No. 20250512-SC

Supreme Court of the State of Utah

Derek Brown, Attorney General, et al.,
Defendants-Appellants,

and

Maria Ruiz, et al.,
Intervenor-Defendants-Appellants,

v.

Kevin Labresh, et al.,
Plaintiffs-Appellees.

State Appellants' Opening Brief

On interlocutory appeal from Third Judicial District Court
No. 240904193, Honorable Laura S. Scott

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Parties to the district court proceedings:

ACE Scholarships
Alliance for Choice in Education
Lt. Gov. Deidre Henderson
Rep. Mike Schultz
Sen. J. Stuart Adams
Utah State Legislature

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Introduction

This case arises from Plaintiffs' challenges to the constitutionality of the Utah Fits All Scholarship Program (UFASP or Program). UFASP provides scholarships for qualifying children to use for authorized educational opportunities separate from Utah's public education system. So children attending a state public school are not eligible for UFASP scholarships. A private third-party administrator operates the Program, which is funded by state income tax revenue.

The district court granted summary judgment on Plaintiffs' state constitutional challenges. The court ruled, in relevant part, that (1) article X impliedly prohibits the legislature from creating any educational programs or benefits separate from the state public education system, and (2) the Program does not "support children" for purposes of article XIII and cannot be funded by income tax revenues.

Both conclusions are wrong and raise important issues about proper constitutional interpretation methodology. On Plaintiffs' first claim, the district court announced that the legislature's constitutional duty to maintain a public education system somehow implied that the legislature lacked authority to do anything to advance the educational needs of Utah's children separate from that system. That gets things backwards: the state legislature possesses plenary authority to act on any subject, including

education, unless expressly or by necessary implication limited by the constitution. And the district court never explained why the legislature cannot both maintain public education and create additional non-public educational programs.

On the second claim, the district court acknowledged the straightforward meaning of "to support children," which was added in 2020 to article XIII as another allowable use for income tax revenue. But under the guise of original public meaning analysis, the court rewrote the constitutional text to mean something else based on the court's view of legislative history, a voter guide, and a few news reports. This subverts the point of a written constitution and the whole reason behind textualist/originalist interpretation. The text controls because that's the only thing the people ratified as part of our state charter. Under the district court's approach, plain constitutional text is simply a springboard to swim around in murky background materials grasping about for other potential purposes or meanings.

The Court should reverse the district court's rulings and clarify as needed correct textualist/originalist methodology.

Statement of the Issues

1. Whether the Utah Constitution, article X, prohibits the Utah State Legislature from enacting an education-related scholarship program separate from the state public education system?

2. Whether the Program "support[s] children" under Utah Constitution article XIII, section 5.

Preservation: The State argued these issues in its motion to dismiss, R. 550-575, and opposition to Plaintiffs' summary judgment motion, R. 1202-17. And the district court addressed them. R. 2198-2257.

Standard of review: The Court reviews constitutional interpretation issues for correctness, affording no deference to the district court. *Richards v. Cox*, 2019 UT 57, ¶ 7, 450 P.3d 1074. And state statutes are presumed to be constitutional with any reasonable doubts resolved in favor of constitutionality. *Id.* ¶ 39.

Statement of the Case

The Utah Fits All Scholarship Program

The Utah Legislature enacted UFASP in 2023. 2023 Utah Laws 1-21. The Program provides a few thousand dollars for a limited number of children who seek educational opportunities outside of Utah's public education system. Utah Code § 53F-6-402(2)(c). To be eligible, a child cannot be "enrolled in the public education system." *Id.* § 53F-6-406(5)(a); *see also id.*

§ 53F-6-401(8) (defining "eligible student"); *id.* § 53E-1-102(7) (defining "LEA" for purposes of Title 53F). The scholarship funds may be used for a variety of educational expenses. *Id.* § 53F-6-401(20).

Similarly, the statute creating the UFASP does not impose public-education-system requirements on those providing educational services to scholarship recipients. *Id.* § 53F-6-406(1)-(3). In fact, a "qualifying provider," *i.e.,* a non-public school or other educational provider that meets the qualifications to receive funds provided under the Program, "has a right to maximum freedom from unlawful governmental control in providing for the educational needs of a scholarship student who attends or engages with the qualifying provider." Utah Code § 53F-6-406(2)(a).

The Program started for the 2024-2025 academic year. For its first year, the legislature appropriated $42.5 million of state income tax revenues to fund the Program. 2023 Utah Laws 21. For the 2025-2026 academic year, the legislature appropriated an additional $40 million per year. Pub. Educ. Budget Amends., S.B. 2, item 21, line 880, 2024 Gen. Sess., SB0002. By comparison, public education system funding amounted to more than $8.5 billion for the 2025-26 fiscal year. *See* Utah State Legislature, Compendium of Budget Information, Fiscal Year 2025-26 (COBI FY2025-26).[1] That means

[1] https://cobi.utah.gov/2025/1/overview.

legislatively allocated funds for UFASP have been less than 1% of the overall budget provided for the public education system. Whatever the funding source for UFASP may be, no facts suggest the Program siphons money that would otherwise be allocated to the public education system for any given year.

Because UFASP is not designated as a part of the State's public education system, the legislature did not place the program under the control of the Utah State Board of Education. Rather, the board merely chooses a manager for the Program and then ensures the manager complies with its management contract. Utah Code § 53F-6-404(2)-(3). The board may not impose any restrictions or mandates on the program manager about instructional content or curriculum within the Program. *Id.* § 53F-6-404(7).

In connection with enacting UFASP, the legislature appropriated money for public school teacher salary increases. 2023 Utah Laws 3; Utah Code § 53F-2-405(4)(a) (2024). These raises partially hinge on whether the Program is funded and in effect: during UFASP's first year, full-time educators received salary increases of $8,400 if the program was funded and in effect, and $4,200 if the program was not funded and in effect. 2023 Utah Laws 3. For the Program's second year, the salary increases are $10,350 and $5,175, respectively. Utah Code § 53F-2-405(4)(a).

Plaintiffs file suit

Plaintiffs (the Utah Education Association and several individuals) filed suit claiming, in relevant part, that UFASP violates the Utah constitution in two ways: (1) establishing a program within the public education system that is not free or open to all Utah children as required by articles III and X; and (2) using income tax revenue to fund the private UFASP manager, private schools, and other nonpublic educational service providers contrary to article XIII. R. 22-26.[2] Plaintiffs requested that UFASP be declared unconstitutional and enjoined from further operation. R. 27.

State Defendants and Intervenor Defendants filed separate motions to dismiss. R. 505-75. And the Plaintiffs filed a motion for summary judgment. R. 628-794. All motions were fully briefed and argued. Order at 1.

The district court concludes UFASP is unconstitutional

In April 2025, the district court granted summary judgment to Plaintiffs on their first two claims (while denying Defendants' motions to dismiss those claims). Ruling and Order Re: Defendants' Motions to Dismiss

[2] Plaintiffs asserted UFASP violated the constitution in two additional ways: (1) authorizing a private entity to control and operate a public education program without state board of education regulation in violation of article X; and (2) delegating provision of public education to private entities exempt from any fiscal oversight or quality control in violation of articles I and VI. R. 22-26. But the district court rejected these claims, R. 2370-78, and they are not part of this interlocutory appeal.

and Plaintiffs' Motion for Summary Judgment (Order) at 57 (Addendum hereto). On the first claim, the court reasoned that under article X the legislature lacks the "plenary authority to create a publicly funded education program outside of the public education system that is neither 'open to all the children of the Utah' nor 'free.'" Order at 34. The court's holding largely hinges on its view of implied constitutional limits—a requirement to do one thing means the legislature can't do any other related things, Order at 32-34, and its reading of *Utah School Boards Association v. Utah State Board of Education*, 2001 UT 2, 17 P.3d 1125. *See, e.g.,* Order at 25, 34.

On the second claim, the district court ruled that UFASP violates article XIII, which requires income tax revenue be used "to support the systems of public education and higher education" and "to support children and to support individuals with a disability." Order at 38 (quoting Utah Const. art. XIII, § 5(5)). The district court concluded that UFASP does not "support children" because it "is neither a social services program nor a program limited to supporting children with disabilities." Order at 57. The court based its definition of "to support children" not on the phrase's ordinary, plain meaning but on the court's view of extrinsic materials like legislative history, a voter information guide, and some news articles. Order at 40-53.

Beyond declaring UFASP unconstitutional, the court didn't order any remedies like enjoining the Program's ongoing operation. Order at 57.

State Defendants and the Intervenor Defendants both timely filed petitions for permission to appeal an interlocutory order from the district court's April 2025 ruling resolving the Plaintiffs' first and second claims. R. 2379-83. The Court granted the petitions and consolidated the cases. R. 2391-92.

Summary of the Argument

The district court erred in holding that article X impliedly prohibits the legislature from creating UFASP, and that UFASP cannot be funded by income tax revenues because the Program does not "support children" under article XIII. This Court should reverse.

I. The district court wrongly determined the legislature's power was limited for two reasons. First, it read this Court's decision in *Utah School Boards Association* to prohibit the legislature from creating non-public school education programs. But the language the district court relies upon is dicta at best. And even if it's not dicta, the language does not support the district court's sweeping prohibition.

Second, the district court reasoned that the constitution's mandate in article X to provide for and maintain a public school system impliedly limits the legislature from creating any educational programs outside the public

system. That gets things backwards. It is well settled that Utah's constitution is one of limit, not grant. So the legislature has plenary power to act on any subject unless expressly or by necessary implication limited by the constitution. The legislature can provide for establishing and maintaining public schools on one hand, while pursuing policies to support education outside the public school system on the other hand. The district court offers no legal or practical reason why the legislature cannot simultaneously pursue these separate educational endeavors. The weight of authority from sister state high courts confirms state legislative power to establish education programs outside public school systems. The district court erred in concluding otherwise.

II. Article XIII was amended in 2020 to allow state income tax revenue to be used "to support children and to support individuals with disabilities." There is no reasonable dispute that UFASP "support[s] children" under any objective ordinary meaning of that phrase. But the district court said it was not constrained by the ordinary meaning of plain constitutional text. Instead, the district court thought it was compelled to review extrinsic materials like legislative history, a voter guide, and some public commentary to determine the plain text's original public meaning. Based on that review, the court rewrote "to support children" to mean to support "[then] existing social services programs that support children as

well as other programs that support children with disabilities." That was wrong. Properly understood both in its textualist and democratic government underpinnings, original public meaning analysis does not require courts to go beyond five-year-old plain text's objective ordinary meaning. Indeed, doing so subverts textualist principles and the allocation of powers under our constitutional republic form of government.

And even if reviewing extrinsic materials to explore some other potential textual purpose or meaning were appropriate in this case—which it is not—the materials the district court reviewed do not override the plain text's ordinary meaning.

Argument

I. The legislature has plenary authority to enact UFASP.

The district court wrongly concluded that the legislature lacks plenary authority to "create publicly funded education program [like UFASP] outside the public education system that is neither 'open to all the children of Utah' nor 'free.'" Order at 34. That's because, the court concluded, article X sets a ceiling or limit on what the legislature can do related to education, rather than a floor or minimum as to what the legislature at least must do. Order at 32-34. That gets things backwards based on the lower court's misapplication of constitutional principles and misreading of this Court's case law.

A. The legislature may legislate on any topic not limited by the constitution.

All political power derives from the people. Utah Const. art. I, § 2 ("All political power is inherent in the people; and all free governments are founded on their authority . . . ."). And the people can allocate that power between or "'delegate it to representative instruments which they create.'" *Carter v. Lehi City*, 2012 UT 2, ¶¶ 21, 30, 269 P.3d 141 (quoting *City of Eastlake v. Forest City Enters.,* 426 U.S. 668, 672 (1976)). The people of Utah, acting through the Utah Constitution, created "The Legislature of the State of Utah" and vested it with the "Legislative power of the State." Utah Const. art. VI, § 1 (1896).[3]

The original public meaning of legislative power defies any "clear, bright line[]" formulation. *Carter*, 2012 UT 2, ¶ 35 (recognizing "the difficulty of delineating the legislative power with clear, bright lines"); *see also id.* ¶ 32 (noting that "[i]t may not be possible to mark the precise boundaries of [legislative] power with bright lines"). The Court nonetheless has described the "essential hallmarks" of that power. *Id.* ¶ 32. And, at least as it pertains

[3] Article VI, section 1 was later amended to also vest "the people" with the "Legislative power" to initiate or refer legislation. Utah Const. art. VI, § 1(1).

to enacting legislation,[4] the legislative power encompasses making generally applicable rules based on broad policy considerations. *Id.* ¶¶ 36-38 & n.25 (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 109-10 (The Lawbook Exchange, Ltd., 5th prtg., 1998) (Boston: Little, Brown, & Co., 5th ed., 1883) (defining legislative power as the power to make general rules for the government of society, which are "predetermination[s] of what the law shall be for the regulation of all future cases falling under [their] provisions")). There's no debate that UFASP is an exercise of legislative power under that definition—it's a generally applicable law based on broad policy considerations.

Beyond outlining the contours of legislative acts, the Court and commentators have consistently recognized that this legislative power is plenary—the legislature may legislate "upon any subject as to which there is no constitutional restraint, or as to which the paramount law does not speak." *State ex rel. Nichols v. Cherry*, 60 P. 1103, 1103 (Utah 1900); *see also*

[4] Legislative power includes more than enacting legislation, *Proulx v. Salt Lake City Recorder*, 2013 UT 2, ¶ 17 n.2, 297 P.3d 573, but those additional powers are not at issue in this case.

Cooley, *Const. Limitations* at 105-06 (Little, Brown, and Co., 5th ed. 1883)[5] ("In creating a legislative department and conferring upon it the legislative power, the people . . . conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restriction as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States.").

This expansive understanding of state legislative power predated statehood. *See, e.g.,* Cooley, *Const. Limitations* at 105-06, 173-74); *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 312 (Ill. 1895) ("no proposition is better settled than that a state constitution is a limitation upon the powers of the legislature, and not a grant of power, and that the legislature possesses every power not delegated to some other department or to the federal government, or denied to it by the constitution of the state or of the United States" (citing cases)). And it permeates the Court's precedents over the ensuing decades. *See, e.g., Kimball v. City of Grantsville City*, 57 P. 1, 4–5 (Utah 1899) ("The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil

[5] Available at https://books.google.com/books?id=2uQ9AAAAIAAJ&pg=PA439&source=gbs_toc_r&cad=3#v=onepage&q&f=false.

government. Therefore, in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government."); *Tribune Rep. Printing Co. v. Homer,* 169 P. 170, 172 (Utah 1917) ("[I]t must be remembered that matters of public policy are clearly within the province of the Legislature. The Legislature has power to determine what [state policy] shall be, and in the exercise of this power it is limited only by the state and federal Constitutions."); *State ex rel. Stain v. Christensen*, 35 P.2d 775, 780 (Utah 1934) ("It is the established doctrine in this and other jurisdictions that the whole lawmaking power is committed to the Legislature except such as is expressly or impliedly withheld by our Federal and State Constitutions."); *State v. Mason*, 78 P.2d 920, 925 (Utah 1938) ("The Legislature has every power which has not been fully granted to the Federal Government or which is not prohibited by the State Constitution."); *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 18, 144 P.3d 1109 ("At the time of statehood, the State of Utah committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution." (internal quotation marks omitted)).

In other words, unlike the default rule of the federal constitution—Congress may exercise only enumerated powers—Utah's default constitutional rule is that the state legislature may exercise any legislative power unless the constitution forbids it. *Spence v. Utah State Agric. Coll.*, 225

P.2d 18, 23 (Utah 1950) (The "state is committed" to the "doctrine firmly established in the laws of most jurisdictions . . . that a state constitution is in no manner a grant of power, it operates solely as a limitation on the legislature, and an act of that body is legal when the constitution contains no prohibition against it"); *see also Salt Lake City v. Christensen Co.*, 95 P. 523, 525 (Utah 1908) ("It is too well settled to require more than passing mention that state Constitutions are mere limitations and not grants of powers."); *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955) (noting "well recognized principle that in state governments, the legislature being the representatives of the people, wherein lies the residuum of governmental power, constitutional provisions are limitations, rather than grants of power"); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation" (internal quotation marks omitted)).

Utah's constitutional framers were fully aware of these principles while drafting the State's charter. During the convention, the delegates:

> Resolved, as the sense of this convention, that the Constitution shall contain only the general plan and fundamental principles of the State government *together with such limitations* of power thereof as may be deemed wise and expedient for the preservation of civil, political and religious liberty.
>
> Resolved further, that matters *purely of a legislative character, not intended as necessary limitations of power,* should not be inserted in the constitution, but left to the Legislature, acting within its constitutional powers.

1 *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895, to Adopt a Constitution for the State of Utah* 212-13 (Star Printing Co. 1898) (emphasis added) [hereinafter *Official Report*].

The resulting constitution shows the delegates put the principle in action. After vesting the legislature with "Legislative power," article VI prohibited the legislature from enacting certain "private or special" laws, Utah Const. art. VI, § 26 (1896), releasing state or municipal debts, *id.* § 27, authorizing gambling, *id.* § 28, delegating certain powers, *id.* § 29, granting extra payments to officials or contractors, *id.* § 30, or lending its credit, *id.* § 31. The declaration of rights also prohibits the legislature from passing certain legislation, including bills of attainder, ex post facto laws, and laws impairing contractual obligations. *Id.* art. I, § 18 (1896 and current).

After finishing their task, the delegates reiterated to the people of Utah that the constitution's legislative article "permit[ed] future lawmakers to perform any needed thing, [while] circumscrib[ing] their powers in a way to prevent either extravagance or the misuse of legislative authority." 2 *Official Report* at 1836.

So it was well understood in mid-1890's Utah—by courts, commentators, the framers, and the people—that "[w]hat the Constitution does not prohibit the Legislature may do." *Scott v. Salt Lake Cty.*, 196 P.

1022, 1024 (Utah 1921). That's why this Court has long recognized that "[b]efore an act of the Legislature can be held unconstitutional it must be clear and free from doubt that it contravenes some provision of the Constitution." *Id.*

Education-related laws are no exception. If the legislature is "restricted in educational as well as [any] other matters, it is imperative that the Legislature be restricted expressly or by necessary implication by the Constitution itself." *Univ. of Utah v. Bd. of Exam'rs of State of Utah*, 295 P.2d 348, 360 (Utah 1956). In other words, the Court must "presume that the legislature possesses plenary authority" to enact UFASP "unless a constitutional provision provides to the contrary." *Shurtleff*, 2006 UT 51, ¶ 31.

B. The constitution's education provisions do not limit the legislature's authority to enact UFASP.

The Utah constitution's education provisions impose no express or necessarily implied limitations prohibiting UFASP. The constitution mandates only that "[t]he Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control." Utah Const. art. III, ord. 4. The education article then provides a few public school system requirements: "The Legislature shall provide for the establishment and

maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control." Utah Const. art. X, § 1. And "[t]he public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate. . . . [And] [p]ublic elementary and secondary schools shall be free . . . ." Utah Const. art. X, § 2.

The legislature is already meeting its constitutional mandate to provide a free public education system devoid of sectarian control and open to all children. *See, e.g.,* Utah Code, Titles 53E, 53F. Plaintiffs do not argue, and the district court did not conclude, otherwise. Order at 32.

Indeed, the lower court recognized that Plaintiffs' article X claim fails as a matter of law if the educational provisions set a floor rather than a ceiling on legislative power. *Id.* Still, the court concluded article X limits the legislature's power even though nothing in the text expressly or impliedly says so. That incorrect reading flowed from two mistakes: misreading caselaw and inventing an implied constitutional limit.

C. This Court's precedent does not prohibit UFASP.

First, the district court repeatedly and primarily relied on a statement from *Utah School Boards* to conclude the legislature lacked authority to create UFASP. Order at 34 (stating this Court has "explicit[ly] reject[ed] . . .

the idea that the legislature could use its plenary authority to establish schools and programs that are not open to all the children of Utah or free from sectarian control" (internal quotation marks omitted)); *see also id.* at 25, 33.

The district court quoted this language:

> The legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. This includes any other schools and programs the legislature may designate to be included in the system. However, its authority is not unlimited. The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control, and it cannot establish public elementary and secondary schools that are not free of charge, for such would be a violation of articles III and X of the Utah Constitution.

Utah Sch. Boards Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶ 14, 17 P.3d 1125.

But that language doesn't carry the weight the district court placed on it. For one, it's dicta—particularly the last two sentences—because those comments are "completely unnecessary to the court's holding." *State v. Hummel*, 2017 UT 19, ¶ 74, 393 P.3d 314. The actual issue the Court resolved focused on the legislature's authority to make the state school board supervise newly created charter schools as part of the board's "'general control and supervision of the public education system.'" *Utah Sch. Bds.*, 2001 UT 2, ¶ 4 (quoting Utah Const. art. X, § 3). As the Court put it, "the

essential question before" the Court was "whether the legislature had authority to pass the Act giving the State Board the designated supervisory powers" over the charter schools. *Utah Sch. Bds.*, 2001 UT 2, ¶ 10.

In resolving that issue, the appellant's argument and the Court's analysis focused on the meaning of the state board's "general control and supervision of the public education system" found in article X, section 3. *Id.* ¶¶ 15-23. After interpreting that phrase, the Court held that "Article X, section 3 of the Utah Constitution does not prohibit the legislature from authorizing the State Board to exercise the control and supervision provided in the [charter school] Act." *Id.* ¶ 23. The Court was not addressing or resolving the legislature's plenary authority to create educational programs separate from the public education program under article X, section 1-2. So the Court's comments that the district court cites are unnecessary dicta to *Utah School Board's* actual issue and holding.

