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In the  
**Supreme Court of the United States**

SPEAKER OF THE ARIZONA HOUSE OF  
REPRESENTATIVES and PRESIDENT OF THE  
ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam  
Flores, minor child; ROSA RZESLAWSKI, individually and  
as parent of Mario Rzeslawski, minor child; STATE OF  
ARIZONA and the ARIZONA STATE BOARD OF  
EDUCATION, and its members in their official capacities;  
THOMAS C. HORNE, Super. of Public Instruction,

RESPONDENTS.

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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RICK RICHMOND  
CHRISTOPHER C. CHIOU  
STEVEN A. HASKINS  
KIRKLAND & ELLIS LLP  
777 South Figueroa Street  
Los Angeles, CA 90017  
(213) 680-8400

DAVID J. CANTELME  
D. AARON BROWN  
PAUL R. NEIL  
CANTELME & BROWN, PLC  
3030 N. Central Avenue  
Phoenix, AZ 85012  
(602) 200-0104

KENNETH W. STARR  
*Counsel of Record*  
KIRKLAND & ELLIS LLP  
777 South Figueroa Street  
Los Angeles, CA 90017  
(213) 680-8400

ASHLEY C. PARRISH  
JEFFREY B. WALL  
KIRKLAND & ELLIS LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5000

*Counsel for Petitioners*

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## QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act (“EEOA”) because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act (“NLCB”). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction’s “basic premises” have not been “swept away.”

The questions presented are:

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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## PETITION FOR A WRIT OF CERTIORARI

The Arizona Speaker of the House of Representatives and the President of the Arizona Senate respectfully petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit.

This Court's guidance is needed to resolve a conflict between the decision below and decisions from other courts of appeals on a recurring issue of practical and constitutional importance: the proper standards for vacating or modifying a judicial decree in the context of institutional reform litigation. The Court's intervention is also needed to correct the Ninth Circuit's doctrinal departures from this Court's decisions, and its contravention of congressional intent by failing to give deference to the federal policy judgments embodied in the No Child Left Behind Act of 2001.

This case presents an appropriate vehicle for the Court to provide much-needed guidance on the federal judiciary's proper role in applying federal educational policies to local schools. The issue underlying this litigation—the Equal Educational Opportunity Act's mandate that States take “appropriate action” to overcome language barriers impeding students' equal participation in educational programs—is a recurring question of federal law. Schoolchildren requiring English-language instruction constitute the fastest-growing segment of the Nation's school-age population—currently accounting for some 19 percent of all school-age children. As a result, the decision below poses a serious threat to the ability of local officials

across the country to deal creatively (and effectively) with their own local educational challenges.

Perhaps most importantly, this Court's intervention is needed to put an end to the federal judiciary's eight-year reign over Arizona's schools. Arizona needs this Court's help to return control over the funding of Arizona's school programs to where it rightly belongs—out of the hands of a single federal district court judge and back into the hands of Arizona's democratically accountable officials.

### OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.3d 1140, and reprinted in the appendix at Pet. App. 1a. The district court's order denying relief under Federal Rule of Civil Procedure 60(b) is reported at 480 F. Supp. 2d 1157, and reprinted at Pet. App. 96a. The district court's order finding violations of the Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, is reported at 172 F. Supp. 2d 1225, and reprinted at Pet. App. 117a.

### JURISDICTION

The court of appeals rendered its decision on February 22, 2008, and denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. On July 11, 2008, Justice Kennedy extended the time for filing this petition to and including September 1, 2008. (Because September 1, 2008 is a legal holiday under 5 U.S.C. § 6103, the time for filing is extended to and including

September 2, 2008. *See* S. Ct. R. 30.1.) The Court has jurisdiction under 28 U.S.C. § 1254(1).

### STATUTES AND REGULATIONS

Title 20, section 1703 of the United States Code, codifying the Equal Educational Opportunity Act of 1974, provides in pertinent part:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ...

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The pertinent parts of Title 20, sections 6301 *et seq.* of the United States Code, codifying the No Child Left Behind Act of 2001, are reprinted at Pet. App. 193a.

The pertinent parts of Arizona House Bill 2064, codified as Arizona Revised Statutes, sections 15-756 *et seq.*, are reprinted at Pet. App. 268a.

Rule 60(b) of the Federal Rules of Civil Procedure is set forth in its entirety at Pet. App. 335a.

## STATEMENT OF THE CASE

This case has drawn the federal judiciary into the center of a long-running, highly politicized debate among Arizona's citizens and local officials over how best to run Arizona's schools and, in particular, how to structure (and fund) Arizona's programs for teaching English to students as a second language. One side of the debate maintains that, to ensure equal educational opportunities, funding earmarked for English-language-learner ("ELL") programs must be substantially increased. In contrast, a different side of the debate is concerned that ELL funding is not being employed productively, and seeks to ensure equal educational opportunities by requiring greater accountability for the considerable funding already provided to Arizona's schools.

