IN THE COURT OF APPEALS
THE STATE OF ARIZONA
DIVISION ONE

No. 1 CA-CV 12-0242

SHARON NIEHAUS, ARIZONA SCHOOL BOARDS ASSOCIATION, ARIZONA EDUCATION ASSOCIATION AND ARIZONA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS,
PLAINTIFFS-APPELLANTS,
VS.
JOHN HUPPENTHAL,
DEFENDANT-APPELLEE,
AND
THE GOLDWATER INSTITUTE, ANDREW WECK ROBERTSON, VICTORIA ZICAFOOSE AND CRYSTAL FOX,
INTERVENORS-APPELLEES.

AMICUS CURIAE BRIEF OF THE 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*, 131 S. Ct. 1436 (2011).

NSBA is concerned about the Arizona empowerment scholarship program because it undermines public education and deprives students with disabilities and their families of important rights and protections under both federal and state law. It imposes these harms but serves no important educational purpose and provides no real independent parental choice. Instead, it is part of a nationwide campaign by special interest groups to divert tax dollars away from public education and into private hands. NSBA urges this Court to avoid a ruling that would strengthen these efforts that seek the destruction of one of the most important cornerstones of our democracy.

STATEMENT OF THE CASE

Amicus NSBA adopts the Appellants' Statement of the Case.

STATEMENT OF FACTS

Amicus NSBA adopts the Appellants' Statement of the Facts.

STATEMENT OF ISSUES

(1) Whether S.B. 1553 violates the Aid and Religion Clauses of the Arizona Constitution.

(2) Whether S.B. 1553 unconstitutionally conditions a benefit on the waiver of a constitutional right.

ARGUMENT

I. By Limiting True Choice for Parents, the Arizona Program Harms the Ostensible "True Beneficiaries," Students with Special Needs and Their Families.

The Arizona Empowerment Account Program ("Arizona Program") established under ARIZ. REV. STAT. ANN. § 15-2402.B.2 (2012) requires parents to affirmatively waive their child's right to a public education in order to receive the benefits of the Arizona voucher program. In other words, to receive the scholarship under the Arizona Program, parents must forgo their right to re-enroll their children in an Arizona public school. In this way, the current statutory scheme wrongly encourages parents to contract away their child's fundamental right to an education under the state constitution.

Unwitting parents, hoping for the best education for their child, may be lured into making a choice from which they cannot escape later without incurring severe economic loss. If the private setting selected by the parents through the Arizona Program turns out to serve their child's educational needs poorly, the parents, having waived their right to re-enroll their child in public schools, face a difficult dilemma—either pay for another private school out of their own pocket (assuming the voucher funds have been depleted) or keep their child in an inappropriate educational placement.

When parents in such situations lack the necessary financial resources to pay for a new school, the harm to the child is clear: the child is sentenced to serving out a school year in an inappropriate private setting that fails to provide the individualized educational services the child needs. The possibility of such harm is substantial given that many private schools lack sufficient qualified/certified staff and other resources necessary to serve special needs students adequately. The experience with voucher programs in other states already well establishes that students with physical, mental, and emotional challenges and those with limited English proficiency, or both, are the least likely to be served well in these programs.[1]

[1] *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*

The cost of serving children with special needs is enormous, often making it difficult, if not impossible, for private schools to provide an appropriate education to special needs students, especially where there is no critical mass of students with specific disabilities. In such circumstances, students with moderate to severe disabilities may be terribly underserved, because a private school cannot economically sustain the costly services needed to deliver an appropriate education based on the voucher amount available to students who participate in the Arizona Program. This has already happened in other states.

In Ohio, for instance, one-time voucher supporter David Brennan wrote to the governor of that state to report that, "Numerous scholarship [voucher] recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child."[2] Other jurisdictions similarly report that private

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Milwaukee: An Examination of the Legal Issues, 88 RESEARCH BRIEF NO. 9 (Public Policy Forum, Milwaukee, WI) (July 21, 2000) at 1; 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; 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.