And, even if the Court's observations upon which the district court relied were not dicta, the lower court misinterpreted them. If anything, this Court's statements recognize that the legislature "*may designate*" "other schools and programs" to be part of the public school system. *Utah Sch. Bds.*, 2001 UT 2, ¶ 14 (emphasis added). Indeed, the Court concluded that the state school board has been "vested with the authority to direct and manage all aspects of the public education system in accordance" with state law,

including "laws regarding any other schools and programs that the legislature *designates* as part of the public education system." *Id.* ¶ 22. (emphasis added)). And if the legislature can designate other schools or programs to be part of the public education system, it necessarily follows that the legislature can designate programs—like UFASP—to be outside the system too. Otherwise—if any education program were automatically and necessarily part of the public school system as the district court says—there'd be no need for the legislature to make any designations placing those "other schools and programs" within the system.

This reading of *Utah School Boards*—allowing for legislative designations in or out of the public school system—also has the virtue of consistency with the Utah Constitution's command that "[t]he public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature *may designate*." Utah Const. art. X, § 1 (emphasis added).[6]

[6] The district court said the phrase "may designate"—added to the constitution in 1986—did not grant the legislature any authority it did not already have. Order at 21-23. But the added language didn't need to. The legislature already had plenary authority over educational programs and policies absent constitutional limits. If anything, the "may designate" phrase simply reenforces the legislature's plenary discretion. *See* Intervenor-Defendants Appellants' Br. at 14-17.

D. The constitutional mandate to create a public school system does not limit the legislature's authority to also create UFASP.

Second, besides mis-relying on *Utah School Boards*, the district court reasoned that article X's mandate to create a public education system combined with the absence of any general duty to provide for Utahn's education or intellectual improvement "impliedly restricts the legislature from creating a publicly funded school or education program outside of the public school system." Order at 34.

That cannot be right. It directly conflicts with the well-settled bedrock principle discussed above that the State's constitution does not have to expressly grant legislative power. *See, e.g., Tintic Stand. Mining Co. v. Utah Cnty.*, 15 P.2d 633, 636 (Utah 1932) ("It is not necessary that we look to the Constitution for a grant of power to the Legislature, but it is sufficient if there is no prohibition in express words or by clear implication against what the Legislature has attempted to do."). That power exists already unless limited by the constitution. *See, e.g., Kimball*, 57 P. at 4–5 (the legislature "has plenary power for all purposes of civil government [and,] in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government").

To say—as the district court does—that the constitution's silence about a specific authority to create other education programs outside the public

system means the legislature lacks that authority turns the state constitution on its head along with decades of precedent dating back to the founding era. *See supra* section I.A.

The district court merely recites the constitution's mandates to create a free public education system devoid of sectarian control and supervised by an elected board of education. Order at 33. But the court never explains how that duty—with or without any grant of additional education authority—"expressly or by necessary implication," *Bd. of Examiners*, 295 P.2d at 360, restricts the legislature's plenary authority to create additional educational programs outside the public education system. The court simply announces an implied limit. Order at 34. But no legal or factual reason exists, much less a necessary implication, showing why the legislature cannot maintain both a public education system and a separate scholarship program. There is no inherent conflict between the two. *Cf. State Bd. of Educ. v. State Bd. of Higher Educ.*, 505 P.2d 1193, 1195 (Utah 1973) (holding constitution's vesting in State Board of Education "the general control and supervision of the Public School System," which then included a university and agricultural college "and such other schools as the legislature may establish," did not prevent legislature from creating a Board of Higher Education to govern universities and colleges because the legislature's authority to establish other schools "would have the power to provide for their governance"); *id.* at 1196

(Ellett, J., concurring in result) (upholding creation of Board of Higher Education because there was no actual conflict of authority with the Board of Education and one may never arise); *id.* at 1197 (Crockett, J., concurring) (stating reasonable basis to believe and assume that the Board of Higher Education can function "without there arising any conflict with the State Board of Education").

Article X's requirements give some direction and limits about the legislature's authority to create and maintain a public education system. It is a constitutional floor, not a ceiling. And there is no question that the legislature is satisfying those minimum public education requirements—with $8.5 billion in current funding. *See* COBI FY2025-26 *supra*. Having complied with the public education mandate, the constitution does not prohibit the legislature from doing more to benefit students educationally outside the public school system.

The district court suggested in a footnote that its conclusion was also supported by the negative-implication canon, *expressio unius est exclusio alterius*. Order at 34 n.51. But, again, the court does not explain how. And that's especially problematic because the maxim is so context-dependent, *see Nevares v. M.L.S.*, 2015 UT 34, ¶ 31 n.2, 345 P.3d 719 and should be applied cautiously to state constitutional provisions. *State v. Beaver*, 887 S.E.2d 610, 627 (W.V. 2022) (recognizing several state supreme courts "have determined

that *expressio unius* should be applied sparingly when construing a state constitutional provision" and citing cases).

This Court explained that "the maxim appropriately applies 'only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the statute.'" *Monson v. Carver*, 928 P.2d 1017, 1025 (Utah 1996) (quoting *Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 924 (Utah 1993)). Or, as the U.S. Supreme Court put it, "[t]he canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

Again, with no attempted explanation, it's hard to know why the district court thought this canon helped. To the extent the court relied on the same *ipse dixit* as it did for its holding finding an implied limit, that again fails for the reasons explained above. The court never identifies, because there is none, any legal or factual reason the State cannot maintain both a public education system and UFASP. The existence of one does not necessarily impede the other. *See, e.g., Meredith v. Pence*, 984 N.E.2d 1213, 1224 (Ind. 2013). And, especially in context of state constitutions being limits,

not grants, on legislative power, the district court fails to identify any natural association of ideas or two or more things that should go hand in hand in article X that necessarily imply a lack of legislative authority to pursue educational policies and programs in addition to the public education system. *See, e.g., Beaver*, 887 S.E.2d at 627 (determining the West Virginia "free schools" clause "does not contain any negative or restrictive language, nor does it contain 'a series of two or more terms or things that should be understood to go hand in hand'" (quoting *Chevron*, 536 U.S. at 81)).

Plus, this Court has long recognized that "where there is a particular reason or a necessity for mentioning one thing and none for mentioning another, the expression of the former will not exclude the latter." *State v. Norman*, 52 P. 986, 991 (Utah 1898), *error on other grounds recognized by Puerto Rico v. Shell Co.*, 302 U.S. 253, 267 (1937). Here, the Utah Enabling Act required Utah's constitution to provide free, non-sectarian public schools. Utah Enabling Act, § 3, cl. 4. The Enabling Act did not require the constitution to outline other education-related programs or policies the legislature could enact under its plenary authority.[7] These facts further show

[7] In fact, Utah's framers rejected an earlier lengthy draft of the education article and requested a simplified revised draft that would not "leave nothing in the future for the Legislature to do," 1 *Official Report* at 395 (statement of Mr. Smith), and recognized that the legislature did not need constitutional "grants of power" to address education issues, *id.* at 397 (statement of Mr. Varian).

the *expressio unius* maxim does not apply here, much less support the district court's conclusion. *Norman*, 52 P. at 991 (noting compliance with Enabling Act provided a special reason for the constitution to mention one item but not another statutorily-related item).

In short, the district court had to do much more than point to one constitutional mandate and the absence of others for the negative-implication canon to apply. *Cf. Monson,* 928 P.2d at 1024-25 (rejecting *expressio unius* argument that board of pardons lacked authority to order restitution merely because that power was not included among other board powers listed in constitution).

E. The district court wrongly dismissed sister state cases finding legislative authority to enact laws like UFASP.

Several other state high courts have held that their respective state constitutions do not limit their legislatures' authority to create educational programs or benefits beyond the required public school systems. The district court below wrongly disregarded those decisions in favor of a Florida decision that does not support the district court's conclusion.

1. The weight of authority supports legislative authority to provide educational benefits in addition to a public school system.

At least five other state supreme courts have upheld their state legislatures' authority to enact educational benefit programs in addition to creating constitutionally required public school systems.

Wisconsin. The Wisconsin Supreme Court twice upheld the Milwaukee Parental Choice Program (MPCP), "a publicly funded program that permits selected children from low-income families to attend nonsectarian private schools at no cost to the student." *Davis v. Grover*, 480 N.W.2d 460, 462 (Wis. 1992). Plaintiffs there argued the program violated the state constitutional provision requiring the legislature to "provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years." *Id.* at 473 (quoting Wis. Const. art. X, § 3). Discussing caselaw dating back to 1886, the supreme court readily concluded that the constitution established an educational minimum or floor after which "the legislature is free to act as it deems proper" education-wise. *Id.* at 473. The state having satisfied its minimum education requirements, the court held that "[t]he MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated." *Id.* at 474. The supreme court reaffirmed the legislature's authority a few years later in

upholding an amended MPCP: "we conclude that the legislature has" satisfied its constitutional duty to establish free uniforms schools and "[t]he amended MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated." *Jackson v. Benson*, 578 N.W.2d 602, 628 (1998).

Indiana. Indiana's supreme court upheld the legislature's creation of a voucher program for use in sending eligible students to private schools. *Meredith*, 984 N.E.2d at 1216. In relevant part, the Indiana constitution provided that "*it shall be the duty* of the General Assembly *to encourage,* by all suitable means, moral, intellectual, scientific, and agricultural improvement; *and to provide,* by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." *Id.* at 1221 (quoting Ind. Const. art. 8, § 1 (emphasis in original)). The plaintiffs argued that the "to provide" clause prohibited the legislature from providing education in any other way than the constitutionally required public school system. *Id.* at 1220. Put another way, plaintiffs argued the legislature's specific duty to establish public schools superseded the legislature's authority to encourage intellectual improvement by any suitable means. *Id.* The Indiana Supreme Court rejected the notion that the duty to create public schools somehow limited the legislature's authority to enact a voucher program. *Id.* at 1224-25. The court recognized the legislature could

do both—create a common school system and encourage education improvement in other ways—"[e]ach may be accomplished without reference to the other." *Id.* at 1224.

North Carolina. The North Carolina Supreme Court likewise rejected a challenge to a state funded scholarship program allowing lower-income families to send children to private school. *Hart v. State*, 774 S.E.2d 281, 284–85, 287 (N.C. 2015). The plaintiffs argued, in part, that the program violated the general assembly's constitutional imperative to provide "for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." *Id.* at 289 (quoting N.C. Const. art. IX, § 2(1)). Like the plaintiffs challenging UFASP, the North Carolina plaintiffs asserted that the duty to create public schools meant that the state couldn't create an alternative system "standing apart from the system of free public schools mandated by the Constitution." *Id.* at 289. The court easily rebuffed that narrow view of legislative power. It noted that while the uniformity clause required providing similar public schools statewide, that mandate applied "exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Id.* at 289-290.

Nevada. In Nevada, the state supreme court found the legislature had authority to enact an education savings account program that allowed state

funds to transfer to private accounts for school-aged children to pay for non-public education services like private schools or tutoring. *Schwartz v. Lopez*, 382 P.3d 886, 891 (Nev. 2016) (en banc). Like Indiana, the Nevada Constitution requires the legislature to encourage education through all suitable means and to provide a uniform public school system. *Id.* at 898. The court emphasized that the uniform-public-school-system duty is "not a ceiling but a floor upon which the legislature can build additional opportunities for school children." *Id.* (quoting *Jackson*, 578 N.W.2d at 628). "If, as the plaintiffs argue, the framers had intended Section 2's requirement for a uniform school system to be the *only* means by which the Legislature could promote educational advancements under Section 1, they could have expressly stated that, but instead they placed these directives in two separate sections of Article 11, neither of which references the other." *Schwartz*, 382 P.3d at 897. So, the court concluded, "as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate of Section 2 is satisfied, and the Legislature may encourage other suitable educational measures under Section 1." *Id.* at 898.

West Virginia. West Virginia also enacted a program that allowed scholarship funds to be used for specified purposes including both public and non-public educational uses. *Beaver*, 887 S.E.2d at 619-20. The plaintiffs argued, in large part, that the state constitution's free-schools clause—

stating the legislature "shall provide, by general law, for a thorough and efficient system of free schools"—only authorizes the legislature to maintain a public school system. *Id.* at 625. The court rejected that argument based on the legislature's plenary authority to act in the absence of any constitutional restrictions and the lack of any such restrictions in the free-schools clause. *Id.* at 626-27. The court thus held that the free-schools provision "operates as a floor, not a ceiling" and "contains a requirement of what the Legislature must do; it does not prohibit the Legislature from enacting additional educational initiatives" like the scholarship program. *Id.* at 627. In a footnote, the court noted that the West Virginia constitution also contained a provision directing the legislature to "foster . . . intellectual . . . improvement" and that other courts had construed similar provisions to support holdings that their legislatures had authority to enact non-public educational programs. *Id.* at 628 n.20. But the court did not rely on that provision to reach its holding.

2. The district court wrongly rejected the weight of authority in favor of a distinguishable Florida decision.

The district court discussed all those holdings. Order at 25-29. But it said they all, except Wisconsin, were "easily distinguishable," Order at 29, because their respective state constitutions, unlike Utah's, imposed on their legislatures two separate educational duties: to encourage educational improvement and establish a public school system. Order at 29-30. That

distinction ignores the sister courts' analyses. All of them recognized the affirmative duty to create a public school system did not limit their legislature's authority to enact non-public school related programs. None of the courts suggested that the only reason their legislatures could enact the challenged programs was because of the separate educational-improvement clauses. Indeed, state legislatures already have the plenary authority to encourage education improvement unless expressly or impliedly limited. *See* Section I.A. *supra*. And the point of the sister state cases was that public-school mandates like Utah's impose no such limits.

As to the Wisconsin supreme court decisions, the district court below simply rejected the Wisconsin court's holdings and instead touted the dissenting opinion. Order at 30-31. This despite admitting the Wisconsin constitutional provision was more like Utah's. Order at 30.

Instead of following the analysis of Wisconsin's more similar educational provision, the district court chose the Florida Supreme Court's analysis of its state's very different education provision. Order at 31-32. In *Bush v. Holmes*, the court invalidated a scholarship program allowing students at a failing public school to attend private school. 919 So. 2d 392, 397-98, 407 (Fla. 2006). The court noted a four-category rating system to analyze state education clauses to ascertain "the level of [constitutional] duty imposed on the state legislature." *Id.* at 404. Category I clauses just require

the legislature to provide a free public school system; category II clauses impose some minimum quality standard for the schools; category III clauses require more specific and stronger education mandates and a purpose preamble; and category IV clauses impose a "maximum duty on the State to provide for education." *Id.* (internal quotation marks omitted). The Florida court said its education clause was in category IV. *Id.* That provision combines three "critical components," *id.* at 405:

> [1] The education of children is a fundamental value of the people of the State of Florida. [2] It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. [3] Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Id. at 403 (quoting Fla. Const. art. IX, § 1(a)) (emphasis omitted).

Reading the three sentences together *in pari materia*, the court concluded that the section both mandates the adequate provision of public school and restricts the execution of that mandate by specifying adequacy as "a uniform, efficient, safe, secure and high quality system of *free public schools*." *Bush*, 919 So. 2d at 406-07. The court also said the *expressio unius* maxim led to the same result: the constitutional requirement to provide an adequate free public school system was necessarily the sole manner in which

the state could fulfill its mandate to provide for the education of all children. *Id.* at 407.

In reaching its conclusion, the Florida Supreme Court distinguished the contrary Wisconsin Supreme Court's decision upholding legislative authority because the Wisconsin constitution's education provision does not contain language stating it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders." *Id.* at 407 n.10 (quoting Fla. Const. art. IX, § 1(a)).

The district court's affinity for the *Bush* decision is hard to understand and certainly not based on that decision's own reasoning. For one, the Florida Constitution's education provision is markedly different than Utah's. Florida's is far more emphatic and specific about public education being a "fundamental value" of the people, a "paramount duty" of the state, and defining "adequate provision" of education as requiring "a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." Fla. Const. art. IX, § 1(a). Indeed, the Florida Supreme Court expressly distinguished its state education provision from Wisconsin's, *Bush*, 919 So. 2d at 407 n.10, which even the district court recognized is closer, Order at 30, to Utah's simple mandate to provide a free public education system devoid of sectarian control.

Utah Const. art. X, §§ 1, 2. In other words, even the Florida Supreme Court wouldn't think its analysis applied to Utah's constitution.[8]

Second, *Bush's* reliance on *in pari materia* to interpret Florida's much different three-part provision does not lead to the same result if applied to Utah's provision(s). *See, e.g., Beaver*, 887 S.E.2d at 628 (rejecting lower court's ruling that state's scholarship program was unconstitutional when construing the "free schools" clause *in pari materia* with other education-related provisions). And *Bush's* cursory alternative reliance on the *expressio unius* canon is at least distinguishable given Florida's more specific constitutional mandates if not flat wrong for the reasons discussed above.

* * *

[8] The category rubric the Florida Supreme Court noted also highlights the differences between Florida's and Utah's constitutions. The court said the Florida constitution falls within category IV given the state's "paramount duty" and imposes "a maximum duty on the state to provide for public education that is uniform and of high quality." *Bush*, 919 So. 2d at 404. In contrast, the academic literature from which the Florida high court pulled the category system classifies Utah's 1985 education provision—which like the current provision merely required free, non-sectarian public schools—as a category I. *See id.* (citing *Coal. for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 n.7 (Fla. 1996) (citing Barbara J. Staros, *School Finance Litigation in Florida: A Historical Analysis,* 23 Stetson L. Rev. 497, 498-99 n.10 (1994) (citing Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills,* 63 Tex. L. Rev. 777, 814-16 & nn.143-46 (1985) (classifying Utah as a category I))).

The district court erred in concluding that the Utah constitution impliedly limits the legislature's plenary authority to enact an education scholarship program in addition to and separate from maintaining a public school system. The legislature can provide both independent of and without harming the other. This Court should reverse that ruling.

II. UFASP "support[s] children" under article XIII.

The district court also ruled that UFASP violates article XIII because the Program is funded by income tax revenue constitutionally dedicated to other purposes. Order at 38-57. But that rewrites the relevant text under the guise of original public meaning constitutional interpretation. And it overemphasizes one view of uncertain history and public commentary.

A. The district court wrongly rejected the ordinary meaning of "to support children" by misapplying original public meaning analysis.

Before 2020, the district court noted, article XIII, section 5(5), limited the use of income tax revenue to "support[ing] the systems of public education and higher education as defined in Article X, Section 2." Order at 38; *see* 2020 Utah Laws 3711. But in 2020, voters approved an amendment to section 5(5) that expanded the potential uses for income tax revenue to include "support[ing] children." The entire provision now reads:

> All revenue from taxes on intangible property or from a tax on income shall be used:
>
> (a) to support the systems of public education and higher education as defined in Article X, Section 2; and
>
> (b) to support children and to support individuals with a disability.

Utah Const. art. XIII, § 5(5).

The entire provision plainly allows income tax revenue to be used for three separate reasons: (1) "to support" the state's school systems, (2) "to support children," and (3) "to support individuals with a disability." They are three independent clauses connected by the conjunction "and." So any of the three purposes can be funded by income taxes.

There can be no real dispute that UFASP "support[s] children" under any ordinary, plain, and objective meaning of that phrase. The verb support means, in senses relevant to using tax revenues: "to promote the interests or cause of especially by action or aid" and "assist" or "help." Merriam-Webster's Collegiate Dictionary (12th ed.).[9] And children means "a young person especially between infancy and puberty" and "a person not yet of the age of majority." *Id.*[10] UFASP provides scholarship funds for educational uses to non-public school students who would be eligible to participate in

[9] https://www.merriam-webster.com/dictionary/support.

[10] https://www.merriam-webster.com/dictionary/children.

kindergarten to twelfth grade. Utah Code §§ 53F-6-401(8), -402(7). Again, there's no serious question the Program promotes the interests of, assists, and helps young people under the age of majority.

Even the district court essentially conceded as much: "If the court is constrained by the plain language of subsection 5(b) and reads it in isolation, Defendants may be correct that the legislature is permitted to use income tax revenues to fund the Program because it 'support[s] children.'" Order at 39; *see also id.* at 39 n.56 ("The court agrees that if it were required to interpret this provision like a contract or statute, Plaintiffs' claim would have to be dismissed unless Plaintiffs were able to show that their interpretation is plausible based on the plain language of this provision.").

But the district court did not feel "constrained by the plain language" of the constitutional text enacted just five years ago. Instead, the lower court read this Court's original public meaning jurisprudence to require a deep dive into the legislative history leading to placing the proposed amendment on the ballot, the voter information pamphlet discussing the amendment, and contemporaneous news articles or commentaries about the amendment. Order at 40-53. Based on that peripheral discussion, rather than the text's ordinary meaning, the district court concluded that "to support children" should be rewritten to mean "[then] existing social services programs that

support children as well as other programs that support children with disabilities and adults with disabilities." Order at 57.

There is no textualist/originalist basis for the district court's revision. The court overlooked the textualist foundations and democratic justifications for original public meaning analysis and misread this Court's cases as requiring the district court to look past the text's plain meaning.

The proper constitutional interpretation method is meant to discover the text's "original public meaning," not to figure out the public's perceived original intent, motives, or policy goals. The inquiry recognizes the paramount importance of the constitution's actual text. "In interpreting the state constitution," the Court "look[s] primarily to the language of the constitution itself." *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 29, 52 P.3d 1148 (quoting *State v. Gardner,* 947 P.2d 630, 633 (Utah 1997)); *see also State v. Casey,* 2002 UT 29, ¶ 20, 44 P.3d 756; *Utah Sch. Bds. Ass'n v. State Bd. of Educ.,* 2001 UT 2, ¶ 13, 17 P.3d 1125; *In re Worthen*, 926 P.2d 853, 866 (Utah 1996). And in keeping with the text's importance, courts "need not inquire beyond the plain meaning of the [constitutional provision] unless [they] find it ambiguous." *Grand Cnty.* 2002 UT 57, ¶ 29 (quoting *Casey,* 2002 UT 29, ¶ 20)); *see also Utah School Bds Ass'n*, 2001 UT 2, ¶ 13. In other words, the Court adheres to the supremacy-of-text principle: "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is

what the text means." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (Thomson/West 2012).

