

SUPREME COURT OF NORTH CAROLINA

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RICHARDSON, et al.,	)	
	)	
PLAINTIFFS-APPELLEES,	)	
v.	)	<u>From WAKE County</u>
	)	13-CVS-16484
	)	COA 14-675
	)	
STATE OF NORTH CAROLINA, et al.,	)	
	)	
DEFENDANTS,	)	
	)	
AND	)	
	)	
PERRY, ET AL.,	)	
	)	
DEFENDANT-INTERVENOR-	)	
APPELLANTS	)	
	)	
	)	

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BRIEF OF AMICUS CURIAE  
NATIONAL SCHOOL BOARDS ASSOCIATION

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BRIEF OF AMICUS CURIAE  
NATIONAL SCHOOL BOARDS ASSOCIATION

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### **INTEREST OF THE AMICUS**

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in many cases involving the use of public funds to pay for private education. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. \_\_\_\_, 131 S. Ct. 1436 (2011).

NSBA is concerned about the "scholarships" made available under N.C. GEN. STAT. §§ 115C-562.1 to 115C-562.7 (2014) ("North Carolina Voucher Program") because they undermine public education and deprive students and their families of important federal and state rights and protections without providing any public benefit.

### **STATEMENT OF THE CASE**

*Amicus* adopts the Statement of the Case of the citizen and school board plaintiffs.

## **STATEMENT OF FACTS**

*Amicus* adopts the Statement of the Facts of the citizen and school board plaintiffs.

## **STATEMENT OF ISSUES**

Whether the statute authorizing the use of public funds to provide vouchers to low income students to attend private schools, including sectarian schools, on which the State has imposed no minimum curricular or teacher qualification standards is prohibited by the North Carolina constitution? N.C. Const. Arts. I, § 15; V, § 2(1); IX, § 2.

## **ARGUMENT**

### **I. The North Carolina Voucher Program's lack of accountability harms state taxpayers.**

The State of North Carolina has a constitutional obligation to be a good steward of taxpayer monies. Because public schools are entrusted with fundamental responsibilities, states must use particular care to ensure that funds appropriated for public education further the public interest. Yet the North Carolina Voucher Program contains virtually no protections for taxpayers.

Private schools in North Carolina do not have to comply with state accountability standards,<sup>1</sup> nor are they required to employ minimally qualified

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<sup>1</sup> For example, private schools in North Carolina are not required to participate in state high school competency testing or statewide testing programs, although they



teachers. The state does not have the authority to control or influence the curricula of these schools. For example, voucher schools are not subject to the same accountability standards public schools must meet with respect to reading, mathematics and communication skills, N.C. Gen. Stat. § 115C-105.35 (2014). While mechanisms are in place to identify low-performing public schools, no comparable mandatory accountability regime is available to identify low-performing private schools.

Consequently, the families of voucher students are left to select a private school based on few, if any, objective measures of educational quality. Other than personal visits to a school, subjective evaluations from other parents or self-interested promotional information from the schools themselves, families typically would have little data to determine whether the private school they are choosing will, in fact, provide their children a better education than the public schools. If the private setting turns out to serve their child's educational needs poorly, parents have few good options if the private school fails to make changes voluntarily. Parents

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may do so voluntarily. N.C. Gen. Stat. §§ 115C-551 and -559 (2014). Instead private schools must administer a nationally standardized test of their own choosing to students in third, sixth and ninth grade in English grammar, spelling, and mathematics. They must also assure that all high school graduates attain a minimum score (set by each school) on a nationally standardized test or measurement selected by the school to assure high school graduates have "those minimum skills and that knowledge thought necessary to function in society." N.C. Gen. Stat. §§115C-549 and -550; 115C-557and -558.

can enroll their child in a new private school with the capacity to provide a quality education, at their own expense; leave the child in a private setting that provides deficient educational services; or re-enroll the child in public school, having lost precious educational time. The possibility of such harm is substantial given that many private schools lack sufficient qualified/certified staff and other resources. The experience with voucher programs in other states already well establishes that certain students are especially at risk, including children with physical, mental, and emotional challenges and those with limited English proficiency.<sup>2</sup>

The North Carolina Voucher Program allows public funds to be used to enroll a child in a private school, the quality of which is unknown to the parents, taxpayers and the state.<sup>3</sup> Despite this lack of oversight, voucher programs like North

