

1 the Petitioners.

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3 the Respondents.

4 NICOLE A. SAHARSKY, ESQ., Assistant to the

5 Solicitor General, Department of Justice, Washington,

6 D.C.; on behalf of the United States, as amicus

7 curiae, supporting the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-289, *Horne v. Flores*, and the consolidated case.

Mr. Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

MR. STARR: Mr. Chief Justice, and may it please the Court:

In January of 2000, the district court in Arizona concluded that the Nogales school system had failed to provide an equal educational opportunity for its English language learners in that particular district.

JUSTICE SOUTER: I -- I thought the determination was that it had failed to provide funds that could reasonably accomplish the -- the plan which the district itself had adopted.

MR. STARR: Well, Your Honor, the specific finding was that there needed to be -- there were very elaborate findings here. There needed in fact to be remediation to, in fact, support a plan, and the State --

JUSTICE SOUTER: But the district agreed on

1 that, I take it. The district said, you've got to do
2 something. This is our plan.

3 And I thought the district court then
4 said -- the school district did that, and I thought the
5 district court then said, well, the -- the funding that
6 you have come up with, or the funding scheme you have
7 come up with simply is not rationally related to the
8 plan that you, yourself, have adopted. Am I -- am I
9 wrong on that?

10 MR. STARR: You are correct.

11 JUSTICE SOUTER: Okay.

12 MR. STARR: It needs to be a rational plan.
13 But then by the time of the 60(b) hearing, the
14 circumstances had dramatically changed. There had been
15 a failure. But in November of 2000, a sea change
16 occurred in educational policy. The old system in
17 Nogales was done away with throughout the State.
18 Strategic English Immersion, intense immersion, and the
19 results are already being shown. In Nogales --

20 JUSTICE GINSBURG: What was the year, Mr.
21 Starr, the year of that change to the SEI from the
22 bilingual education? What was the year of that?

23 MR. STARR: The voters voted it in, in
24 November of 2000, and it began feathering in very
25 promptly as soon as the school districts could in fact

1 respond, and Nogales --

2 JUSTICE GINSBURG: And yet this district
3 court kept renewing his instruction, provide funding
4 that reasonably relates to the cost, many, many times
5 after the SEI became effective. And we -- we have the
6 original decree which was, what, a declaratory judgment
7 in 2000. Then he issues a series of orders. None --
8 and none of them are ever appealed.

9 MR. STARR: Oh, you're -- that is true. And
10 in fact one of the grounds of our submission this
11 morning is that the failure to appeal should be in fact
12 a cause for concern. Indeed, 60(b)(5) is all about
13 exceptions to finality, especially when we are dealing
14 with a very quintessential State and local function,
15 namely education.

16 And, thus, the court should have been open
17 to consider what the Ninth Circuit had commanded it
18 consider, namely the changed circumstances. And what
19 were those changed circumstances? Nogales was doing
20 great. A new leadership came in. Superintendent Cooper
21 made tremendous reforms. The State responded, not only
22 with a new methodology, but by funding that methodology.
23 And, Your Honor, all this --

24 JUSTICE BREYER: Nogales was doing great? I
25 mean, I asked my clerk to go get some figures out of the

1 record, and she says, in 2008 in the sixth grade, just
2 to take an example, 77 percent of the English learners
3 in Nogales failed the tests as compared to 32 percent
4 statewide. In the tenth grade, 84 percent failed the
5 reading exam compared with 34 percent statewide. In
6 2008, the reading exam, fourth graders, 67 percent
7 failed in Nogales, the English learners, compared to 30
8 percent statewide.

9 Now, I'm sure that progress has been made,
10 but it doesn't seem to me, looking at that kind of thing
11 -- and the record is filled with that kind of thing --
12 that -- that you could say that the objectives are
13 achieved.

14 MR. STARR: Your Honor, first of all, the
15 exam to which you are referring is given in English. If
16 I am taking German, then I am not going to do well on a
17 German exam that's --

18 JUSTICE BREYER: Well, isn't the point of
19 this to teach the children to learn English?

20 MR. STARR: But the point is that the exam
21 that one -- that you should look at is the AZELLA exam.

22 JUSTICE SCALIA: Excuse me. I'm not
23 following this exchange because I don't understand
24 whether the -- the statewide percentage is the statewide
25 percentage of English learners or the statewide

1 percentage of all students.

