NO. 08-____

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.

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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September 1, 2008

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.

On June 25, 2001, even though the class was certified to include only students from Nogales Unified School District, the district court granted injunctive relief on a statewide basis. More recently, extending the litigation beyond the named defendants, the trial court ordered the Arizona Legislature to increase incremental funding earmarked solely for ELL programs or face the prospect of fines up to $2 million per day. Pet. App. 173a-174a.

B. No Child Left Behind Act

Over the last eight years, the legal and policy landscape has dramatically changed. The upshot is that the district court's orders are imposing requirements on Arizona's schools that are significantly out of step with current federal educational policies and requirements.

1. Congress comprehensively restructured federal education funding requirements in the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. § 6301, *et seq*. NCLB is designed to improve state and local education standards with the goal that all students achieve proficiency in reading and math by 2014. The statute, which has been characterized as "the largest federal intrusion into the educational affairs of the states in the history of this country," Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, N.Y. Times, Feb. 16, 2003, § 1 (National), at 33 (quoting Paul Houston, Executive Director of American Association of School Administrators), recognizes that additional federal funding will not improve school quality unless it is used efficiently and schools are held

accountable. Pet. App. 256a-258a (20 U.S.C. § 6812). To further accountability, NCLB establishes procedures for measuring student proficiency and compiling detailed information on the educational performance of States and local school districts. Pet. App. 193a-234a (20 U.S.C. § 6311).

2. NCLB is not mandatory—States may "opt out" and elect to forgo federal education funding. If a State accepts NCLB funding, however, it must develop a compliance plan that (i) includes an "accountability system," and (ii) requires its schools to implement "assessments" (*e.g.*, administer standardized tests) of student skills in each grade. Pet. App. 196a (20 U.S.C. § 6311(b)(2)(A)). The test results are used to hold local agencies and schools accountable by determining whether schools have made "academic yearly progress" towards meeting certain proficiency standards. *Id.* Within these parameters, NCLB leaves States broad discretion to develop their own individualized plans for educating students.

Congress vested the Department of Education with authority in the first instance to determine whether state compliance plans satisfy federal requirements. States must, accordingly, report their compliance plans to the Department of Education, which has authority to reject all or part of a State's federal education funding. Pet. App. 193a, 221a (20 U.S.C. § 6311(a), (g)). Schools that fail to make adequate annual progress toward satisfying federal proficiency standards are subject to escalating sanctions. Pet. App. 235a-254a (20 U.S.C. § 6316(b)). If a school fails to make

satisfactory progress in four consecutive years, then the local educational agency must either (i) replace "all or most of the school staff" and turn operations over to a private management company, or (ii) surrender control to state government. Pet. App. 249a-251a (20 U.S.C.§ 6316(b)(8)).

3. Most relevantly, NCLB establishes detailed requirements for state English-language instruction and programs. Incorporating provisions from the Bilingual Education Act of 1968, NCLB's Title III—known as the "English Language Acquisition, Language Enhancement, and Academic Achievement Act," 20 U.S.C. § 6811—is designed to hold schools and state and local educational agencies accountable for the academic progress of ELL students. Pet. App. 257a (20 U.S.C. § 6812(8)). Like NCLB's other provisions, Title III reflects Congress's decision to shift the emphasis of federal education policy away from funding and toward accountability and results. *See* 147 Cong. Rec. 13322 (Dec. 17, 2001) (statement of Sen. Carper).

Title III's requirements are, in a word, extensive. Every school receiving a Title III sub-grant must biennially evaluate its ELL program. The evaluation must provide "a description of the progress made by children in learning the English language and meeting challenging state academic content and student achievement standards." Pet. App. 263a (20 U.S.C. § 6841(a)). Schools are obliged to monitor students and track their achievement "for each of the 2 years after" they depart the ELL program. *Id.* In addition, schools must set "annual measurable achievement

objectives" that accurately measure, among other things, a child's "development and attainment of English proficiency." Pet. App. 263a (20 U.S.C. § 6842(a)(2)). These measurable objectives require annual increases in the percentage of children making progress toward and attaining English proficiency. *Id.* (20 U.S.C. § 6842(a)(3)(A)).

Failure to meet Title III's standards requires a school to jettison ineffective programs. If a school fails to attain satisfactory progress for two consecutive years, the school must develop an "improvement plan" and obtain "technical assistance" from the State. Pet. App. 265a-267a (20 U.S.C. § 6842(b)). If a school fails for four consecutive years, the State must either overhaul the school's ELL curriculum or replace all its personnel. Pet. App. 266a-267a (20 U.S.C. § 6842(b)(4)).

C. Arizona's English Language Programs

In the last eight years, Arizona has implemented significant changes in its English-learning funding, curriculum, and protocols. Pet App. 30a-31a. These changes have appreciably increased funding available for ELL instruction and significantly altered how Arizona runs its ELL programs.

1. In November 2000, Arizona's voters passed Proposition 203, requiring (i) all classes in Arizona's public schools to be taught in English; and (ii) ELL students to be educated in separate, structured immersion classes until they are proficient in English. Pet. App. 369a-379a. Whereas traditional bilingual-education programs

taught substantive content (such as math and science) in students' native languages, Proposition 203 mandates that ELL students be taught in English tailored to a level they can understand.