[2] Memorandum from David Brennan to Tom Needles, Ohio Governor's Office (Sept. 27, 1996) (*as quoted in* Dennis J. Willard and Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows*, AKRON BEACON JOURNAL, June 6, 2011, *available at* 1999 WLNR 1646240, 12/14/99 AKRONBJ A10.

schools are simply incapable of addressing the needs of special needs students without the critical mass of funding that comes from serving a broad population of students.[3]

A public school district already structured to deliver these services and resourced (from certified teachers and specialists, to per pupil costs spread over an entire student population) to address the divergent needs of students with varying disabilities is better situated to provide a greater degree of disability-related services across a broader spectrum of special needs. If past is indeed prologue, the

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[3] A 1998 survey by the United States Department of Education of private schools in the inner cities of large metropolitan areas found that sixty-eight percent of the schools would "definitely or probably" *not* be willing to participate in a voucher program if they had to accept "special needs" students, such as those who are limited English proficient, learning disabled, or low achieving. *See* Lana Muraskin, *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools* 49-51 (U.S. Dep't of Educ., Office of the UnderSecretary) (Nov. 1998). In August 2012, the Associated Press (AP) reported the high cost of educating students with special needs is disproportionately falling on traditional public schools as other students increasingly opt for alternatives that are not always readily open to those requiring special education. According to the AP, public schools of Philadelphia spent $9,100 per regular education pupil in 2009, $14,560 per pupil with milder disabilities and $39,130 for more severe disabilities, according to a consultant's report that compared special education costs, while Los Angeles Unified spent $6,900 to school a regular education student, $15,180 for a pupil with milder disabilities and $25,530 for a child with significant needs. Christina Hoag, *Special needs kids stay in traditional schools*, ASSOCIATED PRESS (August 18, 2012), *available at* http://www.bigstory.ap.org/article/special-needs-kids-staying-in-traditional-schools.

experience of other states suggests that a similar scenario will replicate itself in Arizona.

Lastly, because a student placed in a private setting under the Arizona Program is required to forgo all rights to a public education, the child would not be entitled to the plethora of federal procedural and substantive due process rights afforded to him or her by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482 (2012)—the federal special education law designed to ensure that children with disabilities receive a free appropriate public education ("FAPE") in the least restrictive environment, 20 U.S.C. § 1411(e)(3)(F)(i) (2012). To provide FAPE, public schools are required to develop for each child with a disability an individualized education program ("IEP") with the input of many school-based, curricular, and special needs experts. 20 U.S.C. § 1414(d) (2012). The IEP, which is modified at routine intervals, in turn guides the child's education over the course of the student's academic career with particular attention directed to addressing a child's specific disabilities. *Id.*

In addition, the IDEA provides certain procedural due process rights that guarantee a parent can challenge the educational choices developed on behalf of the child. 20 U.S.C. § 1415(b)(6) (2012). This ability to challenge the educational process is a key component of the IDEA, aimed at ensuring the child is indeed receiving the educational benefits guaranteed by the IDEA. Some of those rights

include: The right to participate in the development of the student's IEP; the right to the development of the IEP by certified experts; the right to challenge the decisions of the IEP team before an impartial administrative hearing officer; and the right to de novo review in state and federal district courts. 20 U.S.C. § 1415 (2012). Often the exercise of those rights is the key factor in obtaining crucial educational services for one's child. Not so under the Arizona Program, under which a parent would be at the mercy of a private school's largesse and whatever contractual and economic restrictions the private school decreed. Interestingly, the parents would also forgo even the limited special education services offered by public schools to students initially enrolled and attending public schools, who are later unilaterally placed in private schools by their parents. 20 U.S.C. § 1412 (a)(10) (2012).

Unfortunately, even if a parent's initial choice was informed by the waiver of these federal rights, under the Arizona Program the child would be affirmatively barred from returning to a public school regardless of whether the parent, subsequent to acceptance of the voucher, was to realize that the private school no longer served the interests of his/her child, or to discover fraud, misrepresentation or even unintentional misinformation about the educational services or the quality of the education to be provided to their child. In this way, the Arizona Program not only violates the Arizona Constitution's guarantee of the public education, but

it also is not good public policy because it neither bears the student's best interests at heart, nor does it contribute to the economic well-being of Arizona families.

