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Idaho Supreme 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.

Case No. **53264-2025**

PETITIONERS' BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

I. STATEMENT OF THE CASE

This case concerns the limit of legislative authority conferred by the Idaho Constitution. The Committee to Protect and Preserve the Idaho Constitution, Inc.; Mormon Women for Ethical Government; School District No. 281, Latah County, State of Idaho; and Idaho Education Association, Inc.; along with Jerry Evans, Marta Hernandez, Stephanie Mickelsen, Alexis Morgan, and Kristine Anderson (collectively "Petitioners") contend the Legislature has acted outside the bounds of its authority by subsidizing private schools within the state of Idaho. Accordingly, Petitioners ask this Court to intervene to prevent a significant violation of the state's constitution.

Factual Background

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain *a* general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1 (emphasis added). Since statehood, the Legislature has fulfilled this duty by funding Idaho's public schools. Idaho's public schools are open to all children, regardless of race, ability, and religion. Attendance is mandatory, unless a child's parents choose an alternative education option. *See* I.C. § 33-202. Traditionally, Idaho's public schools have been funded through a combination of federal, state, and local tax dollars. *Spelling it Out: How Public Schools are Funded*, IDAHO EDUCATION NEWS, https://www.idahoednews.org/news/spelling-it-out-how-public-schools-are-funded/ (last visited Sept. 10, 2025). Private schools, on the other hand, have been funded with private dollars—tuition and fees paid by the parents who choose an alternative education option. Not anymore.

In 2025, the Idaho Legislature enacted House Bill 93 ("HB 93"), now codified at Idaho Code sections 63-3029N and 67-1230. 2025 Idaho Sess. Laws Ch. 9, https://legislature.idaho.gov/sessioninfo/2025/legislation/h0093/. HB 93 established the Idaho Parental Choice Tax Credit (the "Program") with retroactive effect to January 1, 2025. *Id*. The Program provides a dollar-for-dollar refundable tax credit to parent-applicants for "qualified expenses" of up to $5,000 (or up to $7,500 for children with a disability requiring ancillary personnel) who file an application with the Idaho Tax Commission. ("Commission"). I.C. §§ 63-3029N(3), (7).

A student who resides in Idaho, is between the ages of five and eighteen, and is not enrolled either full-time or part-time in a public school qualifies for the Program. I.C. §§ 63-3029N(2)(b), (10)(b). Eligible parents may claim a credit for "qualified expenses" they incurred during the previous tax year. I.C. §§ 63-3029N(9), (10)(b). Qualified expenses include: K-12 private school tuition and fees, tutoring, specific educational assessments and preparatory courses for nationally standardized assessments, textbooks and curriculum materials, and transportation costs to and from a nonpublic K-12 school. I.C. § 63-3029N(2)(f). A parent whose child is enrolled "full-time or part-time in a public school, public charter school, public virtual charter school, public magnet school, or part-time public kindergarten" may not claim the credit. I.C. § 63-3029N(10)(b). Parents are also prohibited from claiming a credit for tuition and fees relating to providing instruction to their own child. I.C. § 63-3029N(10)(c).

There is no income cap that limits eligibility; even the wealthiest Idaho families will qualify. But applications from families whose income does not exceed 300% of the federal

poverty level[1] receive *priority* and are eligible to receive an "advance payment" so they do not have to wait until they file their taxes to claim the credit. I.C. §§ 63-3029N(6), (9). Starting in 2027, priority is given to those who previously received a credit, followed by parents whose taxable income does not exceed 300% of the federal poverty level. I.C. § 63-3029N(6). The aggregate amount of tax credits issued each year—for now—is limited to $50,000,000. I.C. § 63-3029N(12).

Applications for the Program open on January 15, 2026. I.C. § 63-3029N(14). And the tax credit is refundable, meaning that if the credit exceeds the applicant's income tax liability, the applicant will receive a check from the state for the excess. I.C. § 63-3029N(11). Applicants who meet the low-income threshold are eligible to receive a one-time advance payment of the credit, which may be used for qualifying expenses the year the credit is claimed instead of having to claim the credit during tax season for expenses incurred during the previous year. I.C. § 63-3029N(9). Advance payments are made through the "Idaho Parental Choice Tax Credit Advance Payment Fund." I.C. § 67-1230(1). The Advance Payment Fund consists of *legislative appropriations and transfers*; donations and contributions to the fund; reversions of unused, paid back, or recovered advance payment funds, and interest earned on idle monies. I.C. § 67-1230(2)(b). The Advance Payment Fund is to be "continuously appropriated to pay advance payments awarded" under the Program, essentially allowing advance payments to be disbursed without the need for legislative action. I.C. § 67-1230(2)(b).

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1 In 2024, 300% of the federal poverty level for a family of four was $93,600. https://aspe.hhs.gov/sites/default/files/documents/7240229f28375f54435c5b83a3764cd1/detailed-guidelines-2024.pdf.

The Commission must distribute advance payments to qualified applicants no later than August 30. I.C. § 63-3029N(9). However, for 2026 the Commission has publicly indicated that it plans to distribute advance payments as early as June 14, 2026. Pet. at ¶ 45. Since private school tuition and fees are the most expensive "qualifying expenses" under the Program, a significant amount of public monies will flow to private schools for their tuition and fees. Public dollars will flow directly to schools through advance payments that parents direct, and indirectly through parents who are awarded credits for qualified expenses incurred the previous year. The public nature of the funds is readily apparent. Although many parents will bear the initial cost of qualified expenses, a refundable dollar-for-dollar tax credit essentially allows the taxpayer to direct the state to use the taxes they owe for private school tuition and fees instead of another government program. *See* James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 362 (2013) (noting that vouchers, tax deductions, and tax credits "divert to private schools funds that are in the state's possession or that are owed to the state"). And in the instance of advance payments, parents will actually be able to use the public funds received to pay for private education.

In addition to funding private schools, the Program has the effect of reducing funding for the state's public schools. [2] Many students will withdraw from public schools to take advantage of the tax credit. This assertion is not mere speculation and can be seen in other states. *See* Catherine Allen, *Public School Enrollment Falling Nationwide, Data Shows*, NBC NEWS (April

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[2] Petitioners assert that HB 93 is facially unconstitutional as a violation of an express limitation on the Legislature's authority. To the extent facts regarding effects or funding public education are disputed, they do not first require resolution in district court for the Court to analyze the merits of issues presented given the urgency and significance of the constitutional violation.

21, 2024, 6:30 AM), https://www.nbcnews.com/data-graphics/public-school-enrollment-us-states-map-chart-rcna11926262 (noting the link between school choice programs and decline in public school enrollment). When that happens, public school funding will decrease because of the state's attendance-based funding formula. *See* I.C. § 33-1002. Additionally, should the Legislature expand the Program in the future, it will only incentivize more students to withdraw from public school, further reducing funding to public schools.

Private or nonpublic school recipients of public funds stemming from the Program are not subject to the same standards as public schools. HB 93 explicitly provides that "[t]he provisions of this section shall not be construed to permit any government agency to exercise control or supervision over any nonpublic school or to give the state authority to regulate the education of nonpublic school students." I.C. § 63-3029N(20). Further, a nonpublic school is not required to "alter its creed, practices, admissions policy, or curriculum in order to accept students whose payment of tuition or fees stems from a refundable tax credit" under the Program. *Id.* A private school receiving public funds may refuse to admit a student based on the family's religious background. Pet. at ¶ 27; *see also* Decls. of Karli Hosman ¶ 3–9; McKenzie McFarland ¶ 3–8, Alexis Morgan ¶ 7–12. They may refuse to admit a child with disabilities. *See* Decls. of Kristine Anderson ¶ 6–12; Sue Peterson ¶ 3–9. Such actions are inconsistent with the use of public tax dollars.