2 MR. STARR: Here is -- and I think we can
3 cut to -- I'm sorry.

4 JUSTICE SCALIA: If you can't answer that, I
5 think Justice Breyer can.

6 (Laughter.)

7 JUSTICE SCALIA: But I'd like to know what
8 comparison --

9 JUSTICE BREYER: He doesn't actually have
10 the right to ask me questions.

11 (Laughter.)

12 JUSTICE SCALIA: I don't. That's -- that's
13 exactly true. But --

14 CHIEF JUSTICE ROBERTS: Very much true.
15 Counsel, why don't you try and answer?

16 (Laughter.)

17 MR. STARR: Thank you.

18 I would go, if I would -- if you would, to
19 page 46a of our Pet. App., where you -- Petition
20 Appendix, where you, in fact, get the information
21 summarized, and then go to -- and this is the Ninth
22 Circuit's own words that "Nogales is doing substantially
23 better"; "the State has developed a significantly
24 improved infrastructure."

25 And then if you go to the superintendent's

1 Petition Appendix, you will see -- this is the relevant
2 information under No Child Left Behind, which is one of
3 the changed circumstances -- the Nogales students are,
4 in fact, doing better than across the State. The key is
5 to measure the progress that has, in fact, been made,
6 and that is not disputed. Everyone agrees.

7 CHIEF JUSTICE ROBERTS: Well, I -- I still
8 don't have an answer to Justice Breyer's -- I guess
9 Justice Scalia's question following up on Justice
10 Breyer's. What are the parameters or the -- the data
11 with respect to the figures Justice Breyer gave you?

12 MR. STARR: Yes. The key -- I would refer
13 the Court to Appendix 312 of the superintendent's
14 petition and the prior pages, and that gives the
15 percentage of students making progress under the exams
16 that are administered by the State statewide, and that
17 you will see that throughout, including in the high
18 school, that the students are, in fact, making progress.
19 The district court concluded that Nogales had --

20 CHIEF JUSTICE ROBERTS: So Justice -- the
21 answer is that Justice Breyer's figures are correct with
22 respect to the appropriate bases of children. You are
23 just saying you want to use a different test than the
24 one that he was quoting?

25 MR. STARR: Well, again, my quarrel with his

1 figures had to do with the nature of the test being --
2 there are different tests being administered.

3 CHIEF JUSTICE ROBERTS: Right. The figures
4 are accurate --

5 MR. STARR: Yes.

6 CHIEF JUSTICE ROBERTS: You just think a
7 different test should be used.

8 MR. STARR: That one should not take too
9 seriously a test that is --

10 JUSTICE BREYER: All right. Let's take the
11 one you mentioned. Let's take the one you --

12 MR. STARR: -- in English.

13 JUSTICE BREYER: The one you mentioned, I
14 take it, the student academic achievement in
15 mathematics, which is something called the AYP
16 guidelines test -- they are for high school, which you
17 mentioned. It has -- I think it's 2008, maybe it's
18 2007 -- we have limited English-proficient students,
19 this is passing their test, 22.4 percent of the English
20 learners are at -- students scoring at or above
21 proficient. The overall rate is 68 percent. So it
22 seems like about a third.

23 Now, if you look at the reading language
24 arts, the average is 73.5. Limited English proficient
25 is 15.4. And that's quite a difference, 75 percent as

1 to 15.4, in the high schools, on the tests that you have
2 mentioned.

3 So I just say -- my only point is that we
4 have a couple of findings here. You are right, they
5 have made progress, but they are not quite home yet.
6 And I'd say that, looking at this record, it seems to
7 suggest that.

8 MR. STARR: But not home yet, Your Honor,
9 is, in fact, the key question. What is home? And that
10 brings us to --

11 JUSTICE BREYER: Let's do another one. What
12 they started out in the year 2000 is they said one
13 problem with this State is we don't know what it costs,
14 the average in the increased program. They haven't done
15 a good study to tell what it costs. But we think it's
16 somewhere around \$1500, maybe it's \$1300, maybe it's
17 \$1400 per student. And as of this very moment, the
18 State is providing \$300 to \$400, leaving it up to the
19 school district to find the rest of the money, which it
20 has to take from other things like English, or -- is
21 that right?