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<sup>2</sup> See, e.g., Scott S. Greenberger, *Voucher Lessons Learned*, THE BOSTON GLOBE, February 26, 2001, at A1; Julie Mead, *Publicly Funded School Choice Options in Milwaukee: An Examination of the Legal Issues*, 88 RESEARCH BRIEF NO. 9 (Public Policy Forum, Milwaukee, WI) 1 (July 21, 2000); Barbara Miner, *Vouchers: Special Ed Students Need Not Apply*, RETHINKING SCHOOLS (Public Policy Forum, Milwaukee, WI) (Winter 2003), available at [http://www.rethinkingschools.org/special\\_reports/voucher\\_report/v-vouc182.shtml](http://www.rethinkingschools.org/special_reports/voucher_report/v-vouc182.shtml); Tom Held, *School choice program shuts out disabled, federal complaint says*, JOURNAL SENTINEL, June 7, 2011, available at <http://www.jsonline.com/news/education/123374903.html>.

<sup>3</sup> Private schools must annually maintain attendance and disease immunization records for students, administer self-selected nationally standardized tests, and comply with fire, safety, sanitation and immunization laws but are otherwise exempt from state laws regarding education. N.C. GEN. STAT. §§ 115C-554 and -562. A private school may be considered a “qualified nonpublic school” if it obtains accreditation from the State Board of Education, or a national or regional accrediting agency; is an active member of the North Carolina Association of

Carolina's funnel millions of dollars in taxpayer funds to private institutions with no assurance that the State or its citizens will get any return on their investment. The North Carolina Voucher Program does not contain any mechanism for the state to recoup money from private schools that expel or otherwise fail to educate voucher students. Therefore, in addition to funneling money to these schools, the Voucher Program provides no recompense to anyone if the school fails to meet its obligations. In contrast, states regulate every aspect of traditional public schools, from curriculum to procurement to assessment, to assure the responsible use of public money and the adequate education of its students. Voucher programs abandon these safeguards and, in so doing, abandon any sincere effort to assure that the publicly funded education provided by schools receiving vouchers actually meets public needs.

In an effort to assuage such concerns, voucher proponents contend that research overwhelmingly shows that voucher programs uniformly improve student performance. Research on the aggregate effect of voucher programs shows most voucher students do no better than public school students. In fact, when comparing students with similar socioeconomic status, research shows that public school

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Independent Schools or receives no funding from the State of North Carolina (the "scholarship" funds at issue here are not considered state funding for this purpose). N.C. GEN. STAT. § 115C-555.

students outperform their private school counterparts.<sup>4</sup> In a synthesis of research on the efficacy of voucher programs, the Center on Education Policy concluded that “[a]chievement gains for voucher students are similar to those of their public school peers. . . . While some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run.”<sup>5</sup> As to the assertion that voucher programs spur public schools to improve, the CEP report stated that no clear conclusions about cause and effect can be drawn.<sup>6</sup> Even if the voucher proponents’ characterization of the research accurately portrayed the aggregate effect of voucher programs in general, it reveals little about the likelihood that the North Carolina Voucher Program will produce a similar positive outcome and even less about the educational benefits that any particular private school in North Carolina will provide to a child who enrolls there using public tax dollars.

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<sup>4</sup> *See generally*, BERLINER, DAVID C. & GLASS, GENE V. ET AL., 50 MYTHS AND LIES THAT THREATEN AMERICA’S PUBLIC SCHOOLS (Teachers College Press, Columbia University, 2014).

<sup>5</sup> CENTER ON EDUCATION POLICY, KEEPING INFORMED ON SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH 9 (July 2011), *available at* <http://www.cep-dc.org/displayDocument.cfm?DocumentID=369>.

<sup>6</sup> *Id.* at 11. *See also*, BERLINER & GLASS, *supra* note 4.

## **II. The North Carolina Voucher Program Harms Public Education.**

### **A. The North Carolina Voucher Program undermines the significant role of public education in America.**

Public education plays a critical role in American society. The judiciary's recognition of that role was forcefully expressed by the United States Supreme Court in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. 483, 493 (1954). The *Brown* Court's emphasis was not on education in general, regardless of source, but on education as a *function of state and local government, i.e.*, as a public responsibility serving the public good.

