe, private interests—nonpublic schools—are the primary beneficiaries of the Program. This is not permitted by Idaho’s Constitution and is precisely the type of program the public purpose doctrine prohibits.

For the reasons discussed in Petitioner’s Brief in Support of Verified Petition for Writ of Prohibition, and the reasons discussed in more detail below, the Program should be considered unconstitutional and a writ of prohibition issued prohibiting the Tax Commission from implementing and carrying out the Program.

II. ARGUMENT

Petitioners have challenged the Program (and HB 93) as being unconstitutional on its face. Intervenor argues that Petitioners must show “no set of circumstances exists under which [House Bill 93] would be valid to succeed on their facial challenge.” Intervenor’s Brief at 8 (quoting *In re Doe*, 170 Idaho 901, 909, 517 P.3d 830, 838 (2022)) (internal quotations omitted). There is no set of circumstances under which the Program would be valid under article IX, section 1 of the Idaho Constitution or the public purpose doctrine. The text of the Program, Idaho Code Sections 63-3029N and 67-1230, specifically (1) authorizes legislative appropriations to fund advance payments for use on qualified education expenses related to nonpublic schooling; (2) authorizes the Tax Commission to “refund” (i.e., pay) parents whose tax credit awards exceed their state income tax liability with public funds; (3) exclude children attending public schools from participating in the Program; and (4) vest administration of the Program in the Tax

Commission and not the State Board of Education, all with little-to-no meaningful state oversight. Under no set of circumstances would it be constitutionally permissible for public tax dollars to be distributed for payment of strictly private education expenses, including tuition, to the exclusion of most children in the state and without the constitutionally required oversight of educational programs by the State Board of Education.

This is not the typical case of a facial challenge of a law under a “void for vagueness” or similar theory regarding individual rights where the Court would determine whether there was any “core of circumstances to which the law unquestionably could be constitutionally applied.” *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 443, 522 P.3d 1132, 1201 (2023) (internal quotations and citations omitted). Rather, the question before the Court is what limits the Idaho Constitution places on the legislature to fund a separate system of K-12 education through a program outside of the public education system that is free from the constitutional requirements imposed on the public school system. As explained in Sections B and C herein, the plain text of HB 93, in any factual scenario to which it could apply, explicitly details and establishes a Program that is in excess of the legislature’s authority to create and the Tax Commission’s authority to implement. Regardless of what qualifying expenses are incurred, whether a tax credit is awarded as a reduction in tax liability, a refund at a later date, or in an advance payment, and regardless of when expenses are incurred, the central issue is that the state is publicly funding and subsidizing the nonpublic system of education outside of the public education system.

A. Standing.

1. The Committee to Protect and Preserve the Idaho Constitution has standing.

The Committee to Protect and Preserve the Idaho Constitution (“Committee”) has not manufactured injury by incurring litigation costs. Resp’t. Br. at 9. The Committee incurred litigation costs as a direct result of the Attorney General declining to uphold the Idaho Constitution. As noted, the Committee informed legislators that using public funds to support private and religious education presented significant legal challenges. Mickelsen Decl., Ex. 1. After HB 93 was signed into law, the Committee asked the Attorney General if he planned on challenging the constitutionality of HB 93. *Id.*, Ex. 2. The Attorney General indicated that he was prepared to defend the bill instead of challenging it. Mooney Decl, Ex. 2. And, as the Attorney General is the state official tasked with advising and representing *all* state agencies, it is unlikely that the State Board of Education could or would have challenged HB 93. *See* I.C. § 67-1401(1). Accordingly, defending Idaho’s Constitution fell on the Committee.

2. School District No. 281 has standing.

The Tax Commission argues School District No. 281 lacks standing under the Constitutionally Based Educational Claims Act (CBECA). CBECA does not apply. “School 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.” I.C. § 6-2205(4) (emphasis added). CBECA defines a “constitutionally based educational claim” as “a claim that public schools are not providing educational services that they are required to provide under section 1, article IX, of the constitution of the state of Idaho.”

I.C. § 6-2202. Petitioners’ claims are not “constitutionally based educational claims” because Petitioners are not asserting that the legislature has *failed* to establish the required system of schools or that public schools are not providing required services. *See generally* V. Pet.; *see also* I.C. § 6-2203 (declaring that public schools constitute the system described in article IX, section 1). Petitioners’ claims instead allege that the legislature is impermissibly supporting a parallel system of nonpublic education through the Program. The claims are not “constitutionally based educational claims,” and CBECA does not deprive School District No. 281 of standing.

The harms that School District No. 281 identifies are directly traceable to the Program and highly likely to occur. *See Book People, Inc. v. Wong*, 91 F.4th 318, 329 (5th Cir. 2024) (“The threat of future injury must be sufficiently likely.” (citation modified)); *see also The Dangers of Private School Vouchers for Idaho Students, Schools, and Communities*, IDAHO CENTER FOR FISCAL POLICY (January 2024), https://pfps.org/assets/uploads/Danger_of_Private_School_Vouchers_Compressed_.pdf. It is also not conjecture to say that the Parental Choice Tax Credit will lead to decreased enrollment in public schools. The Twin Falls School District has lost enrollment due to the opening of charter schools. Dickinson Decl. ¶ 5. A \$5,000 credit offsetting and refunding a parent’s tax liability further incentivizes parents to unenroll their child from the public school system.

This scenario has played out in other states where schools have closed because students unenroll to take advantage of a school choice program. Amelia Ferrell Knisely, *WV School Board Oks Closing Kanawha Schools Amid Statewide Struggle with Student, Funding Loss*, WEST VIRGINIA WATCH (Nov. 13, 2024, 6:03 pm), <https://westvirginiawatch.com/2024/11/13/wv->

school-board-oks-closing-kanawha-schools-amid-statewide-struggle-with-student-funding-loss/. And in other states, including Georgia, Florida and Wisconsin, budgets for tax credits and voucher programs have increased dramatically while per pupil funding has generally remained the same or decreased. See Samuel Abrams & Steven Koutsavlis, *Public Funds Public Schools Report: The Fiscal Consequences of Private School Vouchers*, EDUCATION LAW CENTER (March 2023), https://pfps.org/assets/uploads/SPLC_ELC_PFPS_2023Report_Final.pdf. When private schools are supported with public funds, public schools suffer consequences. The injury School District No. 281 will suffer as a result of the Program is not hypothetical or speculative.

3. *IEA has associational standing.*

IEA has established associational standing. IEA has established that Marta Hernandez, an IEA member, will suffer harm as a result of the Program. Hernandez has alleged sufficient facts to confer standing. Hernandez has alleged that spending public funds on private schools threatens the financial resources of public schools. Hernandez Decl. ¶ 24. That makes it increasingly difficult to retain qualified teachers, maintain reasonable class sizes, and provide comprehensive educational programs. *Id.* These harms disproportionately impact rural schools, which are less able to account for declines in enrollment. *Id.* ¶¶ 14–15; see Williams Decl. ¶¶ 5, 12; Ramsey Decl. ¶¶ 3–5. The fact that Hernandez’s declaration uses language like “threatens” does not underscore the speculative nature of injury. Resp’t Br. at 14. It simply highlights the fact that the injury has not happened yet. That does not defeat standing. *31 Foster Child. v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (“[A] plaintiff need not wait for an injury to occur.”). Allegations of future injury are sufficient to establish standing, provided the injury is “real and immediate” not

“conjectural or hypothetical.” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Hernandez’s declaration, taken with the declarations of Williams, Ramsey, and Tiegs, shows Petitioners’ alleged injuries are not hypothetical and are fairly traceable to the implementation of the Program.