This textual inquiry's "focus is on the *objective* original public meaning of the text, not the intent of those who wrote it," *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 19 n.6, 450 P.3d 1092 (emphasis added), nor, it should be added, the subjective intent of the voters, legislators, or the public. This means constitutional text must be given "its ordinary and known meaning, as used in common parlance," *Richardson v. Treasure Hill Min. Co.*, 65 P. 74, 80 (Utah 1901), unless context dictates otherwise. *Reading Law* at 69 (explaining ordinary-meaning canon as "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense").

The ordinary-meaning rule "is the most fundamental semantic rule of interpretation" and "[i]t governs constitutions, statutes, rules, and private instruments." *Id.* Neither courts nor other interpreters should be required to discover "hidden meanings" in the text. *Id.* As Justice Joseph Story emphasized long ago "[e]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Id.* (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833)).

And the objective ordinary meaning analysis will focus on the time period when the operative text was ratified. As the Court has repeatedly emphasized, it "seek[s] to ascertain and give power to the meaning of the [constitution's] text as it was understood by the people who validly enacted it as constitutional law." *Richards*, 2019 UT 57, ¶ 13 (emphasis added). So "terms used in a Constitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted." *Tintic Stand. Mining Co.*, 15 P.2d at 637; *see also Patterson v. State*, 2021 UT 52, ¶ 92, 504 P.3d 92 ("when the people of Utah amend the constitution, we look to the meaning that the public would have ascribed to the amended language when it entered the constitution"); *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663 (stating Utah constitutional analysis is an "originalist inquiry" that aims to "ascertain[] the 'original public meaning' of the constitutional text"). In short, original public meaning analysis is also based on the textualist fixed-meaning canon: "[w]ords must be given the meaning they had when the text was adopted." *Reading Law* at 78.

These textualist premises underlying original public meaning analysis are not just good ideas or legalistic guidelines. Interpreting the constitution based on "the original meaning" of "the constitutional text" "is essential to any system of government that finds its legitimacy in the will of the people as expressed in positive laws enacted by their representatives." *State v. Walker*,

2011 UT 53, ¶ 29, 267 P.3d 210 (Lee, J., concurring). That's why the text has been and must remain the controlling lodestar in constitutional interpretation. Deviating from plain text judicially usurps the people's allocation of government power among separate branches and alters our constitutional republic form of government. *State v. Barnett*, 2023 UT 20, ¶ 55, 537 P.3d 212 ("We employ public meaning originalism because the constitution derives its authority from the democratic action of the people in whom "[a]ll political power is inherent." (citing Utah Const. art. I, § 2)); *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 84, 140 P.3d 1235 (Durrant, J., concurring) (stating "the people of this state" are the "constitutionally sanctioned architects of our society").

The district court acknowledged some of this Court's foregoing precedent but thought it had "been supplanted by more recent caselaw." Order at 39 n.57. That misreads the more recent cases the district court relies on. Order at 11, 40 (citing *Barnett, Planned Parenthood*, and *Maese*). Each of those cases flow back to observations this Court made in *Maese. See Planned Parenthood Ass'n of Utah v. State*, 2024 UT 28, ¶ 184, 554 P.3d 998 (citing *Maese*, 2019 UT 58, ¶ 23); *Barnett*, 2023 UT 20, ¶ 10 (citing *Maese*, 2019 UT 58, ¶ 23). There, the Court stated that while "the text is generally the best place to look for understanding, historical sources can be essential to our effort to discern and confirm the original public meaning of the

language." *Maese*, 2019 UT 58, ¶ 23. And "[a]lthough the text's plain language may begin and end the analysis, unlike contract interpretation, constitutional inquiry does not require us to find a textual ambiguity before we turn to those other sources." *Id.* So, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials." *Id.* The Court then examined the historical record only after "acknowledging that the plain language of the Utah Constitution does not answer the question" at issue. *Id.* ¶ 28. Nor did the plain language answer the question presented in the other cases the district court cites as justification for bypassing the ordinary meaning of section 5(5)'s plain text. *See Planned Parenthood*, 2024 UT 28, ¶¶ 184-85 (noting modern plain text reading of equal rights provision could be different than original meaning because language can change meaning over time); *Barnett*, 2023 UT 20, ¶¶ 21-80 (rejecting the State's "plausible" interpretation of the Bail Provision and reliance on founding-era original meaning in favor of contextual reading of the provision and extrinsic materials from 1988 when the provision was last amended). *Maese* doesn't justify what the district court did.

It's one thing to dive into history and secondary materials when trying to tease out the original public meaning of constitutional provisions enacted 130 years ago when linguistic understanding of text could be different from our modern usage. *See, e.g., Neese*, 2017 UT 89, ¶¶ 96, 99 (stating original

public meaning inquiry asks "what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody" and noting "the semantics and pragmatics of the founding era may well be radically different from contemporary linguistic norms and presuppositions"); *see also Planned Parenthood*, 2024 UT 28, ¶ 184 (stating "language can change meaning over time and what seems plain to us today might have had a different import when it was written"); *Reading Law* at 78 (explaining "originalism is an age-old idea" that "mostly applies to older documents that continue in effect: [t]hose are the ones whose operative terms are most likely to have undergone semantic shift"). But it's something else entirely to reject the ordinary meaning of five-year-old unambiguous text in favor of guesses about what purposes the voters may have really intended based on the publicly available comments of a relative few. That subverts the supremacy of the text by elevating extrinsically derived purpose over the objective ordinary public meaning. *Reading Law* at 56-57.

This Court's precedent does not require such non-textualist interpretation under the guise of original public meaning. Nor can the district court's ruling be squared with the textualist underpinnings of original public meaning analysis. Most importantly, the court's judicial rewrite usurps the people's power to amend their constitution and undermines the State's

constitutional republic form of government. The district court should be reversed.

B. Extrinsic materials do not override section 5(5)'s plain text ordinary meaning.

Even if it were appropriate to deep dive into extrinsic material about section 5(5), that peripheral information does not support the district court's rewrite of plain constitutional text. The lower court appears to have succumbed to the "temptation" of placing "undue reliance" on arguments based primarily upon a perceived "zeitgeist" surrounding Amendment G that led the court to see only what it was "already inclined to see." *Maese*, 2019 UT 58, ¶ 20 (citations omitted). But, as this Court has warned, "[m]erely 'asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact' is not a recipe for sound constitutional interpretation." *Id*.

Taking a balanced view of the most relevant information presents a different picture than the district court painted. To begin, 764,420 (out of more than 1.4 million) voters on this issue approved Amendment G's changes to section 5(5). 2020 General Election, State Board of Canvassers, Constitutional Amendments at 45[11]; R. 1900-04 (2020 General Election Voter

[11] https://vote.utah.gov/wp-content/uploads/2020/12/2020-General-Election-Canvass.pdf#page=45.

Information Pamphlet at 59-63[12]). Their votes approved the text at issue as part of Utah's constitution. And that plain text controls.

But assuming for argument's sake that wading through extrinsic materials for clues about how the public otherwise objectively might have understood the clear text's ordinary meaning, it's important to put the materials in context and prioritize the more objective sources that were more widely viewed and thus more likely to affect/reveal any public understanding. Here, that means looking to the ballot question presented to voters and the impartial analysis part of the voter information guide.[13]

The ballot language. No one knows what the voters reviewed, if anything, before casting their votes on Amendment G. But they did have a ballot and voted on the amendment. So the vast majority, if not all, of them presumably read the ballot description of the amendment's effect to understand what they were voting for. The ballot proposal asked "Shall the Utah Constitution be amended to expand the uses of money the state receives from income taxes and intangible property taxes to include *supporting*

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[12] https://vote.utah.gov/wp-content/uploads/2023/09/2020-VIP.pdf#page=59.

[13] State Defendants recognize that the question is what the general public understood the constitutional text to mean, not just those who voted to approve it. *Maese*, 2019 UT 58, ¶ 21 n.7. But the Court also uses voters as a proxy for the public. *See id.*; *see also Barnett*, 2023 UT 20, ¶¶ 59-80 (discussing what voters would have understood based on various extrinsic sources including the voter information pamphlet).

children and supporting people with a disability?" Sample Ballot, Box Elder County, Utah at 2 (Nov. 3, 2020) (emphasis added).[14]

Just like the controlling constitutional text, the ballot question uses parallel construction of two independent clauses joined by a conjunction to explain the amendment will allow income taxes to be used for "supporting children *and* supporting people with a disability?" *Id.* (emphasis added). An objective and ordinary speaker of English would understand that to mean income taxes could be used for two separate purposes: supporting children and supporting people with disabilities. No one would objectively and reasonably read that question to support the district court's much narrower rewrite conflating the two clauses.

Voter information pamphlet. The Court has sometimes looked to voter information guides to help determine a text's ordinary meaning at the time it was ratified. *See, e.g., Barnett*, 2023 UT 20, ¶ 59. The Court has assumed, absent contrary evidence, that "voters who wanted to know what the amendment would do—and who looked to the voter guide to find out—would carry that understanding with them into the ballot box." *Id.* ¶ 62.

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[14] https://ballotpedia.org/Utah_official_sample_ballots,_2020; *see also* Sample Ballot, Millard County, Utah at 2 (Nov. 3, 2020), https://millardcounty.gov/wp-content/uploads/clerk/Elections/2020_Election/2020GeneralElection/Millard-County-Utah-Sample-Ballot-2020-GE.pdf.

Here, the voter information pamphlet does not support the district court's rewrite of section 5(5). Presumably, a reasonable voter would pay more attention to the amendment's text and the voter guide's "impartial analysis" than the for-and- against arguments presented by a few legislators. It bears emphasizing that the guide included section 5(5)'s text and clearly showed in underlined language the proposed amendment: "to support children and to support individuals with a disability." R. 1904 (emphasis removed). This was the only substantive amendment to section 5(5), making it especially easy to notice and read. *Id.*

The impartial analysis supports a straightforward reading of the amended text. It simply and expressly states that "Amendment G expands the allowable uses of the money the state receives from income taxes or from a tax on intangible property to include *supporting children and supporting people with a disability*." R. 1900 (emphasis added).

As to fiscal impact, the impartial analysis stated the then current amount of tax revenues supporting public and higher education and that the state spent about $600 million annually of "non-income tax money on programs for children and programs that benefit people with a disability." *Id.* The analysis then states that "[t]he amount of income tax money that will be spent in future years *to support children and to support people with a disability* will depend on how the Utah Legislature decides to allocate income

tax money." *Id.* (emphasis added). Again, just like the controlling text and the ballot question, the impartial analysis made clear the amendment would allow income tax to be used for two separate things: to support children *and* to support people with a disability. Nothing in this impartial analysis suggests "to support children" actually means only "existing social services programs that support children" and "other programs that support children with disabilities." Order at 57. And nothing suggests the legislature's discretion to allocate income tax money to these purposes would be capped at any certain amount or limited to any particular programs that support children.

The argument in favor of Amendment G doesn't support the district court's narrow view either. It lists educational and tax entities supporting the amendment and says the amendment will help stabilize and safeguard education funds. R. 1901. The proponents also explain that "Amendment G continues the dedicated revenue source to fund education and expands the services funded through income tax. This expansion acknowledges the increasing importance of physical and mental health for academic success. This amendment gives Utah more flexibility to support our children's learning outcomes." *Id.* Nothing here limits Amendment G's reach to then-existing social services or disability programs.

The same goes for the arguments against Amendment G. The rebuttal to the argument in favor argued, in relevant part, that Amendment G would eliminate the dedication of income tax revenue solely to education and expand its use to include "vital social service programs." *Id.* This would "pit our public education system, including charter schools, against all other programs for children and people with disabilities." *Id.*

Representative Shurtliff's argument against Amendment G highlighted her concern that Amendment G "opens the door wider for vouchers by allowing income tax money . . . to be spent on children and adults with a disability." *Id.* at 1902. She twice mentioned disabled students potentially using vouchers for non-public schools. *Id.* Senator Escamilla's argument against asserted that the amendment would threaten funding to both the public education system and vital programs for children and individuals with disabilities. *Id.*

Finally, the rebuttal to the argument against merely reemphasized the entities supporting the amendment and its role in stabilizing and protecting education funding while unlocking ongoing funding for education. *Id.* at 1903.

Reading all of these arguments together, especially in light of the amendment's actual text, the ballot language, and the impartial analysis (not to mention Representative Shurtliff's voucher references), it is simply implausible to assume that any voter—much less the voting public at large—

who actually read the information guide would come away thinking that "to support children" was somehow specifically limited to "existing social services programs that support children as well as other programs that support children with disabilities and adults with disabilities." Order at 57. The fact that Representative Shurtliff and Senator Escamilla focused on potential income tax funding for social services or vouchers for disabled students does not somehow conclusively cover the entire universe of programs that "support children."

Legislative history, news reports, and other public sources. The district court also spends considerable time discussing legislative history, a few news reports, and a few other public sources that discussed Amendment G. Order at 40-57. The district court reads these sources one way. But they're far from definitive or conclusive statements that would lead a reasonable and objective English speaker—much less a majority of them—to conclude that she should ignore what "to support children" normally means and assume that the phrase really means only to support children in certain limited and unwritten ways involving social or disability services. As this Court put it in another case, "[i]t is hard to conclude that Utah voters' understanding of the amendment would have been formed by the inconclusive legislative debate more than the voter guide's definitive statements," *Barnett*, 2023 UT 20, ¶ 74, or the ballot language (and actual amendment text). That's doubly true here,

dealing with straightforward constitutional text.

After considering all this extrinsic and unnecessary material, the district court hangs its hat on a few observations. First, public education "watch dogs" like the Plaintiff Utah Education Association endorsed Amendment G and would not have if they thought it allowed for school choice, vouchers, or scholarships like UFASP. Order at 55. But what any particular public interest group may or may not have thought about Amendment G is hardly dispositive. The text is the text. It governs, not UEA's purported interpretation.

Second, the district court emphasizes that voters were never told Amendment G could allow private school vouchers for children without disabilities and therefore would never have envisioned that possibility. Order at 56. But there's no constitutional requirement that voters foresee every possible application of the provision(s) they're ratifying. That would, in this case at least, wrongly require and enshrine applications over principles. *See, e.g., Maese*, 2019 UT 58, ¶ 70 n.23. And the requirement would put judges in the improper and impossible spot of deciding what voters or the public had to know before approving a constitutional amendment.

Third, the district court suggests reasonable grammarians might agree with the court's non-textualist interpretation stemming from its view of the

extrinsic materials. Order at 56. But the court never explains how or provides an ordinary meaning or grammatical analysis supporting its views.

Finally, the district court claims support from the precept that constitutional amendments must be submitted to voters on the ballot so they fairly understand the question. Order at 56. But as explained above, the ballot language for Amendment G is completely accurate and tracks the constitutional text. No one challenged that language or suggested it was anything but fair and accurate. Amendment G's ballot language undermines the district court's conclusion; it does not help.

* * *

In sum, the extrinsic evidence does not bolster the district court's non-textualist construction of "to support children" in section 5(5). If anything, the most relevant material—the ballot language and voter information guide—contradict the district court. Nothing in the extrinsic evidence can plausibly be taken to override the constitution's unambiguous text. UFASP supports children under any reasonable interpretation.

Conclusion

The Court should reverse the district court's grant of summary judgment to the Plaintiffs-Appellees. The legislature has the plenary authority to create the Utah Fits All Scholarship Program independent from the public education system. And this Program can be properly funded

through income tax revenues because it "support[s] children" under the ordinary meaning of article XIII, section 5's plain text.

Respectfully submitted,

s/ Stanford Purser
Stanford E. Purser
Solicitor General
Utah Attorney General's Office

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1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(g)(1) because:

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s/ Stanford Purser

Certificate of Service

I hereby certify that on 5 January 2026 a true, correct and complete copy of the foregoing Brief of Appellee was filed with the Court and served via the appellate e-filing system on counsel of record.

s/ Stanford Purser

Addendum

A. Ruling and Order Re: Defendants' Motions to Dismiss and Plaintiffs' Motion for Summary Judgment (April 18, 2025)

B. Utah Constitution article III, ord. 4 and article X, sections 1 and 2

C. Utah Constitution article XIII, section 5(5)

A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KEVIN LABRESH, TERRA COOPER, AMY BARTON, CAROL LEAR, and UTAH EDUCATION ASSOCIATION, Plaintiffs, v. GOVERNOR SPENCER J. COX, DEREK BROWN, and ALLIANCE FOR CHOICE IN EDUCATION, d/b/a ACE SCHOLARSHIPS, Defendants.	**RULING AND ORDER RE: DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Case No. 240904193 April 18, 2025 Judge Laura S. Scott

Before the court are the Motions to Dismiss filed by Defendants Governor Spencer J. Cox and Derek Brown[1] (State) and Alliance for Choice in Education d/b/a/ACE Scholarships (ACE) and Parent Intervenors Maria Ruiz and Tiffany Brown (Intervenors) (collectively Defendants) and the Motion for Summary Judgment filed by Plaintiffs Kevin Labresh, Terra Cooper, Amy Barton, Carol Lear, and Utah Education Association (UEA) (collectively Plaintiffs).

The court held a hearing on the pending Motions on December 19, 2024. On January 29, 2025, the court requested supplemental briefing on the legislative history of Proposition No. 3 and Amendment G, which the parties completed on March 27, 2025. The court then took the Motions under advisement.

Having carefully considered the briefs of the parties, the arguments of counsel at the hearing, and the applicable law, the court issues the following Ruling and Order:

[1] Since the filing of the Complaint, Derek Brown became the new Attorney General of Utah. Rule 25(d) provides that when "a public officer is a party to an action and during its pendency . . . ceases to hold office, the action may be continued and maintained by or against his successor[.]" Utah R. Civ. P. 25(d). The State has confirmed that Attorney General Brown "expressly assents" to his substitution as a defendant in his official capacity as Attorney General in place of Sean D. Reyes.

I. INTRODUCTION

At issue in this case is the Utah Fits All Scholarship Program (Program), Utah Code §§ 53F-6-401 *et seq.*, which was established by the Utah Legislature in 2023.[2]

In their Complaint, Plaintiffs request the court "declare the Program unconstitutional and enjoin its continued operation."

The question before the court is not whether the Program is wise or unwise, desirable or undesirable, effective or ineffective. And the answer to the question does not turn on the soundness of the legislation or the number of students affected by it or the potential adverse consequences to the public education system from it.

Rather, the only question before the court is what limits, if any, the Utah Constitution places on the legislature to (a) create education programs outside of the public education system that are free from the constitutional and other requirements imposed on public schools and education programs; (b) use state income tax revenue to fund such programs; and (c) prohibit the State Board of Education (Board) from supervising and controlling such programs.

In deciding this question, the court is not wading into the political debate over the merits of "school choice" or expressing any view on the indirect funding of sectarian schools. Nor is the court weighing in on the difficult policy and fiscal decisions that our constitution has committed to the legislative branch. Rather, the court is fulfilling its constitutional duty to resolve a legal dispute that has been properly raised in the courts.[3]

As discussed further below, the court concludes the Program violates article X and article XIII of the Utah Constitution. Therefore, the Program is unconstitutional.[4]

II. BACKGROUND AND UNDISPUTED MATERIAL FACTS

1. H.B. 215 (Act), which created the Program, was passed by the Utah legislature on January 26, 2023. It took effect on May 3, 2023.

2. Under the Program, eligible students may receive up to $8,000 in state income tax funds, adjustable annually for inflation, to pay "qualifying providers" for certain education

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[2] Plaintiffs refer to it as the "Voucher Program" and Defendants refer to it as the "Scholarship Program." The court, however, simply refers to it as the "Program."

[3] *See* Utah Const. art. VIII, § 1 (judicial power is vested in the courts); *Holden v. Hardy*, 14 Utah 71, 46 P. 756, 760 (1896) (explaining that the judicial power entails the responsibility to "interpret, construe, expound, and apply" the constitution).

[4] At the hearing, the court asked if it should consider whether the legislature could continue to fund certain aspects of the Program – *e.g.*, vouchers for children with disabilities to attend private school – even if it was not permitted to fund the entirety of the Program under article XIII. No party requested the court to do so. Consequently, the court does not address whether some limited form of the Program might pass constitutional muster.

expenses using "scholarship accounts" managed by a private "program manager." Utah Code §§ 53F-6-401 *et seq.*

3. The average annual private school tuition in Utah is more than $10,000 for elementary school and more than $12,000 for high school.

4. In addition to tuition for private school, a "scholarship expense" includes fees and instructional materials at a technical college; tutoring services; fees for after-school or summer educational programs; textbooks or other instructional materials; educational software and applications; supplies or other equipment related to a scholarship student's educational needs; computer hardware or other technological devices that are intended primarily for a scholarship student's educational needs; fees for examinations or test prep courses; educational services for students with disabilities from a licensed or accredited practitioner or provider; approved "contracted services" including individual classes, after-school tutoring services, transportation, or fees or costs associated with participation in extracurricular activities; ride fees or fares; expenses related to extracurricular activities, field trips, and other educational "experiences"; and "any other expense for a good or service that a parent or scholarship student incurs in the education of the scholarship student, and that the program manager approves." Utah Code § 53F-6-401(10).[5]

5. Under the Act, students are eligible for the Program if they are eligible to attend Utah public schools, are not enrolled in public school or disenroll from public school when they receive Program funds, do not receive funding under Utah's disability voucher programs, and their parents annually submit to the program manager a portfolio describing the student's educational opportunities and achievements under the Program. Utah Code §§ 53F-6-401(1)(a), (c)(i), (e), -406(5)

6. Students are eligible for the Program even if they are already attending private school or, for students reaching school-age, would be attending private school regardless of the existence of the Program. *See* Utah Code § 53F-6-401(1) (eligibility requirements).

