Nos. 08-289 & 08-294

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA, PETITIONER
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE, PETITIONERS
v.
MIRIAM FLORES, *ET AL.*, RESPONDENTS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

This case presents an extraordinary example of a state-level political minority losing its agenda at the ballot box but nonetheless imposing its will on the majority through the intervention of sympathetic federal courts. Only this Court can reverse the Ninth Circuit's remarkable expansion of federal judicial authority and, in so doing, prevent the enormous damage that court's ruling will otherwise do to the people of Arizona and their democratic institutions.

At the heart of this case is an effort by the Governor of Arizona and her allies to pass a broad education spending increase which the Arizona Legislature rejected in favor of a competing and less expensive solution. Rather than accept the decision by the people's representatives, the Governor instead sought to use an outdated injunction order, naming her state *as a defendant*, to compel the Legislature to pass her agenda.

The courts below were happy to accommodate the Governor. Acting solely on the authority of a 1974 federal statute requiring states to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program," the district court struck down the Legisla-

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[1] The parties have consented to the filing of this brief. Letters of consent have been lodged with the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. More than ten days prior to the due date, counsel for Amicus provided counsel for respondents with notice of its intent to file this brief.

ture's new program. The district court took umbrage at the fact that the Legislature's approach did not follow the exact framework for improving Arizona's limited English proficient ("LEP") education program that the district court itself had unilaterally designed seven years earlier. The district court's framework measured remedial success in one way only – by the amount of LEP funding allotted per LEP student – rather than in the manner subsequently required by Congress in the No Child Left Behind ("NCLB") law. But the district court nonetheless struck down the Legislature's new program because it was not faithful to the district court's gloss on what Congress meant in 1974.

The district court's approach far exceeded its authority to interfere with duly enacted state legislation, and flouted the express findings of the very Congress whose earlier work it was purporting to enforce. The district court's unbridled exercise of judicial power thus raises grave concerns not only of federalism, but also of separation of powers. Indeed, as Montesquieu perceptively noted more than 250 years ago, "there can be no liberty where . . . the power of judging be not separated from the legislative . . . powers." Montesquieu, The Spirit of the Laws (1748).

The Washington Legal Foundation ("WLF") takes this canon to heart. WLF is a national nonprofit public interest law and policy center dedicated to, among other issues, opposing intrusions by the federal government into the operation of state governments, and of the federal judiciary into the proper functions of the other federal branches. WLF is appalled by the district court's interference with the local political process in this case, and urges review and reversal to

restore the proper separation of powers and federalism principles that were violated by the court below.

STATEMENT

This case began as a challenge to the adequacy of the LEP program in the Nogales Unified School District ("Nogales"). After several years of litigation, in 2000, a class of Nogales parents (named "Flores" after the lead plaintiff) succeeded in obtaining a declaratory judgment finding Nogales's LEP program to be in violation of the Equal Education Opportunity Act of 1974, 20 U.S.C. § 1703(f) (the "EEOA"). The central basis for the district court's finding of liability was that the amount of LEP funding per LEP student then being spent in Nogales was one-third of the average LEP funding per student found in the only study of the subject then available. *See* Appendix to Petition in No. 08-294 ("Pet. App.") at 149a.

The district court's finding of liability was followed a year later by an injunction directing the State of Arizona to figure out how much ideally should be spent per student, and to then spend that amount. *Flores* v. *Arizona*, No. CV-92-596, 2001 WL 1028369 (D. Ariz. Jun. 25, 2001).

A. Congress' Enactment of NCLB

The following year, in 2002, Congress enacted the No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq. ("NCLB"), which radically changed the school funding landscape, particularly with respect to LEP education.

First and foremost, NCLB reflected a broad, bipartisan consensus that schools needed to be held to stricter standards of accountability. As President Bush stated, NCLB was "based on the fundamental

notion that an enterprise works best when responsibility is placed closest to the most important activity of the enterprise, when those responsible are given greatest latitude and support, and when those responsible are held accountable for producing results." *See* http://www.whitehouse.gov/news/reports/no-child-left-behind.html.