22 MR. STARR: No --

23 JUSTICE BREYER: Okay.

24 MR. STARR: -- that is incorrect, Your
25 Honor. First of all, there has been a substantial

1 increase in funding, which we supply and summarize at
2 pages 22 and 23 of the opening brief. And you will see
3 throughout the testimony -- the testimony is absolutely
4 clear, including the plaintiffs' -- the Respondents' --
5 key witness, Dr. Zamudio, agreed that there has, in
6 fact, been substantial progress; indeed, there's an
7 effective program in place.

8 And so our fundamental quarrel with the
9 approach of the district court is it blinded itself to
10 the significant changes structurally as well as the
11 progress that had been made and just said it doesn't
12 matter because this is all about funding. And that is
13 not true. If --

14 JUSTICE GINSBURG: Mr. Starr, can I take you
15 back to the beginning of the 60(b) motion, because you
16 seem to have shifted ground. The 60(b) motion as
17 presented to the district court said that this new law
18 passed by the Arizona Legislature, 2064 -- "2064 creates
19 a plan for adequate funding of programs for the ELL
20 students."

21 That was the whole basis for the 60(b)
22 motion, whether the new law was -- supplied adequate
23 funding, and the Speaker of the House and the Senate
24 intervened specifically for the purpose of defending the
25 new law. Your current argument is detached from the new

1 law.

2 MR. STARR: It's not detached, but our
3 submission is, in fact, that we look to what the
4 district court had before it in the 60(b)(5) hearing.
5 It had an 8-day evidentiary hearing. It was not simply
6 legal argument over that particular bill. And that
7 evidence --

8 JUSTICE GINSBURG: But that was the basis
9 for the 60(b) motion, that 2064 provided adequate
10 funding.

11 MR. STARR: Your Honor, there were a variety
12 of points made, and the -- the 60(b) submission was not
13 limited to this new bill. Rather, it was a totality of
14 the circumstances: Here are the changed circumstances.
15 That's what the whole 8-day trial was about. The 8-day
16 trial was about what are the new funding mechanisms,
17 what is happening on the ground in Nogales? And as I
18 say, even the Respondents' own key witness said that
19 there is an effective ELL program now in place, and
20 that, in fact, progress --

21 JUSTICE GINSBURG: Do we -- do we have
22 the -- the intervention application in the papers before
23 us and the 60(b) motion?

24 MR. STARR: Yes, you do -- you do have it
25 before you. And there is no question that the Speaker

1 and the President were, in fact, submitting to the
2 district court HB 2064 as part of the submission.

3 My point is the evidentiary hearing went
4 much more broadly, and here's the key: Under the EEOA,
5 all that is required under the Castaneda framework is,
6 in fact, good faith efforts toward compliance. The
7 questions that are flowing suggest there has been no
8 good faith effort at compliance, and there has been.
9 There's been -- that's what the 8-day hearing was all
10 about. That's one of the things that Superintendent
11 Cooper testified to, and it was credited.

12 JUSTICE SOUTER: Well, I -- help me out
13 then. I thought the -- the issue was not whether there
14 had been any good faith attempt at compliance, but
15 whether there were two deficiencies under the -- the
16 scheme, under the -- I forget the statute -- the new --
17 the new bill. One deficiency was that it limited the
18 funding for any given student subject to -- to ELL -- to
19 2-year funding when, in fact, the evidence showed that
20 you couldn't get a kid up to par with 2 years of
21 education.

22 And the second deficiency was that the --
23 that the State funds -- strike that, I'm sorry -- that
24 Federal funds were being used to supplant what should
25 have been a State responsibility rather than merely

1 supplementing. I take it that's simply a matter of
2 degree, but that was the problem.

3 I thought those were the two problems,
4 2-year funding, supplantation. Am I -- am I wrong? So
5 there was no -- my point is that there was no denial
6 that some good faith efforts had been made. The finding
7 was that there were two deficiencies and these were the
8 two deficiencies; is that correct?

9 MR. STARR: As -- that is correct. But as
10 to the latter with respect to the Federal funds,
11 supplant versus supplement, all that we have is -- and
12 this is an issue that is entrusted to the Department of
13 Education. It's not entrusted to the district courts
14 under No Child Left Behind. This is an apparatus that
15 Congress has determined there should no longer be -- not
16 that EEOA doesn't -- it has its beachhead, it has its
17 place, but now No Child Left Behind has a very elaborate
18 process including a plan, and Arizona is in compliance
19 with that plan.