II. The Arizona Program Harms Public Education.

A. The Arizona Program conflicts with the judiciary's commitment to public education as an inherent American value.

Like the American people, American courts have always recognized the critical role that public education plays in American society. The judiciary's commitment to public education as expressed by the United States Supreme Court in *Brown v. Board of Education* has resonated through the last fifty years of education law:

> 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.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The Court's emphasis in *Brown* 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 are echoed throughout the jurisprudence of school law. 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 in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In sum, education has a fundamental role in maintaining the fabric of our society."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) ("Nothing this Court holds today in any way detracts from our historic dedication to public education.").

Just as the federal courts have consistently recognized that education is a public function necessary to preserve a democratic society, so, too, have the states. Today, every state constitution contains an education clause that recognizes 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); Molly McCusic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991).

Appellate courts in the majority of states have now confirmed the states' constitutional obligations to provide an adequate public education on an equal basis to all children. *See, e.g.*, DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (Princeton Univ. Press 2003) (addressing the current status of education finance litigation). Time and again the 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"); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (declaring that constitution "requires that all children have the opportunity for a sound basic education"); *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").[4]

[4] This is only a small sampling of state decisions affirming 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.

This Court has an opportunity to reiterate the value that the American judiciary has placed in public education, by recognizing that the Arizona Program moves away from this inherent American value. In particular, the Arizona Program fails to meet Arizona's constitutional obligations to provide an adequate public education on an equal basis to all children, particularly those with disabilities. The inability of parents to choose public schools under the Arizona Program,[5] or to withdraw their children from an inappropriate private setting without enormous financial implications, limits the ability of families, particularly poor families, from both making the best educational choice for their children, and benefitting from the purported advantages associated with the private choice. To the contrary, by offering them the proverbial golden handcuffs, the Arizona Program weighs more heavily and disparately on those ill-prepared to bear its costs: the disadvantaged and poor families of Arizona.

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[5] Under the Arizona Program, a parent cannot obtain the benefits of the funds provided by the state to change a child's public school placement by enrolling the student in another public school outside of his/her attendance zone. In other words, under the program the only option parents have is to use the state money for private education. Such a program is at odds with *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), because a true public option would permit students to utilize the state dollars at any public school of their choice. For instance, students assigned to a neighborhood school by an existing geographic attendance zone would be unable to utilize the Arizona Program to attend a higher performing school outside their attendance zone.

B. The Arizona Program's diversion of public dollars away from schools harms Arizona public schools.

By diverting funding from the State's public schools, the Arizona 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 their students. By diverting substantial tax revenues to private schools that could be used in public schools, the Program constitutes a severe threat to the quality of public education programs. The impact of this diversion in funding is amplified in Arizona where public schools have been underfunded for years, and the recession has recently forced further reductions in public education funding. Arizona has consistently ranked near the bottom in per pupil spending among the states. In 2010 (the latest year for which data are available), Arizona ranked 49th among the states and the District of Columbia. *See* U.S. CENSUS BUREAU, G10-ASPEF, PUBLIC EDUCATION FINANCES: 2010 (June 2012), http://www.census.gov/prod/2012pubs/g10-aspef.pdf. In that school year, the Arizona legislature cut already scarce funding for public schools by $400 million. *See* Don Harris, *Sounding the Alarms: Arizona Schools Feeling Budget Pinch*, ARIZ. CAPITOL TIMES, July 23, 2010 [hereinafter Harris, *Sounding the Alarms*], *available at* 2010 WLNR 15155634.

The impact of these cuts was dramatic. For example, Arizona's public schools: (1) cut preschool programs for 4,328 children; (2) lost half of the prior year's State funding for kindergarten; (3) eliminated programs for disadvantaged children in preschool through third grade; (4) reduced financial aid to charter schools; and (5) slashed funding for books, computers, and other supplies. Arizona was not alone. For fiscal year 2011, thirty-six other states provided less funding per student to public K-12 schools than they did in the previous year due to the continuing economic recession. *See* NICHOLAS JOHNSON ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, *An Update on State Budget Cuts*, (last updated Feb. 9, 2011), http://www.cbpp.org/files/3-13-08spf.pdf. School districts have also been forced to lay off teachers, increase class size, and cut back on music, physical education, and art. *See* Harris, *Sounding the Alarms*.

