
IN THE UTAH SUPREME COURT

Derek Brown, in his official capacity as
Attorney General of Utah; Governor Spencer
J. Cox, in his official capacity as Governor
of Utah,
Defendants-Appellants,

and

Maria Ruiz and Tiffany Brown, Intervenor-
Defendants-Appellants

v.

Kevin Labresh, on behalf of himself and his
minor child; Terra Cooper, on behalf of herself
and her minor children; Amy Barton; Carol
Lear, in her capacity as a member of the State
Board of Education; Utah Education
Association,
Plaintiffs-Appellees

Appellate Case No. 20250512-SC

On appeal from the interlocutory order
from the Third Judicial District Court
Honorable Laura Scott
Case No. 240904193

**BRIEF AMICUS CURIAE OF THE SUTHERLAND INSTITUTE IN
SUPPORT OF APPELLANTS AND INTERVENOR-APPELLANTS**

Tracey M. Watson (Utah Bar No.
9881)
Utah Education Association
PO Box 57880
Murray, UT 84157-0880
(801) 918-9301
tracey.watson@myuea.org

William C. Duncan (Utah Bar
No. 08174)
Sutherland Institute
420 E South Temple, Suite 510
Salt Lake City, UT 84111
(801) 355-1272
bill@sifreedom.org

Attorney for Amicus Curiae

List of counsel continued on the following page

Troy L. Booher (Utah Bar No. 9419)
J. Frederic Voros, Jr. (Utah Bar No. 3340)
Zimmerman Booher
341 South Main Street, Fourth Floor
Salt Lake City, UT 84111
(801) 924-0200
tbooher@zbappeals.com
fvoros@zbappeals.com

Ramya Ravindran (pro hac vice)
Grace Rybak (pro hac vice)
Ian Postman (pro hac vice)
Bredhoff & Kaiser P.L.L.C.
805 15th Street NW, Suite 100
Washington, DC 20005
(202) 842-2600
rravindran@bredhoff.com
grybak@bredhoff.com
ipostman@bredhoff.com

Alice O'Brien (pro hac vice)
National Education Association
1201 16th Street, NW
Washington, DC 20036
aobrien@nea.org

Attorneys for Plaintiffs-Appellees

Arif Panju (TX Bar No. 24070380)
Michael Peña (TX Bar No. 24131580)
Institute for Justice

816 Congress Avenue, Suite 970
Austin, TX 78701
(512) 480-5936
apanju@ij.org
mpena@ij.org

Michael Bindas (WA Bar No. 31590)
Institute for Justice
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Thomas Fisher* (IN Bar No. 17949-49)
EdChoice Legal Advocates
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
(317) 978-9472
tfisher@edchoice.org

Attorneys for Intervenor-Defendants-Appellants

David N. Wolf (Utah Bar No. 6688)
Assistant Attorneys General
160 E. 300 S., 5th Floor
Salt Lake City, UT 84114
(385) 881-3742
dnwolf@agutah.gov

Stanford Purser (Utah Bar No. 13440)
Utah Solicitor General
Office of the Utah Attorney General
160 E. 300 S., 5th Floor
Salt Lake City, UT 84111 801-366-0533
spurser@agutah.gov

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
ARGUMENT	1
A. Constitutional text makes clear that the legislature has the authority to create educational programs that are not part of the public education system.	2
B. Legislative history bolsters the conclusion that the original public meaning of the relevant portion of Article X was that the legislature could create educational programs in addition to those it designates as part of the public education system.	4
C. Relevant practice reflects an understanding that the legislature can create and support educational opportunities outside the public school system, including providing “indirect aid” to private institutions, including those with a religious mission... ..	6
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

Cases

<i>South Salt Lake City v. Maese</i> , 2019 UT 58, ¶19, 450 P.3d 1092.....	3
<i>State in Interest of J.M.S.</i> , 2011 UT 75, ¶ 22, 280 P.3d 410	3
<i>State v. Barnett</i> , 2023 UT 20 ¶74, 537 P.3d 212	5
<i>Utah School Boards Association v. Utah State Board of Education</i> , 2001 UT 2, 17 P.3d 1125	4
<i>Utah Technology Finance Corp. v. Wilkinson</i> , 723 P.2d 406 (Utah 1986).....	4

Statutes

Utah Code §35A-15-203	8
Utah Code §53F-4-302	6
Utah Code §35A-15-301	8
Utah Code §53E-7-402	6
Utah Code §53E-7-405	7
Utah Code §53F-2-401	7
Utah Code §53F-4-304	7
Utah Code §53F-6-402	5
Utah Code §53F-6-417	8
Utah Code §53F-6-501	8
Utah Code §53H-11-402	6
Utah Code §53H-11-403	6
Utah Code §53H-11-409	6
Utah Code §53H-11-411	6
Utah Code §53H-11-412	6
Utah Code §53H-11-413	6
Utah Code §53H-11-414	6
Utah Code §63N-20-10	8
Utah Code §63N-20-102	7, 8