Congress devoted Title III of NCLB to the education of LEP children. In addition to imposing strict new accountability standards, Title III was intended to put an end to the common scenario of LEP students being isolated from their peers and left indefinitely in a dead-end cocoon of instruction in their native language.

By contrast, under the outdated statute invoked by the respondents here, schools were not actually required to teach LEP students English. All that was required was "appropriate action" to overcome their language barriers. In many instances, this meant teaching LEP students in their native language. *See, e.g., Lau* v. *Nichols*, 414 U.S. 563, 564-65 (1974) (noting that "[n]o specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another"); *Castaneda* v. *Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (finding that "Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of 'bilingual education'").

This system did not work. As one of NCLB's sponsors, Senator Gregg, explained, bilingual education "got off track":

> Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there, put them in schools and classrooms where they basically were being taught in their language and they were not being allowed to learn English essentially, or they were not being asked to learn English.

147 Cong. Rec. S13322, S13328 (Dec. 17, 2001). Congress disapproved of this result for the obvious reason that it hindered immigrant children's ability to compete in this country's predominantly English-speaking workforce once they got out of school. *Id.*

NCLB sought to fix this problem in two ways: First, it required LEP programs to produce results in teaching LEP children English, and, second, it permitted parents to pull their LEP children out of bilingual classes if they thought they would be better served in English-only classes. Senator Lott heralded the latter of these changes as "one of the bill's most significant achievements." 147 Cong. Rec. S13365, S13420 (Dec. 18, 2001).

Congress implemented these changes through a detailed statutory framework. It required states and local school districts to (1) implement new educational programs containing certain enumerated basic features, (2) develop quantifiable performance benchmarks, and (3) to report annually on their success in meeting those benchmarks. *See* 20 U.S.C. §§ 6801, *et seq.*

B. The Post-NCLB Proceedings

Arizona education programs were revised significantly to comply with NCLB's numerous precise mandates. The process moved slowly, particularly after

the inauguration of a new Governor in 2003, which placed control of the executive and legislative branches in opposing parties. Work on a new LEP program did not begin until 2005. The Legislature passed three different bills to address LEP education, but the Governor considered each to be inadequately funded and vetoed all of them.

Finally, the Governor sought refuge in the district court which had long shown a preference for the large funding increases she had asked for, but failed to win, in the Legislature. As part of her strategy, the Governor permitted a fourth attempt at LEP program revision – HB 2064 – to become law, stating that she was "convinced that getting this bill into court now is the most expeditious way ultimately to bring the state in compliance with federal law." And she admitted that she had allowed the bill to become law "so that we can move this dispute to a different forum and get a ruling from the Flores Court as to its sufficiency." Pet. App. at 26a n.16.

The district court was only too happy to oblige. Instead of examining whether the Legislature's new programs satisfied the detailed requirements for LEP programs that Congress had spelled out in 2002 in NCLB – which the Legislature's new programs plainly *did* satisfy – the district court struck down much of the new programs on the ground that they did not satisfy the district court's unilateral interpretation of what Congress wanted back in 1974 when it passed the EEOA. *See* Pet. App. at 111a-115a. The district court thus ignored the NCLB and returned to its old spending per LEP student test, which coincidentally could only be satisfied by the substantial spending increases advocated by the Governor and her minority allies.

Because the Governor supported this result and controls the State's litigation positions, the legislative majority was unrepresented in the district court. But the legislative petitioners intervened to give the legislative majority a voice (and to contest the punitive fines the district court was threatening against the Legislature), and appealed the district court's ruling.

The Ninth Circuit affirmed. Like the district court, the Ninth Circuit could not get beyond its fixation on whether the State had complied with the 2001 injunction requiring increased LEP spending per student.