These cuts in Arizona's already significantly underfunded public education budget inevitably leave most of Arizona's parents with fewer educational options from which to choose. They also mean that the students who remain in Arizona's public schools—either by choice or because there is no voucher available to them—are likely receiving a lower-quality public education. Under such circumstances, Arizona cannot afford to divert even more money away from public schools.

C. The Arizona Program's lack of accountability harms Arizona taxpayers.

The State of Arizona has a constitutional obligation to be a good and proper 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 Arizona Program, like many voucher programs, contains virtually no protections for taxpayers.

Under the Arizona Program, private schools would not need to comply with state open meeting and records laws, ARIZ. REV. STAT. ANN. §§ 38-431 to -431.09 (2012), or federal anti-discrimination laws, *e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2012); adhere to state academic standards, or report on academic achievements. Nor would they be subject to state accountability measures to address educational deficiencies.

Nor would an Arizona private school need to comply with all of the federal IDEA mandates that ensure a student receives FAPE. By forgoing state and federal procedural and substantive due process rights and safeguards already discussed in this brief in Part I *supra*, the student who uses an Arizona voucher is left to the educational idiosyncrasies of the private school without regard to

whether or not the educational program is truly in the best interest of the child, meets the child's educational needs, or meets the minimum state standards.

Despite this nearly complete lack of oversight, voucher programs 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. 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.

III. The Court Should Not Be Part of a Troubling Wave of a Nationwide Effort by Special Interest Groups To Undermine Public Education by Diverting Scarce Public Tax Dollars to Private Entities.

A. Private hands are, in fact, the true beneficiaries of the Arizona Program.

The United States Supreme Court recognized in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), that vouchers were constitutionally permissible only where the public schools were part of the framework of choice for parents. Implicit in that ruling is the notion that voucher programs should not be vehicles for diverting money into private hands, but that they should be part of a framework the intent of which is to provide educational options through true choice. But the

express exclusion of public schools under the Arizona Program and its inherent waiver requirement reveal that the intent of the law is not to provide true choice consistent with *Zelman,* but to channel public education dollars into private hands.

Because the Program is not restricted to just new students, it could very well be that even students *already enrolled* in private schools will attempt to rely on the Arizona Program to subsidize a private education. This would be an Arizona reprise of the experience in other states, where between one-third and one-half of students participating in voucher programs were already enrolled in private schools.[6] Even some voucher school administrators have acknowledged this wrinkle. "The make-up of our student body has stayed the same. Many of our current choice kids were our students before choice." PUBLIC POLICY FORUM, *School Choice In Its Tenth Year* 5, 88 RESEARCH BRIEF NO. 3 (April 5, 2000). In May 2012, *the New York Times* reported that although Georgia's private school scholarship program was pitched as a way to provide poor students with the same education choices as their more affluent counterparts, donations to state-designated scholarship programs are benefitting students already in those private schools.

[6] *See* Zach Schiller, *Cleveland School Vouchers: Where the Students Come From* (Policy Matters Ohio, Sept. 2001); WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, *Milwaukee Parental Choice Program Facts and Figures for 1998-99,* and *Number of Choice Students Enrolled by School in 1998-99,* (March 2003), *available at* www.dpi.state.wi.us/sms/geninfo.html.

According to the *Times* article, "In Georgia, a 2011 report by the Southern Education Foundation found that from 2007, the year before the program was enacted, through 2009, private school enrollment increased by only one-third of one percent in the metropolitan counties that included most of the private schools in the scholarship program. The logical conclusion was that most of the students receiving the scholarships had not come from public schools." Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. TIMES. May 21, 2012, http://www.nytimes.com/2012/05/22/education/scholarship-funds-meant-for-needy-benefit-private-schools.html. For these students, a program like the one in Arizona may not create any choice that is not already available to them.