2. Apart from restructuring how ELL students are taught, Arizona has significantly increased the funding available for ELL instruction. In December 2001, the Arizona Legislature passed H.B. 2010, doubling the funding each district receives per ELL student and further appropriating money for ELL instruction materials, teacher training, compensatory education, and reclassification. Pet. App. 380a-428a. Arizona also greatly increased its basic school funding packages. Pet. App. 31a. Proposition 301, approved by the voters in 2000, increased the state sales tax by six tenths of a percent to fund increased base-teacher salaries, teacher-performance pay, and tutoring programs for underperforming students. Pet. App. 358a-361a. Similarly, Arizona's voters approved measures ensuring that a portion of all Indian gaming proceeds will be channeled to Arizona's schools. Pet. App. 361a.

As a result of these initiatives, support for overall education has grown from an inflation-adjusted $3,139 per pupil in 2000 to an estimated $3,570 in 2006. Pet. App. 29a. The difference is even more pronounced when taking into account local funding, which rose from $5,677 per pupil in 2000 to $6,412 in 2006. *Id.* Federal funding has likewise increased, from $526 per pupil in 2000 to about $953 in 2006. *Id.* If H.B. 2064 is allowed to take full effect, funding will increase even more.

The monies available to Nogales Unified School District have likewise expanded. In 2000, Nogales voters agreed to increase property taxes to be used for any educational purpose. Pet. App. 430a-431a. The proceeds flowing directly to Nogales Unified School District grew from $895,891 in FY2001 to over $1.6 million in FY2007. Pet. App. 431a. In fact, in FY2006 Nogales Unified School District carried a budget *surplus* of over $1.3 million.

3. In addition to significantly increasing funding, Arizona has implemented statewide measures designed to enhance ELL instruction. Arizona's English-immersion instructors are required to complete an extensive curriculum to obtain provisional and full endorsements to ensure effective instruction. The State's English Acquisition Services department has grown from six members to sixteen; in addition, H.B. 2064 provides for the hiring of twenty more professionals. Pet. App. 336a-339a. Indeed, Arizona's English Language Proficiency Standards, adopted in 2004, have been recognized by one state official as going from "zero to ten" in providing a benchmark for measuring English proficiency. Pet. App. 339a-340a.

4. Perhaps most importantly, schools are held accountable for ELL students' performance. To fulfill their evaluation mandate, schools are required to employ the Arizona English Language Learner Assessment, and submit annual reports identifying the rate at which their ELL students are achieving English proficiency. Pet. App. 341a-343a. The State's Department of Education has taken an active role in monitoring and working

with individual districts to organize ELL classrooms, arrange class composition, and determine criteria for determining when ELL students should be transferred to mainstream classes. Pet. App. 354a-355a. Department-developed English Language Proficiency Standards provide ELL teachers with reading and writing performance targets. Moreover, through Arizona's English Acquisition Services Program, the Department conducts several dozen site visits each year, hosts annual seminars on innovative ELL teaching methods, and holds monthly meetings with ELL teachers. Monitoring programs that did not exist in 2000 have been effectively implemented to track the day-to-day progress of ELL students. Pet. App. 351a-354a.

5. Working with local officials, Arizona has substantially improved Nogales's ELL programs. The benefits of reduced class sizes, higher-quality teachers, an impressive tutoring program, and comprehensive instruction materials have borne objective, measurable results. For instance, the Arizona Department of Education has ranked 628 schools (each with more than 100 ELL students enrolled) according to student performance on the standardized Arizona Instrument to Measure Skills test used to measure whether students are meeting Arizona's minimum academic standards. Pet. App. 361a-365a. Nogales had *four* schools within the top ten, and *five* within the top 50. Pet. App. 365a.

D. The Proceedings Below

1. Notwithstanding significant structural changes in Arizona's ELL programs and

substantial increases in educational funding, the district court ruled in December 2005 that Arizona was not adequately funding its ELL programs by virtue of the fact that it had not earmarked sufficient funds to cover all the costs of ELL instruction. The court then imposed fines that would continue until Arizona substantially increased ELL funding. Pet. App. 173a-174a. The court gave Arizona's Legislature 15 days from the beginning of the legislative session to comply with its order. If the Legislature failed to enact legislation to the court's satisfaction, then the State would face fines of $500,000 per day (over time increasing to $2 million per day). *See id.*

2. After significant negotiation and fact-finding, the Arizona legislature enacted H.B. 2064. H.B. 2064 implemented funding increases of roughly $14 million in what is referred to as "group B" funding (the additional funds a school directly receives for each student in an ELL program); $10 million to fund local ELL programs; and another $7 million to assess student progress and provide ELL materials. Pet. App. 268a. In addition, the statute established a statewide compensatory instruction fund, and a specific fund for structured-English-immersion, which would cover school districts' incremental costs of ELL instruction beyond that covered by "group B" funds.