In insisting on compliance with the 2001 injunction, moreover, the Ninth Circuit applied an overly-strict standard for determining whether a prior injunction should be lifted. Whereas this Court's precedent requires district courts to ask whether the federal law upon which an injunction was based is still being violated, the Ninth Circuit looked only at whether the facts or law upon which the injunction was based had changed. *See* Pet. App. at 61a-63a. The Ninth Circuit's approach thus gave far greater deference to the original order than it should have.

The Ninth Circuit then misapplied its overly-strict standard, finding that the underlying law had not changed when in fact it had changed with the passage of NCLB. The Ninth Circuit wrote that the EEOA and NCLB, despite having similar objectives, proceeded on two different tracks, and that NCLB compliance, despite being more strictly defined, did not necessarily entail EEOA compliance. Pet. App. at 72a-75a.

The Ninth Circuit went on to approve the district court's continued focus on its own LEP-funding-per-

student test, which necessarily yielded the outcome the Governor and her minority allies sought: more spending, over the objection of Arizona's voters.

REASONS FOR GRANTING THE PETITION

In addition to the compelling reasons offered in the petition, *amicus* wishes to highlight two critical considerations supporting review in this case. First, the Ninth Circuit's standard of review of a motion for relief from an injunction is at odds with this Court's precedent, in that it gave the prior decree far more deference than it deserves. Throughout the vast area overseen by the Ninth Circuit, this error will entrench judicial intrusions into the political process for longer than the minimum necessary to enforce federal laws, thereby trampling bedrock principles of separation of power and federalism. Second, the decisions below fail to give effect to Congress' clear mandate in the No Child Left Behind Act. Review is therefore warranted to enforce those requirements.

I. THE NINTH CIRCUIT'S OVERLY DEFERENTIAL STANDARD OF REVIEW ENTRENCHES JUDICIAL INTRUSIONS INTO POLITICAL PROCESSES FOR LONGER THAN IS CONSTITUTIONALLY PERMISSIBLE, AND NEEDS TO BE CORRECTED BY THIS COURT

During the founding era, the limits on the power of federal courts to issue broad injunctions were one of the few issues upon which both the Federalists and the Anti-Federalists agreed. *See* Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), *in* 1 The Debate on the Constitution 245, 273 (Bernard Bailyn ed., 1993) (Anti-Federalist concerns that federal courts would abuse equity powers); Pub-

lius [Alexander Hamilton], The Federalist No. 78 (May 28, 1788), *in* 2 The Debate on the Constitution 467, 468 (Bernard Bailyn ed., 1993) (Federalist response that judges were capable of "no active resolution whatever"). Yet modern institutional reform litigation raises the very specter of legislation by unelected judges that the framers uniformly rejected. *See, e.g. Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (observing "the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures"). This concern is preeminent both in considering whether an injunction is warranted in the first instance, and, more pertinent here, whether an existing injunction should be continued or taken down.

1. On numerous occasions, this Court has visited the issue of what level of deference a district court should give to its own earlier equitable decrees after the passage of time. A brief survey of those cases shows a clear trend away from deference to earlier rulings and toward what amounts to *de novo* review based solely on current circumstances.

First, in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), Justice Cardozo created the so-called "grievous wrong" test for evaluating any request to modify an injunction or consent decree. At its most basic, this standard made it possible – yet extraordinarily difficult – to upset the original intent behind the district court's injunction.

Swift involved an antitrust consent decree entered against the five largest meat packers in the country, all of which promised to refrain from distributing a variety of foods at the retail level. *Id.* at 111. Despite their original assurances, each immediately tried

various tactics to avoid its obligations under the consent decree, including moving to modify the original decree based on alleged changes in the food industry since the original decree had been agreed upon. *Id.* at 112-14. After the then-Supreme Court of the District of Columbia granted the modifications, the United States, joined by various wholesale grocers, appealed. *Id.* at 113-14.