20 The point is the HB 2064 points completely
21 blinded the district court to what was actually before
22 him, and we think that's just wrong.

23 JUSTICE STEVENS: Mr. Starr, how do you
24 explain the fact the State of Arizona and the board of
25 education are troubled by the same two points?

1 MR. STARR: There is no question that there
2 is disagreement within the house with respect to that.
3 But, Your Honor, there is no authority on the part of a
4 Federal court under No Child Left Behind to render this
5 kind of interpretation. And it has blinded us --
6 ultimately, it's irrelevant.

7 JUSTICE GINSBURG: Well, what is it --

8 MR. STARR: It has blinded us to the
9 issue --

10 JUSTICE GINSBURG: No Child Left Behind, I
11 thought, has a specific saving clause: "Nothing in this
12 part shall be construed in a manner inconsistent with
13 any Federal law guaranteeing a civil right." And the
14 EEOA is such a law.

15 MR. STARR: That is correct. The point that
16 I am making is the interpretation of "supplemental"
17 versus "supplant" is in fact one that is entrusted to
18 the Department of Education. We only have a letter.
19 That's not final agency action.

20 But I want to return to what we think is the
21 key in a 60(b)(5) hearing. What is key in 60(b)(5) is
22 to listen to the changed circumstances. What are the
23 changed circumstances? And the court blinded itself to
24 these very important changes in terms of State
25 funding --

1 JUSTICE BREYER: What is the one on State
2 funding? Because I looked at your brief, page 22 to 23,
3 and if I understand it correctly, it says that the
4 educational expenditures, that is to say moneys,
5 increased in this Nogales -- NUSD --

6 MR. STARR: Yes.

7 JUSTICE BREYER: -- maintenance and
8 operation budget, by 30 percent. Well, I'm sure they
9 did. But that's I take it the entire maintenance and
10 operation budget. The numbers I had -- and I am quite
11 interested to know if they are wrong -- the numbers that
12 I had is that the only survey they've done across the
13 State, or the most recent one, says that the English
14 language instructional costs range between \$1570 and
15 \$3300 per pupil. And then if you look at the amount the
16 State provides outside of the reading, writing, and
17 arithmetic, which they provide, et cetera, for all
18 students, what they provide is -- currently it's \$340,
19 and if that law had gone into effect, 2064, it would
20 have been \$450. Now, are those numbers totally wrong?

21 MR. STARR: The numbers are not wrong, Your
22 Honor, but the numbers are in fact not the pivotal
23 point. The EEOA is not a funding statute, and let me
24 come to the specific point of cost studies. The State
25 of Arizona did in fact seek to undertake a statewide

1 cost study. And our -- one of our fundamental problems
2 here is this case is no longer about Nogales. It has
3 been expanded. Even though it was a class action
4 limited to Nogales, it has been expanded to include an
5 intrusion into the prerogatives of the State in terms of
6 --

7 JUSTICE GINSBURG: That was the fault of the
8 Arizona attorney general, who told the court: You can't
9 deal with Nogales alone because under the Arizona
10 Constitution the -- all the -- all the school districts
11 have to be treated equally. So, it wasn't the
12 plaintiffs that initiated that move to make it
13 statewide; it was in fact the Arizona attorney general.

14 MR. STARR: And we are now seeking relief
15 from that, because what we now know what --

16 JUSTICE SOUTER: Well, it -- has the State
17 law changed?

18 MR. STARR: What has changed --

19 JUSTICE SOUTER: I mean, the reason -- the
20 reason for getting into this is the State required it.
21 Has the State law changed?

22 MR. STARR: The State law does not require
23 specific earmarked funding, district by district, and
24 here's the key --

25 JUSTICE SCALIA: I assume it's --

1 JUSTICE SOUTER: No, we are not talking
2 about -- I'm sorry.

3 JUSTICE SCALIA: I also assume the State law
4 doesn't -- doesn't require that any -- any judicial
5 decree with respect to a particular district be expanded
6 to the whole State. It seems to me you could comply
7 with the State constitution. If and when a judgment is
8 rendered as to the district, it would then be, under the
9 State constitution, the responsibility of the State
10 executive to make sure that the other -- other districts
11 are equalized.

12 But why the attorney general had to come
13 into the Federal court and say, do it to the whole
14 State, because the whole State has to be equal, I -- I
15 can't understand that, to tell you the truth.