In addition to admission and non-discrimination standards, nonpublic schools under the Program are not subject to any meaningful academic standards. Schools must teach English language arts, math, science, and social studies. I.C. § 63-3029N(2)(a). Otherwise, no accreditation is necessary. I.C. § 63-3029N(2)(d). A nonpublic school does not even need to be

located in the state as long as the student is a full-time Idaho resident and between the ages of five and eighteen. *Id.* The Commission, rather than the State Board of Education, is responsible for ensuring a nonpublic school provides sufficient academic instruction. *Id.*; *see also* Decl. of Home School Idaho ¶ 18–21. Thus, despite the public nature of the funds paid to nonpublic schools, the schools themselves are allowed to remain very much private.

Article IX, section 1 provides that the Legislature has the duty to "establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1. The Program is unconstitutional because it funds and maintains a system of schools that is not general, uniform, thorough, public or free. And the Program violates the public purpose doctrine which is implicit in the structure of our Constitution. *See State ex rel. Walton v. Parsons*, 58 Idaho 787, 80 P.2d 20, 22 (1938); *see also Idaho Water Res. Bd. v. Kramer*, 97 Idaho 535, 558, 548 P.2d 35, 59 (1976). As set forth below, Petitioners request a writ of prohibition preventing the Commission from implementing or otherwise administering the unconstitutional Program.

II. ISSUES PRESENTED

1. Whether HB 93 violates Article IX, section 1 of the Idaho Constitution.

2. Whether HB 93 violates the public purpose doctrine implicit in the structure of the Idaho Constitution.

III. ATTORNEY FEES

Petitioners request attorney fees under the private attorney general doctrine. *Reclaim Idaho v. Denney*, 169 Idaho 406, 439, 497 P.3d 160, 193 (2021). Petitioners also request attorney

fees under Idaho Code sections 12-117(1) and 12-121. Additionally, School District No. 281 requests attorney fees pursuant to Idaho Code section 12-117(4).

IV. JURISDICTION AND STANDING

A. This Court Should Exercise Its Original Jurisdiction and a Writ of Prohibition Is the Proper Remedy.

Under the Idaho Constitution, this Court has original jurisdiction to "issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." IDAHO CONST. art. V, § 9. Once the Court chooses to exercise jurisdiction, the decision to issue an extraordinary writ is a matter of discretion. *Id.* A writ of prohibition "arrests the proceedings of any tribunal . . . board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal . . . board or person." I.C. § 7-401. The writ of prohibition "can undoubtedly be an appropriate legal avenue where the petition 'alleges sufficient facts concerning a possible constitutional violation of an urgent nature.'" *The Associated Press v. Second Jud. Dist.*, 172 Idaho 113, 120, 529 P.3d 1259, 1266 (2023) (quoting *Reclaim Idaho*, 169 Idaho at 418, 497 P.3d at 172). A petitioner seeking a writ of prohibition must prove that "no plain, speedy, and adequate remedy at law is available." *Id*. (citing I.C. § 7-402).

As demonstrated in the accompanying Verified Petition, this case warrants the original jurisdiction of this Court. This case concerns the limits of legislative power and the duty to establish and maintain a system of general, uniform, thorough, public, free, and common schools commanded by Article IX, section 1 of the Idaho Constitution. As set forth below, HB 93 plainly conflicts with the limitations of the Legislature's authority and its duty to "establish and maintain a general, uniform and thorough system of public, free common schools" because it is attempting

to establish and maintain a separate system that is not general, uniform, thorough, public, free, or common. IDAHO CONST. art. IX, § 1; Pet. at ¶ 56–65.

Moreover, HB 93 is a major shift in how education is funded in the Gem State. *See Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 400, 522 P.3d 1132, 1158 (2023) (exercising jurisdiction after noting "shift in constitutional landscape" and the petitioners' declarations on how the shift affected them). HB 93 "open[s] state coffers to students outside of public schools like never before." Sally Krutzig & Ian Max Stevenson, *After Years of Rejection, School Voucher Bill Clears Idaho Legislature, Goes to Governor*, IDAHO STATESMAN (Feb. 20, 2025, 3:33 PM), https://www.idahostatesman.com/news/politics-government/state-politics/article300604104.html. HB 93 allocates $50 million to the Program for 2026. *Id.*; *see also* I.C. §§ 63-3029N, 67-1230. That number is likely to grow.

Supporters of HB 93 have noted that "[t]he biggest limitation of [HB] 93 is its lack of funding." *See* Samuel T. Lair, *What's Next for Universal School Choice*, IDAHO FREEDOM FOUNDATION (May 15, 2025), https://idahofreedom.org/whats-next-for-universal-school-choice/. Proponents of the Program argue that "[o]ne of the first priorities of the Legislature in 2026" should be increasing funding for the Program by "at least an additional $150 million." *Id.*; *see also* Caitlin Sievers, *Arizona School Voucher Program Ignored State Audit Law for Nearly a Year, Officials Say,* AZ MIRROR (July 29, 2025), http://azmirror.com/2025/07/29/arizona-school-voucher-program-ignored-state-audit-law-for-nearly-a-year-officials-say/ (noting that Arizona's universal voucher program is projected to cost $1 billion in 2025-2026—up from $300 million in 2022). Thus, it appears the Program's initial price tag of $50,000,000 is only just the beginning.

A writ of prohibition is proper because the constitutional violation is urgent. The Commission will begin accepting applications for the tax credit on January 15, 2026. I.C. § 63-3029N(4). The application period must be open for sixty days, and parents must be notified whether they will receive a credit within thirty days of the close of the application period. *Id.* Advance payments for 2027 under the Program must be distributed by August 30, 2026. I.C. § 63-3029N(9). However, the Commission has stated its desire to distribute advance payments as soon as June 14, 2026. Pet. at ¶ 45. And when money is distributed, it is usually spent. The government is unlikely to recover that money even if the Program is determined to be unconstitutional. *Cf. Dep't of State v. AIDS Vaccine Advocacy Coalition*, 145 S.Ct. 753, 757 (2025) (Alito, J., dissenting from denial of application to vacate order) (considering the likelihood of recovering funds while discussing irreparable harm).

Finally, Petitioners lack a plain, speedy, and adequate remedy at law. Proceedings in the district court would likely last months, if not years, and this Court would ultimately be called upon to rule on the constitutionality of HB 93. *See Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020) (exercising original jurisdiction when case presented "urgent constitutional dispute" concerning education and trial court proceedings would be "drawn out" causing uncertainty and disruption of educational services). Petitioners seek relief as soon as possible, but no later than January 14, 2026, the day before Program applications open. Original jurisdiction is warranted, and a writ of prohibition is the proper remedy.