The *Swift* Court determined that a court had inherent power to modify its own decree regardless of whether the decree expressly provided for such modification. *Id.* at 114. Indeed, Justice Cardozo noted that even "[i]f the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Id.*

But while the power existed, it would not be easy to wield. In explicating the standard by which a district court should judge whether changed circumstances merit modification, Justice Cardozo stated:

> We are not at liberty to reverse under the guise of readjusting.... The inquiry for us is whether the changes [in the grocery industry] are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was de-

> creed after years of litigation with the consent of all concerned.

Id. at 119.

This Court substantially modified the *Swift* standard in *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237 (1991). There the Court considered whether a school district could extricate itself from a district court's busing order if the local authorities had complied with the court's decree for a reasonable amount of time and achieved results. *Id.* at 243. In that case, the district court had found *de jure* segregation and ordered an extensive busing scheme that brought in students from a wide range of diverse residential districts. *Dowell* v. *Bd. of Educ. of the Oklahoma Pub. Schs.*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir. 1972). The city complied with the so-called "Finger Plan" for five years, achieving substantial desegregation and prompting the district court to terminate its supervision of the school system. *Dowell*, 498 U.S. at 242.

By 1985, however, a group of African-American families challenged the school system's new plan of neighborhood elementary school assignment as a return to segregation and, thus, a violation of the original court-ordered desegregation. *Id.* at 240. The Tenth Circuit ultimately found that, because an injunction remained in effect until a school district could show "grievous wrong evoked by new and unforeseen conditions," something Oklahoma City could not show, the district court should continue administering the school district to ensure no regression in segregation. *Dowell* v. *Bd. of Educ. of the Oklahoma City Pub. Schs.*, 890 F.2d 1483, 1490 (10th Cir. 1989).

This Court reversed. It not only discarded the "grievous wrong" standard, but noted that because desegregation decrees were always intended to be temporary, district court control of school districts should last no longer than absolutely necessary to remedy past wrongs. *Dowell*, 498 U.S. at 248.[2] The Court emphasized that the injunction should merely be transitional, to foster a "transition to a unitary, nonracial system of public education," and that if the school district was being operated in compliance with the law and was unlikely to return to its former ways, no additional showing was required to lift the injunction. *Id.* at 247-48.

A year after *Dowell*, in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court announced an even more "flexible" standard for evaluating continuing injunctions.

In *Rufo*, a district court had long ago barred Massachusetts officials from using the decaying Charles Street Jail to house prisoners awaiting trial in small, double-bunked cells. The state officials sought modification of the applicable consent decree to permit double-bunking in any event because of a vast increase in the number of prisoners. *Rufo*, 502 U.S. at 376. The district court, applying the pre-*Dowell* "grievous wrong" test, denied the requested relief. *Id.* at 377. The First Circuit affirmed.

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[2] The *Swift* "grievous wrong" test may still be applicable in situations where the court is being asked to lift a decree while the plaintiff's statutory rights are still being violated. *See Dowell*, 498 U.S. at 247; Sandler & Schoenbrod, *Democracy By Decree*, at 175 n.45 (2002). But this is not the case here.

This Court reversed and remanded for further fact finding. The Court noted the need for "flexibility" in public institutional reform cases such as this where the decree affects not just the parties, but the public as well. *Id.* at 381. The Court found that where unforeseen changes occur in the facts or in the law forming the basis for the decree, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391. In structuring such revisions, this Court wrote that the district court should bear three principles in mind: (1) the modification must not violate the underlying law; (2) the modification must be narrowly tailored to resolve only the problems created by the changed circumstance; and (3) the district court should defer to local government administrators as much as possible. *Id.* at 391-92.

This Court's most recent refinement of its standard for modifying an injunction came in *Frew* v. *Hawkins*, 540 U.S. 431 (2004). There, a group of mothers of children eligible for a state-administered Medicaid program sued the State of Texas for failing to provide those Medicaid services. In 1993, the district court ruled in their favor, and in 1996, the district court entered a lengthy consent decree compelling the State to comply with the Medicaid law. Two years later, the district court found that the State had violated the decree. The State appealed, arguing that the decree was unenforceable to the extent it exceeded the scope of the Medicaid law it purported to enforce, and that the State was in compliance with the Medicaid law.