16 MR. STARR: It's why the district
17 court should have been on guard --

18 JUSTICE SOUTER: What is the district court
19 supposed to do? The attorney general for the State
20 comes in and says, do it this way. It seems to me that
21 the State has no standing later on to say, oh, gee, the
22 district court should have said sorry, Mr. Attorney
23 General, you don't know anything about your State law;
24 we won't do it this way.

25 MR. STARR: Your Honor, we are not trying to

1 relitigate the original judgment. We quarrel with it,
2 but that's not why we're here. We're here --

3 JUSTICE SCALIA: The fact is he wanted to be
4 thrown into the briar patch, didn't he?

5 MR. STARR: It was --

6 JUSTICE SCALIA: The State attorney general
7 wanted the decree.

8 MR. STARR: There is -- there is no question
9 that there was a division of opinion within the State
10 and that in fact the attorney general was essentially
11 siding with the plaintiffs in their litigation.

12 There's now a very different perspective,
13 and you have that before you, that the governor who
14 controls the litigation in the State is the chief
15 executive of the State in terms of determining what the
16 State's position is --

17 JUSTICE KENNEDY: Could you tell me what
18 your submission is with respect to the error you see in
19 the findings and the order made after the 8-day hearing?
20 First, are you saying that after No Child Left Behind,
21 that the duty of the State with respect to educating the
22 students who had a different language was less onerous?

23 MR. STARR: No, it's not less onerous, but
24 there's a different methodology and a different
25 approach. And so --

1 JUSTICE KENNEDY: All right. And are you
2 saying that because of that methodology any remedy based
3 on funding is no longer appropriate?

4 MR. STARR: A funding remedy is in fact
5 inappropriate presumptively statewide. That's our key
6 submission, because of the variation in costs, district
7 by district on every --

8 JUSTICE KENNEDY: If we could -- is it -- is
9 it valid as to Nogales, if we focus just on Nogales?

10 MR. STARR: Not in terms of changed
11 circumstances, because of what has in fact happened on
12 the ground. Namely, one of the things when we go back
13 to the original order --

14 JUSTICE KENNEDY: Are you saying --

15 CHIEF JUSTICE ROBERTS: You lost me.

16 JUSTICE KENNEDY: Are you saying that the
17 order the district court gave with respect just to
18 Nogales --

19 MR. STARR: Yes.

20 JUSTICE KENNEDY: -- is inappropriate
21 because it used a funding remedy or a funding measure of
22 compliance when it should have used blank? And then
23 fill in the blank.

24 MR. STARR: Yes. It should have simply
25 determined under Castaneda the three-part test. It

1 should not have said the EEOA requires a particular
2 level of funding. That's precisely what Castaneda --

3 JUSTICE SOUTER: But that isn't what it -- I
4 don't understand that it has ever said that. I thought
5 the funding point was basically this: You, Nogales,
6 have come up with plan A. You have come up with funding
7 B. Funding B is not enough money to fund plan A. It's
8 your plan. You've got to fund your plan.

9 That is not saying that the Federal statute
10 requires a particular level of funding. It's not saying
11 that the district court can take over the responsibility
12 of deciding what is appropriate funding in a school
13 district. It's simply saying, "If you choose plan A,
14 you have got to pay for plan A."

15 MR. STARR: And --

16 JUSTICE SOUTER: Am I -- am I wrong? Did it
17 ever go beyond that?

18 MR. STARR: It did go beyond that in this
19 sense: It did not in fact determine whether in fact
20 there was an effective program in place. That's the
21 oddity about this case --

22 JUSTICE SOUTER: In other words, it should
23 have said: Before I decide whether your funding for
24 plan A is good enough, I have got to decide whether plan
25 A itself is worth anything? I mean, I have got to

1 evaluate plan A?

2 MR. STARR: No. The difficulty is seeking
3 to enforce a specific funding order, and particularly
4 statewide, which intrudes --

5 JUSTICE SOUTER: All right. Let's go back
6 to Justice Kennedy's point a moment ago. Let's just
7 talk about Nogales for a minute. With respect to plan
8 A, that was Nogales's plan. And the district court
9 said: You can't fund that plan with the amount of money
10 that you've appropriated. Did the district court go
11 beyond that with respect to Nogales?