4. *Remaining petitioners.*

Petitioners have not forfeited any argument regarding the standing of other Petitioners. As set forth in the opening brief, Verified Petition, and accompanying Declarations, Petitioners sufficiently raised the issue of standing as to each Petitioner. Petitioners did not simply mention standing “in passing.” *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). In fact, Petitioners devoted numerous pages in their Verified Petition and the accompanying Declarations highlighting the injuries each Petitioner will suffer as a result of the program. *See generally* V. Pet. ¶¶ 17–28; Evans Decl.; Hernandez Decl.; Mickelsen Decl.; Morgan Decl.; Anderson Decl. Accordingly, the issue is not waived, and Petitioners will rebut the Tax Commission’s contentions. *See* I.A.R. 35(c) (A reply brief “may contain additional argument in rebuttal to the contentions of the respondent.”); *see also Idahoans for Open Primaries v. Labrador*, 172 Idaho 466, 477, 533 P.3d 1262, 1273 (2023) (permitting appellants to address associational standing in reply brief because attorney general addressed only one type of standing in his response).

Petitioners Anderson and Morgan have sufficiently alleged injury in fact caused by the Program. Petitioner Morgan sought to educate her child at a nonpublic school. Morgan Decl. ¶¶ 7–8. Citing Morgan’s religion, the school denied her child admission. Morgan Decl. ¶ 9; *see*

also Hosman Decl. ¶¶ 7–9. Similarly, Anderson’s children are educated in public schools and have an Individualized Education Program. Anderson Decl. ¶ 4. Private schools typically do not accept children with developmental or speech disabilities, and many lack the necessary therapies and resources. *Id.* ¶ 9. Allocating public funds to private schools jeopardizes the special education services public schools are required to provide. Williams Decl. ¶¶ 3–5, 11–12. Petitioners are harmed by the Program because the nonpublic schools able to receive state funds are free to pick and choose who gets admitted based on religion or ability. *See* V. Pet. ¶ 24. The diversion of funds caused by the Program threatens the services that students with disabilities rely on. *See* V. Pet ¶ 25. Thus, Petitioners Anderson and Morgan will suffer injury as a result of the implementation of the Program.

5. *Relaxed standing is appropriate in the unlikely event the Court concludes no Petitioner has established standing.*

The Tax Commission argues that Petitioners cannot satisfy the requirements for relaxed standing because someone else would have standing to bring the claim—the State Board of Education. Petitioners did not allege that the State Board of Education would have standing to bring the claims asserted here. *See generally* Petrs’. Br. at 14–15. The Tax Commission points to *Hawkins*, where the Court held that the petitioners lacked standing because two state agencies would likely have had standing to bring the claim. *Hawkins Cos., LLC v. State by & through Dep’t of Admin.*, 174 Idaho 1023, 1033, 554 P.3d 74, 84 (2024).

Hawkins involved the unsuccessful purchase of surplus state property by a group of business entities that were the high bidders. *Id.* at 1026, 554 P.3d at 77. The bidders mounted a legal challenge after the legislature passed a bill appropriating money to rehabilitate the surplus

property and revoking the Department of Administration's authority to dispose of the property. *Id.* at 1028, 554 P.3d at 79. The Court concluded that the bidders could not establish relaxed standing because other parties could have standing—the executive agencies “directly affected” by the challenged law and whose statutory authority was “interfere[d]” with. *Id.* at 1033, 554 P.3d at 84.

Hawkins concerned matters fundamentally different than the issues Petitioners raise here. Leaving the disposition of surplus state property to the political process is one thing. The legislature's mandate under Article IX, section 1 is entirely different. Further, the legal dispute in *Hawkins* primarily concerned “a constitutional conflict between executive branch agencies” and the legislature. *See id.* at 1029, 554 P.3d at 80. While Petitioners maintain that tasking the Tax Commission with implementing the Program is problematic and highlights yet another constitutional defect of HB 93, it is not the main “conflict” at issue. The constitutional conflict here involves: 1) Idahoans with school aged children; 2) Idaho taxpayers who are now required to fund tuition payments to private schools in addition to income and property taxes that fund public schools; 3) Idaho school districts who will lose funding when students unenroll to take advantage of the tax credit; and 4) Idaho parents who want to take advantage of the Program but are unable to enroll their child in a particular private school because of their religious background or some other discriminatory reason. Unlike *Hawkins*, Petitioners are not caught in the crossfire of an intragovernmental dispute. Instead, Petitioners are everyday Idahoans, taxpaying citizens, teachers, and parents who are directly affected by the implementation of the Program.

Additionally, the Court has previously conferred relaxed standing even when a government agency or official could have established standing. Some issues are of such importance that entrusting them to the “political branches” is insufficient to protect the public. This case is a prime example. So too is *Coeur d’Alene Tribe v. Denney*, 161 Idaho 508, 387 P.3d 761 (2015). There, the governor failed to veto a bill within five days as required by the Idaho Constitution. *Id.* at 511, 387 P.3d at 764. Under article IV, section 10 of the Idaho Constitution, the bill should have automatically become law. *Id.* at 512, 387 P.3d at 765. However, the Governor returned the bill to the Senate with a veto message. *Id.* at 511, 387 P.3d at 764. The Senate unsuccessfully attempted to override the governor’s veto. *Id.* at 512, 387 P.3d at 765. The Coeur d’Alene Tribe notified the Secretary of State that the bill automatically became law when the governor failed to return the veto within five days. *Id.* When the Secretary of State failed to certify the bill as law, the Tribe sought a writ of mandamus compelling the bill’s certification. *Id.* The Court granted the Tribe standing after noting that “[n]either the members of the Senate, the Governor, nor the Secretary of State appear ready or willing to challenge” the governor’s untimely veto. *Id.* at 514, 387 P.3d at 767. The Court did not leave “adhering to the Constitution” to the “political process.” *Compare* Resp’t. Br. at 16.

For the same reasons expressed in *Coeur d’Alene Tribe*, the Court should relax the standing requirements here in the unlikely event it concludes that no Petitioner has traditional standing. The matter concerns a significant and distinct constitutional violation of article IX, section 1, no government agency or political body appears ready or willing to defend Idaho’s

Constitution, and no other party could otherwise have standing to bring the claim. *Coeur d'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767.

B. The Program Violates Article IX, Section 1 of the Idaho Constitution.

The Tax Commission contends that the Program does not violate article IX, section 1 of the Idaho Constitution because the legislature “can pass whatever legislation it wants unless the Constitution specifically prohibits it[.]” Resp’t. Br. at 1. The Tax Commission and Intervenor focus on the right of parents to educate their children and the policy rationale for enacting the Program, positing that the legislature is not limited by the constitution in what it may do in the realm of education.

However, the Tax Commission and Intervenor’s analysis of article IX, section 1 of the Constitution fails to capture the “big picture” contemplated by Idaho’s framers for public education in the state and the historical context in which it was adopted. The framers dedicated an entire article of the Constitution to public education, titled “Education and School Lands,” which provides the foundational framework for establishing, regulating, financing, and operating the public school system. Section 1 required the establishment and maintenance of the system with restrictions on how it must be set up; Section 2 provided for a State Board of Education to oversee it; and Sections 3 and 4 set up a public school fund to finance it. IDAHO CONST. art. IX, §§ 1–4. Section 7 established a state land board to sell, lease, and otherwise manage the school lands, and Section 8 required the land board to obtain the “maximum possible amount” from the lands for the benefit of the public schools and universities. *Id.* §§ 7–8. Section 5 specifically prohibited any state funds from ever being used for any kind of religious education, and

Section 6 prohibited sectarian teaching in public schools. *Id.* §§ 5–6. Finally, Section 9 provided that the legislature may require compulsory school attendance at public schools of the state “unless educated by other means.” *Id.* § 9.