This Court found that the decree was enforceable, but that the State was entitled to wide latitude in showing why it should be modified. The Court wrote

that "principles of federalism require that the state officials with front-line responsibility for administering the program be given latitude and substantial discretion." *Frew*, 540 U.S. at 442. The Court noted that a State, unlike a private party, "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources," and that those successor officials ought to be given the opportunity to show the wisdom of their new insights. *Id.* The Court thus concluded that, to "ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials," a district court should modify its decree "[i]f the State establishes reason" to do so. *Id.*

This standard is effectively *de novo* review, a far cry from the deference to an existing decree embodied in Justice Cardozo's decision in *Swift*.

Bit by bit, this Court has thus moved away from deferring to earlier judicial decrees and toward greater fidelity to the separation of powers principles that guard against judicial intrusion into the political arena. This Court has now recognized that the overriding goal in injunctions and consent decrees issued in institutional reform cases is neither the protection of a district judge's power over implementation of necessary reforms, nor the enforcement of the plaintiff's rights to what she won in the earlier decree.[3]

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[3] "[O]verly broad consent decrees work an inappropriate shift from judicial protection of the plaintiffs – in their status as rights-holders – to judicial protection of plaintiffs in a new status – as beneficiaries of a contract. . . . This not-so-subtle shift in theory collides with fundamental democratic principles." Sandler & Schoenbrod, "From Status to Contract and Back

Instead, the goal is to return power to local authorities as quickly as possible. *Rufo*, 502 U.S. at 391-92; *Frew*, 540 U.S. at 442.

2. Contrary to that goal, the Ninth Circuit here constructed a particularly onerous burden for modifying the district court's injunction, requiring a showing that "the basic factual premises" of the court's holding had been erased, or that "some *change* in the legal landscape" made the original ruling improper. Pet. App. at 63a. Rather than asking – as *Frew* directs – whether the current set of facts matched the *current* law, the Ninth Circuit asked whether the current set of facts and law matched the facts and law seven years ago. This inappropriately high hurdle, reminiscent of Justice Cardozo's "grievous wrong" test in *Swift*, violates this Court's precedents which have sought a more flexible approach to extricating states from court-imposed injunctions or consent decrees.

Ironically, the Ninth Circuit recognized the substantial progress Arizona and Nogales have made since the Flores litigation began. Pet. App. at 30a. Indeed, the court below admitted that the state had "significantly improved its [LEP] infrastructure" and "increased overall school funding and ... [LEP] program-specific funding." *Id.* It further acknowledged that HB 2064 would "augment" and "further improve" LEP programs statewide and summarized significant changes in education policy and progress state-wide. *Id.* at 30a-34a (describing Arizona's progress in detail).

Again: Consent Decrees in Institutional Reform Litigation," 27 Review of Litigation 115, 115-16 (2007).

Under *Swift*, such progress might have been insufficient to override Justice Cardozo's insistence on deferring to the original decree. But under *Frew*, these findings warrant modification of the injunction and the return of education policymaking to state and local officials. Only this Court can ensure that the principles articulated in *Frew* are respected and applied in this case, as well as other cases arising in the Ninth Circuit.

II. REVIEW IS NEEDED TO GIVE EFFECT TO CONGRESS' MANDATES IN THE NO CHILD LEFT BEHIND ACT

The decision below merits this Court's review for a second and equally important reason: it fails to respect the principles that Congress enacted in the NCLB Act, and in so doing fails to apply NCLB's framework for measuring progress in implementing improvements to Arizona's LEP programs.