B. Petitioners Have Standing

Standing is a concept of justiciability which helps identify "appropriate or suitable occasions for adjudication by a court." *Idahoans for Open Primaries v. Labrador*, 172 Idaho

466, 476, 533 P.3d 1262, 1272 (2023) (quoting *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015)). The issue of standing focuses on whether an injury or interest is "adequate to invoke the protection" of a judicial decision. *Id.*

This Court's test for determining whether a litigant has standing is well established. To establish standing, a plaintiff must show an injury in fact, a fairly traceable causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision. *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173. The injury complained of must be "concrete and particularized" and "actual or imminent" rather than hypothetical. *Id*. (quoting *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015)). Further, the injury must be "peculiar or personal" to the plaintiff and different than the injury suffered by any other member of the public. *Id.*

An entity may establish standing in one of two ways. It can have standing in its own right, or associational standing on behalf of its members. *Idahoans for Open Primaries*, 172 Idaho at 476, 533 P.3d at 1272. To establish associational standing, the entity must show "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Id.* "When an association seeks some form of prospective relief, such as a declaration or an injunction, its benefits will likely be shared by the association's members without any need for individualized findings of injury that would require the direct participation of its members as named parties." *Id.* at 477, 533 P.3d at 1273. The key inquiry for associational standing is "whether the association has alleged that at least one of its members face injury and could meet the

requirements of standing on an individual basis." *Id.* at 476, 533 P.3d at 1272 (quotation marks and citation omitted).

One plaintiff with standing is sufficient for the Court to exercise jurisdiction. *See Bear Crest Ltd. LLC v. State by and through Idaho Transp. Dep't*, No. 50840, 2025 WL 2525340 at *5 (Idaho Sept. 3, 2025) (considering the merits of an appeal when at least one appellant had standing for each issue presented). That said, the Court has signaled it is willing to relax the standing requirement in cases of constitutional significance and consider the merits when *no* plaintiff would have standing. *Reclaim Idaho*, 169 Idaho at 422, 497 P.3d at 176. A plaintiff may qualify for relaxed standing by showing "the matter concerns a significant and distinct constitutional violation" and no other party has standing to bring the claim. *Id.*

The accompanying Verified Petition alleges all Petitioners have standing. Specifically, the many declarations of Petitioners allege adequate injuries and interests as a result of the Program sufficient to establish standing. *See generally* Pet. at ¶ 17–27 and accompanying Declarations. Nevertheless, a few are highlighted to assure the Court that this case is appropriate for adjudication. *Idahoans for Open Primaries*, 172 Idaho at 476, 533 P.3d at 1272.

1. *The Committee to Protect and Preserve the Idaho Constitution, Inc. Has Standing*.

The Committee to Protect and Preserve the Idaho Constitution, Inc. ("Committee") is an Idaho nonprofit whose members are Idahoans committed to upholding and preserving the constitutional rights of the people and ensuring that the Idaho Constitution is not violated by the Legislature. Pet. at ¶ 17. The Committee has suffered injury because it has been forced to defend the state's constitution because the Attorney General will not. The Committee warned legislators

of the legal obstacles to using public funds to subsidize private education. Decl. of Stephanie Mickelsen, Ex. I. HB 93 was enacted despite this guidance from the Committee. Therefore, the Committee along with fellow Petitioners Representative Stephanie Mickelsen and former Superintendent Jerry Evans asked the Attorney General to fulfill his oath of office and defend the Constitution against the implementation of HB 93. Decl. of Daniel E. Mooney ¶ 16. The Attorney General declined. *Id.* ¶ 17. Accordingly, the Committee has diverted resources from its normal practices to specifically challenge the program. *see* Pet. at ¶ 17, Decl. of Daniel E. Mooney ¶ 5–6, 9–17. The Committee has suffered an injury in fact sufficient to establish standing.

2. *School District No. 281 Has Standing.*

School District No. 281, Latah County, State of Idaho ("Moscow School District") is a public school district. Pet. at ¶ 19. The Commission's implementation of the Program will lead to decreased enrollment in Moscow's public schools. Pet. at ¶ 19; Decl. of Shawn Tiegs ¶ 12–13; *see also* Allen, *supra*. And decreased enrollment will certainly mean decreased funding. *See* I.C. § 33-1002 (determining school funding in part by average daily attendance). Decreased funding will impact the ability of Moscow School District to attract and retain quality teachers, thereby reducing the quality of education for all students in the district. *See generally* Decls. of Shawn Tiegs, Kevin Ramsey, Brady Dickinson. Moscow School District's inevitable loss of funding is fairly traceable to the Commission's implementation and administration of HB 93 and able to be redressed by a favorable decision from this Court. Moscow School District has standing. *See Idaho Sch. For Equal Educ. Opportunity v. State*, 140 Idaho 586, 591, 97 P.3d 453, 458 (2004); *see also* I.C. § 33-301.

3. *The Idaho Education Association Has Associational Standing.*

The Idaho Education Association ("IEA") is an Idaho nonprofit corporation and the State's teachers' union. Pet. at ¶ 20. IEA's members include teachers, retired and aspiring teachers, administrators, and school professionals. *Id.* IEA's core mission is to "advance the cause of public education throughout the state." *Id.* IEA has associational standing on behalf of its members. IEA's members would have standing to sue in their own right, IEA seeks to protect interests germane to its purpose, and neither Petitioners' claims nor the relief requested require individual participation.

Marta Hernandez is the co-president of the Cassia County Education Association and a member of IEA. Pet. at ¶ 22. Class sizes at rural schools like Marta's have been growing rapidly. Decl. of Marta Hernandez, ¶ 16. HB 93 redirects funds that would otherwise be allocated to public education to private schools and homeschools. *Id.* at ¶ 21–25. Yet, 21 out of Idaho's 44 counties, or 48%, lack a private school. Bas van Doorn, *Mapping School Choice in the Gem State*, IDAHO STATE BOARD OF EDUCATION (last visited Sept. 10, 2025), https://storymaps.arcgis.com/stories/9f5459e2811a420491be715190551495. And of the 23 counties with private schools, seven do not have a high school, meaning 28 counties, or 63%, lack a private high school. *Id.* Public schools, particularly in rural areas, will be unable to handle even modest reductions in funding. *See* Hilary Wething, *How Vouchers Harm Public Schools*, ECONOMIC POLICY INSTITUTE (Dec. 19, 2024), https://www.epi.org/publication/vouchers-harm-public-schools/; *see also* Decl. of Kevin Ramsey ¶ 7–11.

The redirection of funds will also negatively impact the comprehensive educational services provided by public schools. Wething, *supra*; *see* Pet. at ¶ 22; *see also* Decl. of Shawn

Tiegs ¶ 12–13. Hernandez's job will be made materially harder as a result of the Program. *See* Decl. of Marta Hernandez ¶ 16–25. The injuries Hernandez and other members of IEA will suffer are fairly traceable to the Commission's imminent implementation of HB 93 and are able to be redressed by a favorable decision. Therefore, Hernandez and other members of IEA have standing.

IEA has associational standing because its members would have standing to sue in their own capacity, it seeks to protects interests germane to its purpose of advancing the cause of public education, and the claims asserted do not require the individual participation of IEA's members. *See Idahoans for Open Primaries*, 172 Idaho at 477, 533 P.3d at 1273.

4. *As an Alternative, Relaxed Standing is Appropriate*.