12 MR. STARR: The district court failed to
13 note that plan A had changed. There was no longer a
14 plan A. It was Strategic English Immersion, which has
15 an entirely different methodology. And what it also --

16 JUSTICE GINSBURG: But that came in, in
17 2000, and this case was going on for, what, 8, 9 years
18 before there was ever an argument. I mean, in all of
19 these orders that were not appealed, don't those
20 judgments, unappealed judgments, settle anything?

21 MR. STARR: Of -- of course. They let that
22 judgment stand during that period of time. But the
23 whole purpose of 60(b)(5) is relief from finality. It's
24 an --

25 JUSTICE SCALIA: Yes, but didn't -- didn't

1 the court -- you say plan A is no longer in effect; they
2 have a new plan under -- under the No Child Left Behind
3 Act. But didn't the -- didn't the district court find
4 that the funding for that plan is inadequate, for the
5 two reasons that were mentioned earlier?

6 MR. STARR: Well, it said that -- here is
7 what the court held: That it has developed a
8 significantly improved infrastructure for ELL
9 programming, but it has not complied with the original
10 judgment. That is our complaint. The original funding
11 judgment was in fact informed by a different methodology
12 and a different set of circumstances. For example,
13 Superintendent Cooper comes in and says: I don't want
14 to spend money on teachers' aides; they are standing in
15 the way. Yet the Respondents say: We need money for
16 teachers' aides. That's part of No Child Left Behind.

17 Inputs -- now we look at -- we test, we
18 determine what progress is being made, and we are
19 requiring progress to be made.

20 JUSTICE GINSBURG: I didn't think there was
21 in the district judge's declaratory judgment, spend this
22 much on teachers aides, that much on the other. It was:
23 You need a plan, and you have to figure out how much it
24 costs, and then you have to appropriate money that
25 matches the cost.

1 But the district court -- and I may be wrong
2 about this, but I thought that the original declaratory
3 judgment didn't try to tell them what the components of
4 that plan had to be.

5 MR. STARR: You are precisely right, but the
6 point I'm making is that the objects of that underlying
7 decree shifted by virtue of the new methodology that was
8 in fact adequately funded through a whole variety of
9 funds. The funds that Justice Breyer has referred to
10 are only part of the basket of funds that have been made
11 available.

12 JUSTICE SOUTER: No. But doesn't it --
13 doesn't it -- don't we come back to Justice Scalia's
14 question of a moment ago? Even with the -- the changed
15 plan to immersion, isn't the finding that 2 years of
16 funding per child is not enough? And you are
17 supplanting, not supplementing. Isn't that still the
18 problem?

19 MR. STARR: We believe not. We believe that
20 ultimately those two issues are irrelevant to the issue
21 that is before the Court.

22 JUSTICE SOUTER: But those are the issues
23 that the court focused on; are they not?

24 MR. STARR: Wrongly, because that's --
25 that's part of our quarrel, that the district court

1 simply focused on these two elements of HB 2064,
2 blinded itself to the evidence --

3 JUSTICE BREYER: There is a minor thing that
4 I -- I think -- I'm not sure that Justice Ginsburg said.
5 I thought that the funding order was not: fund the plan
6 you come up with; but, rather, come up with a funding
7 plan that bears a rational relationship to -- to the
8 plan you come up with. So is that right?

9 MR. STARR: That is correct, and that's --

10 JUSTICE BREYER: All right. And now the
11 district court is at considerable remove. He says they
12 have not yet come up with a study and a plan that seems
13 satisfactory, and they haven't shown how the funding is
14 rational in relation to the plan that they haven't fully
15 developed, though they've made progress. That's where
16 we are -- is that where we are?

17 MR. STARR: Three brief points. On the
18 study, the State did undertake a study, and this is in
19 the record. And the National Conference of State
20 Legislatures said, we throw up our hands because we
21 can't do this statewide. I would invite the Court to
22 refocus on Nogales as a district versus statewide.

23 What was entered here in this order, which
24 makes it so extraordinary, is that the entire State
25 funding mechanism has been interfered with by the order.