1. As previously noted, the district court based its decision to deny petitioners' Rule 60(b)(5) motion on its finding that the per-LEP-student cost of providing adequate LEP instruction is greater than both the State's current fund level and what it proposes to fund under HB 2064. Pet. App. at 149a. The district court focused on per-student LEP funding because that was the yardstick it used in its 2000 order finding the State to be in violation of the EEOA. The district court reasoned that if the basis for the State's liability in 2000 was inadequate per-student LEP spending, the way to measure the State's remediation of that liability was to see if the same spending had subsequently increased to acceptable levels. The Ninth Circuit sustained this approach. Pet. App. at 72a.

But the district court's incremental funding yardstick was conceived in 2000, at a time when Congress had provided no guidance on how to measure a State's compliance with federal LEP requirements. Congress filled that void in 2002 when NCLB became law. Accordingly, courts gauging the sufficiency of an LEP program since the passage of NCLB have now been given a detailed set of measurement tools and may no longer resort to yardsticks of their own making.

2. Because it is undisputed that Arizona's LEP program is presently in full compliance with the measurements mandated by the NCLB, the same program is necessarily also in compliance with the EEOA. To see why that is so, it is necessary to review the EEOA's history.

Congress' purpose in passing the LEP provision of the EEOA in 1974 was to codify certain federal agency guidelines dealing with non-English-speaking students. Those guidelines required school districts with national origin-minority students unable to speak English to "take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." The same regulations had only recently been upheld by this Court in *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974). In keeping with this purpose, the LEP provision of the EEOA simply requires states to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). At that time, however, Congress left unanswered the question of what educational programs would constitute "appropriate action."

Most courts grappling with that question (including the courts below) have tracked the analysis of the Fifth Circuit in *Castaneda* v. *Pickard*, 648 F.2d 989 (5th Cir. 1981). Under the "*Castaneda* test," as it has come to be known, a state's LEP program will be considered "appropriate action" sufficient to satisfy the EEOA where it is:

> [1] informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy;...
>
> [2] reasonably calculated to implement effectively the educational theory adopted by the school; [and
>
> (3) proven], after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome.

Id. at 1009-10.

Here it is undisputed that Arizona's LEP program is based on a well-established educational theory and that the first prong of the *Castaneda* test has thus been satisfied. Accordingly, the decisions below focused primarily on the second and third prongs – whether Arizona devoted sufficient resources to implement its LEP program and whether that program has produced adequate results. And the courts below chose to measure Arizona's progress in these areas by examining the State's LEP funding per student.

In 2000, in the absence of any further guidance from Congress or the appellate courts, the district court's decision to use incremental funding to meas-

ure the adequacy of Arizona's LEP program was not unreasonable. But in 2002, Congress *did* provide further guidance. Congress enacted the No Child Left Behind Act, which featured an entire title mandating LEP programs, and included a detailed set of measurements for determining whether those programs were adequate. It thus makes no sense to assess the adequacy of these programs under a different, judicially created standard.

3. Congress's objectives in passing the LEP provisions of NCLB were identical to its objectives in enacting the EEOA's LEP standard. In both Acts, Congress sought to make sure that LEP students were not being left behind because they lacked English language skills. In the EEOA, this objective was expressed as a desire to eliminate "barriers that impede equal participation" of LEP students (20 U.S.C. § 1703(f)). In NCLB, Congress wrote that its purpose was "to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet" (20 U.S.C. § 6812(2)).

Similarly, the EEOA leaves "educators and public officials charged with responsibility for directing the educational policy of a school system" with the task of "choosing between sound but competing theories," so long as those theories are "recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Likewise, NCLB "provide[s] State educational agencies and local educational agencies with the flexibility to implement language instruction edu-

cational programs, based on scientifically based research on teaching limited English proficient children, that the *agencies* believe to be the most effective for teaching English" (20 U.S.C. § 6812(9)) (emphasis added).

But while the ends of the EEOA and NCLB are the same, only NCLB spells out the means of achieving them. The EEOA – even with the interpretive assistance of *Castaneda* – offers only vague mandates as to how to comply with its goals, requiring "programs and practices ... reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010.