Against this backdrop, the Arizona Legislature has enacted laws designed to increase efficiency, avoid unnecessary waste, and improve overall student performance. Successful reforms have focused on invigorating local school management, improving teacher quality, cutting unnecessary costs, eliminating shortages in instructional materials, and reducing class size through innovative policies. Although more than doubling ELL funding and substantially expanding overall school funding (which school districts may use for ELL instruction), the Legislature has rejected calls for dramatic, one-size-fits-all increases in funding for ELL programs. Instead, the people's elected representatives have sought to tie ELL funding to the actual costs incurred by individual school districts in teaching English to students.

Moreover, because ELL funding is provided based on the number of students participating in ELL programs—not the number of students who become proficient in English—the Legislature has passed carefully structured legislation, such as the recent H.B. 2064, that holds schools accountable and avoids perverse incentives for keeping students languishing in special-language programs. Under H.B. 2064, Arizona’s schools will receive \$444 in funding for each and every ELL student in addition to approximately \$7,400 per student in general funding. To the extent this funding is inadequate for any particular school district, the Legislature has established a specially-structured English-immersion fund that will cover the incremental costs of teaching English to students. In the Legislature’s judgment, this approach is more than sufficient to satisfy the State’s obligation to provide students with equal educational opportunities.

Respondents, supported by Arizona’s Governor, have opposed many of the Legislature’s attempted reforms. Instead, Respondents have pressed for dramatic increases in the amount of funds earmarked for ELL instruction on a state-wide basis. See Robert Rob, *GOP Must Keep Fighting on English-Learner Issue*, *The Arizona Republic*, Aug. 14, 2005 (Arizona’s Governor has proposed that ELL students should receive an additional \$1,289 per year in state funding). In their view, Arizona’s educational successes will be “fleeting at best” unless the State commits substantially more taxpayer dollars to ELL instruction, without performance requirements or timetables for ELL

students to achieve English proficiency. Pet. App. 100a.

Taking sides in this policy debate, the district court anointed itself overseer of Arizona's public schools and enmeshed the federal judiciary in enduringly sensitive questions of local educational policy. See Chip Scutari, *Judge Gives Napolitano Victory With Ruling on English-learners*, *The Arizona Republic*, Jan. 27, 2006; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (noting "major" controversy over "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education"). This case, which began 16 years ago as a declaratory judgment action concerning the adequacy of ELL instruction in a single school district on the Mexican border, has morphed into a state-wide injunction against Arizona's officials. Specifically, a federal judge has ordered Arizona's Legislature, on threat of daily multi-million-dollar penalties, to enact legislation adopting Respondents' preferred policy outcomes by substantially increasing ELL funding. The Legislature emphatically disagrees with those policy choices, but finds itself cabined by the equitable powers of the Article III branch. That should not be.

#### **A. The 1992 Lawsuit**

1. The city of Nogales, adjacent to Heroica Nogales in Sonora, Mexico, is Arizona's largest border town. The Nogales Unified School District has six elementary schools, two middle schools, one high school, and an alternative high school. Pet.

App. 6a. Nearly all of Nogales's student population is Hispanic or Latino. *See id.* The Census Bureau estimates that 93 percent of Nogales's population (20,878 people) speak a language other than English at home. As of 2006, approximately 30 percent of Nogales's students were enrolled as English-language-learners, with some 60 percent having previously participated in ELL programs. *See id.*

In 1992, certain Nogales students and their parents filed a class action lawsuit against the State of Arizona, the Superintendent of Public Instruction, and individual officials of the Arizona State Board of Education. The plaintiffs alleged violations of the Equal Educational Opportunities Act of 1974 ("EEOA"), and sought declaratory relief. The Act's section 1703(f) provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by" failing "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). Invoking this provision, the plaintiffs contended that Arizona officials were not taking "appropriate action" to educate Nogales's non-English speaking schoolchildren.

2. After lengthy pre-trial proceedings and a three-day bench trial, the district court entered an order on January 24, 2000, granting declaratory relief. The court held that defendants were violating the EEOA's "appropriate action" requirement. In the court's view, although the State's programs were based on sound educational

theory, the State “failed to follow through with practices, resources and personnel necessary to transform the theory into reality.” Pet. App. 151a. The court expressed particular concern that funding earmarked for ELL programs did not cover the cost of ELL instruction Pet. App. 149a-150a. And it found that Nogales’s bilingual-education programs were deficient in six respects: (1) too many students in a classroom; (2) not enough classrooms; (3) not enough qualified teachers; (4) not enough teacher aids; (5) inadequate tutoring programs; and (6) insufficient teaching materials. *See id.*

The named defendants declined to appeal. They also entered into a consent decree, resolving plaintiffs’ claims with respect to the evaluation and monitoring of students, tutoring and other compensatory instruction, and the structure of English language curriculum. Pet App. 10a. The district court approved the consent decree on July 30, 2000. *See id.*

3. In the wake of the district court’s declaratory judgment, the Arizona Legislature has sought to address the district court’s concerns and escape the federal judiciary’s supervision of Arizona’s public schools. Reforms enacted by the Legislature have made Arizona’s schools, in many respects, a model of success for English-language programs. Yet, notwithstanding significant increases in overall funding, and substantial measures taken to address deficiencies identified in the court’s initial order, none of those efforts have satisfied the district court. Instead, the court has steadily extended its reach over Arizona’s schools.