Other Authorities

“Carson Smith Opportunity Scholarships,” Children First Education Fund.....	7
Tony Zambrana & Tami Gear, “Special Needs Opportunity Scholarship” Utah State Board of Education Report to the Education Interim Committee (Nov. 2024),	7
Utah Administrative Code R277-733-10.....	7
Utah Senate Bill 44 (2024)	7

Constitutional Provisions

Utah Constitution, article VI, section 1	3, 4
Utah Constitution, Article X, section 2	passim
Utah Constitution, Article XIII, section 5	1, 9

INTEREST OF AMICUS CURIAE

Sutherland Institute is a nonpartisan policy and educational institution – a think tank – that informs the public and policymakers alike. Its mission is to advance principled public policy in selected areas of emphasis, such as promoting excellence in education and parents’ responsibility to direct their children’s education. Sutherland joined with other groups to promote the passage of the Utah Fits All legislation.

Notice of amici’s intent to file was provided as required by Rule 25(a). All parties consented to the filing of the brief, per Rule 25(b)(2). And, per Rule 25(6), amici state that no party or party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The appellants and appellants-intervenors have effectively explained the errors in the analysis of the District Court opinion below. Sutherland Institute writes separately to supplement the information provided in their briefs regarding the meaning of Utah Constitution, Article X, section 2. In doing so, we also note that a proper reading of Utah Constitution, Article XIII, section 5(5)(b) requires finding in favor of appellants and appellants-intervenors. In the opinion below, the Court paraphrased this section as allowing the State to fund only “*existing* social service programs.” Ruling and Order at 54. That word could have been inserted by the drafters into the amendment, but was not, and its exclusion from the text is critical. A court cannot add language to a constitutional provision

and then use the judicially amended version to resolve disputes under the law. Yet, that is what the Court did, and reversing that clear error could resolve this case.

It is also significant that the decision below asserts that Utah Fits All (UFA) is “not a social service program.” *Id.* at 55. The text of the amendment, of course, does not speak of “social service programs” but of any legislative effort to “support children.” This is, of course, not a legal conclusion but a policy preference, as evidenced by its origin in a statement opposing the ratification of the amendment (a statement which, ironically, seems to assume that UFA is such a program). A program that helps families with specific needs, as this scholarship program does by providing means-tested financial assistance to those whose children could benefit from opportunities not available in the public school system, certainly looks like a social service program. People of good faith can differ as to whether a particular legislative initiative is the best use of the State’s resources, but this is a question to be determined by the representative branches rather than a question of textual interpretation.

Independent of this question, though, the crabbed interpretation of legislative authority under Article X, section 2, in the opinion of the Court below is at odds with the text of the Constitution and unsupported by other evidence of the meaning of that text. That interpretation could call into question other programs that provide significant benefits to the people of the State without any Constitutional justification.

A. Constitutional text makes clear that the legislature has the authority to create educational programs that are not part of the public education system.

In interpreting constitutional provisions, the text of those provisions is paramount.

South Salt Lake City v. Maese, 2019 UT 58, ¶19, 450 P.3d 1092, 1097 (“our focus is on the objective original public meaning of the text, not the intent of those who wrote it”). So, it should be dispositive in this appeal that the text of Article X, section 2 is at odds with the interpretation placed on it by the Court below. The provision is clear:

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.

Thus, while all public schools must (“shall”) be part of the “public education” and “higher education” systems, “other schools and programs” need not be. The use of “may” gives the Legislature discretion to determine whether these other schools or educational programs will be part of the public education system. The obvious corollary is that the Legislature can authorize programs which may perform similar functions to the schools and programs within the system, but which it will not “designate” as part of that system. If the Constitution is read to preclude the Legislature from creating or recognizing any non-public schools or programs, the final clauses of sentences one and two are superfluous. *Cf. State in Interest of J.M.S.*, 2011 UT 75, ¶ 22, 280 P.3d 410 (describing canon against superfluity in statutory context).