The framers of Idaho’s constitution meticulously provided for an education system that was to be organized, financed, operated, and regulated by the state. It was clear that the framers wanted all school-age children to attend those public schools, but they gave the legislature the authority to allow children to be educated by means that were not organized, financed, operated, and regulated by the state. In other words, children could be educated at state expense within the framework of article IX, or they could be educated at private expense without state financing or regulatory control under such conditions as the legislature might impose.

“[T]he Idaho Constitution is an instrument whose meaning is fixed at its creation[.]” *Planned Parenthood*, 171 Idaho at 405, 522 P.3d at 1163. By enacting the Program, the legislature has exceeded the limitations imposed by the framers in article IX regarding the manner of publicly funding K-12 education in the state that is uniform, thorough, public and free to all children.

1. The plain text of the Idaho Constitution prohibits the Program.

The Tax Commission and Intervenor contend that the plain text of article IX, section 1 is unambiguous in that it imposes a duty on the legislature to establish and maintain a system of public schools for the state, but otherwise does not impose any limitations on how the legislature can further support educational opportunities. Petitioners agree that the text is unambiguous; however, when reading the Idaho Constitution, the Court will “look to [it], not to determine what

the legislature may do, but to determine what it may not do.” *Evans v. Andrus*, 124 Idaho 6, 10, 855 P.2d 467, 471 (1993).

Article IX, section 1 provides, in part, “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. This language clearly and expressly establishes 1) a duty on the legislature, and 2) restrictions or guardrails on how the legislature must establish and maintain this system.

The Tax Commission and Intervenor take the position that the Court should not read in any limitation on the legislature’s authority where there is no express limitation. *See* Resp’t. Br. at 17–18; Intervenor’s Br. at 11–12. They cite to various provisions in the Idaho Constitution for examples of how the legislature’s authority can be expressly limited, using language such as “shall not” or “prohibited” as plain restrictions on power. *See* Resp’t Br. at 17–18. Expressly prohibiting an action in the foregoing manner is not the only manner in which limitations can be imposed. Actions can also be prohibited by imposing conditions on how or by whom certain powers can be used or how duties must be fulfilled.

The case of *Evans v. Andrus*, where the Court read the word “a” to conclude that there can only be one single board of education and that the legislature could not vest the powers of that single board into three separate boards, is an example of the Court clearly treating declarative text as containing a limitation and prohibition. *Evans*, 124 Idaho at 11, 855 P.2d at 472; Resp’t. Br. at 26–27; Intervenor’s Br. at 26–27. The Tax Commission and Intervenor attempt to limit the holding in *Evans* by asserting that it simply stands for the proposition that the

authority of constitutional entities cannot be reassigned or delegated to other boards or entities. *Id.* However, *Evans* illustrates that where the text of the Idaho Constitution is clear on a grant of authority, imposition of a duty, or expression of conditions, the legislature may not contradict the plain language. Plainly, the legislature was limited in its ability to transfer authority from *a* board to *three* boards. Likewise, the legislature is limited in how it establishes and maintains “*a* general, uniform and thorough system of public, free common schools.” IDAHO CONST. art. IX, § 1 (emphasis added). It may not establish and maintain multiple systems, and even if it could establish and maintain multiple systems, it cannot establish and maintain a system that does not meet the conditions of being uniform, thorough, public and free—especially, as is the case with the Program, where doing so would undermine its public education duty by providing funding to support a private education system in direct competition with the public education system.

Additionally, the Tax Commission and Intervenor argue that the “*expressio unius est exclusio alterius*” rule of construction is inapplicable in this instance or unhelpful to Petitioners’ arguments. However, they misapply the *expressio unius* rule to contend that article IX, section 1 only imposes a duty upon the legislature but otherwise does not impose any other limitations or prohibitions regarding educational funding—i.e., the Court should not read any extratextual limitations when interpreting article IX, section 1. Intervenor’s Brief at 22. However, the limitations imposed by article IX, section 1 are express and clear on how the legislature must provide publicly funded, free, uniform, and thorough education to the children of Idaho. When relying upon *expressio unius*, other courts have held that where a constitutional provision provides an express manner of doing an act, “it impliedly forbids its being done in a substantially

different manner. . . . Therefore, when the Constitution prescribes the manner of doing an act, . . . it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.” *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006) (quoting *Weinberger v. Bd. of Pub. Instruction*, 93 Fla. 470, 112 So. 253, 256 (1927)).

Also, reading article IX, section 1 as a limitation upon the legislature’s powers would not render other constitutional provisions as surplusage. The prohibition on publicly funding religious schools in article IX, section 5 is contained in the broader prohibition on publicly funding *any* institutions controlled by a religious society or for any religious purpose and applies to not only the legislature, but to counties, cities, towns, townships, school districts, or other public corporations. IDAHO CONST. art. IX, § 5. Meanwhile, article IX, section 1 applies only to the legislature and more broadly covers the provision of public education in general rather than solely prohibitions surrounding religious affiliation.

Finally, article X, section 1’s reference to educational institutions that “shall be established and supported by the state in such manner as may be prescribed by law” almost certainly refers to institutions such as the state’s universities and colleges, which are not a part of the system established under article IX, section 1 and instead are “state educational institutions” still governed by the State Board of Education under article IX, section 2. *See* IDAHO CONST. art. IX, § 2 (“The 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[.]”); *see also Davis v. Moon*, 77 Idaho 146, 153, 289 P.2d 614, 618 (1955) (“The Constitution makes it the 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. An educational institution is established for no personal profit and serves only the public benefit.”); *State v. State Bd. of Educ.*, 33 Idaho 415, ___, 196 P. 201, 206 (1921) (“[Article X, section 1] includes the University [of Idaho], and in obedience thereto the state Legislature every two years since the founding of that institution has provided support for it, as well as for the normal schools[.]”).

2. *Article IX, section 1 sets a ceiling.*

The language of article IX, section 1 is clear that the legislature’s method of implementing its duty for the provision of elementary and secondary education is expressly limited by the conditions contained therein—that is, there can only be one public education system established and maintained by the legislature, and that system must be general, uniform, thorough, and free. The arguments of the Tax Commission and Intervenor largely boil down to the central premise that article IX, section 1 simply sets a “floor” or minimum threshold for what the legislature must do, and that any programs relating to education beyond that are within the province of the legislature’s plenary authority. *See* Resp’t Br. at 1, 17–18, 28–30; Intervenor’s Br. at 15–17, 23. In other words, they argue that article IX, section 1 does not create a “ceiling” limiting the legislature’s authority in the province of educational policy. As explained in Section B.1 above, article IX, section 1 *does* contain express limitations on legislative authority and, when read in the context of the entirety of article IX of the Constitution, clearly evidences the framers’ intent that publicly-funded educational programs for primary and secondary

education created by the legislature should be under the umbrella of the general, uniform, thorough, and free system of public schools.