7. The Program is funded by annual appropriations from the Income Tax Fund. H.B. 215, 2023 Utah Laws Ch. 1, § 19.

8. In 2023, the legislature appropriated $42.5 million from the Income Tax Fund to the Program on an ongoing basis. *Id.*

9. The Board may give up to $1 million of the $42.5 million to the program manager for start-up, marketing, and other costs associated with initiating the Program. In addition to one-time startup costs, each year the program manager may receive the lesser of $2.5 million or 5% of the funds appropriated for the Program. *Id.*

[5] It is the court's understanding that the legislature has modified or eliminated some of these categories of expenses and that the numbering of some of the provisions has changed. The court cites the version cited by the parties.

10. During the 2024 session, the legislature appropriated an additional $40 million on an ongoing basis for the Program.[6] *See* S.B. 2, item 21 (2024) (Utah budget for fiscal years 2023-24 and 2024-25).

11. There is no cap on the number of students who may receive Program funds. Participation is limited only by the amount of money the legislature appropriates to the Program.

12. Students are not eligible for the Program if they remain enrolled in public school. Utah Code § 53F-6-406(5).

13. Utah Code § 53F-6-402(2)(a) provides that "[t]he program manager shall establish and maintain, in accordance with this part, scholarship accounts for eligible students." The program manager also "shall determine that a student meets the requirements to be an eligible student." *Id.* § 53F-6-402(2)(b).

14. The Board "shall ensure that the [contract with the program manager] ensures the efficiency and success of the program; and does not impose any requirements on the program manger that are not essential to the basic administration of the program; or create restrictions, directions, or mandates regarding instructional content or curriculum." *Id.* § 53F-6-404(1).

15. The Board "may regulate and take enforcement action as necessary against a program manager in accordance with the provisions of the state board's agreement with the program manager." *Id.* § 53F-6-404(2).

16. The Board "may not include a provision in any rule that creates or implies a restriction, direction, or mandate regarding instructional content or curriculum." *Id.* § 53F-6-404(8).

17. "The program manager shall administer the program," including maintaining a website; reviewing applications and determining eligibility of schools and providers; and granting or denying applications for a scholarship account. *Id.* 53F-6-405(1).

18. "[A] program manager may not require a qualifying provider to alter the qualifying provider's creed, practices, admissions, policies, hiring practices, or curricula in order to accept scholarship funds," provided the qualifying provider "compl[ies] with the antidiscrimination provisions of 42 U.S.C. Sec. 2000d, which prohibits discrimination based on "race, color, or national origin." *Id.* § 53F-6-406(3).

19. "By virtue of a scholarship student's involvement in the [P]rogram and unless otherwise expressly provided in statute, a scholarship student is not enrolled in the public education system." *Id.* § 53F-6-406(5).

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[6] According to the State, the amount provided to these approximately 5,000 students represent "less than 1% of the overall budget provided for the public education system."

20. The Program does not require qualifying providers to provide a sound basic education, satisfy any academic standards, or prepare students for higher education or the workforce.

21. To be eligible for the Program, parents must certify "that the qualifying provider . . . is capable of providing education services for the student." *Id.* § 53F-6-402(4)(a). Parents must acknowledge that (1) "[a] qualifying provider may not provide the same level of disability services that are provided in a public school;" (2) agree to "assume full financial responsibility for the education of" their child; (3) acknowledge that enrolling in the Program "has the same effect as a parental refusal to consent to services . . . under the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400 et seq.;" and (4) acknowledge that their "child may return to a public school at any time." *Id.* § 53F-6-402(4)(b).

22. Private schools that participate in the Program are permitted to charge tuition to Program students in excess of the scholarship amount.

23. While private schools and other providers receiving Program funds may not discriminate on the basis of race, color, or national origin, they are permitted to discriminate on any other basis, including religion, sex, gender, sexual orientation, gender identity, and disability status. *See id.* §§ 53F-6-406(3), -408(1)(b), -408(3)(b), -408(5)(b), -409(1)(b).

24. The Board originally selected ACE as the program manager.

25. According to ACE's website, ACE was founded because its founders believed that "[t]he American public education system is flawed" and "[p]rivate schools offer great value and have open seats." ACE's mission is to promote "school choice" by engaging in advocacy and amassing both public and private funds to provide scholarships to facilitate school attendance at its partner schools. ACE is a private scholarship provider to 26 private schools in Utah, 22 of which have already been approved by ACE as "qualifying providers" in the Program.

26. The program manager contract initially awarded $9,151,808.83 to ACE for administering the Program through June 30, 2028, and the contract was subsequently increased to $11 million.

27. On March 6, 2025, Governor Cox signed H.B. 455 into law, which amended the Act. The amended Act provides for enhanced oversight of the Program Manager by the Board, additional eligibility requirements for scholarships, and various changes to definitions.[7]

28. On March 20, 2025, the Board terminated ACE as the program manager.[8]

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[7] *See* Ace's Supp. Br. at 5. During the 2025 session, the legislature made changes to the Program. The parties have not briefed the impact, if any, these changes might have on the questions before the court. Consequently, the court did not consider any of them in rendering this decision.

[8] Ace's Supp. Br. at 5.

III. PLAINTIFFS' COMPLAINT

Plaintiffs assert four claims for relief. In their First Claim for Relief, Plaintiffs allege the Act violates article III and article X of the Utah Constitution "by establishing a program within the public education system that is not free and is not 'open to all the children of Utah.'"

In their Second Claim for Relief, Plaintiffs allege the Program violates article XIII of the Utah Constitution because it "diverts millions of dollars of income tax revenue to the private program manager, private schools, and other nonpublic educational services providers[.]"

In their Third Claim for Relief, Plaintiffs allege the Program violates article X of the Utah Constitution "by vesting control and supervision of a public education program in a private program manager and prohibiting the Board from promulgating any rules concerning instructional content and curriculum in voucher-funded schools."

Finally, in their Fourth Claim for Relief, Plaintiffs allege the Program violates article I and article VI of the Utah Constitution by "delegating an essential public service and one of the Legislature's core constitutional functions – providing education – to private entities and exempting them from oversight over both fiscal management and the quality of educational services they provide."[9]

Plaintiffs request the Program be declared unconstitutional and the court enjoin its continued operation.

IV. PENDING MOTIONS

In its Motion to Dismiss, the State argues the Program "is expressly not part of the public education system" and the legislature, under article XIII, "can and does appropriate state income tax revenues for purposes that are not part of the public education system," including programs that "support children" or "support individuals with a disability."

The State next argues that even if the Program diverts funds that would be otherwise used for Utah's public education system, the legislature's "appropriation of income tax revenues . . . amounts to less than 1% of the amount provided for Utah's public education system" and therefore "does not support any conclusion" that "Utah does not provide a free and open public education system for all Utah children who wish to attend public school."

The State further argues that because the "Program is not part of Utah's public education system," the legislature has not "delegate[d] the State Board's authority to anyone" or delegated "an essential public service." Finally, the State argues that Plaintiff Lear's claims must be dismissed for lack of subject matter jurisdiction because she lacks either traditional or "public interest" standing.

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[9] On September 18, 2024, Plaintiffs filed a Motion for Leave to File Supplemental Complaint to assert additional claims related to Amendment A. These claims were resolved pursuant to a stipulated Order of Permanent Injunction after the Utah Supreme Court issued its opinion in *League of Women Voters of Utah v. Utah State Legislature* (*League of Women Voters*), 2024 UT 40, 559 P.3d 11.

In their Motion to Dismiss, Intervenors similarly argue the Program is not part of the public education system and the Utah Constitution "does not impose a ceiling on the Legislature's power to legislate in the area of education." They further argue the Program "supports children and individuals with a disability." Finally, they argue the Program does not delegate the Board's authority over the "public education system" or the legislature's authority over an essential public service.

In its Motion to Dismiss, ACE argues that the Program does not violate the Utah Constitution's requirement that public schools be open and free. ACE also argues the "plain language" of article XIII permits funding of the Program.

Defendants make essentially these same arguments in their oppositions to Plaintiffs' Motion for Summary Judgment.

In their Motion for Summary Judgment and in their opposition to the Motions to Dismiss, Plaintiffs argue the legislature violated the Utah Constitution by establishing a public education program – the Program – that is neither free nor open to all and that improperly vests control and supervision in a "program manager" instead of the Board.

Plaintiffs argue further that even if the Program is not part of the public education system, it still violates article VIII by using income tax revenue to fund private schools and delegates control of the Program to a "program manager" instead of a governmental entity.

V. RELEVANT CONSTITUTIONAL PROVISIONS

The Enabling Act authorized "the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States." Utah Enabling Act § 1, 28 Stat. 107 (1894). The Enabling Act requires that "provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control." *Id.* § 3. It also provides that "[t]he schools, colleges, and university provided for in this act shall forever remain under the exclusive control of said State[.]" *Id.* § 11.

Article I, section 26 provides as follows:

> [Provisions mandatory and prohibitory.] The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article III, Ordinance, Fourth provides as follows:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State: . . . [Free, nonsectarian schools.] Fourth: The Legislature shall make laws for the establishment and maintenance of a system of public schools,

which shall be open to all the children of the State and be free from sectarian control.

Article X, section 1 provides as follows:

> [Free nonsectarian schools.] The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.

Article X, section 2 provides as follows:

> [Defining what shall constitute the public school system.] The public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate. The higher education system shall include all public universities and colleges and such other institutions and programs as the Legislature may designate. Public elementary and secondary schools shall be free, except the Legislature may authorize the imposition of fees in the secondary schools.

Article X, section 3 provides as follows:

> [State Board of Education.] The general control and supervision of the public education system shall be vested in a State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board.

Article X, section 8 provides as follows:

> [No religious or partisan tests in schools.] No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state's education systems.

Article X, section 9 provides as follows:

> [Public aid to church schools forbidden.] Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.

Article XIII, section 5 (5) provides as follows:

> All revenue from taxes on intangible personal property or from a tax on income shall be used: (a) to support the systems of public education and higher education as defined in Article X, Section 2; and (b) to support children and to support individuals with a disability.

VI. LEGAL STANDARD

On July 19, 2024, the State moved to dismiss the Complaint pursuant to rules 12(b)(1) and 12(b)(6) of the Utah Rules of Civil Procedure. On August 30, 2024, Plaintiffs moved for summary judgment on their claim that the Program is unconstitutional.

A rule 12(b)(6) motion "should be granted only if, 'assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff, it is clear that the plaintiff is not entitled to relief.'" *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275 (quoting *Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 10, 228 P.3d 747).

However, given there are no disputed issues of material fact, the parties agree that the court should evaluate the merits of Plaintiffs' claims under rule 56, which provides that "[t]he court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a).[10]

VII. INTERPRETATION OF RELEVANT CONSTITUTIONAL PROVISIONS

A. The Enabling Act and Articles X and XIII of the Utah Constitution

At the time Utah applied for statehood, its Enabling Act provided that, as a condition of being a state, "provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control." Utah Enabling Act § 3.

To this end, upon admission into the Union, certain lands were "granted to said State for the support of common schools" and the proceeds of the sale of certain lands "by the United States subsequent to the admission . . . shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State." *Id.* §§ 6, 9.

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[10] With respect to rule 12(b)(1), the State argues Plaintiff Carol Lear lacks standing to bring claims "in her capacity as a member of" the Board. However, the State agrees that other Plaintiffs have standing to assert these claims. Consequently, the court declines to address this issue because Ms. Lear's alleged lack of standing would not result in a full dismissal of the Complaint under rule 12(b)(1). *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 22 n.12, 299 P.3d 1098 (noting that, in "the federal system . . . 'if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case'" (quoting *Ry. Lab. Execs.' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993))).

Further, "the proceeds of lands . . . granted for educational purposes . . . shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . . ." *Id.* § 10. Finally, "[t]he schools, colleges, and university provided for in this Act shall forever remain under the exclusive control of said State." *Id.* § 11.

In accordance with the Enabling Act, article III of the Utah Constitution requires that "[t]he Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control." Similarly, article X, section 1 requires that "[t]he Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system." Article X, section 1 further requires that "[b]oth systems shall be free from sectarian control."

Article X, section 2 "[d]efin[es] what shall constitute the public school system." Relevant to this case, "[t]he public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate." *Id.* The provision also reiterates that "[p]ublic elementary and secondary schools shall be free, except the legislature may authorize the imposition of fees in the secondary schools." *Id.*

Finally, the public education system is funded by "revenue from taxes on intangible property or from a tax on income[.]" Utah Const. Art. XIII, § 5(5). In 2020, Utah voters amended article XIII to allow this revenue to be used "to support children and to support individuals with a disability." *See* S.J.R. 9 § 1 (2020).

To resolve the pending Motions, the court must first determine whether the legislature has the authority to create an education program that is not part of the public education system, either pursuant to the "may designate" language in article X or the legislature's plenary authority. If so, the court must then determine whether the legislature may fund the Program with income tax revenue.

B. Interpretation of Utah Constitution

"The power and duty of ascertaining the meaning of a constitutional provision resides exclusively with the judiciary." *Wadsworth v. Santaquin*, 83 Utah 321, 351, 28 P.2d 161, 172 (1933). When confronted with a constitutional challenge to a statute, the court must "presume[] that the statute is valid[] and . . . resolve any reasonable doubts in favor of constitutionality." State v. Morrison, 2001 UT 73, ¶ 5, 31 P.3d 547; *see also Jones v. Utah Bd. of Pardons & Parole*, 2004 UT 53, ¶ 10, 94 P.3d 283; *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.* (*Utah School Boards*), 2001 UT 2, ¶ 9, 17 P.3d 1125.

The "Utah Constitution enshrines principles, not application of those principles." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092. Thus, a court's "interpretive task is to determine what the principles the people of Utah enshrined in the constitution." *Planned Parenthood Association of Utah v. State* (*Planned Parenthood*), 2024 UT 28, ¶ 127 n.33, 554 P.3d 998.

In their briefing, Defendants insist that if the constitutional language is "unambiguous," that is the end of the inquiry. In fairness to Defendants, there is support for their approach in earlier decisions of the Utah Supreme Court. For example, in *State v. Willis*, the supreme court stated that "when interpreting our state constitution, we look first to the plain meaning of the constitutional provision at issue" and "need not inquire beyond the plain meaning . . . unless we find it ambiguous." 2004 UT 93, ¶ 4, 100 P.3d 1218 (omission in original) (quoting *State v. Casey*, 2002 UT 29, ¶ 20, 44 P.3d 756). The *Willis* court also explained that if "the plain language of the amendment is susceptible to two plausible readings, it is ambiguous." *Id.* ¶ 12. In such cases, courts "may go beyond the text by looking to evidence of 'legislative history and relevant policy considerations.'" *Id.* (quoting *In re Worthen*, 926 P.2d 853, 866 (Utah 1996)).

But more recently, the supreme court "began to emphasize that [it] would interpret the Utah Constitution by focusing on its original public meaning." *Planned Parenthood*, 2024 UT 28, ¶ 109. Under this approach, the parties "look to history and tradition as part of the inquiry into what . . . Utahns would have understood the constitution's text to mean. From that original meaning, we can identify the constitutionally protected principle. That is, an inquiry into history and tradition is not an end in itself; it is a means to discover what the constitutional language meant to Utahns when it entered the constitution." *Id.*

Accordingly, the court must "ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." *Richards v. Cox*, 2019 UT 57, ¶ 13, 450 P.3d 1074; *see also Maese*, 2019 UT 58, ¶ 18 (noting that the court's interpretation of relevant constitutional provisions "start[s] with the meaning of the text as understood when it was adopted."). This is because "the Utah Constitution derives its power and effect" from "the citizens who voted it into effect," so "it is to them we must look for [the Constitution's] proper interpretation." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235; *see also State v. Barnett*, 2023 UT 20, ¶ 55, 537 P.3d 21 (explaining the courts "employ public meaning originalism because the constitution derives its authority from the democratic action of the people in whom '[a]ll political power is inherent'" (alteration in original) (quoting Utah Const. art. I, § 2)); *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663 (the court's "inquiry must focus on ascertaining the 'original public meaning' of the constitutional text").

Consequently, "unlike other forms of analysis, 'constitutional inquiry does not require us to find a textual ambiguity before we turn to . . . sources' outside the text." *Barnett*, 2023 UT 20, ¶ 10 (omission in original) (quoting *Maese*, 2019 UT 58, ¶ 23); *see also Planned Parenthood*, 2024 UT 28, ¶ 184 (explaining that "we don't necessarily stop our analysis when the document's plain language suggests an answer"). "[W]hile 'the text is generally the best place to look for understanding, historical sources can be essential to our effort to discern and confirm the original public meaning of the language.'" *Barnett* 2023 UT 20, ¶ 10 (quoting *Maese*, 2019 UT 58, ¶ 23). Importantly, "[t]here is no magical formula for this analysis – different sources will be more or less persuasive depending on the constitutional question and the content of those sources." *Maese*, 2019 UT 58, ¶ 19.

Here, the relevant constitutional provisions were amended by Utah voters. Consequently, the court must "look to the meaning that the public would have ascribed to the amended

language when it entered the constitution." *See Barnett*, 2023 UT 20, ¶ 41 (quoting *Randolph v. State*, 2022 UT 34, ¶ 68, 515 P.3d 444); *see also Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 12, 466 P.3d 178 (explaining that courts should "determine the 'original public meaning' of the constitutional provision in question at the time it was adopted" (quoting *Neese*, 2017 UT 89, ¶ 95)). The court is not limited to a linguistic analysis of the original public meaning of particular words but also may consider "how Utahns would have understood the *scope* of the rights enshrined" in the relevant constitutional provision. *League of Women Voters*, 2024 UT 21, ¶ 102.[11]

To this end, the court "must ask what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody." *Neese*, 2017 UT 89, ¶ 96. This does not entail merely translating historical terms into "roughly equivalent contemporary English." *Neese* at ¶ 98. "It involves using all available tools – Black's Law Dictionary, corpus linguistics, and our examination of the 'shared linguistic, political, and legal presuppositions and understandings of the ratification era.'" *Richards*, 2019 UT 57, ¶ 13 (quoting *Neese*, 2017 UT 89, ¶ 98; *see also Am. Bush*, 2006 UT 40, ¶ 10, 140 P.3d 1235 ("[W]e recognize that constitutional language . . . is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." (omission in original) (quoting *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring))).

Importantly, "'when we interpret our constitution, we are not simply shopping for interpretations that we might like' or for one that, in our view, 'best serve[s] the people of Utah.' Rather, we 'try[] to understand what the language meant' to the public at the time 'and we go from there.'" *League of Women Voters*, 2024 UT 21, ¶ 63 n.15 (alterations in original) (quoting *Randolph*, 2022 UT 34, ¶ 69).

Finally, when interpreting the constitution, the court must "strive to harmonize constitutional provisions with one another and with the meaning and function of the constitution as a whole" and avoid examining the language in "isolation." *University of Utah v. Shurtleff*, 2006 UT 51, ¶¶ 17, 30, 144 P.3d 1109 (quoting *Estate of Berkemeir v. Hartford Ins. Co.*, 2004 UT 104, ¶ 13, 106 P.3d 700).

With these principles in mind, the court "take[s] the disputed constitutional provisions in turn, asses[es] the historical context in which they were ratified, and determine[s] what they would have meant to Utahns at the time." *League of Women Voters*, 2024 UT 21, ¶ 103.

VIII. ARTICLE X OF THE UTAH CONSTITUTION

[11] In *League of Women Voters*, "the parties d[id] not argue about the original public meaning of particular words . . . at least, not in linguistic terms." 2024 UT 21, ¶ 102. Instead, the "debate center[ed] on how Utahns would have understood the scope of the rights enshrined in the Initiative Provision and the Alter or Reform Clause, and specifically how those rights retained by the people would interact with the powers they had assigned to the Legislature." *Id.*

In their First Claim for Relief, Plaintiffs allege the Program violates articles III and X of the Utah Constitution because it is a "program within the public education system that is not free and is not 'open to all the children of Utah.'"

Defendants argue "[t]he clearest path to dismissing Plaintiffs' lead claim is to hold that the Legislature did not designate the [ ] Program part of the public education system."

Accordingly, the court first considers whether the legislature has authority to create publicly funded education program that is not part of the public education system pursuant to article X or its plenary power.

A. Article X and Proposition 3

Although they retreat somewhat from this position in subsequent briefing, the State initially contends that Proposition 3 granted the legislature express authority to "designate" publicly funded education programs as being outside of the public education system.[12]

For the November 1986 election, Proposition No. 3, Education Article Revision, was placed on the ballot. To put Proposition No. 3 in context, it is important to understand the events leading up to it[13] and the legislative and public discussion surrounding it.[14]

1. Background and Legislative History of Proposition 3

Prior to 1986, article X, sections 1 and 2 stated as follows:

> Sec. 1. The Legislature shall provide for the establishment and maintenance of a uniform system of public schools which shall be open to all children of the State and be free from sectarian control.
>
> Sec. 2. The public schools system shall include kindergarten schools; common schools, consisting of primary and grammar grades; high schools; an agricultural college; a university; and such other schools as the Legislature may establish. The common

[12] For example, the State's supplemental briefing frames the issue as whether "the proposed amendments were designed to place any constraints on the Legislature's otherwise plenary authority to create programs outside the public education system . . . ." In doing so, the State appears to concede that Proposition 3 did not grant the legislature specific authority to create education programs outside of the public education system.