In the unlikely event the Court concludes that no Petitioner has standing, then relaxed standing is appropriate. Relaxed standing is appropriate here because the matter concerns a significant and distinct constitutional violation, and no party could otherwise establish standing. *Hawkins Companies, LLC v. State by and through Dep't of Admin.*, 174 Idaho 1023, ___, 554 P.3d 74, 83 (2024). Petitioners allege that the Legislature "exceeded its constitutional authority" when it passed HB 93, which funds and maintains an alternative education system in violation of Article IX, section 1 of the state constitution, and directs the Commission to spend public monies for a primarily private purpose. *Id.* at 84. "If true, that would constitute a significant and distinct constitutional violation." *Id.*

Second, it is hard to see who would have standing to challenge HB 93 if Petitioners do not. Petitioners include: the Idaho's teachers' union, parents of children in public school, parents of children with disabilities who are unable to attend private school due to the lack of dedicated

resources, parents of children who have been denied admission to private school based on their religion, a local school district, nonprofit organizations, and teachers. *See generally* Pet. If all in this diverse group lack standing to seek this writ, the question becomes, who does? Article IX, section 1 would essentially be "deleted from the Constitution because no party would have standing to enforce it." *Coeur d'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767 (citation modified). This Court has previously invoked relaxed standing when the governor attempted to veto legislation after the deadline had passed and no state official challenged the failed veto. *Id.* The Court also granted a group of taxpayers who challenged municipal indebtedness relaxed standing because the only party with standing was the county committing the alleged unconstitutional conduct. *Koch v. Canyon Cnty.*, 145 Idaho 158, 162, 177 P.3d 372, 376 (2008).

Here, neither the Superintendent of Public Instruction nor the State Board of Education nor the Attorney General appear ready or willing to uphold Article IX, section 1 of the state constitution. *Coeur d'Alene Tribe*, 161 Idaho at 514, 387 P.3d at 767. If Petitioners lack standing, it is unlikely anyone could establish standing. So even if this Court were to find that none of the Petitioners has standing, it should conclude relaxed standing is warranted and proceed to the merits of Petitioners' claims.

V. ARGUMENT

A. HB 93 Violates Article IX, section 1 of the Idaho Constitution Because it Funds a Separate System of Schools That is Not Uniform, Thorough, Free, or Public.

As a general matter, it is 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." *BABE VOTE v. McGrane*, 173 Idaho 682, 695–96, 546 P.3d 694, 707–08 (2024) (quoting *Planned*

Parenthood Great Nw., 171 Idaho at 439, 522 P.3d at 1197). The party asserting a statute is unconstitutional "bears the burden of showing its invalidity." *Planned Parenthood Great Nw.*, 171 Idaho at 439, 522 P.3d at 1197. Petitioners have met their burden. As set forth below, the plain language of Article IX, section 1 prohibits the legislature from establishing and maintaining a parallel system of private education. Neither history nor tradition supports funding private schools as HB 93 does. And the structure of our state's constitution prohibits the legislature from acting contrary to an explicitly provided constitutional duty.

1. *The Plain Language of Article IX, Section 1 of the Idaho Constitution Prohibits Maintenance of a Separate Educational System.*

When "[p]assing on the constitutionality of statutory enactments," "the primary object is to determine the intent of the framers." *Id.* at 404, 522 P.3d at 1162 (first citing *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993); then quoting *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019)). The Court has long taken this approach. *Id.* at 404–405, 522 P.3d at 1162–63 (listing examples of interpreting constitution by what the framers intended). As with statutes, this Court begins with the plain language "read in context of the entire instrument." *Id.* at 407, 522 P.3d at 1165. The Court will "look to the State Constitution, 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 of the Idaho Constitution provides: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain *a* general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, § 1 (emphasis added). Plainly, the Idaho

Constitution states that the Legislature's duty to establish and maintain *one* system of public education that is general, uniform, thorough, public, free and common. By its very language, the Legislature may not establish and maintain other educational systems outside of this single system.

In *Evans v. Andrus*, the Legislature attempted to create three boards of education to supervise public education in the state. 124 Idaho at 7–9, 855 P.2d at 468–470. The three boards consisted of two councils, one of which would govern higher education and the other would govern public schools, and the board of education would govern other educational institutions. *Id.* at 9, 855 P.2d at 470. The State Superintendent of Public Instruction asked this Court to declare the plan unconstitutional. *Id.* To determine whether the Legislature's plan was constitutional, this Court looked to the plain language of Article IX, section 2 of the Idaho Constitution which provides that "[t]he general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in *a* state board of education, the membership, powers and duties of which shall be prescribed by law." *Id.* at 10, 855 P.2d at 471 (quoting IDAHO CONST. art. IX, § 2). The Court concluded the three boards were unconstitutional because the use of the article "a" required a "single" board of education. *Id.*

Like *Andrus*, the plain language is clear that there is but one system of public schools to be established and maintained in the state. *See id.* at 11, 855 P.2d at 472. The Legislature has the duty to establish and maintain *a* system of schools. IDAHO CONST. art. IX, § 1 (emphasis added). Not multiple.

The Program is not simply a tax credit program whereby the state is forgoing income tax revenue. The Program is funded by a legislative appropriation of public funds raised from

taxpayers of the state and, to the extent a tax credit exceeds a taxpayer's state income tax liability, such funds are appropriated by the Legislature to be paid to recipients and used solely for nonpublic education expenses, the greatest of which is private school tuition and fees. By limiting qualified expenses to nonpublic education only, public funds will go directly to private schools, thereby causing the Legislature to maintain a system of education separate from the one required under Article IX, section 1 of the Idaho Constitution. As such HB 93 and the Program are unconstitutional.

To the extent that Article IX, section 1 could somehow permit the Legislature to maintain multiple systems of education, such education systems would still be required to comply with the limitations and standards set forth therein: such system would need to be general, uniform, thorough, public, free, and common. A plain reading of the Constitution makes clear that private education—especially private schools funded under the Program—do not meet several of these standards. This is particularly true where nonpublic schools receiving funds stemming from the Program are not subject to any state regulation over their provision of education and where they are not required to alter their "creed, practices, admissions policy, or curriculum in order to accept students whose payment of tuition or fees stems from a refundable tax credit . . . ." I.C. § 63-3029N(20). Thus, by the very language of HB 93, private schools receiving public funds stemming from the Program are not required to be (1) general, uniform or common in providing similar curriculum and academic expectations as public schools, (2) thorough in instructional quality or in levels of funding to provide environments that are conducive to learning, (3) public in being open to all students in the state or accountable to governmental regulators, or (4) free for students to attend without imposition of tuition or fees.

Finally for any such Program to pass constitutional muster, it would necessarily be subject to supervision and control by the State Board of Education, the constitutional body vested with "governance over all state educational systems and public schools" under Article IX, section 2 of the Idaho Constitution. *Ybarra*, 166 Idaho at 911, 466 P.3d at 430. However, HB 93 designates the Commission as the state agency tasked with implementing the Program—an agency plainly not intended to oversee public education in Idaho

2. *The Program Violates Article IX, Section I of the Idaho Constitution under Other Canons of Construction*.

While the plain language of the Idaho Constitution is paramount in determining the intent of the framers, the rules of statutory construction nevertheless apply. *See Planned Parenthood Great Nw.*, 171 Idaho at 407, 522 P.3d at 1165 (quoting *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181). "A constitutional provision 'is ambiguous where reasonable minds might differ or be uncertain as to its meaning.'" *Id.* at 407–08, 522 P.3d at 1165–66 (citation omitted). The 'best resource' for determining what meaning the framers intended to impart within sections that have remained unchanged since the constitution was ratified in 1889 is the compilation of the PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO (I. W. Hart ed., 1912) (hereinafter "Proceedings and Debates") from the Idaho constitutional convention of 1889. *Id.* Even if no debate occurred surrounding a particular constitutional provision, the framers' intent can also be examined "in light of the practices at common law and the statutes of Idaho" when that section was adopted and ratified by the people of Idaho. *Id.* at 408, 522 P.3d at 1166 (internal citations and quotations omitted).