Under the “floor” logic forwarded by the Tax Commission and Intervenor, there would be nothing prohibiting the legislature from cutting out the “middleman” and establishing a program that directly funds private schools with public tax dollars in order to promote education. Nor would the legislature be prohibited from establishing schools outside of the public education system for primary and secondary education that are not open to all children, require payment of tuition, do not provide a safe environment conducive to learning, and do not provide uniformity in education with the basic curriculum offered by the existing system of public schools.

In these scenarios, as long as the legislature makes sure to affirmatively state in enabling legislation that a program does not confer the state supervisory or regulatory authority and that schools benefitting from such programs are not considered a part of the public education system, the possibilities for a robust private education system funded by the state would be endless—so long as public schools are still an option. Such could not possibly be the intent of Idaho’s constitutional framers. *See Idaho Sch. for Equal Educ. Opportunity v. State*, 132 Idaho 559, 566, 976 P.2d 913, 920 (1998) (“Certainly, the constitutional obligation of the Legislature cannot be read to allow a system of schools that do not provide a safe environment conducive to learning.”)

In order to bolster their “floor vs. ceiling” argument, the Tax Commission and Intervenor cite to cases from several other states where certain education programs were upheld as persuasive authority for how the Court should evaluate the Program. Aside from the fact that

these cases are not binding on the Court, they are also readily distinguishable under the facts of the specific programs at issue and the state constitutional provisions in play.

For example, in Wisconsin's case of *Davis v. Grover*, the program at issue was a limited, publicly-funded program that allowed certain children to attend a nonsectarian private school at no cost; however, participating schools were required to comply with various standards such as nondiscrimination, health and safety codes applicable to public schools, and submitting to financial and performance audits by the state (unlike the Program here with limited-to-no meaningful state oversight). See 166 Wis. 2d 501, 514, 480 N.W.2d 460, 463 (1992). Wisconsin's article regarding uniformity of education is more limited than Idaho's where its legislature must establish "district schools[] which shall be nearly as uniform as practicable; and such schools shall be free and without charge for tuition[.]" *Id.* at 537, 480 N.W.2d at 473 (quoting WIS. CONST. art. X, § 3). Notably, the Wisconsin Supreme Court opined that the program was not subject to uniformity requirements or in violation of Wisconsin's public purpose doctrine since appropriation of public funds to a private entity "need only be accompanied by such controls as are necessary to fulfill the public purpose required." *Id.* at 540, 480 N.W.2d at 474. Likewise, the other state cases cited deal with factually different scenarios under unique state constitutional provisions underscored by years of state-specific case law interpreting those constitutional provisions.

Respondent attempts to distinguish the Florida Supreme Court case of *Bush v. Holmes* due to Florida's express prohibition for diverting State School Fund moneys to support private schools. Resp't Br. at 33. However, the Florida Supreme Court recognized that establishing a

programmatic alternative to the constitutionally mandated system of public schools in the form of private school scholarship vouchers was unconstitutional by “devoting the state’s resources to the education of children within our state through means other than a system of free public schools.” *Holmes*, 919 So. 2d at 407. The Florida Supreme Court recognized that its education article provision “mandates that the state’s obligation is to provide for the education of Florida’s children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.” *Id.* at 408.

In *Commonwealth, ex rel. Cameron v. Johnson*, the Kentucky Supreme Court likewise struck down private school tax credit legislation under language contained in the Kentucky Constitution prohibiting any “sum” from being “raised or collected for education other than in common schools,” finding that under the “plain language,” the income tax credit scheme “raises money for nonpublic education and its characterization as a tax credit rather than an appropriation is immaterial.” 658 S.W.3d 25, 31 (Ky. 2022).

Additionally, a recent Utah District Court decision conducted a detailed analysis of Utah’s constitution as it relates to education and held a private school scholarship account program to be a “legislatively created, publicly funded education program aimed at elementary and secondary education,” meaning that “it must satisfy the constitutional requirements applicable to the ‘public education system’ set forth in the Utah Constitution.” *Labresh v. Cox*, Ruling and Order RE: Defendant’s Motions to Dismiss and Plaintiffs’ Motion for Summary Judgment, Case No. 240904193 at 37 (Utah Third Jud. Dist. Ct. April 18, 2025). Because there was no genuine dispute

that the program at issue was not “open to all children” and “free,” it was held unconstitutional. *Id.*

In sum, while several states have held their constitutions to establish a “floor” and not a “ceiling” regarding legislative authority to fund educational programs, other states have held to the contrary by recognizing the limits imposed by their constitutions (a ceiling on the manner of maintaining the public education system) and applying it to the substance of programs funding private education.

3. *The Program maintains a separate and unequal system of schools.*

The Tax Commission and Intervenor attempt to further limit the words of article IX, section 1 by looking to the definitions of what “establish,” “maintain,” and “system” mean in order to argue that the legislature is not establishing or maintaining any system of private schools. *See* Resp. Br. at 24–25; Intervenor’s Br. at 24–25. Nevertheless, this exercise places an emphasis on form over substance. The Tax Commission’s and Intervenor’s contention that the legislature is not in violation of the Idaho Constitution where it is not creating the private schools, is not “maintaining” private schools when the benefit to those schools is so low, and that there is no “system” of private schools when they are separate, already existing entities not under one cohesive ownership or supervisory umbrella is unavailing. The substance of the Program is clear—a separate “system” is being “maintained” (if not “established”) when public funds are used to directly or indirectly finance (i.e., maintain) private schools throughout the state (i.e., a system) through their charging parents the tuition, fees, and expenses used to operate said private schools. The fact that Intervenor argues the Program would not be considered as “maintaining”

the separate private school system due to the relative amount of funding under the current Program cap of \$50 million as compared to appropriations made for maintenance of public schools is flawed reasoning. Intervenor attempts to make the constitutionality of the Program an inquiry into the specifics of *how much* private schools would benefit from the Program rather than the proper focus of the text of HB 93, which expressly enables state financial support of the private education system, which could very well balloon in magnitude. There is no difference between a small constitutional violation and a large one.

4. *Article IX, section 1 does not jeopardize other programs that support education, and those programs are factually distinguishable.*

Finally, the Tax Commission and Intervenor cite to various provisions in Idaho Code where public funds are used to promote education as an example of allowing public funding of private education. These programs are not at issue in this case. However, these programs are patently different from the Program at issue here. For example, Respondent cites to the Empowering Parents Grant Program as an example of indirect state support of private schools. Resp't Br. at 29. However, that program 1) is (or was) available to all children who meet eligibility requirements regardless of whether they attend public or nonpublic schools, 2) does not include private school tuition as an eligible expense, and 3) is overseen by the State Board of Education. I.C. §§ 33-1030(3)–(4), 1031(1). Other programs cited are not analogous to the Program here, such as those relating to postsecondary education, *see* I.C. §§ 33-3731 (WWAMI) and 72-1205, or largely are considered a part of the public school system and overseen by the State Board of Education. *See* I.C. § 33-5202 (charter schools).

C. The Program Violates the Public Purpose Doctrine Implicit in Idaho’s Constitution.

1. *HB 93 does not serve a public purpose because it funds educational institutions that do not benefit the public.*

The public purpose doctrine provides that “[i]t is a fundamental constitutional limitation upon the powers of government 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) (emphasis added). A public purpose “serves to benefit the community as a whole and is directly related to the functions of government.” *Id.* The Court applies a two-part test articulated in *Idaho Water Res. Bd. v. Kramer*, which requires that a public purpose (1) serve[] the community as a whole and (2) is directly related to the functions of government. 97 Idaho 535, 558, 548 P.2d 35, 59 (1976) (emphasis added).