H.B. 2064's provisions concerning "group B" funding were to take effect after the district court's confirmation that Arizona had taken "appropriate action" under the EEOA. Arizona Governor Napolitano, who had vetoed three earlier legislative attempts to respond to the district court's contempt

orders, allowed H.B. 2064 to become law without her signature. Pet. App. 26a. Because the district court's December 2005 order (for the first time) commanded the Legislature to take action, and because Petitioners were concerned that the named defendants were not adequately protecting the State's interests (in fact, the named defendants had stated their support for the district court's injunction), Petitioners intervened in March 2006. Along with the Superintendent of Public Instruction, Petitioners moved (i) to purge the contempt, and (ii) for relief from judgment under Federal Rule of Civil Procedure 60(b)(5). Pet. App. 28a.

3. On April 25, 2006, the district court ruled that H.B. 2064 did not comply with its prior orders because, in the court's view, the legislation did not sufficiently fund ELL education. Pet. App. 27a. Petitioners appealed. In an unpublished memorandum decision, the court of appeals vacated both orders, noting that "the landscape of educational funding has changed significantly" since 2000, and remanded for the district court to hold an evidentiary hearing on whether changed circumstances "had a bearing on the appropriate remedy." Pet. App. 190a.

4. On remand, the district court acknowledged NCLB's dramatic effect on federal and local education policy. The court recognized that, by "increasing the standards of accountability," NCLB "has to some extent significantly changed State educators' approach to educating students in Arizona." Pet. App. 101a. The court likewise found that the State's Department of Education had

taken seriously its role both in creating standards and norms and in overseeing Arizona's ELL programs. Pet. App. 95a-100a. The court acknowledged that "[t]here is no doubt" the Nogales school district "is doing substantially better than it was in 2000." Pet. App. 99a.

The court nonetheless found the "strides made by" Nogales were "largely" a result of its own "efforts alone." Pet. App. 100a. The court held that the significant improvements in the quality of education did "not establish that Arizona is fulfilling its duty to fund ELL programming rationally." Pet. App. 46a. In addition, the court denied Petitioners' Rule 60(b)(5) motion. Pet. App. 115a. In the court's view, Arizona's "minimum funding level for ELL programs ... bore no rational relation to the actual funding needed to insure that ELL students could achieve mastery of the State's academic standards." Pet. App. 116a. The court further held that H.B. 2064 violated federal law because it purportedly used federal funds to "supplant" rather than "supplement" state monies. Pet. App. 113a-114a. And it determined that the Legislature's decision to provide incentives for schools to teach students English within two years was unreasonable. Pet. App. 114a-115a.

5. Upon Petitioners' appeal, the Ninth Circuit affirmed. Pet. App. 91a. Instead of determining whether the district court's orders were appropriate in view of dramatic changes in federal requirements, the court of appeals applied a highly deferential standard of review. Even though Petitioners were seeking relief in the broader public interest, and even though it is undisputed that the

named defendants wanted the injunction to remain in place, the Ninth Circuit deemed it improper to grant "relief from judgment on grounds that could have been raised on appeal" from the district court's prior orders. Pet. App. 60a.

According to the court of appeals, to obtain relief under Rule 60(b), Petitioners were required to show that the "basic factual premises of the district court's central incremental funding determination had been swept away, or that there has been some change in legal landscape that makes the original ruling now improper." Pet. App. 63a. The court emphasized that it is not sufficient "to argue for vacating the judgment because of factual or legal circumstances that have not changed the basic premises of the original rulings." *Id.* Instead, the court below required Petitioners "to demonstrate either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its funding model. *Id.*

Measured against that strict standard, the court of appeals found that the "basic premise" of the district court's 2000 orders—"ELL students need extra help and that costs extra money"—had not been "swept away." Pet. App. 64a. It interpreted the "recent statewide program to *improve* ELL testing, monitoring, and support programs" as factors weighing *against* a finding of changed factual circumstances, inasmuch as those programs would impose "incremental costs on school districts." *Id.* (emphasis added). And it rejected Petitioners' argument that focusing solely on ELL-specific funding "is no longer appropriate

given general increases in education funding since 2000." Pet. App. 67a.

Finally, the court of appeals concluded that Arizona's compliance with NCLB's standards and requirements did not satisfy the EEOA's "appropriate action" requirement. Pet. App. 72a-81a. Rather than attempting to harmonize the two statutes, the court below focused on the supposed differences in the statutes' legislative purposes, and concluded that compliance with NCLB was not sufficient to satisfy the EEOA's "appropriate action" requirement because NCLB did not repeal or pre-empt the EEOA. Pet. App. 75a-80a.

The court of appeals denied a timely petition for rehearing and rehearing en banc on April 17, 2008. Pet. App. 92a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* for three reasons. *First*, the Ninth Circuit's decision conflicts with decisions of other courts of appeals and cannot be squared with this Court's decisions concerning the proper role of federal courts in the context of institutional reform litigation. *Second*, this Court's intervention is required to correct the Ninth Circuit's setting aside of congressional policy and intrusion into traditional prerogatives of local state officials in establishing educational policies and priorities. *Third*, the questions presented address an important, recurring issue of federal law. If left uncorrected, the decision below threatens to undermine local officials' freedom to deal creatively and effectively with local educational challenges.