Article IX, section 1 was adopted without debate. However, Idaho's constitutional framers gave not even the slightest hint that public money could ever be used to finance or support private education, and no such usage has been allowed in the 135 years since Idaho achieved statehood.

The framers also indicated a strong preference for using the publicly-financed school system to educate Idaho children. The Constitution they wrote provided in Article IX, section 9: "The legislature may require by law, that every child of sufficient mental and physical ability, shall attend the public school throughout the period between the ages of six and eighteen years, for a time equivalent to three years, unless educated by other means." In its first session in 1891, the Legislature enacted a compulsory attendance law, fleshing out those "other means." Section 39 of the school laws contained in the 1891 general laws provided an exemption from compulsory attendance for "children taught in a private school or at home in such branches as are taught in a primary school." 1891 Idaho Gen. Laws, SCHOOLS § 39, p.146. That definition obviously included religious schools, which were specifically denied public funding under Article IX, section 5. The compulsory education law was amended in 1963 to require parents to educate their children in "public, private or parochial school." 1963 Idaho Sess. Laws Ch. 13, § 25, p.33. In 1972, Idaho voters approved an amendment to Article IX, section 9, to read: "The legislature may require by law that every child shall attend the public schools of the state, throughout the period between the ages of six and eighteen years, unless educated by other means, as provided by law." Both the people and their elected representatives have thereby explicitly reaffirmed the framers' obvious intent to place public schools over every other means of education in the State of Idaho.

Application of the time-honored maxim, "*expressio unius est exclusio alterius,*" also supports this conclusion. The Court has recognized this rule of construction "which literally means 'to express or include one thing implies the exclusion of the other.'" *Smith v. Excel Fabrication, LLC*, 172 Idaho 725, 731, 535 P.3d 1098, 1104 (2023) (quoting *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019)). Previously, this Court has applied the *expressio unius* rule to constitutional provisions of limitation. *See Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006); *see also Clayton v. Barnes*, 52 Idaho 418, 16 P.2d 1056 (1932); *Shoshone Cnty. v. Profit*, 11 Idaho 763, 84 P. 712 (1906) (using *espressio unius* when interpreting art. XVIII, § 3 of the state constitution). When our constitution specifies certain things, it excludes the things not specified. *See Idaho Press Club*, 142 Idaho at 642–43, 132 P.3d at 399–400. Unlike the ability to close committee meetings, *id.*, the framers discussed funding of public education at length during the constitutional convention. Article IX, section 1 is not an enumeration of legislative power—it is an express limitation.

The framers understood that four types of schooling existed in the Idaho Territory as they labored at their task in Boise in 1889—public, private, parochial and home. *See* IDAHO CONST. art. IX, §§ 1, 5; *see also* 1891 Idaho Gen. Laws, SCHOOLS § 39, p.146. "Statements made by several of the delegates to the state constitutional convention during that body's discussion of the education article demonstrate that the delegates were greatly concerned with public education and felt the need to provide for a continuing system of public education for the children of the state." *Thompson v. Engleking*, 96 Idaho 793, 805, 537 P.2d 635, 647 (1975); PROCEEDINGS AND DEBATES 647 (I. W. Hart ed., 1912) (Mr. McCONNELL. . . . "I think no fund

is more sacred than the school fund, and perhaps there is no other fund so sacred; it should be guarded in every manner possible . . . .”). The framers chose to allow, indeed require, that only one type of education could be financed or otherwise supported with public money—public schooling. In enacting Article IX, section 1, the framers imposed a limitation on the Legislature’s power: the mandate given to the Legislature in maintaining a public school system in the state came with the express restriction on that mandate that such system be uniform, thorough, public, free and common. That undoubtedly disclosed the intent to exclude any establishment, financing or support of other types of schooling.

Additionally, “the legislature cannot do indirectly. . . what is impermissible for it to do directly.” *Williams v. State Legislature of State of Idaho*, 111 Idaho 156, 161, 722 P.2d 465, 470 (1986). Under this principle, “[t]he duty of the courts to declare void any statute which violates the Constitution is not limited to direct violations but extends to any evasion or indirection which may be practiced by the legislature.” *Robb v. Nielson*, 71 Idaho 222, 226, 229 P.2d 981, 983 (1951); *see also Vill. of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 348, 353 P.2d 767, 774 (1960) (“That which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition.”); *Atkinson v. Bd. of Comm’rs of Ada Cnty.*, 18 Idaho 282, 108 P. 1046, 1047 (1910) (“[I]t is our duty to look to the results an act will and is intended to accomplish, and determine whether those results will be violative of the Constitution.”). To the extent the Program being characterized as a “tax credit” program for parents rather than a direct subsidy to private schools could somehow make the expenditure of public funds on private education permissible, the foregoing principles would hold otherwise. As shown herein, the Program’s intent is to use public funds to subsidize, on a

dollar-for-dollar basis, private education where such private education is not subject to the requirements of Article IX, section 1. The Legislature would plainly be prohibited from directly funding private schools with appropriated public funds in order to offset tuition and fees. Likewise, the Legislature is prohibited from doing so indirectly by using parents as the middlemen, where the ultimate result is appropriated public funds being used to pay private school tuition and fees.

3. *The Program Provides Public Funds to Schools That Are Not Uniform, Thorough, Public, Free and Common.*

The actual meaning of terms such as "uniform," "thorough," and "free" has been addressed by the Court in several cases. In *Thompson v. Engelking*, the Court indicated that the Legislature's discretion regarding public education was limited, and that it must meet certain basic standards in providing for education. *See* 96 Idaho 793, 537 P.2d 635. The Court cited approvingly the Washington Supreme Court's definition of a "general and uniform system" of public education:

> A general and uniform system, we think, is, at the present time, one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.

Id. at 810 (quoting *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178, 202 (Wash. 1974)).

Nearly two decades after *Thompson*, the Court, in a series of school funding decisions (referred to herein as the "ISEEO cases") further defined the terms "uniform" and "thorough" in Article IX, section 1. These decisions (1) reaffirm the proposition that Article IX, section 1 does

require "uniformity in curriculum," and (2) hold that the state's funding system must provide for a baseline level of education. *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 579–83, 850 P.2d 724, 730–34 (1993) ("*ISEEO I*"). In a subsequent ruling in this series of cases, the Court found the state's method of funding school facilities unconstitutional, finding "overwhelming evidence" that school facilities were unsafe and that the state had failed to establish any funding system that could effectively address the shortcomings. *Idaho Sch. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 460, 129 P.3d 1199, 1209 (2005) ("*ISEEO V*"). Additionally, the Idaho Supreme Court has enforced Article IX, section 1's "free" mandate, finding that the provision limits the government's discretion in charging fees to students. *See Paulson v. Minidoka Cnty. Sch. Dist. No. 331,* 93 Idaho 469, 463 P.2d 935 (1970) (holding that school district could not withhold transcripts from students who failed to pay a $25 fee, which was designed to cover textbooks and extracurricular activities and assessed regardless of whether students actually participated in extracurriculars).

The clear import of the ISEEO cases is that the state cannot fulfill its duties under Article IX, section 1, through funding public schools that are not uniform in curriculum and that are not subject to any education standards. Yet the Program does just that, albeit through private schools. The Program requires instruction in certain core subjects, but explicitly prohibits any regulation of "curriculum," private school "practices," "the education of nonpublic school students," or "supervision over any nonpublic school." The Program also sets no minimum standard for school facilities, instructional programs or textbooks—anyone could set up a private school right now and seek new students in hopes of recipients supported by the Program enrolling their children.