The Tax Commission argues that The Program serves at least two public purposes: first, education is “universally regarded as a public purpose,” and second, the Program promotes “parents’ ‘fundamental right’ to ‘direct the upbringing and education of children under their control.’” Resp’t. Br. at 38–39.

In support of their first argument, the Tax Commission and Intervenor heavily rely on a single phrase from the Idaho Supreme Court case *Davis v. Moon*, 77 Idaho 146, 149, 289 P.2d 614, 615 (1955), that “the furtherance of education is universally regarded as a public purpose.” Resp’t. Br. at 38, Intervenor’s Br. At 32. However, properly understood, the *Davis* case cuts squarely against them.

Davis v. Moon is a case where the State Board of Education issued and sold dormitory revenue bonds to construct a dormitory at the Northern Idaho College of Education. 77 Idaho at

149, 289 P.2d 615. However, the college ceased operations in 1951 due to a lack of legislative appropriation, resulting in no revenue to pay the bonds. *Id.* In 1955, the legislature changed the name of the school to Lewis-Clark Normal School, “provided that its course of study . . . be designed to train teachers for elementary schools,” and created the “Dormitory Bond Redemption Fund” appropriating \$100,000 to be disbursed by the State to the school, which disbursement was challenged as unconstitutional. *Id.*

The Court found that the appropriation served a public purpose because the “educational institution is established for no personal profit and serves only the public benefit.” *Id.* at 153, 289 P.2d 618. The Court reasoned that the appropriation was “intended to be expended in payment of a building acquired by Lewis-Clark Normal School as a part of its plant ‘required by or convenient for the purposes’ of such school, I.C. sec. 33-3802, ‘as a governmental instrumentality for the dissemination of knowledge and learning.’” *Id.* at 153, 289 P.2d 618. The Lewis-Clark Normal School, a state educational institution, was for “training and educating teachers in the art of instruction and governing in the public schools of this state and teaching the various branches that pertain to a good public school education.” *Id.* Because the appropriation could not be regarded as intended for use in furtherance of any private purpose, the Court found that the “public purpose of the appropriation and its expenditure as so intended, [was] in the interests of the public good, [and] in furtherance of the educational objectives of the state [as] clearly expressed.” *Id.* The Court cited to article IX, section 1 in reaching this conclusion, providing that, “[t]he Constitution makes it the 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.” *Id.* For these reasons, the public purpose was justified.

The *Davis* case reinforces the constitutional distinction Petitioners emphasize, which is that public educational institutions are proper objects of public funding, private institutions are not. By their very nature, nonpublic schools do not serve the community as a whole. See *Fannin v. Williams*, 655 S.W.2d 480, 482 (Ky. 1983) (“Nonpublic schools are open to *selected* people in the state, as contrasted with public schools which are open to ‘all people in the state.’” (emphasis added)). The Program violates the public purpose doctrine because it diverts state funds to the benefit of private schools that reject students, impose religious or ideological litmus tests, lack accountability, and, most importantly, operate outside Idaho’s constitutional public education system.

2. *Advancing private education through the Program does not serve a public purpose, and is not directly related to the functions of government.*

The Tax Commission argues that HB 93 serves two public purposes, “parental choice” and “educational enhancement.” Resp’t. Br. at 38. In support of its argument, the Tax Commission cites to Idaho cases that have previously applied the public purpose doctrine in the context of “public-oriented goals through private means” to public and private hospitals, water systems, and energy facilities. Resp’t. Br. at 39, citing to *Bd. of Cty. Comm’rs of Twin Falls Cty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (issuing bonds to fund public and private non-profit hospitals is a public purpose); *Idaho Falls Consol. Hosps. Inc. v. Bingham Cty. Bd. of Cty. Comm’rs*, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982) (requiring counties to pay public and private hospitals for the medical care of indigent residents is a public

purpose); *Nelson v. Marshall*, 94 Idaho 726, 731–32, P.2d 47, 52–53 (1972) (loaning money to a private individual to develop irrigation wells is a public purpose); *Idaho Water Res. Bd. v. Kramer*, 97 Idaho 535, 558, 548 P.2d 35, 58 (1976) (building dams to be leased to a privately owned and operated company to build and operate generating facilities on the land is a public purpose); *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 955, 703 P.2d 714, 719 (1985) (building a generating facility on land to be leased from a private company with a promise to remit energy generated to the private company is a public purpose). On a similar note, Intervenor applies *Utah Power & Light Co.* to argue that under the public purpose doctrine, the Court should consider whether the government otherwise has a duty to provide a service to its citizens. Intervenor’s Br. at 40.

However, these cases deal with public and private non-profit hospitals that admit all patients and serve the community as a whole; municipal water systems that serve every home and business; and hydroelectric and energy projects that supply power to all on equal terms. Each of these programs involves businesses that are publicly owned or publicly regulated, and most importantly, serve the community as a whole, are open to all, and are integral to core functions of the government. HB 93 on the other hand does not fall into these categories and allows parents to claim tax credits in exchange for paying for-profit schools and enterprises.

In *Village of Moyie Springs, Idaho v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960), the Idaho Supreme Court held unconstitutional a statute which authorized cities to issue revenue bonds to finance the acquisition of land and construction of facilities that were to be leased to private enterprises. The Court found that the statute and an ordinance enacted under it

by the village, violated the provisions of article VIII, section 4 and article XII, section 4, because the primary purpose of these laws was to benefit private enterprise. The Court reasoned that “we do not agree that an incidental or indirect benefit to the public can transform a private industrial enterprise into a public one or imbue it with a public purpose.” *Id.* at 345–46. 353 P.2d at 772–773.

HB 93’s incidental or indirect benefit to the public should not transform the underlying purpose of the Program which is to fund private for profit enterprises including private schools. If private education is a public purpose then a Constitutional Amendment could say so.

First, by their very nature, nonpublic schools do not serve the community as a whole. *See Fannin*, 655 S.W.2d 480, 482 (Ky. 1983). Private education is not directly related to the functions of government where they are not bound to serve all children of the state. Private schools can discriminate and exclude students, impose religious or ideological requirements, decline to accommodate disabilities, and limit enrollment. *See also* Decl. of Stephanie Mickelsen ¶ 11; *see generally* Decls. of Alexis Morgan, Kathleen Ross, Kristine Anderson, and Sue Peterson. Private schools are not bound by the restriction against teaching “critical race theory.” *See* I.C. § 33-138. Additionally, private schools may do business with companies engaged in a boycott of Israel (contravening I.C. § 67-23460); contract with companies owned or operated by the government of China (contravening I.C. § 67-2359); and enter into contracts with companies that boycott fossil fuels, timber and mineral production, and firearms production (contravening I.C. § 67-2347A). Private schools are not required to provide information on adoption practices and resources whenever contraception or STDs are discussed in the classroom. *See* I.C. § 33-141.

HB 93 redirects public funds to private schools that are free to ignore innumerable state policies and laws applicable to public schools. Petitioner’s Brief at 29–30. These requirements, among many others that the legislature has deemed important for public schools to adhere to in the education of the populace, are wholly inapplicable to private schools receiving and benefitting Program funds. *Id.* The fact that the Program spends public money on schools that are free to disregard other provisions of Idaho statutes further indicates that it does not serve a “public purpose.”