[13] *See, e.g., Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993) (when interpreting constitutional provision, the court should consider "other provisions dealing with the general topic" as well as any unique social and political history regarding the topic).

[14] "Although evaluating evidence of legislative intent is inherently problematic, it is even more so in cases involving a constitutional amendment, where the relevant legislators include the voting public. Therefore, we evaluate both the relevant legislative history and the relevant policy considerations to determine which interpretation is valid." *See Willis*, 2004 UT 93, ¶ 13; *see also id.* ¶14 (referencing statements made by sponsor of amendment "indicating his intent that the amendment not alter the legislature's then-existing right to restrict felons from possessing firearms").

> schools shall be free. The other departments of the system shall be supported as provided by law.

According to the State, in 1985 and 1986, the Utah Constitutional Revision Commission (CRC) "saw a need to revise Article X to bring it into alignment with the then-current structure of Utah's public education system, including public higher education."

The legislature was also attempting to "resolve a number of educational issues [by] focusing on five educational concepts."[15] The fifth concept involved "joint public and higher education issues," including "vocational education" and "public and higher education linkage" or "the relationship between the two systems of public education [and their] areas of conflict and cooperation."[16] The legislature also identified "study[ing] the Education Article of the Utah Constitution and determin[ing] how it should be revised to conform to practice and eliminate outdated provisions" as a "top priority."[17]

At the same, time, the legislature was discussing the possibility of "provid[ing] public funding to non-public institutions of higher education."[18] Specifically, a "one-time $1,130,000 appropriation . . . to renovate Ferry Hall on the Westminster campus."[19] During the Education Interim Committee discussion of this one-time appropriation, Representative Donald R. LeBaron "asked if there were any constitutional problems with this proposal" and the Minutes reflect that "[i]t was reported that there are none."[20]

A few months later, the CRC discussed "the language prohibiting direct state support of religious schools" in the proposed Education Article Revision. Shelly Cordon, the legislature's research analyst:

> told the commission that the federal constitutional provisions and case law governed in the area of state support for religious schools, and was fairly restrictive. State constitutions can only be more restrictive, not more permissive, than the federal constitution. The present language in the Utah Constitution is probably more

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[15] Letter of Office of Legislative Research and General Counsel dated April 3, 1986.

[16] *Id.*

[17] *Id.* Intervenors insist the "Legislature was working on private school choice tax credits 'for parents of children in private schools,' at the same time that it was studying the amendment to the Education Article." Perhaps. And the topic of "Tuition Tax Credits – to study whether tax deductions should be allowed for parents of children in private schools, and examine funding the tax credits with a video game tax" was certainly listed as one of thirty studies that "have not yet been officially approved by the Management Committee, although we do anticipate their approval on most if not all study items." But Proposition 3 was never linked to such behind the scenes efforts. And Intervenors' statement that "a few months earlier, the history shows lawmakers addressing appropriations to assist private 'non-public institutions of higher education' is incorrect. They were discussing a one-time appropriation to Westminster College to renovate Ferry Hall.

[18] Letter of Office of Legislative Research and General Counsel dated April 3, 1986.

[19] *Id.*

[20] Minutes of the Education Interim Committee on December 9, 1985.

> restrictive than the U.S. Constitution and case law but the language in the Education Article Revision would probably not be more restrictive than the U.S. Constitution.[21]

The specific revision at issue was the proposed change in article X, section 9 from prohibiting "any appropriation *to aid in the support of* any" educational institution controlled by any religious organization to prohibiting "any appropriation *for the direct support of* any educational institution controlled by any religious organization."[22] The minutes of the CRC's meeting also reflect that the State Board of Education supported the proposed revision and that the State Board of Regents did not have any concern that the proposed revision would permit "state scholarships [to] be given to BYU."[23]

During the 1986 legislative session, the legislature passed a Joint Resolution proposing to amend the Utah Constitution relating to the Education Article. Among other things, the amendment would "provide for the establishment of a public education system and a higher education system[.]"[24] It would also "prohibit[] state appropriations for the direct support of educational institutions controlled by religious organizations[.]"[25]

2. Proposition No. 3 (Education Article Revision)

Proposition 3, Education Article Revision, proposed to change article X, sections 1 and 2 as follows:

> Sec. 1.
>
> The Legislature shall provide for the establishment and maintenance of [~~a uniform system of public schools~~] the state's education systems including: (a) a public education system, which shall be open to all children of the state [~~,~~]; and (b) a higher education system. Both systems shall be free from sectarian control.
>
> Sec. 2.
>
> The public [~~school~~] education system shall include [~~kindergarten~~] all public elementary and secondary schools [~~, common schools, consisting of primary and grammar grades; high schools; an agricultural college; a university;~~] and such other schools and programs as the Legislature may [~~establish~~] designate. The [~~common~~] higher education system shall include all public universities and colleges and such other institutions and programs

[21] Minutes of Constitutional Revision Commission on January 3, 1986.

[22] S.J.R. 1 § 1 (2d Spec. Sess. 1986) (emphases added).

[23] Minutes of Constitutional Revision Commission on January 3, 1986.

[24] S.J.R. 1.

[25] *Id.*

as the Legislature may designate. Public elementary and secondary schools shall be free, except the Legislature may authorize the imposition of fees in the secondary schools.

3. The Voter Information Pamphlet

The Utah Supreme Court views voter information pamphlets as more reliable than legislative history because they contain the "definitive statements" made available to all voters and are "the kinds of materials that citizens regularly reference to understand a proposition's meaning." *Barnett*, 2023 UT 20, ¶ 74.

The Official Ballot Title for Proposition 3 states, in relevant part, as follows: "Shall Article X, Sections 1 [and] 2 . . . be amended . . . to provide an Education Article which: retains a public education system and establishes a higher education system; provides for public elementary and secondary schools to be free, while allowing the Legislature to authorize fees in the secondary schools[.]"

The Utah Voter Information Pamphlet, General Election, November 4, 1986, provides in relevant part as follows:

> **Proposal.**
>
> The provisions of the Education Article Revision can be divided into four general categories:
>
> 1. **Structure and Governance of Education** – *The present Utah Constitution mentions only one system of education*: a public school system, which includes "kindergarten schools; common schools, consisting of primary and grammar grades; high schools, an agricultural college, a university, and such other schools as the Legislature may establish." The constitution establishes an elected State Board of Education to control the public school system.
>
> Shortly after statehood, new colleges and universities were formed. They were controlled in different ways, but at no time was all of higher education controlled by the State Board of Education. Colleges and universities were generally separated from the public education system. In 1969, the Legislature created a system of higher education for the colleges and universities of the state. At the same time, the Legislature created a State Board of Regents to control and supervise the system of higher education. The State Board of Regents is appointed by the governor.
>
> In 1972, the State Board of Education sued the State Board of Regents, claiming that the higher education system was unconstitutional since the constitution did not provide for the creation of a system of higher education separate from public

education. The Utah Supreme Court decided that the practice of having two education systems was constitutional.[26]

The proposed constitutional revision provides for two systems of education:

a. **Public Education System**: Includes all public elementary and secondary schools, plus any other schools and programs that the Legislature may designate. An elected State Board of Education is given control and supervision of the system (as in the present constitution).

b. **Higher Education System**: Includes all public universities and colleges, plus any other institutions and programs that the Legislature may designate. The control and supervision of the system is to be established by statute.

The Legislature is allowed to place additional programs under each system so that certain programs and institutions, such as vocational education, may be assigned to the appropriate system.

2. Free Education – The present constitution provides only that the common schools (grades 1-8) shall be free. The revision states that public elementary and secondary schools are free, but permits the Legislature to allow fees to be charged in the secondary schools.

3. Prohibition of Direct Support – The present constitution prohibits state and local governments from making any appropriation to aid in the support of schools controlled, even in part, by a religious organization. The meaning of this provision is not completely clear. It may prevent governments from paying a school controlled by a religious organization for a service of benefit to the state. The revision states that state and local governments may not make any appropriation for the ***direct*** support of a school or educational institution controlled by a religious organization. This clarifies and probably expands the power of state and local governments to offer certain kinds of indirect support.[27]

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[26] In *State Board of Education v. State Board of Higher Education* , the Utah Supreme Court held that, "[i]n view of the long interpretation of Article X, Sections 2 and 8, by the legislature, with the acquiescence of the people, as well as the State Board of Education, and the administrators of the institutions of higher learning, we are of the opinion that [the act creating the system of higher education] . . . is valid." 505 P.2d 1193, 1196 (Utah 1973) (internal footnote omitted).

[27] Voter Information Pamphlet, General Election, Nov. 4, 1986 (bold formatting in original and non-bold italic formatting added).

The "Arguments For" section of the Voter Information Pamphlet states, in relevant part, as follows:

> **Proposition 3 simply puts current practice into the constitution.** The state's education systems have grown and changed, but the Education Article of the Utah Constitution has not been revised since it was written in 1898. It contains archaic language and practices. For example, the present constitution prohibits a State Textbook Commission, even though the state has had one since 1909. Also, the constitution now includes an agricultural college and a university in the public education system, which has not been the practice for many decades.
>
> **Proposition 3 provides clear, simple constitutional language.**
>
> . . .
>
> **Proposition 3 ends uncertainty about education governance.** The Utah System of Higher Education was established by law in 1969. Even though the governance structure has been very successful, there has been uncertainty about the system's authority because of unclear constitutional language. Proposition 3 clearly makes the public education system responsible for elementary and secondary education and the higher education system responsible for college and university education.
>
> **Proposition 3 guarantees a free public education.**
>
> . . .
>
> **Proposition 3 allows for laws to change as needs change.** Because the Proposition is streamlined, it leaves many non-constitutional matters where they belong – with the Legislature.
>
> . . .
>
> **A vote for Proposition 3 is a vote for education in Utah!** The State Board of Education and the State Board of Regents agree that Proposition 3 makes necessary changes to improve education in Utah. Now is the time to revise the constitution so the school boards can get on with the substantive issues of education.[28]

The "Arguments Against" section of the Voter Information Pamphlet states, in relevant part, as follows:

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[28] *Id.*

> The new wording changes the current relationship of church and state in the law regarding aid to religious institutions. In existing law, the state may not make any appropriation to aid in support of schools or institutions owned in whole or in part by any religious organization. The new wording prohibits the state only from making any appropriation for direct aid, leaving the door open for the giving of indirect aid to church-owned facilities.
>
> . . .
>
> **Proposition 3 doesn't revise anything!** All this revision does is restate the status quo. *It doesn't give more flexibility to the Legislature, and it doesn't solve the problems of education in Utah.* Changes are needed in education, but this revision cuts off the possibility of change!
>
> . . .
>
> **Proposition 3 ignores vocational education!** This revision does not make clear where vocational rehabilitation belongs. In fact, it sets up a turf battle between public and higher education over who will administer vocational education. Vocational education has been a stepchild to the rest of education all too long, but Proposition 3 does nothing to solve this problem. Proposition 3 still leaves vocational education in limbo![29]

The "Rebuttal to" the "Arguments Against" section of the Voter Information Pamphlet states, in relevant part, as follows:

> **Proposition 3 revises the constitution to bring it in line with statutory practices, such as the board of regents, which have evolved over many years.** The current system is working well, and should be placed in the constitution to eliminate confusion and court challenges. *Within the basic structure outlined by Proposition 3, the Legislature can make meaningful changes to save money and improve education.*
>
> **Proposition 3 does not ignore vocational education!** Proposition 3 ends the confusion over vocational education governance by allowing the Legislature to decide which board should govern various vocational education programs and institutions when the two boards cannot agree. Some areas of vocational education are best handled by the public education system, while others are best handled by the higher education system. It would be expensive and

[29] *Id.* (bold formatting in original and italic formatting added).

wasteful to create a separate constitutional board for vocational education!

Proposition 3 prohibits direct state support of church schools, while allowing flexibility that will serve the state's interests. By forbidding indirect support of church schools, the current constitution may prohibit contracts that could benefit the state between the state and church schools. Proposition 3 forbids only ***direct*** support. ***It is more in line with the U.S. Constitution and federal court decisions allowing limited indirect aid to church schools.*** By following the federal constitution, Proposition 3 gives greater flexibility and uniformity with other states.

This revision is supported by both the Board of Education and the Board of Regents! It clears up conflicts about governance while leaving the power to improve education with the Legislature.[30]

4. Newspaper Articles About Proposition 3

A Salt Lake Tribune newspaper article regarding Proposition 3 stated as follows:

> Proposition 3 proposes to streamline the constitutional article on education governance. It culminates years of debate in the Legislature on defining and delineating bureaucratic authorities and funding principles over public and higher education but the ballot issue largely sustains the status quo in the Utah Constitution.
>
> Proponents of Proposition 3 have contended that it clarifies legislative purview in educational matters. Opponents have countered that it still leaves many questions unresolved, such as where vocational education should fit in the public/higher education schematic.
>
> The revised article would accent [sic] "free education" in the state through elementary and secondary grades, though it would allow the Legislature to grant permission for "fees" in the secondary schools.
>
> It also modifies language on the state's relationship to schools owned and operated by religious organizations, proposing that no Utah public entity can appropriate any "direct" support to those institutions.[31]

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[30] *Id.* (bold formatting in original and non-bold italic formatting added).

[31] "Propositions Battle Election-Year Obscurity," *Salt Lake Tribune*, Sept. 1, 1986.

An Ogden Standard Examiner newspaper article, which was published after Proposition No. 3 was passed by the voters, described Proposition No. 3 as follows:

> [Proposition 3] amends the Constitution to:
>
> * Establish a state system of higher education to govern Utah's colleges and universities. The amendment resolves a long-running debate over whether the State Board of Education also should govern higher education.
>
> * Assure a free education to Utah students through grade 12 but provides that fees may be charged in secondary schools. However, the revision does not stipulate a free kindergarten and does not define which grades constitute secondary school.
>
> * Eliminate an absolute prohibition of state aid to private schools primarily supported by religious organizations. *The revision prohibits only "direct aid," possibly opening the door for in-direct non-financial aid.*
>
> * Cleans up language and provisions considered "obsolete" by the Utah Constitutional Review Commission.[32]

5. Proposition 3 Did Not Expand or Limit Legislature's Authority

The court concludes that Proposition 3 did not expand or limit the legislature's plenary authority with respect to education.[33] In other words, if the legislature had plenary authority to create the Program prior to 1986, Proposition 3 did not limit that authority. Conversely, if the legislature did not have such authority prior to 1986, the addition of the phrase "as the Legislature may designate" did not give them specific authority to do so.[34]

As a preliminary matter, the State implicitly acknowledges that the CRC's proposed revisions to sections 1 and 2 were not intended to grant the legislature specific authority to create education programs outside of the public education system. But even without this concession, the court concludes that the "original public meaning" of these revisions – *i.e.*, what Utah voters would have understood Proposition 3 to accomplish and what "as may designate" to mean – is that amended sections 1 and 2 would constitutionalize a division between Utah's public

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[32] "Failure of Proposition 1 may prompt recount," *Ogden Standard Examiner*, Nov. 5, 1986 (emphasis added).

[33] ACE appears to concede this point in its supplemental brief when it acknowledges that "the amendment merely created two educational systems to resolve a governance dispute without suggesting any exclusivity or limits on plenary legislative power to create education programs falling outside those two systems." However, the court and ACE part ways on whether the legislature has such plenary power.

[34] According to the State, the CRC "saw a need to revise Article X to bring it into alignment with the then-current structure of Utah's public education system, including public higher education." Therefore, the State implicitly acknowledges the CRC's proposed amendments to sections 1 and 2 were not intended to grant the legislature express authority to create education programs outside of the public education system.

education system and higher education system and allow the legislature to assign newly created schools and education programs to one of the two systems. Utah voters would not have understood Proposition 3 to authorize the legislature to create publicly funded schools or education programs outside of the public education system or the higher education system or that are otherwise not subject to constitutional constraints.

In connection with Proposition 3, Utah voters were explicitly told that the "Utah Constitution mentions only one system of education: a public school system" and that Proposition 3 "provides for two systems of education: . . . a public education system [and] a higher education system."[35] Utah voters also were explicitly told that the legislature would be "allowed to place additional programs *under each system* so that certain programs and institutions, such as vocational education, may be *assigned to the appropriate system*." [36]

Further, Utah voters were explicitly told that Proposition 3 "simply puts current practice into the constitution" using "clear, simple constitutional language" that will "end[] uncertainty about education governance" while "guarantee[ing] a free public education."[37]

Consistent with these statements, Utah voters were asked whether Article X, Sections 1 and 2 should "be amended" to "retain[] a public education system and establish[] a higher education system," the former of which being "free" except that the legislature may "authorize fees in the secondary schools[.]"[38]

Given these clear statements of the purpose of Proposition 3 and what it would accomplish if passed, the court concludes that Utah voters would have understood "as the Legislature may designate" to mean that the legislature would decide whether "other schools and [education] programs" created by them were part of the public school system or the higher education system.

There is certainly nothing in the language itself or the historical sources that suggests Utah voters would have understood "as the Legislature may designate" to mean that the legislature would now have the authority to create schools and other education programs outside of the public education system or the higher education system. Or that by simply failing to "designate" a publicly funded school or education program as part of the public education system, the legislature's newly created school or education program would be free from constitutional constraints and Board oversight.[39]

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[35] Utah Voter Information Pamphlet, General Election, Nov. 4, 1986 (cleaned up).

[36] *Id.* (emphasis added).

[37] *Id.* (bold formatting omitted).

[38] *Id.*

[39] There is nothing in the legislative history that supports Intervenors' assertion that "the legislative history reflects that the Legislature in 1986 was contemplating a variety of state-funded education programs, including private school choice programs and state funding for private colleges."

It is true that Proposition 3 also included a proposed revision to section 9 to prohibit "appropriation[s] for the direct support of any school or educational institution controlled by any religious organization."[40] But there is nothing in the legislative history or Voter Information Pamphlet or plain text of these three sections that links them together or that otherwise suggests that "as the Legislature may designate" means the legislature could not only create education programs outside of the public education system but also use those newly created programs to support schools controlled by religious organizations. And Defendants' reliance on the amendment to article X, section 9 is additionally misplaced because Plaintiffs do not bring a claim under this section.

Indeed, the court agrees with Plaintiffs that informed voters could not reasonably conclude that by tasking the legislature with placing vocational education programs into one of the State's two educational systems, Proposition 3 empowered the legislature "to create a constitution-free zone where publicly funded educational programs could operate in violation of constitutional requirements."[41] The court further agrees with Plaintiffs that the notion the legislature could unilaterally decide whether its enactments must comply with constitutional mandates by using or omitting the word "designate" is "necessarily inconsistent with the premise of a written constitution which was intended to be, and is, a statement of positive law that limits the powers of government." *See Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985) (the court also explained that the legislature cannot "nullify" a constitutional protection "in whole or part, by indirect means.")

Accordingly, the court concludes that Proposition 3 did not give the legislature "specific" "authority and discretion to determine what programs are or are not part of the public education and higher education systems" or that Utah voters would have "understood the amendment to clarify the Legislature's authority to designate any school or program in or out of the public education system[.]"[42]

B. The Legislature Does Not Have Plenary Authority to Establish the Program

Because Proposition 3 did not expand or limit the legislature's plenary authority with respect to education, the court's analysis focuses on the core principles enshrined in the Education Article of the Utah Constitution and how those principles apply to the legislature's creation of the Program.

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[40] S.J.R. 1 § 1. The State's contention that the CRC's discussion of article X, section 9 "lend[s] insight into the meaning of the 1986 amendments" because it proposed "an intentional loosening of the previous restriction on the Legislature's authority where the use of public funds for non-public educational options is concerned" is not supported by the historical sources provided to the court and discussed above. During the floor debates, for example, the legislators discussed BYU renting Provo High School, roads, gas lines, and water lines leading to private university property. They were not discussing vouchers or scholarships or other forms of direct aid that would allow students to attend private schools instead of public schools. And the only time scholarships were specifically discussed – during a CRC meeting on January 3, 1986 – the members seemed to agree that the proposed revision would not, for example, permit state scholarships to be given to students attending BYU.

[41] *See* Plaintiffs' Supplemental Brief at 5.

[42] Defendants do not point to any schools or education programs that the legislature created outside of the public education system or the higher education system prior to the passage of the Program in 2023.

In summary, article X, section 1 of the Utah Constitution requires that "[t]he Legislature shall provide for the establishment and maintenance of the state's education systems including . . . a public education system." Article X, section 2 further provides that the State's "public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate." Finally article X, section 1 also provides that the State's "public education system shall be open to all children of the state" and "shall be free from sectarian control."

According to Defendants, "[t]he Legislature possesses plenary power to support education through other means, including scholarships for children that can be used at private schools or with other private providers" and "[t]here is nothing in Article X or elsewhere in Utah's Constitution that prevents the Legislature from enacting programs that touch education, but which are not designed to be part of the of the public education system." Therefore, "[f]or Plaintiffs to prevail on their First Claim, they bear the burden of showing that the Constitution restrains the Legislature from creating educational programs outside of the 'public education system.'"[43]

According to Plaintiffs, "[t]he Constitution does not permit the Legislature to establish publicly funded education programs that are exempt from the constitutional requirements of Article X" because the Constitution "provide[s] for two – and only two – systems of education within the state" and the legislature may only "designate additional education programs within one of these two systems[.]" Therefore, any education program created by the legislature must "be free from sectarian control" and comply with article X's mandates that the public education system "shall be open to all children of the state" and "shall be free."