Finally, the Program is not free, and participating private schools are not prohibited from raising tuition on tax credit recipients.

In other words, the schools funded by the Program need not be "uniform" or "thorough" or "free" and, in fact, the Program not only allows but *requires* the state to abdicate its constitutionally mandated role to exercise oversight for the education it is funding. This is not a system that "enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing" or ensures "access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education . . . ." *ISEEO I* at 730 (quoting *Northshore Sch. Dist. No. 417*, 530 P.2d at 202). The ISEEO Cases establish that Article IX, section 1 requires the state to take great care in setting up public schools, creating a regulatory scheme to ensure they are "uniform" and "thorough" and properly funded, because "[t]he 'thoroughness' of the system of public education affects the present and future quality of life of Idaho's citizens and its future leaders, its children." *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ*., 128 Idaho 276, 284, 912 P.2d 644, 652 (1996) ("*ISEEO II*").

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 funding public education. Instead, Petitioners contend that the express limitations and qualifications contained in Article IX, section 1 are a *constitutional bar* to the creation of the Program. The Legislature may not maintain and fund a school system that is inconsistent with these limitations and qualifications.

The plain language of Article IX, section 1 is clear. The Legislature must establish and maintain one school system that is uniform, thorough, public, free and common. The Legislature

may not establish or maintain an alternative system that fails to meet constitutional requirements. For over 130 years, our Legislature understood this. This Court should declare HB 93 unconstitutional and issue a writ of prohibition prohibiting the Commission from implementing or administering the Program.

B. HB 93 Violates the Public Purpose Doctrine Implicit in Idaho's Constitution.

The Idaho Constitution does not "specifically require that taxes shall be levied and collected by general laws for public purposes only." *Parsons*, 58 Idaho 787, ___, 80 P.2d at 22. But an appropriation for a private purpose is "inconsistent with the duty of maintenance of a republican form of government guaranteed by [the] State . . . Constitution. It is contrary to implied and express limitations of governmental power which is essential to all free governments." *Id.* (quoting *Hawks v. Bland*, 9 P.2d 720, 723 (Okla. 1932)). 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.* "To be sure, 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 (concluding that the acquisition of the University of Phoenix would violate the public purpose doctrine); *see also* I.C. § 63-3029N(2)(D) (restricting the program to "nonpublic" schools).

The origins of the public purpose doctrine are debated. Some have suggested that Article

VIII, sections 2 and 4, and Article XII, section 4, which prohibit loaning of the public credit, are the source of Idaho's public purpose doctrine. *See* Spencer W. Holm, Comment, *What's the Tiff About Tif?: An Incremental Approach to Improving the Perception, Awareness, and Effectiveness of Urban Renewal in Idaho*, 50 IDAHO L. REV. 273 (2014). When considering the origins of Article VIII, section 4 and Article XII, section 4, this Court noted that the framers of our constitution were "primarily concerned about private interests gaining advantage at the expense of the taxpayer." *Idaho Falls Consol. Hosps., Inc. v. Bingham Cnty. Bd. of Cnty. Comm'rs*, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982). Admittedly, the framers were concerned about railroads and other large businesses that imposed taxes on municipal residents. *See id.*; *see also* PROCEEDINGS AND DEBATES 597 (I. W. Hart ed., 1912). That said, the public purpose doctrine remains good law and is applicable here. Private interests—nonpublic schools—are the primary beneficiaries of the Program. Our constitution does not permit such a result.

Much of this Court's jurisprudence regarding the public purpose doctrine has concerned municipal bonds, but a few general principles can be discerned. First, the doctrine prevents the public's money from flowing to private parties as an outright gift. *See Fluharty v. Bd. of Comm'rs of Nez Perce Cnty.*, 29 Idaho 203, 158 P. 320, 321 (1916) (holding that donation to private enterprise violated art. XII, § 4), *superseded by statute as recognized in Bradbury v. City of Lewiston*, 172 Idaho 393, 410, 533 P.3d 606, 623 (2023). Second, it prevents conferring "favored status" on any "private enterprise or individual in the application of public funds." *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 883, 499 P.2d 575, 582 (1972).

Finally, and perhaps most importantly, it dictates that the primary purpose of spending tax revenue must serve public rather than private interests. *Kramer,* 97 Idaho at 558, 548 P.2d at 59.

HB 93 conflicts with the public purpose doctrine because private education is not a public purpose; even if it were, the how matters, and HB 93's funding mechanism primarily serves private rather than public purposes.

First, consider nonpublic education. The Legislature's categorization itself should serve as a clear indication that advancing nonpublic education serves a private purpose. I.C. § 63-3029N(2)(d). A public purpose (1) serves *the community as a whole* and (2) is *directly related* to the functions of government. *Id.* The Program cannot satisfy either prong of that test. As demonstrated by the many declarations attached to the Petition, private schools can discriminate in admissions based on religion, sexual orientation and gender identity, political affiliation, academic ability, and even disability status. Decl. of Stephanie Mickelsen ¶ 11; *see generally* Decls. of Kathleen Ross, Kristine Anderson, Sue Peterson. The Program places no restrictions on the discrimination nonpublic schools can engage in. I.C. § 63-3029N(20). 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)). In addition, the Program is not widely available to all parents of 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 all parents of school-aged children but is specifically limited to nonpublic schooling making the service to the "community as a whole" be instead limited to private school communities.

Additionally, it is not clear that private education is "directly related" to the functions of government. As demonstrated in Section V.A., *supra*, the Idaho Constitution prohibits the Legislature from subsidizing private education at the outset. That is to say, there is a clear separation between public education, funded by taxes, and other forms of education which have been clearly left outside of the regulation of and funding by the state, but for compulsory attendance requirements. *See* IDAHO CONST., art. IX § 9. Therefore, the novelty of the Program in light of our constitutional history and the tradition of funding only public schools provides a compelling rationale that private education is not "directly related" to the functions of government and that HB 93 does not advances a "public purpose," especially when considering the stringent requirements imposed on public schools to ensure uniform, thorough, public and free education.

Finally, the any "public purpose" the Program allegedly serves is undermined by the fact that there is little oversight on the teachings of the private schools. HB 93 redirects public funds to entities that are free to ignore innumerable state policies and laws applicable to public schools. 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. § 67-2346), 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. 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 Program funds. The fact that the Program spends public money on schools who are free to disregard other provisions of Idaho statutes further indicates that it does not serve a "public purpose."

Even if advancing nonpublic education served a public purpose, HB 93's funding mechanism, the "how," is imbued with private benefits. Recall that the Program distributes funds in two ways. First, it provides a refundable dollar-for-dollar tax credit that a parent can claim as reimbursement for qualifying expenses. I.C. §§ 63-3029N(3), (7). Second, it establishes an Advance Payment Fund that is to be "continuously appropriated" by the Legislature. I.C. § 67-1230(2)(b). The Program's no-strings-attached refundable, dollar-for-dollar tax credit coupled with the advance payment serve primarily private interests.