Second, HB 93’s funding mechanism is filled with private benefits. *Petr’s Br.* at 30. The Program distributes funds through a refundable dollar-for-dollar tax credit that a parent can claim as reimbursement for qualifying expenses, I.C. §§ 63-3029N(3), (7), or through an Advance Payment Fund that is to be “continuously appropriated” by the legislature. I.C. § 67-1230(2)(b). These no-strings-attached, refundable, dollar-for-dollar tax credits, coupled with the advance payment option, divert general-fund tax revenues to underwrite private choices that the State has no independent constitutional obligation to provide. Once deposited, the State has no control, no curricular oversight, and no guarantee that the funds support any educational objective. Any claimed public benefit is speculative and incidental.

Intervenor argues that the Parental Choice Tax Credit cannot violate the public purpose doctrine if a taxpayer’s liability exceeds the amount of the credit because writing a smaller check to the state is not state funding. *Intervenor Br.* at 29. For example, if a parent owes \$6,000 in taxes, claiming the credit reduces the tax liability to \$1,000. “No funds flow from the State.” *Id.* Intervenor cites *Winn* for the proposition that money not paid to the state due to a tax credit is not

government property because it never comes into the tax collector's hands. *Id.* (citing *Az. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011)).

Winn primarily dealt with taxpayer standing and the Establishment Clause. *Winn*, 563 U.S. at 129–30. A taxpayer could claim a refundable tax credit if they contributed to a school tuition organization (STO). *Id.* at 130. The STO would then use the contributions to provide scholarships to students attending private schools. *Id.* at 129. A group of Arizona taxpayers challenged the program on the grounds that it allowed STOs to use state income tax revenue to pay tuition for students at religious schools, some of which discriminated on the basis of religion in admitting students. *Id.* at 131. Plainly, the legal analysis in *Winn* is inapplicable. Petitioners have not asserted taxpayer standing and have not raised an Establishment Clause claim.

Tax credits are government expenditures, even when the individual's tax liability exceeds the amount of the credit. *See Johnson*, 658 S.W.3d at 39 (“The [tax credits] at issue cannot be characterized as simply private funds, rather it represents the tax liability that the taxpayer would otherwise owe but will have forgiven entirely or reduced. Moreover, in reality, . . . those funds likely do make it to the State Treasury and are then refunded. Regardless, the funds at issue are sums legally owed to the Commonwealth of Kentucky and subject to collection for public use”); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 589 n.22 (1997) (recognizing that tax exemptions can be viewed as a form of government spending); *Winn*, 563 U.S. at 158 (Kagan, J., dissenting) (“Tax breaks ‘can be viewed as a form of government spending,’ even assuming the diverted tax funds do not pass through the public treasury.” (citation modified)). Consider an applicant with a tentative tax liability of \$6,000.

After the Parental Choice Tax Credit is applied, the taxpayer has a net tax liability of \$1,000. The \$5,000 credit is subtracted from the \$50 million pot of “state funds.” I.C. § 63-3029N(12); *see also* <https://myschoolchoice.idaho.gov/about-the-program/> (identifying “Nearly \$50M in *state funds* (emphasis added)). So state funds are used even when the tentative tax liability exceeds the amount allowed under the Parental Choice Tax Credit.

Some courts have held that tax credits are not government expenditures because “[a] tax credit is not a drain on the state’s coffers; it closes the faucet that money flows through into the state treasury rather than opening the drain.” *Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011). This logic is erroneous. “Tax credits, deductions, and exemptions provided to an individual or organization have ‘much the same effect as a cash grant to the [recipient] of the amount of tax it would have to pay’ absent the tax break.” *Winn*, 563 U.S. at 157 (Kagan, J., dissenting) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983)). Reducing the taxpayer’s \$6,000 bill to \$1,000 has the same effect as collecting the full \$6,000 and providing a cash grant to the taxpayer for qualifying expenses.

Finally, Intervenor argues that “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.” Intervenor’s Br. at 41. This statement entirely misconstrues the public purpose doctrine. Even assuming that a child unenrolling from a public school reduces the expenses of the public school by a commensurate amount of what the parent pays to educate the child, the “obligation”

to educate the child is not extinguished, and a public purpose hasn't been fulfilled by the state paying for the child's private education through the Program with no ability to ensure a uniform and thorough education.

Overall, the Program is a selective benefit available to some families, and not all, that funds a private education system that does not serve the community as a whole. It funds private educational markets, not the public system that the Idaho Constitution requires the State to operate, undermining the duty the legislature is tasked with. Such actions do not promote education's "universally" recognized public purpose.

3. *The manner of implementing the Program matters for a public purpose analysis.*

The Tax Commission also criticizes Petitioners for citing Attorney General Opinion No. 24-01 and asserts that the "how" matters only as it illuminates the "why." Resp't Br. at 41. In the Attorney General's March 11, 2024, analysis, the state examined whether a university could purchase and operate a private online university. The Opinion concluded the transaction lacked a public purpose. The Attorney General's conclusion stated that "promoting education as a general matter has a public purpose. But the 'how' matters. And here, the 'how' is overwhelmingly imbued with a private character." See Idaho Att'y Gen. Opinion 24-01, 2024 WL 5357302 at 10. The Attorney General's own recent analysis asserted that it was the mechanism of private ownership and control and the absence of public oversight that converted a seemingly public "end" into a private purpose, even though that transaction would have had *more* public oversight than the Program and been controlled by the public university to expand online educational opportunities.

The same analysis can be applied here. At the outset, K-12 education, rather than post-secondary education, is specifically addressed by article IX, section 1. The Program places no restrictions on the discrimination that nonpublic schools can engage in. I.C. § 63-3029N(20). Importantly, the Program is not widely available to parents of all K-12 students being educated in the state. This is not a widely available tax credit program that helps offset and pay for educational expenses incurred by parents of all school-aged children. The Program is specifically limited to nonpublic schooling, limiting the benefit of the Program to private school entities and private actors instead of the “community as a whole.”

HB 93 exceeds the defects the Attorney General identified in the above opinion. The Program routes public money to private schools, private tutors, private curriculum vendors, and private education companies, all operating entirely outside of Idaho’s constitutional public school system. These private actors determine who may enroll, what is and is not taught, what religious standards apply, and which students may be excluded. This is the opposite of “public” education.

In support of their argument, the Tax Commission reasons that HB 93 is constitutional because “[t]he State currently offers programs that condition eligibility on” indigency³, age⁴,

³ Medicaid codified in I.C. § 56-267(1) provides that “Medicaid eligibility [] include[s] those persons under sixty-five (65) years of age whose modified adjusted gross income is one hundred thirty-three percent (133%) of the poverty level or below and who are not otherwise eligible for any other coverage.”

⁴ Medicare or the Senior Services and Older Americans Act under IDAPA 18.04.10 and IDAPA 15.01.01 provide a wide range of health-related services for individuals aged 60 years or older.

sex⁵, disability status⁶, familial status⁷, occupation, and locality, and therefore HB 93 may do so as well. Resp’t. Br. at 44–45. The Tax Commission goes so far as to say, “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.” Resp’t. Br. at 44. Additionally, Intervenor references the Federal American Opportunity Credit (AOTC) also in support of the constitutionality of the tax credit since “the indirect beneficiary of a tax benefit need not admit all-comers.” Intervenor’s Br. at 37.