These same themes have echoed throughout school law jurisprudence. For instance, the High Court has concluded that "public school teachers may be regarded as performing a task 'that [goes] to the heart of representative government'" and that public schools "are an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground." *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 n.6 (1973)); see also, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681

(1986) (internal citations omitted) (“[Public] education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values. . . indispensable to the practice of self-government in the community and the nation.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation has a fundamental role in maintaining the fabric of our society.”).

Just as the federal courts have consistently recognized that education is a public function necessary to preserve our democracy, so, too, have the states. Every state constitution contains an education clause recognizing the provision of a public education as a state function. *See, e.g.*, William Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. (West) 19 (1993). As in North Carolina, appellate courts in the majority of states have confirmed the states’ constitutional obligations to provide an adequate public education on an equal basis to all children. These courts have insisted that the states provide for the needs of students in *all* of the public schools and eliminate disparities in educational opportunity. *See, e.g.*, *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (holding that state must “provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools”); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993) (finding that constitution “imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d

71, 91 (Wash. 1978) (concluding that “the constitution has created a ‘duty’ that is supreme, preeminent or dominant” to provide an adequate education with “sufficient funds”).<sup>7</sup>

Likewise, this Court has recognized North Carolina students’ constitutional right to an opportunity to receive a sound basic education. *Leandro v. State of N.C.*, 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997). The North Carolina Voucher Program fails to meet the state’s constitutional obligations. Providing taxpayer funds to private schools without making any effort to hold those private schools accountable for meeting state standards contravenes the public’s interest in funding an adequate education for all students.

**B. The North Carolina Voucher Program’s diversion of public dollars away from schools harms North Carolina public schools.**

By diverting funds that could otherwise be spent in strengthening the State’s public schools, the North Carolina Voucher Program categorically undermines this country’s longstanding commitment to public education. Public schools rely on a critical mass of per pupil funding to provide quality education to all students. By diverting to private schools substantial tax revenues that could be used in public

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<sup>7</sup> Many other court decisions affirm the duty of the states to provide for public education. The Advocacy Center for Children’s Educational Success With Standards maintains a current and historical database of all state education litigation at <http://www.accessednetwork.org/litigationmain.html>.

schools, the voucher scheme constitutes a severe threat to the quality of public education programs.

The impact of this diversion is amplified in North Carolina where public schools have been underfunded for years, and the 2008 recession forced further reductions in education funding. North Carolina has consistently ranked near the bottom in per pupil spending. In 2010 (the latest year for which data are available), North Carolina ranked 43rd. *See* U.S. CENSUS BUREAU, G10-ASPEF, PUBLIC EDUCATION FINANCES: 2010, Table 11 (June 2012), <http://www.census.gov/prod/2012pubs/g10-aspef.pdf>. Although overall funding has increased by \$60 million since 2008, restoring a portion of the recessionary cuts, “the funding available for classroom activities (text books, transportation, teacher assistants, teachers, etc.) has been reduced by over \$1 billion.” In addition, funding for classroom materials and instructional supplies has been cut by nearly 47% since fiscal year 2009-10.<sup>8</sup> By 2013-2014 state per pupil funding in North Carolina public schools, adjusted for inflation, remained 8.6% less than in 2008. *See* M. Leachman and C. Mai, *Most States Funding Schools Less than Before the Recession* (Center on Budget and Policy Priorities, May 2014), <http://www.cbpp.org/files/9-12-13sfp.pdf>. North Carolina is not alone. For fiscal year 2014, at least thirty-five states provided less

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<sup>8</sup> Quick Facts: 2013-2015 State Budget Impact (Public School First NC, Sept. 22, 2014), *available at* <http://www.publicschoolsfirstnc.org/wp-content/uploads/2013/09/9-13-14-The-Impact-of-the-2013-15-State-Budget.pdf>.



funding per student to public K-12 schools than they did before the economic recession. *Id.*

Combined with these cuts, the North Carolina Voucher Program leaves most families with fewer educational resources available to them. Students who remain in the public schools—either by choice or because no voucher is available to them—are likely receiving a lower-quality public education than if public funds were not expended on private schools. Under such circumstances, North Carolina cannot afford to redirect even more money away from public schools.

### **CONCLUSION**

For these reasons, *Amicus Curiae* National School Boards Association respectfully urges this Court to hold the North Carolina Voucher Program unconstitutional.

Respectfully submitted this 2d day of February, 2015,

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