The fundamental mistake in the District Court’s analysis of this section is to have read it in isolation from (or in opposition to) the Constitutional provision that describe the Legislature’s power. Utah Constitution, article VI, section 1 (“The Legislative power of the State shall be vested in: a Senate and House of Representatives which shall be

designated the Legislature of the State of Utah; and the people of the State of Utah as provided in Subsection (2).”). This provision makes clear that the Legislature “has plenary power for all purposes of civil government” and possesses “the whole lawmaking power.” *Utah School Boards Association v. Utah State Board of Education*, 2001 UT 2, ¶11, 17 P.3d 1125. This means that the Legislature “has every power which has not been granted to the federal government or prohibited by the state constitution.” *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 409 (Utah 1986). Article X, section 2 does not contain such a prohibition in the context of educational programs since it specifically recognizes that the Legislature may or may not designate “other schools and programs” as part of the public education system.

Reading Article VI, section 1 and Article X, section 2 together makes clear what the latter means when it refers to “programs and schools” that may not be designated as part of the public education system. These are programs that the Legislature could create or recognize as part of its plenary lawmaking power (recognized in Article VI) but that it determines should not be designated a part of the public education system.

The District Court essentially skipped a step, spending an inordinate amount of time discussing the legislative history of Article X, section 2 to try and determine the subjective intentions of legislators and voters but glossing over the text that they actually drafted and ratified.

B. Legislative history bolsters the conclusion that the original public meaning of the relevant portion of Article X was that the legislature could create educational programs in addition to those it designates as part of the public education system.

Though evidence in extraneous materials cannot displace the text of the Constitution in determining a provision’s meaning, they can illuminate that meaning when it may not be clear. Here, the text is clear and legislative history is unnecessary to establish it, but it is perhaps illuminating that the most “definitive” part of the legislative history (the voter information pamphlet) of the proposed amendment that became Article X, section 2 supports the conclusions that would naturally be drawn from examining the text.

This Court has recognized voter pamphlets as providing “definitive statements” of what the voters who were asked to ratify an amendment would have been presented regarding its meaning. *State v. Barnett*, 2023 UT 20 ¶74, 537 P.3d 212. As noted in the impartial analysis included in the Utah Voter Information Pamphlet for the 1986 election, in which proposed changes to Article X were ratified (reproduced in the opinion of the court below), these changes would “clarif[y] and probably expand[] the power of state and local governments to offer certain kinds of indirect support” to “a school or educational institution controlled a religious organization.” (Ruling and Order at 18).

This is certainly consistent with the “may designate” language in the text. It can be assumed that in ratifying the amendment, voters knew that schools and programs not designated by the Legislature as part of the public education system could receive “indirect support” from the government. UFA is an apt illustration of just such a program. It provides support for families that they can use for the costs of educational programs outside the public education system. Utah Code §53F-6-402. The State thus does not directly aid nonpublic schools but instead provides support to children in families in need of assistance who then use that support to secure educational resources outside of the public school

system.

C. Relevant practice reflects an understanding that the legislature can create and support educational opportunities outside the public school system, including providing “indirect aid” to private institutions, including those with a religious mission.

Like legislative history, subsequent practice does not displace the clear meaning of constitutional text. At best, it can suggest how that text is understood. So, with the caveat that this type of evidence is not dispositive, it is of interest that the practice of the State is consistent with the understanding that Article X, section 2 allows the government to provide indirect aid to private educational institutions, including those with a religious mission.

The Board of Higher Education offers scholarships which include funds from legislative appropriations to “private, nonprofit institution of higher education in the state” through the Opportunity Scholarship Program (Utah Code §53H-11-402(1)(a) & (2)), the Karen Mayne Public Safety Officer Scholarship Program (Utah Code §53H-11-403(3)(a)), the Terrel H. Bell Education Scholarship Program (Utah Code §53H-11-409(1)(b) & (2)), the First Responder Mental Health Services Grant Program (Utah Code §53H-11-411(3)), the Adult Learner’s Grant Program (Utah Code §53H-11-412(1)(b)), the Veterans Tuition Gap Program (Utah Code §53H-11-413(3)(a)), the Utah Promise Program (Utah Code §53H-11-414(1)(h)(ii)).

The Carson Smith Scholarship Program was “created to award scholarships to students with disabilities to attend a private school” (Utah Code §53E-7-402 and §53F-4-302) in 2005. Tony Zambrana & Tami Gear, “Special Needs Opportunity Scholarship”

Utah State Board of Education Report to the Education Interim Committee (Nov. 2024), https://schools.utah.gov/policy/_policy/_utahlegislative-reports/_2024_/2024%20Special%20Needs%20Opportunity%20Scholarship%20Report.pdf. From 2021 to 2024, the State also administered a similar Special Needs Opportunity Scholarship Program, which was merged with the Carson Smith program. See Utah Senate Bill 44 (2024), <https://le.utah.gov/~2024/bills/static/SB0044.html>. Part of the money for these scholarships comes from appropriations from the Legislature, and additional funds come from private donations. Utah Code §53F-4-304; “Carson Smith Opportunity Scholarships,” Children First Education Fund, <https://scholarship.cfe-fund.org/scholarship/>. The private donations to the Program are eligible for a nonrefundable tax credit. Utah Code §53E-7-405.