HB 93 directly funds nonpublic education through its Advance Payment Fund. In contrast to tax credits, which reimburse for tuition and other expenses, advance payments are given to the taxpayer *before the expense is incurred*. The State might as well write a check to the private institution. Tax credits fare no better. The Program indirectly funds those same schools because tax credits are essentially grants that incentivize certain behavior. *See Kosydar v. Wolman*, 353 F. Supp. 744, 763–64 (S.D. Ohio 1972), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901 (1973). Unlike a tax deduction, which reduces the taxpayer's gross income for the year, the Program's no-questions-asked tax credit essentially funnels state funds to private institutions. As demonstrated in other states, establishing a tax credit primarily benefits private schools, not parents, because schools generally raise tuition when they know a portion is paid for by the state government. *See* Ruby Topalian, *Private School Tuition Hikes Have Surged Since Oklahoma Tax*

Credit Began, THE OKLAHOMAN (Aug. 13, 2024, 11:29 AM), https://www.oklahoman.com/story/news/2024/08/13/oklahoma-private-school-tax-credit-tuition-increase-some-schools/74781756007/. One headmaster of a private school in Oklahoma specifically said that "[the tax credit] definitely played a factor" in the decision to increase tuition. *Id.* The Program's funding mechanism is comparable to a subsidy to private schools. The public purpose doctrine prevents such legislative misappropriation.

In sum, HB 93 violates the public purpose doctrine. Advancing private education does not serve a public purpose. And private education is not directly related to the functions of government. Additionally, even if education is a public purpose, HB 93's funding mechanism is essentially a grant that primarily benefits private schools, using parents as a vehicle for the delivery of the grant. This Court should issue a writ of prohibition preventing the Commission from implementing the unconstitutional Program.

C. Petitioners Are Entitled to Their Attorney Fees.

Pursuant to Idaho Appellate Rule 5(g), Petitioners request costs and attorney fees. Petitioners first request attorney fees under the private attorney general doctrine. To determine whether attorney fees are warranted, under the doctrine the Court considers three factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Reclaim Idaho*, 169 Idaho at 439, 497 P.3d at 193; *see also Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 545, 38 P.3d 121, 124 (2001).

This Court has previously explained that "the private attorney general doctrine is not available as the basis for an award of attorney fees in a case against a state agency." *Roe v. Harris*, 128 Idaho 569, 573, 917 P.2d 403, 407 (1996), *abrogated by Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999); *see also Arambarri v. Armstrong*, 152 Idaho 734, 274 P.3d 1249 (2012) (reinforcing *Roe*). Stare decisis instructs this Court to follow controlling precedent unless it is manifestly wrong, has proven to be unjust or unwise, or overruling the precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006). As set forth below, *Roe* was wrongly decided to the extent that it held that Idaho Code section 12-117 evidenced a legislative intent to make section 12-117 the exclusive basis for an award of attorney fees to a state agency. *Roe*, 128 Idaho at 573, 917 P.2d at 407. Additionally, overruling *Roe* is necessary to vindicate plain, obvious principles of the law and remedy continued injustice.

Roe was an attorney fee case. The plaintiffs succeeded at trial and requested attorney fees based on the private attorney general doctrine and Idaho Code section 12-117. *Id.* at 571, 917 P.2d at 405. The Court considered the history of the private attorney general doctrine and described the doctrine as "draw[ing] its viability from [Idaho Code section 12-121]." *Id.* at 572, 917 P.2d at 406. The *Roe* court then noted that when there is a conflict between two statutes, the later or more specific prevails. *Id.* Surprisingly, the Court did not look to the statutory language or the dates which the provisions were enacted. *Id.* Instead, it compared the private attorney general doctrine to Idaho Code section 12-117. *Id.* at 57273, 917 P.2d at 406–07. In doing so, the Court noted that

> the private attorney general doctrine considers the value of the prevailing party's contribution, while I.C. § 12–117 considers the character of the losing party's case. This difference evidences a legislative intent to make the standard of I.C. § 12–117 the basis for an attorney fee award against a state agency, rather than the tests encompassed under the private attorney general doctrine. This legislative intent causes us to rule that the private attorney general doctrine is not available as the basis for an award of attorney fees in a case against a state agency.

Id. at 573, 917 P.2d at 407. That analysis is wrong.

The private attorney general doctrine is rooted in Idaho Code section 12-121 which, at the time, provided for an award of attorney fees to the prevailing party. *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). Idaho Rule of Civil Procedure 54(e)(1) provided the familiar limitation that fees should only be awarded when cases were "defended frivolously, unreasonably, or without foundation." *Id.* The private attorney general doctrine is an exception to the "frivolous" limitation. *Id.* Thus, fees could be awarded even without finding the nonprevailing party defended unreasonably or without foundation, provided that the prevailing party vindicated a public policy or right of great societal significance. *Id.*; *see Roe*, 128 Idaho at 572, 917 P.2d at 406 ("[T]here does not appear to be any connection between the issuance of *Hellar* and the enactment of I.C. § 12–117 because *Hellar* involved an executive officer who would not even fall within the scope of I.C. § 12–117.").

In *Roe*, the Court had just discussed the canon of construction that when two statutes conflict, the later in time or more specific prevails. 128 Idaho at 572, 917 P.2d at 406. But the Court did not look to statutory language. Instead, it looked to the *purpose* of the private attorney general doctrine and the *conduct* addressed by Idaho Code section 12-117. But that is like comparing apples to oranges. It is not clear that section 12-117 was meant to be the exclusive basis for awarding attorney fees. In any event, the language of section 12-117 did not conflict

with section 12-121 such that only one statute could be complied with at a time. *See* Stephen L. Adams, *Which Statute Applies? An Update on Attorney Fee Statutes in Governmental Entity Cases*, THE ADVOCATE 26, 28 (June 2023). This Court should clarify that Idaho Code section 12-117 does not foreclose an award of attorney fees under the private attorney general doctrine against a state agency, provided the requirements of the private attorney general doctrine are met.

Overruling *Roe* is necessary to remedy continued injustice. As stated in *Roe*, the private attorney general doctrine looks to the value of the prevailing party's contribution. Section 12-117 looks to the "character of the losing party's case." *Roe*, 128 Idaho at 573, 917 P.2d at 407. Those two things are not in conflict. Public interest litigation, such as this action, often involves a group of petitioners seeking a writ of prohibition against a state agency, board, or commission to prevent implementation of unconstitutional legislation. *Coeur d'Alene Tribe*, 161 Idaho at 524, 387 P.3d at 777. And due to the state's political makeup, state officials generally defend state agencies and the legislature. *See id.* at 514, 387 P.3d at 767 (noting that "[n]either the members of the Senate, the Governor, nor the Secretary of State" appeared willing to challenge the Governor's or Senate's actions); *Reclaim Idaho*, 169 Idaho 406, 497 P.3d 160 (noting the Speaker of the House, the President Pro Tempore of the senate, and the legislature intervened on behalf of the Secretary of State). Thus, vindication of important public policies or constitutional rights falls upon public petitioners. Holding that the private attorney general doctrine is inapplicable in suits against state agencies, particularly in cases concerning a significant constitutional violation of an urgent nature requiring original jurisdiction by this Court, leaves compliance of constitutional provisions and protection of constitutional rights up to the whims of

state officials because of the significant cost of litigation barring those most affected from seeking relief.