1. The Legislature's Plenary Authority Generally

"The Utah Constitution is not one of grant, but one of limitation." *Utah School Boards*, 2001 UT 2, ¶ 11.Moreover, under the constitution, the state "committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution." *Id.* (quoting *Univ. of Utah v. Bd. of Examiners,* 4 Utah 2d 408, 426, 295 P.2d 348, 361 (1956)); *see also* Utah Const. art. VI, § 1 (vesting the state's legislative power in the legislature and in "the people of the State of Utah"). Consequently, a challenged statute "must be deemed constitutional unless an examination of the Utah Constitution reveals limitations upon the legislature with respect thereto." *Id.*

2. Legislature's Plenary Authority with Respect to Education

If the legislature is to "be restricted in educational as well as all other matters, it is imperative that the Legislature be restricted expressly or by necessary implication by the Constitution itself." *Univ. of Utah*, 295 P.2d at 360.

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[43] State Supp. Br. at 2.

Importantly, the supreme court described the legislature's plenary authority with respect to education as follows:

> The legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. This includes any other schools or programs the legislature may designate to be included in the system. However, its authority is not unlimited. *The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control, and it cannot establish public elementary and secondary schools that are not free of charge,* for such would be a violation of articles III and X of the Utah Constitution.

Utah School Boards, 2001 UT 2, ¶ 14 (emphasis added).

3. Cases from Other Jurisdictions Cited by Defendants

Rather than directly tackling the supreme court's holding in *Utah School Boards*, Defendants rely heavily on "numerous" decisions from courts in other states – five to be exact – that have upheld some form of a voucher or school choice program under its state's unique constitutional provisions.

(a) Wisconsin

In *Davis v. Grover*, the Wisconsin Supreme Court addressed the constitutionality of the Milwaukee Parental Choice Program (MPCP), which "is a publicly funded program that permits selected children from low-income families to attend nonsectarian private schools at no cost to the student." 480 N.W.2d 460, 462 (Wis. 1992). Ms. Davis, represented families of participating students and private schools and filed the lawsuit challenging a number of regulatory actions taken by the state superintendent. *Id.* at 462. Mr. Chaney, representing various school administration organizations and the NAACP, intervened to challenging the constitutionality of the MPCP. *Id.*

The "uniformity clause" in Wisconsin Constitution art. X, sec. 3 states:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.

Davis, 480 N.W.2d at 473 (quoting Wis. Const. art. X, § 3). Mr. Chaney argued the MPCP violated the uniformity clause because the participating private schools were "district schools" that offered a "character of instruction" that was different from the one required by the statute. *Id.*The court noted the "key to this argument is whether private schools participating in the MPCP are considered 'district schools' for the purposes of the uniformity clause." *Id.* The court ultimately held that:

> [T]he MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education. Even these students participating in the program may withdraw at any time and return to a public school. The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education. The legislature has done so. The MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated.

Id. at 474.[44]

A few years later in *Jackson v. Benson*, the Wisconsin supreme court returned to the constitutionality of the MPCP, which had been amended to, among other things, remove the limitation that private schools be "nonsectarian." 578 N.W.2d 602, 608 (Wis. 1998). Relying on *Davis*, the Wisconsin supreme court reiterated that "diverting students and funds away from the public school system" does not violate the uniformity clause because it "provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin." *Id.* at 629.

(b) Indiana

In *Meredith v. Pence*, the Indiana Supreme Court addressed the constitutionality of the Choice Scholarship Program, which "permits eligible students to obtain scholarships (also called 'vouchers') that may be used toward tuition at participating nonpublic schools in Indiana." 984 N.E.2d 1213, 1219 (Ind. 2013).

To be eligible, students must meet certain income requirements. *Id.* Moreover, "nonpublic schools must meet several criteria, including accreditation . . . , statewide testing for educational progress . . . , and participation in the [state] [b]oard of [e]ducation's school improvement program[.]" *Id.* "Participation in the program does not subject participating schools to 'regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school,' except that the school must meet certain minimum instructional requirements which correspond to the mandatory curriculum in Indiana public schools and nonpublic schools accredited by the [b]oard of [e]ducation." *Id.* (internal citation omitted). Ultimately, "most of the schools that had sought and received approval . . . to participate . . . were religiously affiliated," and once the

[44] The court also held "the mere appropriation of public monies to a private school [does not] transform[] that school into a public school." *Davis*, 480 N.W.2d at 474.

voucher funds are distributed, the "program places no specific restrictions on the use of the funds." *Id.*

The Education Clause of the Indiana Constitution provides as follows:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Meredith, 984 N.E.2d at 1221 (emphasis omitted) (quoting Ind. Const. art. 8, § 1). The *Meredith* court first noted that the Education Clause articulates two "separate and distinct" duties of the General Assembly with respect to education in Indiana. *Id.* at 1222. The first duty is "to *encourage* moral, intellectual, scientific, and agricultural improvement" by all suitable means. *Id.* (quotation omitted). The second duty is "to *provide* for a general and uniform system of open common schools without tuition." *Id.* (quotation omitted). Given the General Assembly's "broad legislative discretion" and the fact that the "voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren," the supreme court held that the Choice Scholarship Program does not violate the Education Clause. *Id.* at 1222, 1223.

(c) North Carolina

In *Hart v. State*, the North Carolina Supreme Court addressed the constitutionality of "the Opportunity Scholarship Program, which allows a small number of students in lower-income families to receive scholarships from the [s]tate to attend private school." 774 S.E.2d 281, 284-85 (N.C. 2015) (internal footnote omitted).

The court noted that, under the statutory scheme,

> A nonpublic school that accepts a scholarship recipient for admission must (1) provid[e] . . . documentation of the tuition and fees charged to the student; (2) provid[e] . . . a criminal background check conducted on the highest ranking staff member at the school; (3) provid[e] the parent or guardian of the student with an annual progress report, including standardized test scores; (4) administer[] at least one nationally standardized test or equivalent measure for each student in grades three or higher that measures achievement in the areas of English grammar, reading, spelling, and mathematics; (5) provid[e] . . . graduation rates of scholarship program students; and (6) contract[] with a certified public accountant to perform a financial review for each school year in which the non-public school accepts more than $300,000 in scholarship grants.

Id. at 286. The court then discussed two provisions of the North Carolina Constitution that were relevant to the case. Under one provision, the people of North Carolina "have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." *Id.* at 292 (quoting N.C. Const. art. I, § 15). The court held this provision "is not an independent restriction on the [s]tate" and that, even if it was, "there is no merit in the argument that a legislative program designed to increase educational opportunity in our state is one that fails to 'guard and maintain' the 'right to the privilege of education.'" *Id.* at 292-93.

The other provision (referred to as the "uniformity clause") states that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." *Id.* at 289 (alteration in original) (quoting N.C. Const. art. IX, § 2(1)). The court ultimately rejected the argument that "[i]f the uniformity clause has any substance, it means that the [s]tate cannot create an alternate system of publicly funded private schools standing apart from the system of free public schools mandated by the [c]onstitution." *Id.* Importantly, the court held "the Opportunity Scholarship Program legislation does not create 'an alternate system of publicly funded private schools'" and the "uniformity clause applies exclusively to the public school system and does not prohibit the [the state] from funding educational initiatives outside of that system." *Id.* at 289-90.

(d) Nevada

In *Schwartz v. Lopez*, the Nevada Supreme Court addressed the constitutionality of "the Education Savings Account (ESA) program, which allows public funds to be transferred from the State Distributive School Account into private education savings accounts maintained for the benefit of school-aged children to pay for private schooling, tutoring, and other non-public educational services and expenses." 382 P.3d 886, 891 (Nev. 2016).[45]

Article 11, Sections 1 and 2 of the Nevada Constitution provides as follows:

> Section 1. **Legislature to encourage education; appointment, term and duties of superintendent of public instruction.** The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.
>
> Section 2. **Uniform system of common schools.** The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character

[45] "To be eligible for an account, a child must have been enrolled in public school for 100 consecutive days immediately preceding the account's establishment." *Schwartz*, 382 P.3d at 892. So, presumably, children currently attending private schools would not be eligible for the account.

> therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

The *Schwartz* court held that "Article 11, Section 1 does not limit the Legislature's discretion to encourage other methods of education. Based on that reasoning, the ESA program is not contrary to the Legislature's duty under Article 11, Section 2 to provide for a uniform system of common schools." *Schwartz*, 382 P.3d at 891. Nevertheless, the court also "conclude[d] that the use of money that the Legislature appropriated for K-12 public education to instead fund education savings accounts undermines the constitutional mandates under Sections 2 and 6 to fund public education." *Id.* The court ultimately "enjoin[ed] the use of any money appropriated for K-12 public education in the State Distributive School Account to instead fund the education savings accounts." *Id.*

(e) West Virginia

Finally, in *State v. Beaver*, the West Virginia Supreme Court addressed the constitutionality of the Hope Scholarship Act, which created "education-savings accounts" that may be used for qualifying expenses to educate "any child who resides in West Virginia and 'is enrolled full-time and attending a public elementary or secondary school program in this state for at least 45 calendar days . . . or is eligible at the time of application to enroll in a kindergarten.'" 887 S.E.2d 610, 620 (W. Va. 2022) (omission in original) (quoting W. Va. Code § 18-31-2(5)).

The "free schools clause" of the West Virginia Constitution states that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools." *Id.* at 625 (quoting W. Va. Const. art. XII, § 1). Elsewhere, the constitution provides that "[t]he Legislature shall foster and encourage, moral, intellectual, scientific and agricultural improvement; it shall, whenever it may be practicable, make suitable provision for the blind, mute and insane, and for the organization of such institutions of learning as the best interests of general education in the state may demand." *Id.* at 628 n.20 (quoting W. Va. Const. art. XII, § 12).

The supreme court held that "[w]hile the 'free schools' clause requires the Legislature to provide a th[o]rough and efficient system of free schools, it does not contain any restrictive language prohibiting the Legislature from enacting additional educational initiatives." *Id.* at 626. The court further explained "the 'free schools' clause operates as a floor, not a ceiling. That is, it contains a requirement of what the Legislature must do; it does not prohibit the Legislature from enacting additional educational initiatives, such as the Hope Scholarship Program." *Id.* at 627.

4. The Cases Cited by Defendants Are Distinguishable

These cases provide little guidance in determining whether Utah's legislature has plenary power to create the Program because four of the five constitutions at issue impose on the legislative bodies an additional broad duty to encourage or foster education by all suitable means. Thus, these cases are easily distinguishable.

For example, the Education Clause of the Indiana Constitution articulates two "separate and distinct duties" of the legislative body with respect to education. *Meredith*, 984 N.E.2d at 1222. The first duty is "to encourage, *by all suitable means*, moral, intellectual, scientific, and agricultural improvement." *Id.* (emphasis added) (quoting Ind. Const. art. 8, § 1). The second duty is "to provide . . . for a general and uniform system of" public schools. *Id.* at 1225 (quoting Ind. Const. art. 8, § 1).

The North Carolina Constitution also states at least two duties of the legislative body with respect to education. In addition to its duty to "provide . . . for a general and uniform system of free public schools," *Hart* , 774 S.E.2d at 289 (quoting N.C. Const. art. IX, § 2(1)), the legislative body has a duty to "guard and maintain" the people's "right to the privilege of education," *id.* at 292 (quoting N.C. Const. art. I, § 15). This privilege of education is explained in a separate directive, which provides that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education *shall forever be encouraged*." *Id.* (cleaned up and emphasis added) (quoting N.C. Const. art. IX, § 1).

Similarly, article 11 of the Nevada Constitution expresses two duties of the legislature. The first duty, found in section 1, requires that the legislature "shall *encourage by all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements." (emphasis added.) The legislature's separate obligation to "provide for a uniform system of common schools" is found in section 2.

Finally, Article XII of the West Virginia Constitution imposes two separate duties on the legislature with respect to education. Under section 1, the legislature "shall provide, by general law, for a thorough and efficient system of free schools." And under section 12, the legislature "*shall foster and encourage*, moral, intellectual, scientific improvement; it shall, whenever it may be practicable, *make suitable provision for* . . . the organization of such institutions of learning as the best interests of general education in the state may demand." (emphasis added.)

In stark contrast, article III and article X of the Utah Constitution impose one simple, straightforward, and limited duty on the legislature with respect to education. The Fourth Ordinance of article III states that the legislature "shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control." And article X, section 1 likewise provides that "[t]he Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system[,]" both of which "shall be free from sectarian control."

This leaves the Wisconsin cases. Article X, section 3 of the Wisconsin Constitution – which states that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable" – is closer to article X, section 1 of the Utah Constitution than the other provisions noted above. Even so, the court is not persuaded by the Wisconsin Supreme Court's cursory analysis or otherwise convinced that it applies to Utah's Education Article. Perhaps more persuasively and more directly relevant to the language adopted

in the Utah Constitution, the dissent points out that "Article X *compels* the legislature to exercise its authority to create district schools; it commands the legislature to establish a specific educational system – district schools, statewide uniformity, and free tuition for children of certain ages." *Davis*, 480 N.W.2d at 481 (Wis. 1992) (Abrahamson, J., dissenting). And from this command, "the constitution prohibits the legislature from diverting state support for the district schools to a duplicate, competitive private system of schools." *Id.* at 482.

Accordingly, while it has carefully considered these holdings in reaching its decision, the court ultimately declines to follow them.

5. Cases from Florida Not Cited by Defendants

Defendants initially ignored one other important case addressing the constitutionality of a similar voucher or school choice program.

In *Bush v. Holmes*, the Florida Supreme Court addressed the constitutionality of the Opportunity Scholarship Program (OSP), which "authorizes a system of school vouchers" for students from public schools that fail to meet certain minimum state standards to "receive funds from the public treasury" that "would otherwise have gone to the student's school district, to pay the student's tuition at a private school." 919 So.2d 392, 397-98 (Fla. 2006).

Article IX, Section 1(a) of the Florida Constitution provides as follows:

> **Public education.**
>
> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

The court held that the OSP violates the Florida Constitution because

> [i]t diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. This diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the

> public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies. In sum, through the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools.

Bush, 919 So.2d at 398. In reaching this conclusion, the court referred to article IX, section 1(a) as "[a] [m]andate [w]ith a [r]estriction." *Id.* at 406. The court found that the provision's "language acts as a limitation on legislative power." *Id.* The court also employed the principles of "in pari materia" and "expressio unius est exclusio alterius," the latter of which means "the expression of one thing implies the exclusion of another." *Id.* at 406, 407. Ultimately, the *Bush* court explained:

> [W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when 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.

Id. at 407 (alteration in original).[46]

6. Utah's Education Article Is a Ceiling.

The court starts with two points the parties do not dispute in the briefing.

First, Plaintiffs do not dispute that Utah's public education system "remains firmly in place" regardless of the Program. Consequently, if the Education Article is a "floor, not a ceiling," Plaintiffs' claim for relief under article X fails as a matter of law.

Second, Defendants do not seriously contend that the Program complies with the constitutional requirements applicable to public schools and education programs, including that they be "free of charge" and "open to all children of Utah." Nor do Defendants seriously dispute that many of the schools supported by the Program are not "free from sectarian control."[47]

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[46] Other courts have invalidated voucher or school choice programs because they violate other provisions of their constitutions. *See, e.g., Eidson v. Dep't of Education*, 906 S.E.2d 345, 348 (S.C. 2024) (invalidating state's Education Scholarship Trust Fund, which consists of "monies appropriated . . . to provide scholarships to eligible students for qualifying expenses," based on state's "constitutional prohibition against the use of public funds for the direct benefit of private educational institutions"); *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009) (invalidating two voucher programs under the Aid Clause of the Arizona Constitution, which prohibits "appropriations of public money to private and sectarian schools").

Consequently, if the Education Article is a "ceiling, not a floor," the Program is unconstitutional under article X.

The court now turns to the legislature's plenary authority with respect to education.

Defendants' briefing on plenary authority is relatively sparse. ACE does not mention it until its supplemental brief.[48] The State initially tethers it plenary authority argument to the "as the Legislature may designate" language in article X. Intervenors claim the legislature "possesses plenary power to support education through other means, including scholarships for children that can be used at private schools or with other private providers." They briefly mention *Utah School Boards* but focus primarily on Proposition 3's "may designate" language and the cases from other states discussed above.

Defendants articulate the relevant constitutional principles – that because the Utah Constitution is one of limitation, the legislature has plenary power to legislate on all matters unless some other constitutional text restrains that authority – but they never really attempt to apply these principles to the text of articles III and X. Nor do they grapple with the supreme court's clear statement in *Utah School Boards* that it "would be a violation of articles III and X of the Utah Constitution" for the legislature to "establish schools and programs that are not open to all the children of Utah or free from sectarian control" or "public elementary and secondary schools that are not free of charge." *See* 2001 UT 2, ¶ 14.

Section 11 of Utah's Enabling Act provides that "[t]he schools, colleges, and university provided for in this Act shall forever remain under the exclusive control of said State[.]" Consistent with this principle, the framers of the Utah Constitution sought to "draw[] around the public schools such protection and defense as will secure for them, it is believed, the steady upward progress which is the enthusiastic desire of this people."[49] As one delegate explained, "[t]here is nothing the American people are so jealous about having taxes [for] as their public schools."[50]

Demonstrating this commitment to public education, the delegates adopted several important provisions in the Utah Constitution that establish the State's duty to create and maintain a public education system that is free, open to all, and under the control of the Board, which is elected by and answerable to the people. These core principles remain in the Utah Constitution today. *See* Utah Const. art. III, ord. 4; *id.* art. X, §§ 1-3.

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[47] Despite Defendants' extensive discussion of it, Plaintiffs have not brought a claim under article X, section 9, which prohibits the State from "mak[ing] any appropriation for the direct support of any school or educational institution controlled by any religious organization."

[48] ACE suggests *State Board of Education v. State Board of Higher Education*, 505 P.2d 1193 (Utah 1973), supports its argument that the legislature has the power to create an entire education system that is not public. The narrow holding of this case cannot support the weight of this assertion.

[49] Utah Const., Address to the People of Utah (1895).

[50] Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah (1895) (Statement of Delegate Goodwin).

Indeed, Utah's Education Article does more than simply articulate a policy or aspiration, leaving the legislature with plenary authority to determine how best to accomplish it. It is a direct command to the legislature to perform a single duty: establish and maintain "the state's education systems including (a) a public education system, which shall be open to all children of the state; and (b) a higher education system," which "shall be free from sectarian control."

This clear expression of one duty – coupled with the absence of any general duty to provide for the education or intellectual improvement of Utahns – impliedly restricts the legislature from creating a publicly funded school or education program outside of the public school system or otherwise exempt from the constitutional requirements of article X.[51]

This conclusion is consistent with the Utah Supreme Court's unequivocal statement in *Utah School Boards* that the legislature's "plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system . . . is not unlimited." *See* 2001 UT 2, ¶ 14. The conclusion is also consistent with the *Utah School Boards* court's explicit rejection of the idea that the legislature could use its plenary authority to "establish schools and programs that are not open to all the children of Utah or free from sectarian control . . . for such would be a violation of articles III and X of the Utah Constitution." *See id.*

Accordingly, the court concludes that the legislature does not have plenary authority to create a publicly funded education program outside of the public education system that is neither "open to all the children of Utah" nor "free."

7. The Program Is Not Free or Open to All Children of the State.

The Utah Constitution mandates that "[p]ublic elementary and secondary schools shall be free, except that the Legislature may authorize the imposition of fees in the secondary schools." Utah Const., art. X, § 2. These provisions are "mandatory and prohibitory." *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, ¶ 11, 16 P.3d 533. Thus, the legislature "cannot establish schools and programs that are not open to all children of Utah or free from sectarian control, and it cannot establish public and elementary and secondary schools that are not free of charge." *Utah School Boards*, 2001 UT 2, ¶ 14.

Defendants' primary responsive argument is that the legislature declined to "designate" the Program as part of the public education system and, therefore, these constitutional requirements do not apply to it. The State and Intervenors do not argue that the Program satisfies the "free" and "open to all" requirements.

While ACE is correct that there is no "fee" to apply for the Program, the Utah Constitution requires more than the freedom to apply for a voucher. It requires schools to be "free" and "open to all." The Program does not limit the tuition, fees, and other costs that a

[51] The maxim "expressio unius est exclusio alterius" also supports this conclusion. The Utah Supreme Court has "endorsed this principle only as an aid to constitutional and statutory interpretation, not as a rule of law." *Monson v. Carver*, 928 P.2d 1017, 1024-25 (Utah 1996). The "maxim appropriate applies 'only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the [constitution]." *Id.* at 1025.

private school may impose on Utah students and their families.[52] Indeed, the Program does not require private schools to accept the $8,000 voucher as payment in full, nor does it prohibit them from increasing the amount of tuition charged to Program students.

But even if the Program is "free" because there is no application fee, the elementary and secondary schools funded through the Program are not "open." As required by the Utah Constitution, public schools must allow all resident students to enroll and may not discriminate against them. In stark contrast, every school participating in the Program has some form of an application process, which may include assessments, interviews, or tests to determine if the student is the right "fit." While private schools are prohibited from discriminating against students based on race, color, and national origin, they are not prohibited from discriminating against students based on gender, religion, socio-economic status, disability, sexual orientation, or political affiliation.[53] Qualifying providers receiving public funds under the Program are not required to provide individualized disability evaluation and services and are permitted to refuse admission to students needing them.[54]

By any measure, the Program is not "open to all children of the state" as required by article X, section 1.