NCLB, on the other hand, contains a lengthy list of "required" activities which school districts "shall" provide to implement LEP programs, as well as a list of "authorized" activities which school districts "may" provide. *See* 20 U.S.C. §§ 6825(c), (d). These activities include, for example, "provid[ing] high-quality professional development to teachers, principals and other school personnel," "identifying, acquiring, and upgrading curricula, instruction materials, educational software, and assessment procedures," and "providing tutorials and academic or vocational education for limited English proficient children." *Id.*

Similarly, NCLB contains far more precise guidance on how to measure a state's success in implementing the required programs. Whereas EEOA compliance under *Castaneda* vaguely tests whether an LEP program "fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome" (*Castaneda*, 648 F.2d at 1010), NCLB ex-

pressly requires states to develop "annual measurable achievement objectives for limited English proficient children." 20 U.S.C. § 6842. These objectives must, at a minimum, include annual increases in the number or percentage of children making progress in learning English, annual increases in the number or percentage of children attaining English proficiency by the end of each school year, and adequate yearly progress in achieving benchmarks applicable to all (including non-LEP) students generally. *Id.*

The detailed requirements of NCLB were a deliberate departure from the vague pronouncements of the EEOA. Such detail would have been wholly unnecessary had Congress been satisfied with the then-existing judge-made minimum standards of the EEOA. In passing NCLB, Congress perceived a failure in LEP education, and spoke clearly in announcing what states needed to do to improve.

4. By contrast, the decision below rested on the faulty conclusion that the EEOA and NCLB, despite having similar objectives, proceeded on two different tracks, and that NCLB compliance, despite being more strictly defined, did not necessarily entail EEOA compliance. As the Ninth Circuit expressed it, the EEOA is "an equality-based civil rights statute," whereas NCLB is "a program for overall, gradual school improvement." Pet. App. at 72a-73a. "The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools." Pet. App. at 75a.

On this point, then, the principal flaw in the Ninth Circuit's reasoning is that it ignores the fact that the district court chose to remedy the EEOA vio-

lations it found by mandating its *own* program of "gradual school improvement" even though Congress in the NCLB has now mapped out a different method for achieving such gradual improvement. Even if the Ninth Circuit is correct that the two statutes look to different time frames and *can*, in the abstract, have different remedies – that is, that an EEOA violation can occur today and can be enforced by a private right of action whereas an NCLB violation can only happen after years of missed objectives and cannot be enforced by a private right of action – in this case, the remedy the district court chose is squarely addressed and rejected by the text of NCLB.

The Ninth Circuit also erred in overstating the claimed conflict between the statutes. Contrary to the Ninth Circuit, it was not necessary to consider whether NCLB "repealed" the EEOA, or even superseded its liability rule. This Court has repeatedly held that a judicial interpretation of an earlier statute may be supplanted by a later statute without "repealing" the earlier statute. *See United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *Vermont Agency of Natural Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted"); *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

All that was at issue here was whether NCLB affected the particular remedy imposed by the district court in this case. That remedy required the State to

formulate and implement programs to improve the quality of its LEP instruction over a multi-year period, and to measure their success. At the time it was fashioned, in the absence of any guidance from Congress, the district court's remedy was a reasonable interpretation of the EEOA's requirements. But in 2002, Congress spelled out at length what LEP programs must include, how they should be improved, and how to measure those improvements. Judicial guesswork as to how to carry out Congress's will was no longer needed or appropriate.

CONCLUSION

In insisting on compliance with its *own* criteria for measuring the adequacy of Arizona's LEP program, the district court not only usurped the power of the Arizona Legislature to regulate traditional state functions, but also usurped the power of Congress to mandate its own carefully-considered policies. Review is needed to restore control of Arizona's schools to its voters and to give effect to Congress' mandate in NCLB. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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