B. This Court should discourage the Arizona Program from becoming a national model.

At least eight other states have already adopted similar scholarship programs,[7] most of which have been challenged in court. This Court should avoid a ruling that further enhances the ability of special interest groups to promote the financing of a private school education with public tax dollars in even more states. Among the proponents of voucher initiatives, the American Legislative Exchange

[7] FLA. STAT. § 1002.395 (2012); GA. CODE ANN. § 20-2A-1 *et seq.* (2012); IND. CODE § 6-3.1-30.5-7 (2012); IOWA CODE § 422.115 (2012); LA. REV. STAT. ANN. § 42: 297.10 (2011); MINN. STAT. § 290.0674 (2012); N.C. GEN. STAT. § 105-151.33 (2012); OKLA. STAT. tit. 69, § 2357.206 (2012).

Council (ALEC) has issued a blueprint for drafting tuition tax credit legislation that will purportedly withstand legal challenge. In April 2007, ALEC, in conjunction with The Institute for Justice, published a guide, titled *School Choice and State Constitutions: A Guide to Designing School Choice Programs* (April 2007), http://www.alec.org/docs/IJ-ALEC-school-choice.pdf (last visited Oct. 22, 2012), that provides analysis and recommendations for succeeding in enacting tuition tax credit and voucher laws similar to the Arizona Program.

The Arizona model of false choice has been repeated in legislation introduced in a number of states. In Colorado, a bill was introduced in the state's General Assembly in 2011 that would provide a tuition tax credit for enrolling a dependent qualified child in a private school or when the taxpayer awards a scholarship to a qualified child for enrollment in the private school. H.B. 1048, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011). Similar bills have been introduced in Maine, H.P. 779, 125th Leg., 1st Reg. Sess. (Me. 2011), Montana, H.B. 379, 62nd Leg., Reg. Sess. (Mont. 2011), Oregon, H.B. 3388, 76th Leg., Reg. Sess. (Ore. 2011), and Wisconsin's House, A.B. 112, 100th Leg., Reg. Sess. (Wis. 2012), and Senate, S.B. 69, 100th Leg., Reg. Sess. (Wis. 2012).

Common to all these bills and to the Arizona Program is that none provides either scholarships or a tax credit to a parent/guardian for a student attending a

public school outside the student's attendance zone.[8] Along with these other states, the Arizona Program endorses a system of education that funnels money away from public schools and denies parents the ability to exercise true choice within the public school system. But, while legislation continues to be introduced, many state legislatures are defeating proposals designed to erode the financial support of public schools. Five states have defeated voucher/tuition tax credit legislation over the last few years.[9] This Court should not add Arizona's voice to the rising tide of national special interests grabbing at the public till for already scarce public school dollars that benefit all of the state's children.

[8] Although Arizona law permits open enrollment so that a student could attend a public school outside his or her attendance zone as long as the receiving school had capacity, ARK. REV. STAT. §§ 15-816 – 15.816.07, the Arizona Program does not assist such students.

[9] H.P. 779 was defeated in the Maine House and Senate in 2011; H.B. 849 died in the Mississippi House's Education Committee in 2012; H.B. 379 died in the Montana House's Standing Committee in 2011; H.B. 65, H.B. 166, H.B. 427, and H.B. 510 were postponed indefinitely in the New Mexico House's Taxation and Revenue Committee and Education Committee in 2011; S.B. 31 and S.B. 88 were postponed indefinitely in the New Mexico Senate's Education Committee in 2012; A.B. 112 and S.B. 69 failed to pass in the Wisconsin Legislature pursuant to a joint Senate resolution in 2012.

CONCLUSION

For these reasons and those asserted in Appellants' brief, *Amicus Curiae* National School Boards Association respectfully urges this Court to hold the Arizona Program unconstitutional.

October 31, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the foregoing brief uses a proportionately spaced typeface of 14 points, is double-spaced using a Roman font, and contains approximately 4,737 words.

/**S**/Denise M. Bainton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AMICUS CURIAE BRIEF was furnished through electronic service to the following on October 31, 2012.

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