The Utah Supreme Court's holding in *Logan City School District v. Kowallis*, 77 P.2d 348 (Utah 1938), does not change this result. In that case, the Logan City Board of Education adopted a rule that all students who lived outside the district boundaries would be required to pay a nonresident fee. *Id.* at 349. The Utah Supreme Court addressed the following question: "Under the provisions of the State Constitution, is every public school within the state open to any child of school age residing within the state, free; that is without payment of tuition or entrance charges?" *Id.* at 350.

The Court held that:

> When their home district provides a school suitable in its curriculum, faculty, and facilities for their stage of educational growth and development, free and open to them, and reasonably convenient for attendance, they are given all the Constitution assures or provides for them. To secure to every child in the state

[52] The Utah Constitution prohibits the imposition of fees on elementary school children. While the Constitution permits "the imposition of fees in the secondary schools," the legislature has significantly limited those fees and established a fee waiver application and appeals system. It also has enabled the Board to make and enforce rules regarding those requirements. *See* Utah Code §§ 53G-7-502 to -505.

[53] As shown in Exhibit 7 to Plaintiffs' Motion for Summary Judgment, nearly all private schools participating in the Program have selective admission criteria and exclusionary policies that limit admission on various grounds. Many private schools require parents or students to adhere to a particular statement of faith or accept certain religious teachings. Others disclaim the ability to accommodate students with disabilities or students with "learning challenges." Others include specific academic qualifications, assessment tests, and interviews to evaluate students.

[54] This aspect of the Program – that participating schools and providers are allowed to discriminate against children with disabilities – is inconsistent with what Utah voters were told about Amendment G, *i.e.*, that it would use income tax revenue to fund services and programs "to support" children with disabilities.

> the maximum benefit of the school system, the assignment of children to particular schools is often essential. Economy and efficiency in school operation and administration, as well as effectuating and making possible the harmonious development and growth of all school children, would be seriously impaired were students permitted to shift or change, at their own volition, from one school to another. The Cache County School District, having provided adequate schools and facilities, equal to those of Logan City, open and free and reasonably convenient for attendance of all children within such district, all constitutional and statutory requirements have been met, and no child within such district has a legal right to insist upon attendance at public schools elsewhere.

Id. at 353-54. But it is perhaps the rest of the *Kowallis* court's opinion that is most relevant to the issues before this court:

> *The requirement that the schools must be open to all children of the state is a prohibition against any law or rule which would separate or divide the children of the state into classes or groups, and grant, allow, or provide one group or class educational privileges or advantages denied another. No child of school age, resident within the state, can be lawfully denied admission to the schools of the state because of race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such child equally of educational opportunities or facilities with all other children of the state.* This is a direction to the Legislature to provide a system of public schools to which all children of the state may be admitted. It is also a prohibition against the Legislature, or any other body, making any law or rule which would deny admission to, or exclude from, the public school any child resident of the state, for any cause except the child's own conduct, behavior or health. The schools are open to all children of the state when there are no restrictions on any child, children, or group of children which do not apply to all children of the state alike. The provision for being open does not apply to matters financial; it does not mean they must be free. It simply means that all children must have equal rights and opportunity to attend the grade or class of schools for which such child is suited by previous training or development.[55]

Id. at 350-51.

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[55] The Court also emphasized "[t]he history of educational development in Utah, from the first settlements to the very latest enactments, shows a devotion to the ideal of intellectual development and a constantly growing effort to insure all children in the state equality of educational opportunities and privileges as a fundamental and inalienable right, free and open to all alike." *Id.* at 353.

The Program not only allows participating schools to deny admission because of location, religion, politics, and many other bars and barriers, it arguably divides children into groups or classes (*i.e.*, children attending public schools and children attending private schools). And for the latter group, the Program provides additional benefits to private or homeschooled children that may not be available to children attending public school, such as funds for computers, test prep courses, private tutoring, summer camps, extracurricular activities such as music and dance lessons and sports, ride share fees, and other "educational experiences."

In summary, because the Program is a legislatively created, publicly funded education program aimed at elementary and secondary education, it must satisfy the constitutional requirements applicable to the "public education system" set forth in the Utah Constitution. The legislature does not have plenary authority to circumvent these constitutional requirements by simply declining to "designate" the Program as part of the public education system. And because there is no genuine dispute that the Program fails to meet these "open to all children" and "free" requirements, it is unconstitutional under article X of the Utah Constitution.

IX. ARTICLE XIII OF THE UTAH CONSTITUTION

In their Second Claim for Relief, Plaintiffs assert the Program is unconstitutional because it improperly uses state income tax revenue in a manner prohibited by the Utah Constitution.

Although it is not necessary to reach this claim if the Program is unconstitutional under article X, the court nevertheless addresses the merits because article XIII is an alternative ground for declaring the Program unconstitutional.

A. The Amendment of Article XIII of the Utah Constitution

Prior to 2020, article XIII, section 5(5) of the Utah Constitution provided that "[a]ll revenue from taxes on intangible property or from a tax on income shall be used to support the systems of public education and higher education as defined in Article X, Section 2."

In 2020, Utah voters passed Amendment G, which added "and to support children and to support individuals with disabilities."

Article XIII, section 5(5) of the Utah Constitution now provides:

> All revenue from taxes on intangible property or from a tax on income shall be used:
>
> (a) to support the systems of public education and higher education as defined in Article X, Section 2; and
>
> (b) to support children and to support individuals with a disability.

Utah Const. art. XIII, § 5(5).

Defendants argue that subsection 5(b) "is clear and unambiguous and provides the Legislature with authority to appropriate income tax revenues for purposes that 'support children' even if those purposes are served via programs that are not part of the public education system." Defendants further argue the Program "is designed to 'support children' by providing a modest portion of overall public funding for students wishing to seek educational opportunities outside the regular public school system."

Plaintiffs argue that this "is neither a reasonable interpretation of the text nor consistent with the original public meaning of Amendment G." Additionally, Plaintiffs argue "the purpose of Amendment G was to maintain the strong protection for public school funding, as reflected in subsection (a), while allowing a modest expansion of permissible uses of income tax revenue to fund certain mental health and disability social service programs."

If the court is constrained by the plain language of subsection 5(b) and reads it in isolation, Defendants may be correct that the legislature is permitted to use income tax revenues to fund the Program because it "support[s] children."

But subsection 5(b) is not "barren text" that can be read in isolation. *See University of Utah*, 2006 UT 51, ¶ 17 ("When interpreting the constitution, we strive to harmonize constitutional provisions with one another and with the meaning and function of the constitution as a whole."). And both sides' proffered interpretations would render aspects of section 5 superfluous. *See Planned Parenthood*, 2024 UT 28, ¶ 184 ("We normally presume that the drafters of the Utah Constitution chose their words carefully. That causes us to avoid interpretations that would treat an entire clause as surplusage."); *cf. Utah American Energy, Inc. v. Labor Commission*, 2021 UT App 33, ¶ 15, 484 P.3d 1195 ("A statute 'should be construed so that no part or provision will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.'" (quoting *State v. Jeffries*, 2009 UT 57, ¶ 9, 217 P.3d 265)).

As Plaintiffs point out, if the phrase "to support children" is as broad as Defendants claim, subsection (a)'s "to support the systems of public education" is superfluous because the public education system obviously "supports children." Similarly, as Defendants note, if subsection (b) is limited to supporting children with disabilities within the public education system only, the "to support individuals" is superfluous.

But more importantly, as the supreme court has instructed, the relevant inquiry is not what the parties or the court thinks the plain text means.[56] The relevant inquiry is what Utah voters would have understood "to support children and to support individuals with disabilities" to mean when they voted to approve Amendment G.[57] This inquiry necessarily recognizes that most Utah voters are not lawyers or grammarians. So technical arguments regarding infinitives and conjunctions and modifiers are not particularly helpful in discovering the public's understanding of this language and how it might interact with the legislature's powers.

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[56] The court agrees that if it were required to interpret this provision like a contract or statute, Plaintiffs' claim would have to be dismissed unless Plaintiffs were able to show that their interpretation is plausible based on the plain language of this provision.

[57] Defendants cite several cases in support of their argument that the court may not turn to sources beyond the plain language to interpret a constitutional provision unless the language is ambiguous. However, each case cited by Defendants is either referring to statutory interpretation, not constitutional interpretation, or has been supplanted by more recent caselaw.

For example, ACE cites *Zilleruelo v. Commodity Transps.*, 2022 UT 1, ¶ 31, 506 P.3d 509, and *Bryner v. Cardon Outreach*, LLC, 2018 UT 52, ¶¶ 9-11, 428 P.3d 1096, for the proposition that a court may not look to other sources when the plain language of a constitutional provision is clear and unambiguous. However, neither case deals with constitutional interpretation. The *Zilleruelo* court, finding that "the language of the Tolling Statute is unambiguous[,]" determined that the "language must then 'be held to mean what it expresses.'" 2022 UT 1, ¶ 32 (quoting *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, ¶ 13, 977 P.2d 479). The *Bryner* court found that there was no ambiguity in the Hospital Lien Statute and therefore held that it could "determine the statute's meaning by its plain language." 2018 UT 52, ¶ 11.

Again, as the supreme court recently explained, "when we interpret the constitution, we don't necessarily stop our analysis when the document's plain language suggests an answer." *Planned Parenthood*, 2024 UT 28, ¶ 184.

According to Plaintiffs, "the voters who approved Amendment G understood it to narrowly expand the permissible uses of income tax revenue to cover limited social service programs for children and individuals with disabilities, while otherwise maintaining the mandate on income tax dollars for public education."

Again, the court's task is "to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law," *Richards*, 2019 UT 57, ¶ 13, which "[o]ften . . . will require a 'deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era,'" *Maese*, 2019 UT 58, ¶ 23 (quoting *Neese*, 2017 UT 89, ¶ 98). This requires the court to look to historical and legislative sources, because against the amendment's "historical backdrop we can better discern what the people of Utah would have understood they were putting in the constitution." *Patterson v. State*, 2021 UT 52, ¶ 94, 504 P.3d 92. And in doing so, the court "must remain open to the possibility that [Plaintiffs] might establish that the constitutional language describes a principle narrower than it appears when we read it today." *See Planned Parenthood*, 2024 UT 28, ¶ 185.

In looking to the historical record to determine how voters would have understood the amendment, "'we hope that it resembles a Norman Rockwell painting – a poignant, straightforward, and easy to interpret representation' – rather than a 'Jackson Pollock' where we 'find ourselves staring at the canvas in hopes of finding some unifying theme.'" *Haik*, 2020 UT 29, ¶ 44 (quoting *Maese*, 2019 UT 58, ¶ 29). For this reason, it is crucial that "parties . . . present a complete view of the historical record to help us avoid the 'pattern of asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact.'" *Planned Parenthood*, 2024 UT 28, ¶ 134 (quoting *State v. Tulley*, 2018 UT 35, ¶ 82, 428 P.3d 1005). "This type of analysis poses problems because 'undue reliance on arguments based primarily upon the zeitgeist risks converting the historical record into a type of Rorschach test where we only see what we are already inclined to see.'" *Tulley*, 2018 UT 35, ¶ 82 (quoting *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 101, 416 P.3d 635 (Pearce, J., concurring)). "The more robust our understanding of the history, the better we are at avoiding those traps." *Planned Parenthood*, 2024 UT 28, ¶ 134.

1. Legislative History of Amendment G

During the 2020 legislative session, the legislature passed Senate Joint Resolution 9, Proposal to Amend Utah Constitution – Use of Tax Revenue. The resolution "proposes to amend the Utah Constitution to: expand the uses for revenue from taxes on intangible property or from a tax on income to include supporting children and individuals with a disability."

The court agrees that the legislative history, on its own, provides little in the way of affirmative guidance and is most often helpful when considered in conjunction with the relevant voter materials such as the Voter Information Pamphlet. While recognizing that it may have limited value, the court nevertheless starts with a discussion of the legislative history of Amendment G because it provides important context.[58]

[58] In reviewing Amendment G's legislative history, the court notes that "[e]vidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 19 n.6. The court is instructed to use historical sources to discern the original public meaning of the text. *Id.* ¶ 23;

In a House Revenue and Taxation Committee hearing on March 5, 2020, Senator Ann Millner, a sponsor of Amendment G's companion bill, HB 357, stated:

> This isn't trying to take the earmark off. Let's open it up to support children and I think all of us know that health outcomes and education outcomes are linked for our kids.

In a Senate Revenue and Taxation Committee hearing on March 5, 2020, Senator Millner stated:

> While we need to be able to have more flexibility, in terms of being able to use income tax to support a broad array of services, we also want to make sure that we're protecting and stabilizing funding in public education because that's a really high priority of this legislature.

In a House Revenue and Taxation Committee Hearing on March 9, 2020, Senator Daniel McCay, one of the sponsors, stated:

> This language acknowledges that the whole child in the education process matters . . . . We've seen this on a number of matters this session that looked at expanding programs we do for school breakfast or whatever it might be but we've seen the desire to see that kids are well-fed, to make sure they have the appropriate academic classroom and the appropriate academic ability, but that they also have *the ability physically and mentally to participate in the classroom and participate in their own education. We have programs here at the state that are intended to do that and allowing those services to be covered in income tax I think adds value to that conversation.*

(Emphasis added.)

In a Senate Floor Debate on March 6, 2020, Senator McCay explained:

> We can start thinking about . . . programs that we could pay for with income tax. *This could potentially apply to CHIP [Children's Health Insurance Program] or the DSPD [Division of Services for People with Disabilities]* waiting list. There are a myriad of programs we have at the state level where *we're working with specifically people with disabilities* and how we help those in need. That's the purpose of those changes.

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see also Barnett, 2023 UT 20, ¶ 41 ("[W]hen the voters have amended the language, 'we look to the meaning that the public would have ascribed to the amended language when it entered the constitution.'" (quoting *Randolph v. State*, 2022 UT 34, ¶ 68, 515 P.3d 444)).

(Emphases added.)

In a House Revenue and Taxation Committee Hearing on March 9, 2020, Senator McCay stated:

> So really [Amendment G] in its primary language takes the constitutional earmark, leaves it in place, and *expands it just a little bit*. . . . The expansion allows for income tax as well as taxes on intangible personal property to be spent on education and to support children and to support individuals with a disability. So this language would allow the state to use some flexibility.
>
> I've thought . . . why is this language significant and why does it matter and why does it matter that it's still limited? *This language acknowledges that the whole child in the education process matters.*

(Emphases added.)

Representative Mike Schultz, the House sponsor, similarly stated that Amendment G "doesn't open up the constitutional earmarks; rather, it puts some framework around it in allowing children and individuals with a disability to be funded out of the income tax." In the same hearing, Representative Rex P. Shipp asked Representative Schultz whether the sponsors had considered removing the public education earmark altogether to allow for greater funding flexibility. Representative McCay responded that "I originally thought it would be good to remove the earmark and just give unlimited budget flexibility, but where we've had this budget practice in the Constitution for as long as we have, I think it makes sense honestly. It is a measured, appropriate step."

In the House Revenue and Taxation Committee hearing on March 9, 2020, Senator Millner stated:

> *This isn't trying to take the earmark off.* Let's open it up to support children and I think all of us know *that health outcomes and education outcomes are linked for our kids. If they aren't healthy, if they can't hear, if they can't see, if they've got some kind of learning disability, etc., they can't learn and we need to meet the needs of the whole child. And we have people with disabilities we need to support.* Some of them are children, but not all.

(Emphases added.)

In the same Senate Floor Debate, Senator Millner stated:

> [W]e all think that public education is a real priority and I think we work to make sure we're funding it. At the same time, we have responsibilities to be able to support our children. We know that it's about the whole child. If a child is not healthy, it's going to be difficult for that child to learn. So being able to support them in terms of being able to have *CHIP support . . . and support for mental health. We need to help them be ready to learn when they go to the classroom and not expect that public education can do that all by themselves.*

(Emphasis added.)

In a Senate Floor Debate on March 11, 2020, Senator McCay stated:

> SJR 9 is a bill to put a constitutional amendment on the ballot for the voters to choose: *Are they willing to allow us to use the income tax earmark to care for both the physical and the educational needs of our K-12 children*?

(Emphasis added.)

In a House Floor Debate on March 11, 2020, Representative Schultz stated:

> [T]he education community's reason for supporting this was because they care about the children of this state. They mentioned multiple times they feel the children of this state are their responsibility and *children that are well-fed, well-taken care of, they have the ability to learn*. So they felt they could get around the language "children and individuals with disabilities" to be part of the income revenue.

(Emphasis added.)

During the same debate, Representative King explained he voted "no" for SJR 9 because:

> [W]e've done this before. In 1996, we opened up the silo that was previously just for public education and added higher education. And you can see, in the last 24 years, what direction we've gone in funding for public ed. I don't think it's been nearly as good as the children of the state deserve.

During these legislative debates, no legislator ever mentioned "school choice" or vouchers for children who do not have disabilities. No legislator ever suggested that Amendment G could be used to divert income tax revenue from public schools to private schools or that it could be used for the parents of children attending private schools – but not the parents of children attending public schools – to pay for computers or summer camp or extracurricular

activities. Rather, the legislative debates consistently emphasized two key points on the effect of Amendment G: (1) it would address budgetary constraints by allowing income tax revenue to fund certain social services programs; and (2) it would strengthen public education funding.[59]

2. The Voter Information Pamphlet

Amendment G asked Utah voters the following question: "Shall the Utah Constitution be amended to expand the uses of money the state receives from income taxes and intangible property taxes to include supporting children and supporting people with a disability?"

In the Impartial Analysis, Effect of Constitutional Amendment G, Utah voters were told that "Constitutional Amendment G expands the allowable uses of the money the state receives from income taxes . . . to include supporting children and supporting people with a disability."

In the Impartial Analysis, Fiscal Effects, Utah voters were told that "Constitutional Amendment G will not result in any increase or decrease in revenue or cost to the state or to local governments."

Utah voters were further told that "[c]urrently income taxes in the state total about $5 billion annually, which is spent to support public education and higher education. In addition, the state spends about $600 million annually of non-income tax money on programs for children and programs that benefit people with a disability. The amount of income tax money that will be spent in future years to support children and to support people with a disability will depend on how the Utah Legislature decides to allocate income tax money."[60]

In the "Argument In Favor," Senator McCay and Representative Schultz told Utah voters the following:

> Amendment G will protect and stabilize funding for education, children and individuals with disabilities for years to come. During the 2020 legislative session, Amendment G was supported by the following education groups:
>
> Utah State Board of Education
> Utah School Boards Association
> Utah School Superintendents Association
> Utah Association of Public Charter Schools

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[59] Plaintiffs suggest that subsequent legislative history reinforces this point because soon after the Act was passed, the legislature sought to amend article XIII, section 5(5) to give wide discretion to spend income tax as it saw fit – a constitutional amendment that would be entirely unnecessary if Amendment G had the expansive meaning the State is advancing in this case. The court is not persuaded that this later attempt to amend the constitution is relevant and, consequently, did not consider any "subsequent legislative history."

[60] Plaintiffs and Defendants point to the Voter Information Pamphlet for Amendment G as evidence of Amendment G's original public meaning. The Utah Supreme Court "h[as], at times, concluded that voter guides can help us answer [the] question" of "what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody." *Barnett*, 2023 UT 20, ¶ 59 (quoting *Neese*, 2017 UT 89, ¶ 96).

> Utah Public Employees Association
> Utah Education Association
> Utah PTA
> Utah Taxpayers Association
>
> . . . .
>
> Funding Assurance – Income tax is the least stable source of education funding. Amendment G stabilizes education funding and creates safeguards to ensure Utah is prepared to fund future growth and adjust for inflation.
>
> *Amendment G continues the dedicated revenue source to fund education and expands the services funded through income tax.* This expansion acknowledges the increasing importance of physical and mental health for academic success. This amendment gives Utah more flexibility to support our children's learning outcomes.
>
> Safety Net – Amendment G is specifically designed for economic uncertainty when income tax revenues shrink. The proposal protects education funds and moves current K-12 education funding into a constitutionally protected account. It also ensures education funding will automatically grow by tying it to enrollment growth and inflation, providing K-12 education greater security and stability. The Utah Legislature is committed to supporting Utah's educators and has increased education funding by $1 billion in the last five years.
>
> Amendment G provides educational security in funding, especially in down years like 2020. Utah's students and educators deserve funding stability and security.

(Emphasis added.)

In the "Rebuttal to Argument in Favor" Senator Luz Escamilla and Representative LaWanna "Lou" Shurtliff told Utah voters:

> The proponents for Constitutional Amendment G . . . selectively choose to discuss what the amendment hopes to accomplish, not what it does. They argue that it ". . . stabilizes education funding and creates safeguards to ensure Utah is prepared to fund future growth and adjust for inflation." This sounds nice, but that isn't reflected in the text of the amendment itself.

> Amendment G takes away the current constitutional guarantee that Utah income tax revenues are dedicated to education, and it proposes to also pay for vital social services programs with those guaranteed funds.
>
> *Amendment G will pit our public education system, including charter schools, against all other programs for children and people with disabilities.* This is a lose-lose scenario for all affected.
> . . .
>
> . . . .
>
> Now, as we must do everything possible to keep our schools funded and stable, Amendment G is a threat to our children's education and our critical services for individuals with a disability.

(Second omission in original and emphasis added.)

In the "Argument Against," Representative Shurtliff told Utah voters:

> *Amendment G lessens protections for students with disabilities and opens the door wider for vouchers by allowing income tax money, currently only available to spend on education, to be spent on children and adults with a disability.*
>
> During tax reform, one option that was continuously negative to the public was amending the state constitution to remove a requirement that income taxes be used only for education. *Amendment G chips away at that guaranteed funding source by allowing income tax dollars to be spent on people with a disability. Those tax dollars could be misused for vouchers to send students with a disability to non-public schools.* I am of the firm belief that public education dollars belong in our public schools.
>
> *Vouchers also may lessen protections for students with a disability.* Section 504 of the Rehabilitation Act strongly protects students with a disability from discrimination if they attend a school receiving federal financial assistance, which would include Utah public schools. Amendment G is concerning *because it could allow for students with disabilities to receive vouchers to non-public schools, where those students are not as protected against discrimination as they are in our public school system.*

(Emphases added.)