Referencing these programs proves Petitioners’ challenge, rather than counter it. In every one of these programs cited by the Tax Commission and Intervenor, eligibility is determined by statute or regulation and is uniform for all participants, regardless of which private provider ultimately delivers the service. While private hospitals and other vendors can choose whether to participate in Medicaid, Medicare, or the Women, Infants & Children (WIC) Program, once a person is deemed eligible to participate, the hospital or vendor cannot decide which eligible

⁵ Women, Infants & Children Program (WIC) provides WIC cards to buy healthy food at authorized WIC vendors, help find healthcare and other community services, and provide additional support on breastfeeding. See Idaho Dep’t of Health and Welfare (Oct. 2025), <https://healthandwelfare.idaho.gov/services-programs/food-assistance/about-wic>.

⁶ The Idaho Development Disabilities Services and Facilities Act allows “any person suspected of a developmental disability shall be eligible for initial intake and for diagnostic services through any comprehensive developmental disability center, without reference to any other eligibility criteria.” See I.C. § 39-4606.

⁷ The Idaho Child Care Program applies to individuals seeking childcare assistance, and applicants must meet federal poverty guidelines, and the family’s income cannot exceed one hundred seventy-five percent (175%) of the Federal Poverty Guidelines for a family of the same size. See IDAPA 16.06.12.000.

individual they will or will not serve. Once accepted as eligible, the person or family has access to the public assistance or funds to use them as directed and regulated under the statute.

HB 93 is structurally different. Here, the Tax Commission formally determines whether a parent meets the statutory eligibility criteria for the tax credit and will notify the parent within thirty (30) days of the close of the application period. I.C. § 63-3029N(4). The advance payment is also approved by the Tax Commission for eligible students whose parents' modified adjusted gross income, as indicated on their most recently filed tax return, does not exceed three hundred percent (300%) of the federal poverty line. I.C. § 63-3029N(9). However, unlike Medicaid, Medicare, WIC, SNAP, and others, the determination of eligibility by the Tax Commission does not guarantee access to the benefit the legislature created. A family could be deemed fully eligible by the Tax Commission, yet completely unable to access the credit if the private school or other program denies their child. Therefore, the publicly funded benefit provided through HB 93 is ultimately controlled by the private actor's admissions decisions, not Idaho law.

Intervenor's reference to the federal AOTC is inapposite because the AOTC operates in a completely different constitutional and educational space. Intervenor's Br. At 37. The AOTC is a federally regulated tax credit for qualified education expenses paid for an eligible student for the first four years of higher education. *See* 26 U.S.C. § 25A. However, neither the federal government nor the State of Idaho has any constitutional duty to provide postsecondary education. *See Thompson v. Engelking*, 96 Idaho 793, 805, 537 P.2d 635, 648 (1975) ("Art. 9, Sec. 1, is a mandate to the State through the Legislature to set up a complete and uniform system of public education for Idaho elementary and secondary school students"). The AOTC

encourages private spending on postsecondary education. It does not withdraw money from, or compete with, constitutionally required public K-12 schools.

Next, the Tax Commission asserts that Petitioner Mickelsen is “proud to support Idaho LAUNCH,” in attempt to draw parallels between Idaho LAUNCH and HB 93 where none exist. The LAUNCH program, as referenced by the Tax Commission, “provides financial aid only to college students pursuing certain degrees at certain educational institutions (which may consider academics and religion in deciding admission).” Resp’t. Br. at 44–45. However, this comparison illustrates the very constitutional divide that matters in this case.

LAUNCH operates a program of postsecondary workforce training, an aspect of education that the Idaho Constitution does not obligate the State to provide. *See* I.C. § 72-1205.⁸ Because LAUNCH lies wholly outside the guarantees of article IX, section 1, it does not divert from, compete with, or structurally undermine the K-12 system.

HB 93 is the opposite. The Program’s central benefit—a parent’s access to private school tuition and other costs—does not depend on Idaho’s uniform statutory criteria but on the admissions decisions of the private schools or other programs that may exclude children for disability, religion, or any reason at all. The Tax Commission’s reliance on Petitioner Mickelsen’s own experience with LAUNCH, therefore, does not weaken Petitioners’ challenge,

⁸ LAUNCH has been effective in increasing enrollment in postsecondary institutions across Idaho, including a 15 percent surge in community college enrollment and an 8 percent increase in the number of kids taking dual credits, meaning more students than ever are thinking about college. *Launch success reflected in astounding postsecondary enrollment leaps* (Feb. 26, 2025) <https://gov.idaho.gov/pressrelease/launch-success-reflected-in-astounding-postsecondary-enrollment-leaps/>.

but strengthens it. When the legislature intends a public purpose program like LAUNCH, it preserves public control. When the Legislature departs from that model, as they have done in HB 93, the Constitution’s protections for the public K-12 system are directly implicated.

The Tax Commission’s second argument contends that HB 93 promotes parents’ “fundamental right” to “direct the upbringing and education of children under their control.” Resp’t. Br. at 38. Petitioners do not dispute and in fact fully acknowledge and support the longstanding constitutional right of parents to direct and nurture the upbringing and education of their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Petitioners’ challenge does not diminish that right; if anything, it protects it.

Parental autonomy is meaningful only when families retain the genuine freedom to choose among educational options without being steered or constrained by state-created structures privileging certain actors over others. Here, the Program narrows parental choice by steering public resources toward private schools that many parents cannot access, cannot afford, or are blatantly excluded from. *See generally* Decls. of Alexis Morgan, Kathleen Ross, Kristine Anderson, and Sue Peterson. The State’s grant through HB 93 enhances choices only for families who are the “right fit”⁹ for private schools. If anything, it could undermine parents’ rights by funding educational opportunities placed in the hands of private gatekeepers.

⁹ *See* Exhibit H, Declaration of Alexis Morgan, who was denied admission at a private school based on the particular “brand” of Christianity she and her family practice, apparently because a class in the late “middle school year” curriculum is disparaging to her family’s religion.

For these reasons, the Court should accept Petitioners’ challenge to the Program and HB 93 as a violation of the public purpose doctrine. At its core, the Program diverts public funds into a structure controlled by private gatekeepers, placing the Program’s central benefit beyond the reach of many Idaho parents and K-12 students, and outside the public purpose framework. Public dollars must remain tied to public control, not selective private discretion.

D. Petitioners Are Entitled to be Awarded Attorneys’ Fees.

The Tax Commission argues that Petitioners cannot recover fees under Idaho Code Section 12-117(4) because Petitioner, School District No. 281, lacks standing and therefore cannot be a prevailing party. Resp’t. Br. at 46. The Tax Commission also claims that if the Petitioners prevail “based on someone else’s standing” the School District No. 281 still cannot recover fees. *Id.* at 46–47.

This argument is entirely based on the Tax Commission’s theories of standing. This is not based on the statute’s text. We agree that this proceeding involves governmental entities—the Tax Commission and School District No. 281—which is precisely the condition required under Idaho Code Section 12-117(4). The Tax Commission does not dispute whether Idaho Code Section 12-117(4) applies. The Tax Commission simply asserts that School District No. 281 cannot prevail because it lacks standing. Petitioners disagree. It is within this Court’s discretion to grant standing, and as discussed in Petitioners’ Verified Petition and Brief in Support, along with the corresponding declarations and arguments reiterated here, it is Petitioners’ position that School District No. 281 has standing, and thus School District No. 281 is entitled to fees under Idaho Code Section 12-117(4).