At bottom, the Court should overrule *Roe* to the extent it held the private attorney general doctrine is inapplicable when a state agency is a party to the litigation. *Roe's* analysis is wrong. And the upshot of *Roe* is that attorney fees may only be awarded if the state agency acts frivolously. Many significant constitutional issues are unlikely to be challenged by a governmental entity. *See* I.C. § 12-117(4). Accordingly, attorney fees in even the most significant cases affecting the rights of all citizens in the state would be limited only to those cases that are deemed to be brought or defended without a reasonable basis in law or fact. As long as there is a reasonable argument to be made by a losing party for violating the constitution, then only those parties with (1) standing and (2) the means to pay the significant costs of litigation could vindicate those issues. I.C. § 12-117(1). When public petitioners are forced to sue to vindicate a constitutional right or significant public policy because our state officials will not, attorney fees should be available under the private attorney general doctrine. It is worth pointing out that the private attorney general doctrine considers the "strength or societal importance of the public policy vindicated by the litigation." Overruling *Roe* specifically as it relates to the private attorney general doctrine will not cause negative effects. Instead, it will only provide attorney fees to proper plaintiffs who are successful in vindicating a constitutional right.

Even if the Court declines to overrule Roe, this case is distinguishable from *Roe* and *Arambarri*. *Roe* concerned an IDAPA rule which provided that the Idaho Department of Health and Welfare would pay for abortions "only under the circumstances where the abortion is necessary to save the life of the mother." *Roe*, 128 Idaho at 571, 917 P.2d at 405. *Arambarri*

concerned the statutory authority to eliminate four regional director positions. *Arambarri*, 152 Idaho 734, 736, 274 P.3d 1249, 1251 (2012). Neither case concerned a facial constitutional challenge to recently enacted legislation as Petitioners bring here. The public policies sought to be vindicated by *Roe* and *Arambarri* are vastly different than the constitutional provision Petitioners seek to enforce here. The private attorney general doctrine should apply.

As a final note before turning to the merits of Petitioners' attorney fee request, Petitioners note that other parties are likely to intervene in this matter. The Legislature is entitled to and likely to intervene as it did in *Reclaim Idaho*. 169 Idaho 406, 497 P.3d 160; I.C. § 67-465 (providing a right of intervention); *see also Planned Parenthood Great Nw.*, 171 Idaho 384, 522 P.3d 1132 (legislature intervening to defend abortion laws). Even if the court leaves recent private attorney general doctrine jurisprudence untouched, Petitioners anticipate parties joining the litigation to whom section 12-117 does not apply. *See* I.C. § 12-117(6)(5) (citing I.C. § 67-5201) (excluding "legislative or judicial branches, executive officers listed in section 1, article IV of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution" from the definition of "agency"). Accordingly, Petitioners may be entitled to attorney fees under the private attorney doctrine regardless of the initial action.

This Court has awarded attorney fees under the private attorney general doctrine in prior cases involving significant constitutional issues. *Reclaim Idaho* concerned the people's "constitutional right to pass and repeal legislation." *Reclaim Idaho*, 169 Idaho at 440, 497 P.3d at 194. *Smith* involved the "right to cast a meaningful vote." *Smith*, 136 Idaho at 546, 38 P.3d at 125. The Court in *Smith* also clarified that an award of fees under the private attorney general

doctrine does not require "the unique fact finding ability of a trial court" to determine if fees are appropriate. *Id.* In both *Smith* and *Reclaim Idaho*, this Court awarded fees to petitioners under the private attorney general doctrine because they vigorously pursued the vindication of constitutional rights which benefited a large number of Idaho citizens. *See id.*; *Reclaim Idaho*, 169 Idaho at 440, 497 P.3d at 194.

Attorney fees should likewise be awarded here. The issues involved in the present litigation are of the utmost importance. There are few things more important than public education and the quantity and methods of funding public education. The framers of our state's constitution thought so too. And although the burden on Petitioners is great, instituting the present action is a matter of necessity. No one from the public sector has stepped up to challenge HB 93, and the Idaho Attorney General has expressly declined to take action despite demand by certain Petitioners. *See* Decl. of Daniel E. Mooney ¶¶ 16–17. And all citizens stand to benefit from this Court's favorable decision. Upholding the constitution is "vital to the public interest" of all Idahoans. *See Reclaim Idaho*, 169 Idaho at 440, 497 P.3d at 194. Attorney fees should be awarded to Petitioners under the private attorney general doctrine.

In the alternative, Petitioners request attorney fees pursuant to Idaho Code section 12-117(1). That provision provides that "in any proceeding involving as adverse parties a state agency or a political subdivision and a person . . . the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." I.C. 12-117(1). Matters of first impression are not given a free pass to bring unreasonable arguments. *Ada Cnty. v. Browning*, 168 Idaho 856, 861, 489 P.3d 443, 448 (2021).

Petitioners assert that HB 93 is plainly unconstitutional and enacted without a reasonable basis in law. Attorney fees should be awarded.

Petitioners are also entitled to attorney fees under Idaho Code section 12-121. This Court previously held that seeking a writ of prohibition against the State Tax Commission is "in effect an action against the State of Idaho." *Chastain's, Inc. v. State Tax Comm'n*, 72 Idaho 344, 350, 241 P.2d 167, 170 (1952). Writs of prohibition are frequently used against public officers, boards, and commissions of the state. *Coeur d'Alene Tribe*, 161 Idaho at 525, 387 P.3d at 778 (collecting cases). The suit against the Commission is essentially a suit against the state itself, and Idaho Code section 12-121 applies. *Id.*

This Court noted in *Hellar* that an award of fees under section 12-121 was a two-step process. *Hellar*, 106 Idaho at 578, 682 P.2d at 531. First, a court had to determine whether fees were warranted and second, it had to determine if the "[Idaho Rule of Civil Procedure] 54(e)(1) limitation restricting the award to those cases which are 'defended frivolously, unreasonably, or without foundation'" applied. *Id.* This Court held that the Rule 54(e)(1) limitation "does not apply" when fees are awarded under the private attorney general doctrine. *Id.* The fact that Rule 54(e)(1) has been absorbed by Idaho Code section 12-121 should not change this result. *See* 2017 Idaho Sess. Laws Ch. 47, §§1–2, p.75 (amending section 12-121 to contain a "frivolous" clause after this Court's decision in *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016); "[I]t is the Legislature's intent that this legislation be construed in harmony with Idaho Supreme Court decisions on attorney's fees that were issued before *Hoffer*."). An award of attorney fees pursuant to the private attorney general doctrine does not require a finding that the nonprevailing

party acted frivolously. Accordingly, Petitioners are entitled to attorney fees under Idaho Code section 12-121.

Idaho Code section 12-117(4) provides that in a suit in which governmental entities are adverse parties, the prevailing party shall be awarded attorney fees. Therefore, Moscow School District requests reasonable attorney fees pursuant to Idaho Code section 12-117(4).

VI. CONCLUSION

For the foregoing reasons, HB 93 should be declared unconstitutional and the Commission should be prohibited from implementing the Program. The Program is in direct violation of the Idaho Constitution by publicly funding and maintaining a separate system of education from the single public school system required by Article IX, section 1, particularly where the private system is not uniform, thorough, public, free or common. The Program uses appropriated public funds for private purposes that are neither for the benefit of the community as a whole nor directly related to the functions of government. Given the significant constitutional violation and the urgent need for resolution demonstrated herein, Petitioners ask that the Court exercise its original jurisdiction and issue a writ of prohibition forbidding the Commission from implementation of the Program due to the unconstitutionality of HB 93.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served a true copy of the foregoing PETITIONERS' BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF PROHIBITION by filing through the Court's e-filing and serve system, and addressed to each of the following:

Idaho Attorney General
700 W. Jefferson Street, Suite 210
Boise, ID 83720
aglabrador@ag.idaho.gov

Dated: September 17, 2025

/s/ Marvin M. Smith
Marvin M. Smith, ISB No. 2236