In the "Argument Against," Senator Escamilla told Utah voters:

> In 1946, Utah's voters dedicated the state's income tax revenues for the sole purpose of funding education. On numerous occasions since, voters have sustained and reaffirmed that commitment. Once again, voters are being asked to consider using income tax for other purposes. This constitutional amendment may seem simple and sounds harmless. *However, adding these few words to Article XIII, Section 5 of the Utah Constitution means suddenly pitting hundreds of vital social services programs against our already underfunded public education system.* Utah consistently ranks 51st in the nation in per-pupil funding. The last thing we need to be doing right now is diverting even more funds away from our schools. *Combined with significant economic uncertainty, this constitutional amendment poses a serious threat to both our public education system AND to vital programs for children and individuals with disabilities.*

(Emphases added.)

In the "Rebuttal to Argument Against," Senator McCay and Representative Schultz told Utah's voters:

> It's important to remember that Amendment G was supported by the following education groups during the 2020 legislative session:
>
> Utah State Board of Education
> Utah School Boards Association
> Utah School Superintendents Association
> Utah Association of Public Charter Schools
> Utah Public Employees Association
> Utah Education Association
> Utah PTA
> Utah Taxpayers Association
>
> *The same watchdogs that fight for and guard Utah's public education funding are the same organizations that support Amendment G.* Utahns are rightfully concerned about education funding and can have confidence in Amendment G.
>
> Amendment G is the key to a larger education funding stabilization initiative that unlocks ongoing funding for education, including an additional amount for enrollment growth and inflation. It also protects education funding from cuts during an economic downturn by creating a sizeable education stabilization fund that can be utilized in times of economic troubles. Current funding mechanisms are highly volatile revenue sources that

> disproportionately harm our education system during economic downturns.
>
> During turbulent years like 2020, Utah students and educators deserve education funding stability and security, which only Amendment G can provide.

(Emphasis added.)

3. Contemporaneous News Reporting and Other Public Presentations Regarding Amendment G

Amendment G was discussed in the media and other public forums.

In a panel discussion hosted by the Salt Lake Chamber, Senator Millner described the purpose of Amendment G as follows:

> If students are going to be able to learn and ready to learn, we have to make sure we're meeting both the physical and mental needs that they have in order to make sure they're really ready to learn in the classroom. This allows the Legislature some flexibility to be able to support the highest priority needs of our students, both children and also people with disabilities.
>
> . . . .
>
> [Amendment G] provide[s] some flexibility around making sure we could access money for our children and for people with disabilities. But we know a lot more now about education of the whole child and being able to create the kind of partnerships that ultimately will help all of our children succeed and I think that's what our goal is in this state.[61]

The news articles cited by Plaintiffs also explain that Amendment G would allow social services programs to be funded from income tax.[62]

For example, in a Salt Lake Tribune article, journalist Robert Gehrke wrote:

> [Amendment G is] a complicated proposal that *makes significant changes to how some of the most vital programs in state government – education and services for children and disabled individuals – get funded*. . . .

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[61] Salt Lake Chamber, *Meet Amendment G: Education Funding and Taxes, Utah's Proposed Constitutional Amendment* (Oct. 15, 2020).

[62] Utah courts have also looked to newspapers to determine voters' understanding of a constitutional amendment at the time it entered the Constitution. *See Barnett*, 2023 UT 20, ¶¶ 63-64; *Patterson*, 2021 UT 52, ¶ 134.

. . . .

It proposes taking social service programs for children and Utahns with disabilities – about $600 million total – and funding them with money meant for education instead of sales tax dollars. State Sen. Dan McCay, R-Riverton, who sponsored the change, said the ideas is to "focus on the whole kid," that *mental health services and the like are part of a quality education, so it makes sense to fund them out of the Education Fund. . . .*

. . . .

Now is not the time to start carving up education's revenue stream and I fear that is exactly what will happen if we pit K-12 education against higher education and important social services.[63]

A KUTV article stated:

The constitutional amendment would trigger a process that would *add some social services to the list of items that could be drawn from the state's income tax fund. . . .*

. . . .

Most every education organization in Utah supports Amendment G. . . .

. . . .

These organizations support Amendment G and House Bill 357, which will be triggered if the amendment passes:

- Utah Education Association
- Utah PTA
- Utah State Board of Education
- Utah School Boards Association
- Utah School Superintendents Association
- Utah Association of Public Charter Schools
- Utah Public Employees Association
- Utah Taxpayers Association

Organizations opposed to Amendment G include:

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[63] Robert Gehrke, *What's Amendment G on Your Ballot? It's a Legislative Shell Game Involving Education*, SALT LAKE TRIBUNE, Oct. 18, 2020 (emphases added).

- Voices for Utah Children
- Utah Citizens' Counsel[64]

In a statement of support for Amendment G, the Utah PTA stated:

> Utah PTA's mission and purposes are to help every child realize his full potential and to advocate for laws that further the education, physical and mental health, welfare, and safety of children and youth. Securing funding for services for children and for expanding education funding supports the mission of Utah PTA to advocate for the whole child.
>
> **What is the purpose of this Amendment?** Constitutional Amendment G will provide additional supports for children while also allowing laws that were passed in the 2020 legislative session to go into effect that are designed to protect, grow, and stabilize current and future public education funding. . . .
>
> . . . .
>
> ***What does Amendment G mean by "services for children and people with disabilities?"*** *It has been suggested that the following programs that have been funded by the General Fund may be moved to the Education Fund*:
>
> - Children's Justice Centers
> - Child Protection Services
> - Guardian ad Litem
> - Children's Health Insurance Program (CHIP)
> - Children with Special Health Care Needs
> - Juvenile Justice Services
> - Temporary Assistance for Needy Families
> - Intermediate Care Facilities for the Intellectually Disabled
> - Services for People with Disabilities
> - Mental Health Centers
> - Substance Abuse Services
> - State Office of Rehabilitation
>
> . . . .
>
> We recognize that the legislature believes more flexibility is needed and support Constitutional Amendment G to provide for

[64] Chris Jones & Nadia Pflaum, *Amendment G Could End Decades of 'Sleight of Hand' Regarding Utah Budget Process*, KUTV NEWS, Oct. 16, 2020 (italics added).

> the well-being of children and to protect public education funding through the constitutionally guaranteed Uniform School Fund.[65]

Moe Hickey, CEO of Voices for Utah Children, one of the few education groups to oppose Amendment G, wrote in the Salt Lake Tribune:

> It's hard to tell from [the] wording [of Amendment G], but this question is the culmination of a years-long effort to end the Utah Constitution's dedication of all income tax revenue to education. Legislators have chafed at the restriction . . . and sought ways to escape the requirement.
>
> . . . .
>
> *Now they are aiming to win our approval for Constitutional Amendment G to . . . transfer up to $600 million of income tax revenue away from education and into services currently funded by the sales tax. . . .*
>
> . . . .
>
> The promise being made by proponents is that if we vote for Amendment G, we will see greater investment in education – *and* greater investment in social services for children and Utahns with disabilities.
>
> But where will the new revenues come from to keep these promises? . . .
>
> . . . .
>
> Once legislators get the increased flexibility they have long sought, they will have full discretion as to which entity receives funding. There are no actual guarantees that establish a funding system for any of the crucial services that we need for our children.[66]

An article in the Deseret News by Jay Evensen, the Opinion Editor, stated:

> When voters get their ballots in the mail next month, they will face, among many other things, Amendment G, which asks whether to change Utah's constitution to expand the use of income

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[65] *2020 Constitutional Amendment G*, UTAH PTA (italics added).

[66] Moe Hickey, *Amendment G Is Not the Answer to Utah's Budget Problems*, SALT LAKE TRIBUNE, Oct. 15, 2020 (second set of italics added).

> and intangible property taxes "to include supporting children and supporting people with a disability."
>
> . . . .
>
> [Tax reform] reemerged in March as a deal to create a new reserve account for education designed as a guarantee against the rising costs of growth and inflation. *Social Service programs that help children and the disabled were to be moved from sales tax funds to income tax.*
>
> But it all would hinge on voters approving Amendment G, which would end Utah's 89-year-old guarantee that all income tax collections go solely to education.[67]

Another Deseret News article stated:

> [Senator] Millner said the framework in HB357, which will be enacted if a majority of Utah voters approve proposed constitutional Amendment G, would "better protect and stabilize education over the long term."
>
> Utah's education community – elected state and local school board members, associations that represent educations, education leaders and parents – joined Millner to lend their support of Amendment G.
>
> *Proposed constitutional Amendment G . . . seeks to expand the uses of income tax revenue to support programs for children and people with disabilities.*
>
> . . . .
>
> Critics say expanding the earmark to also allow income tax to fund programs for children and people with disabilities will further stretch a revenue source that already falls short of meeting the needs of Utah's educational system.
>
> Steve Hirase, a former superintendent of the Murray City School District, said *it makes more sense to take a holistic approach to serving people with disabilities. . . .*
>
> . . . .

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[67] Jay Evensen, *What Is Amendment G? Don't Let It Take You by Surprise*, DESERET NEWS, Sept. 17, 2020 (emphasis added).

> "When [older students] left our school system, many of them went into programs that had very long waiting lists and there weren't a lot of funds that would help support them[.]"
>
> . . . .
>
> Most [of the older students] ended up at home and their skills deteriorated as they lingered on waiting lists for services for people with disabilities.
>
> "So for me, I think this is a good step in the right direction to help provide programs for *those children that are leaving the public school system that are adults and need additional programs and support so that they can continue to develop and become productive members in our society . . . .*"[68]

A KUER article explained:

> *If passed, the amendment would allow income tax to also cover services for children and people with disabilities.*
>
> The phrasing would provide lawmakers flexibility in determining which services qualify and how to pay for them. *An estimate from the Lt. Gov's office found current services for children and people with disabilities add up to around $600 million, currently paid for using the state's General Fund.*
>
> . . . .
>
> Advocates of Amendment G have said the change is needed in part to help stabilize the state's budget, by placing less burden on the General Fund, which they say is shrinking. . . .
>
> . . . .
>
> Longtime education advocate Sharon Gallagher-Fishbaugh said she sees Amendment G as another attempt by the Legislature to relax the rules and slice the education pie even further, *pitting the state's public education system against programs for children and people with disabilities in the process.*[69]

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[68] Marjorie Cortez, *Amendment G Would 'Protect, Stabilize' Education Funding over the Long Term, Backers Say*, DESERET NEWS, Oct. 12, 2020 (emphases added).

[69] Jon Reed, *A Deeper Dive into Amendment G: What It Does and Who's Behind It*, KUER 90.1, Oct. 26, 2020 (emphases added).

B. Original Public Meaning of Amendment G

Here, the historical record is robust, consistent, and presents cohesive themes that clarify how Utahns understood Amendment G when they adopted it. And it creates a Rockwellian painting of a narrow expansion of the public education earmark to include existing social services programs that support children as well as other programs that support children with disabilities and adults with disabilities.

Utah voters were repeatedly informed by multiple sources that:

(a) Amendment G would allow income tax revenue to be used to fund existing social services programs for children and other programs for children and individuals with disabilities. These programs would address a child's mental and physical health in the educational process and seek to benefit the "whole child."[70]

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[70] While "social services" is not a legal term of art, it is generally defined to mean "an activity designed to promote social well-being; [specifically] organized philanthropic assistance of the sick, destitute, or unfortunate" or as "organized welfare efforts carried on under professional auspices by trained personnel." *Doe v. Salvation Army in U.S.*, 685 F.3d 564, 570 (6th Cir. 2012) (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1115 (10th ed. 1995). Merriam-Webster's current definition of "social service" is similar: "a program or effort designed to promote human or society well-being[;] *specifically*: organized help for people who are in need of assistance with basic needs (such as food, housing, safety, or job training) or with medical needs (such as addiction or mental illness)." *Social service,* MERRIAM-WEBSTER DICTIONARY; https://www.merriam-webster.com/dictionary/social%20service (last visited Feb. 20, 2025). Similarly, Encyclopedia Britannica defines "social service" as "any of numerous publicly or privately provided services intended to aid disadvantaged, distressed, or vulnerable persons or groups." *Social service,* ENCYCLOPEDIA BRITANNICA; https://www.britannica.com/topic/social-service (last visited Mar. 5, 2025).

In Utah, the Department of Health and Human Services (DHHS) serves as the "social services authority of the state" and the "sole state agency" for "social service block grants" as well as mental health programs, child welfare, public health, child health, services for individuals with a disability, and medical assistance. *See* Utah Code § 26B-1-201.

The Department of Workforce Services (DWS) also administers certain social service programs. Specifically, DHHS administers the programs cited by programs like the Children's Health Insurance Plan (CHIP) and the Division of Services for People with Disabilities (DSPD). CHIP provides "child health assistance to uninsured, low-income children[.]" 42 U.S.C. § 1397aa(a); *see also* Utah Code § 26B-3-902(1) (provision "creat[ing] the Utah Children's Health Insurance Program"). DPSD is responsible for "plan[ning] and deliver[ing] an appropriate array of services and supports to persons with disabilities and their families in this state." Utah Code § 26B-6-402(2).

DHHS or DWS administers most of the programs cited by the Utah PTA. In addition to CHIP and DSPD, DHHS also administers Child Protective Services and the Division of Child and Family Services; the Office of Children with Special Health Care Needs; Juvenile Justice and Youth Services; Intermediate Care Facilities for the Intellectually Disabled; Services for People with Disabilities; and Mental Health Centers and Substance Abuse Services, which fall under the Office of Substance Use and Mental Health. DWS houses the State Office of Rehabilitation. DWS is also responsible for submitting the state plan to "the United States Department of Health and Human Services to receive funding . . . through the Temporary Assistance for Needy Families Block Grant[.]" *See* Utah Code § 35A-3-102(26).

The two other programs cited by the Utah PTA – the Children's Justice Center Program (CJCP) and the Office of Guardian Ad Litem (GAL) – are programs administered by the attorney general (CJCP) and the state judiciary (GAL). The CJCP "provide[s] a comprehensive, multidisciplinary, intergovernmental response to child

(b) The primary motivation behind Amendment G was budgetary, and it was intended to provide funding flexibility for already-existing programs.

(c) Amendment G represented a "narrow expansion" of the constitutional earmark for public education. It was also characterized as "leaving the [public education] earmark in place."

(d) It might allow the use of income tax revenue to provide private school vouchers to children with disabilities.

(e) It was supported by the "watch dogs" of the public education system.

And it is this last representation to Utah voters that bears particular emphasis.

ACE acknowledges that "[n]o education stakeholder would have supported an amendment modifying Article XIII's earmark of income tax funds for the public education system without certain guarantees that public education funding would not be affected."[71] And Defendants cannot seriously contend that the "watchdogs that fight for and guard Utah's public education funding" would have supported Amendment G if they believed it would open the door to "school choice" or "vouchers" for children without disabilities.[72] And it is reasonable to assume that many Utahns voted in favor of Amendment G because of what the support of these watchdogs told them about the meaning and limited effect of Amendment G.

To avoid this conclusion, Defendants focus on the few times the word "vouchers" was used in connection with Amendment G. For example, Intervenors insist that Senator Escamilla's statement in the Voter Information Pamphlet – "adding these few words . . . means suddenly pitting hundreds of vital social services programs against our already underfunded public education system" – "suggest[s] an understanding that 'support' for children" could include the Program. But the Program is not a social services program. Nor is it a program for children or adults with disabilities.[73]

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abuse victims in a facility known as a Children's Justice Center." The GAL manages the statewide guardian ad litem program and is responsible for "ensur[ing] that each attorney guardian ad litem employed by the office" "represent[s] the best interest of a minor involved in any case before the court."

ACE is correct that these two "social services programs covered by Amendment G include programs unrelated to disabilities." But that misses the point. They are still social services programs, not voucher or school choice programs.

[71] ACE Supplemental Brief at 9.

[72] There is no question that there are many advocates fighting for "school choice" and private school voucher programs, including those participating in this case. Yet there is no mention of these advocates in the historical record for Amendment G.

[73] Again, if the Program were limited to providing vouchers to children with disabilities so they could attend private schools, it might be consistent with the original public meaning of Amendment G. But given the requirement that parents acknowledge that enrolling in the Program "has the same effect as a parental refusal to consent to services . . . under the Individuals with Disabilities Education Act" and that private schools may refuse to admit children with disabilities, the court questions whether the Program could effectively function as one for children with disabilities.

Other Defendants latch onto Representative Shurtliff's statements regarding vouchers in the Voter Information Pamphlet. But these statements were made in the context of vouchers for children *with disabilities* to attend private school. Similarly, the few times the word "vouchers" is mentioned in the media, it was in the context of vouchers for children *with disabilities* to attend private schools.

But equally important is what Utah voters were *not* told about Amendment G. There is not a single reference in the historical sources to "school choice" or private school vouchers for children who do not have disabilities. Consequently, the court is not persuaded that Utah voters would have envisioned income tax revenue being used to create a private school voucher program for children who do not have disabilities or a "scholarship" program that provides public funds to pay "scholarship expenses" of children in private schools such as music lessons, summer camps, transportation, and computers, regardless of income or disability and regardless of whether children in public schools have access to similar activities or equipment or experiences.

Finally, this original public meaning is not untethered from the plain language of the amendment. Indeed, reasonable grammarians might disagree as to whether this original public meaning actually "differs from the result the plain language suggests." *See Barnett*, 2023 UT 20, ¶ 32.[74] Thus, it is not, as Intervenors suggest, that Plaintiffs or the court are "merely having difficulty accepted the words ratified by Utah citizens" and the so-called "evidence reflecting the well-understood words 'support' and 'children.'"[75] It is that the language describes a principle narrower than it appears when read as barren text without consideration of the historical record and the original public meaning of Amendment G. *See Planned Parenthood*, 2024 UT 28, ¶ 185.

In reaching this conclusion, the court makes no judgment as to the value of "school choice" or private school vouchers. But "school choice" or vouchers for children without disabilities was never discussed, much less debated, in connection with the legislature's passage of Amendment G. And, more importantly, the voters were never informed that Amendment G was about "school choice" or vouchers for children without disabilities.

As the Utah Supreme Court explained in a different but somewhat related context, the Utah Constitution requires an amendment to be "submitted to the electors of the state for their approval or rejection" with "ballot language that accurately describes the proposed constitutional amendment" so that "[t]he ballot together with the immediately surrounding circumstances of the election [is] such that a reasonably intelligent voter knows what the question is." *League of Women Voters*, 2024 UT 40, ¶¶ 68, 79 (first alteration in original) (first quoting Utah Const. art. XXIII, § 1; and then quoting *Nowers v. Oakden*, 169 P.2d 108, 116 (Utah 1946)). Thus, "[t]he proposition must be 'framed with such clarity as to enable the voter to express their will' and ensure that 'no reasonably intelligent voter' would be 'misled . . . as to what he was voting for or against.'" *Id.* ¶ 79 (omission in original) (quoting *Nowers*, 169 P.2d at 116). This principle certainly applies here.

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[74] As Defendants repeatedly emphasize, the court's focus is "on the objective original public meaning of the text, not the intent of those who wrote it." Consequently, whether the sponsors of Amendment G to open the doors to "school choice" is irrelevant.

[75] Intervenors Supp. Br. at 8.

In summary, the court concludes that the original public meaning of Amendment G permitted a narrow expansion of the public education earmark to include existing social services programs that support children as well as other programs that support children with disabilities and adults with disabilities. And because the Program is neither a social services program nor a program limited to supporting children with disabilities, the court concludes that the Program is also unconstitutional under article XIII.

X. REMAINING CLAIMS AND ARGUMENTS

In their Third Claim for Relief, Plaintiffs allege the Program violates article X of the Utah Constitution "by vesting control and supervision of a public education program in a private program manager and prohibiting the Board from promulgating any rules concerning instructional content and curriculum in voucher-funded schools."

In their Fourth Claim for Relief, Plaintiffs allege the Program violates articles I and VI of the Utah Constitution by "delegating an essential public service and one of the Legislature's core constitutional functions – providing education – to private entities and exempting them from oversight over both fiscal management and the quality of educational services they provide."

Given the court's ruling that the Program is unconstitutional under article X and article XIII of the Utah Constitution, Plaintiffs' remaining claims are moot. However, if the parties prefer the court to rule on them for purposes of appeal or otherwise, this can be discussed at the status conference scheduled for April 23, 2025.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is GRANTED and Defendants' Motions to Dismiss are DENIED.

SO ORDERED.

Dated this 18th day of April, 2025

Judge Laura S. Scott
Third Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 240904193 by the method and on the date specified.

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/s/ KETI SAFONOVA

Signature

B

Article III, Ordinance 4 [Free, nonsectarian schools.]

Fourth: -- The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.

Article X, Section 1. [Free nonsectarian schools.]

The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.

Article X, Section 2. [Defining what shall constitute the public school system.]

The public education system shall include all public elementary and secondary schools and such other schools and programs as the Legislature may designate. The higher education system shall include all public universities and colleges and such other institutions and programs as the Legislature may designate. Public elementary and secondary schools shall be free, except the Legislature may authorize the imposition of fees in the secondary schools.

C

Article XIII, Section 5. [Use and amount of taxes and expenditures.]

(5) All revenue from taxes on intangible property or from a tax on income shall be used:

(a) to support the systems of public education and higher education as defined in Article X, Section 2; and

(b) to support children and to support individuals with a disability.