The State Board for Adult Education is tasked with providing “adult high school completion and adult basic skills programs” including to “individuals in the custody of the Department of Corrections.” In this responsibility, they “shall, where feasible, contract with appropriate private or public agencies to provide educational and related administrative services.” Utah Code §53F-2-401. Utah State Board of Education rules reiterate this, providing that “The Board may contract to provide educational services inmates with . . . private providers recommended by a local school board” Utah Administrative Code R277-733-10(1)(d).

The Governor’s Office of Economic Opportunity administers the UPSTART Program to “provide preschool children across the state access to a home-based educational technology program with strong parental involvement.” Utah Code §63N-20-102(2)(a).

Both public and private preschool providers are eligible to participate. Utah Code §63N-20-10(2). The program is delivered by a contractor who must “provide for the installation of a computer, a tablet, or other electronic or peripheral equipment, and Internet access: in homes of participants who are eligible to receive free or reduced lunch; and for participating private preschool providers, including residential certificate providers, based upon need” Utah Code §63N-20-102(4)(c)(2)(ii). The Legislature appropriates funding for the program. Utah Code §63N-20-102(5).

Similarly, the Legislature makes appropriations to private preschool providers as part of the Becoming Quality School Readiness Grant Program. Utah Code §35A-15-301(1) & §35A-15-203.

Most recently, the Legislature created the Utah Private Course Choice Empowerment program, which would “allow all authorized online course providers and courses the state board has approved . . . for the Statewide Online Education Program . . . to be offered to private school students.” Utah Code §53F-6-417(11)(b). In reviewing and approving courses for eligibility under this program, the program manager is to ensure the online course provider is not required to “alter the provider's: creed; practices; admissions policies; hiring practices; or curricula, including any religious course or course content. Utah Code §53F-6-501(14)(a).

It would create an absurd result if the Constitution were read to say that any program or initiative that allows learning to take place outside of public school system may not be funded by the State. The scholarships, programs addressed to student with special needs, preschool support, and adult education initiatives described above would be invalidated.

What would such a rule mean for public funding of museums, historical markers, exhibits at state parks, etc.?

It is similarly absurd to accept the Appellee's position that courts have the authority to examine all of the state's funding choices to ensure they do not take money away from public education. Every appropriation the state makes would be open to scrutiny, since if the state is funding the operation of public facilities, paying the salary of law enforcement officials, or promoting public health initiatives, the money used in these efforts could theoretically have been used for funding public schooling. It is much more reasonable to assume that the plenary Legislative power includes the ability to make decisions about how to apportion tax revenue among many important priorities, rather than assuming courts must oversee those decisions to make sure they do not shortchange education funding.

In summary, the Utah Constitution does not require a zero-sum calculation where the state can either maintain a public education system or provide assistance to others who have unique needs that may be best met outside the public education system. Even if the Court were to accept this assertion, the clear text of Article XIII, section 5 would prevent its application to invalidate the Utah Fits All program.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted this 20th day of January, 2026.

/s/ William C. Duncan
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. This brief complies with the word limits set forth in Utah Rules of Appellate Procedure 25(f) because this brief contains 2,414 words, excluding those parts of the brief exempted under the rule.
2. This brief complies with Utah Rules of Appellate Procedure 21(h) regarding public and non-public filings.

DATED this 20th day of January, 2026

/s/ William C. Duncan

William C. Duncan (Utah Bar No. 08714)

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2026, the foregoing BRIEF AMICUS CURIAE OF THE SUTHERLAND INSTITUTE IN SUPPORT OF APPELLANTS AND INTERVENOR-APPELLANTS was served upon the following counsel of record via the court's electronic filing system and via electronic mail:

Tracey M. Watson tracey.watson@myuea.org
Troy L. Booher tbooher@zbappeals.com
J. Frederic Voros, Jr. fvoros@zbappeals.com
Ramya Ravindran rravindran@bredhoff.com
Grace Rybak grybak@bredhoff.com
Ian Postman ipostman@bredhoff.com
Alice O'Brien aobrien@nea.org
Attorneys for Plaintiffs-Appellees

David N. Wolf dnwolf@agutah.gov
Stanford Purser spurger@agutah.gov
Attorneys for Defendants-Appellants

Arif Panju apanju@ij.org
Michael Peña mpena@ij.org
Michael Bindas mbindas@ij.org
Thomas Fisher Thomas Fisher tfisher@edchoice.org
Attorneys for Defendants-Appellants-Intervenors

/s/ William C. Duncan
William C. Duncan