Both the Tax Commission and Intervenor argue that the private attorney general doctrine is no longer a valid basis for attorneys' fees under Idaho law, and even if it did exist, it cannot be used where a public entity is a petitioner. Resp't. Br. at 47–49, Intervenor's Brief at 42–46. The reasoning from both the Tax Commission and Intervenor is based on Idaho Code Section 12-121's amendment in 2017 to allow fees to be awarded only "when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." Resp't. Br. at 47; Intervenor's Br. at 43. Intervenor continues this argument, providing that "the judiciary does not have today what it did in 1978 and 1984: statutory discretion to award fees on a basis other than frivolousness," and therefore it "is not currently a viable basis for a fee award in Idaho." Intervenor's Br. at 43–44.

However, these arguments are directly contradicted by the Court's application of the private attorney general doctrine in a post-2017 amendment case, *Reclaim Idaho v. Denney*, 169 Idaho 406, 440, 497 P.3d 160, 194 (2021), and *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 545, 38 P.3d 121, 124 (2001). In both of these cases, the Court awarded fees under the private attorney general doctrine due to the significant constitutional issues raised in the cases. This Court should do the same here.

In *Reclaim Idaho*, the Court expressly applied the private attorney general doctrine *after* the 2017 amendment to Section 12-121, awarding fees to petitioners who vindicated Idaho's "constitutional right to pass and repeal legislation." *Reclaim Idaho*, 169 Idaho at 440, 497 P.3d at 194. Far from signaling that the doctrine had been extinguished, the Court treated it as fully

operative, and applied the three part test and concluded the petitioners had a protected right which was “vital to the public interest to people across Idaho.” *Id.*

Smith is equally instructive. In *Smith*, the Court awarded fees under the private attorney general doctrine in a constitutional challenge to Idaho’s redistricting plan. *Smith*, 136 Idaho 542, 544, 38 P.3d 121, 123 (2001). Because the case involved the “right to cast a meaningful vote,” the Court held that fees were appropriate under the private attorney general doctrine reasoning that the petitioners “pursued the vindication of this right vigorously and the pursuit of such benefited a large number of Idahoans.” *Id.* at 546, 38 P.3d at 125. *Petr’s Br.* at 36–37.

Taken together, *Reclaim Idaho* and *Smith* reflect a consistent principle that the State must not create disincentives for Idahoans who undertake the burden of enforcing the Idaho Constitution. If the Tax Commission and Intervenor’s positions prevailed, citizens would be deterred from raising legitimate constitutional concerns. Idaho’s attorney’s fees statutes were not enacted to deter concerned Idaho citizens and entities from protecting the integrity of the Idaho Constitution.

The Tax Commission argues Petitioners do not meet the standard laid out in *Smith* that “a significant number of people stand to benefit from the decision.” *Resp’t. Br.* at 49. However, *Smith* reaffirmed the private attorney general doctrine precisely where constitutional limits and governmental structure were at stake. Petitioners in this case raise foundational questions as they pertain to article IX, section 1, and the constitutional restrictions on public funds. The issues involved in the present litigation are of the utmost importance and affect all K-12 aged children in Idaho. *Petr’s Br.* at 37.

Intervenor next argues that “even if the Court finds a statutory basis for an award of fees under the private attorney general doctrine, Petitioners fail to satisfy the second element – the necessity of private enforcement – based on Petitioner Moscow School District being a political subdivision of the state.” Intervenor’s Br. at 45. However, here, private enforcement is necessary because the public officials with the authority to act have refused to defend and enforce the Idaho Constitution. The private attorney general doctrine asks whether the litigation protects constitutional values of broad societal importance, not whether some individuals might prefer the unconstitutional statute to remain in place. The Idaho Attorney General, despite being asked, declined to challenge HB 93. *See* Petrs’ Br. at 37; *see also* Decl. of Daniel E. Mooney ¶¶ 16–17. School District No. 281, like the individual Petitioners, is not acting as a regulator or enforcer, but instead as an injured party whose constitutional interests and statutory obligations are directly affected by HB 93. As a result, Petitioners’ efforts in vindicating the people’s constitutional right to a general, uniform, and thorough system of public, free common school potentially benefits every citizen of Idaho, and thus fees under the private attorney general doctrine are warranted.

Additionally, Petitioners request attorneys’ fees pursuant to Idaho Code Sections 12-117(1) and 12-121 as laid out in Petitioners’ Brief in Support. Petitioners assert that HB 93 is plainly unconstitutional and enacted without a reasonable basis in law, and thus, the prevailing party shall be awarded fees.

III. CONCLUSION

The Idaho Constitution clearly tasks the legislature to establish one general, uniform, and thorough system of public, free common schools. In enacting HB 93, the legislature has exceeded these limitations in an attempt to create and establish a competing, unregulated, and irregular system of paid private schools. HB 93's supporters tout the illusory promise of "school choice," when in fact private schools do not exist in over fifteen (15) of Idaho's rural counties and private schools can discriminate against children on the basis of religion, disability, and race with impunity.¹⁰ When the legislature appropriates taxpayer funds, it should be for a purpose that benefits the community as a whole such as roads, bridges, and law enforcement. Public funds should not be used to subsidize private schools that are not regulated, are not held accountable to the State, and are utilized by a small percentage of Idaho children.¹¹

Accordingly, Petitioners respectfully request that this Court issue a writ of prohibition preventing the Tax Commission from implementing the Program and distributing tax credits,

¹⁰ Bas van Doorn, Mapping School Choice in the Gem State, IDAHO STATE BOARD OF EDUCATION (last visited Nov. 25, 2025), <https://storymaps.arcgis.com/stories/9f5459e2811a420491be715190551495>

Bas van Doorn, *Idaho's Private School Landscape: A Brief Overview*, (Idaho State Board of Education, working paper, Feb. 16, 2024), <https://boardofed.idaho.gov/resources/idahos-private-school-landscape-a-brief-overview/>;

The Dangers of Private School Vouchers for Idaho Students, Schools, and Communities, IDAHO CENTER FOR FISCAL POLICY (January 2024), https://pfps.org/assets/uploads/Danger_of_Private_School_Vouchers_Compressed_.pdf.

¹¹ Bas van Doorn, *Idaho's Private School Landscape: A Brief Overview*, (Idaho State Board of Education, working paper, Feb. 16, 2024), <https://boardofed.idaho.gov/resources/idahos-private-school-landscape-a-brief-overview/>.

because it is unconstitutional. Petitioners also request the other relief sought in its Petition, including but not limited to attorneys' fees and costs.

DATED THIS 25th day of November, 2025.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By: /s/ Marvin M. Smith

Marvin M. Smith, ISB No. 2236

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served a true copy of the foregoing CONSOLIDATED REPLY BRIEF by the method indicated below, and addressed to each of the following:

Raul R. Labrador
Attorney General

Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Alan M. Hurst
Solicitor General
James E.M. Craig
Chief, Civil Litigation and Constitutional Defense
Michael A. Zarian
Deputy Solicitor General
Sean M. Corkery
Assistant Solicitor General

Jeremy C. Chou
Morgan D. Goodin

Givens Pursley LLP
601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Attorneys for Intervenor-Respondent

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail: alan.hurst@ag.idaho.gov
james.craig@ag.idaho.gov
michael.zarian@ag.idaho.gov
jack.corkery@ag.idaho.gov
☐ Facsimile
☒ iCourt

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail: jcc@givenspursley.com
morgangoodin@givenspursley.com
☐ Facsimile
☒ iCourt

Dated: November 25, 2025

/s/ Marvin M. Smith

Marvin M. Smith, ISB No. 2236