1 This case started out in Nogales. And so the statewide
2 study was in fact undertaken. But we could not do it.
3 The National Conference of State Legislatures says that,
4 we throw up our hands. We can do a local study, and it
5 was done. And if the Court refocuses on the various
6 tranches of funding, including in Nogales itself and
7 from the State, one will see that there has been a very
8 substantial increase in the actual funding as well as
9 progress --

10 JUSTICE SCALIA: Well, I -- I agree with
11 that. I think it was a vast mistake to extend a lawsuit
12 that applied only to Nogales to the whole State, but the
13 State attorney general wanted that done.

14 MR. STARR: But we should be able now to --

15 JUSTICE SCALIA: But that's -- that's water
16 over the dam. That's not what this suit is about now.

17 MR. STARR: No, Your Honor, not under 60(b),
18 and this Court has warned about the ability of State
19 officials --

20 JUSTICE SOUTER: What has 60(b) got to do
21 with the question of whether the attorney general
22 represents the State before the court? If the attorney
23 general comes back into court and says, no longer do we
24 want this statewide, then you've got an issue. If the
25 -- if the attorney general speaking for the State does

1 not do that, then I don't see why Justice Scalia's point
2 is not the answer.

3 MR. STARR: Not under Arizona law. It is
4 the governor who speaks and the attorney general is
5 beholden --

6 JUSTICE SOUTER: So the district court is
7 supposed to referee a fight between the governor and the
8 attorney general at this point? Is that what's going
9 on?

10 MR. STARR: No, Your Honor. The district
11 court is to listen to what the State has to say through
12 -- once the legislature was fine, it was brought in. It
13 should have listened to the --

14 JUSTICE SOUTER: Doesn't the attorney
15 general speak for the State?

16 MR. STARR: No, Your Honor, not in Arizona.
17 The -- the attorney general speaks for the State when
18 the governor directs him or her to do that.

19 JUSTICE GINSBURG: But he was speaking alone
20 for years and years, and 60(b) -- it has been said over
21 and over again -- is not a substitute for appeal. What
22 wasn't appealed was that Arizona is required by Federal
23 law to determine the cost and adequately fund a
24 statewide system of English acquisition programming.

25 JUSTICE SCALIA: Which would be good enough

1 to fix Nogales. So you are quite right. There's a vast
2 difference in each school district. But that attorney
3 general wanted enough money to fund the whole State the
4 way you have to fund to -- to fix Nogales. That's what
5 he wanted.

6 MR. STARR: And former officials shouldn't
7 continue to be able to bind the State.

8 I'd like to reserve the remainder of my
9 time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Srinivasan.

12 ORAL ARGUMENT OF SRI SRINIVASAN
13 ON BEHALF OF THE RESPONDENTS

14 MR. SRINIVASAN: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 When the district court issued its initial
17 judgment in 2000, what the court found was that there
18 was a systemic violation of the EEOA. And the court
19 further found that the program deficiencies were the
20 result of the lack of funding rationally related to
21 programs.

22 JUSTICE SCALIA: Can I ask whether the
23 requirements of the EEOA are at all affected
24 by Congress's later enactment of the No Child Left
25 Behind Act? I mean, you know, it's a very vague

1 requirement that you make a good faith effort to -- to
2 provide language assistance to children.

3 Why shouldn't the courts decide that what
4 constitutes a good faith effort is pretty much what
5 Congress thought was necessary in the -- in the No Child
6 Left Behind Act, and if you comply with that, you are
7 doing okay?

8 MR. SRINIVASAN: Justice Scalia, just one
9 point of clarification on -- in our view, on what the
10 EEOA requires, and then I'll address the No Child Left
11 Behind point. And the EEOA doesn't really require good
12 faith efforts. It requires efforts that are in fact
13 reasonably calculated to overcome language barriers, and
14 --

15 JUSTICE SCALIA: Okay. I would call that
16 good faith, but that's a reasonable --

17 MR. SRINIVASAN: With that -- with that
18 clarification. Thank you.

19 JUSTICE SCALIA: That's fine.

20 MR. SRINIVASAN: With that clarification on
21 the question of whether No Child Left Behind sets the
22 standard for compliance with the EEOA, which is, I
23 think, what the Petitioners' position is, we think the
24 answer is no for two fundamental reasons. First is just
25 a textual point. The text of No Child Left Behind

1 doesn't say anywhere that it displaces the standard for
2 compliance with the EEOA. That's particularly --

3 JUSTICE ALITO: I don't think that's their
4 argument, counsel. I don't think that it's their
5 argument that No Child Left Behind supplants the earlier
6 act. It's simply their -- their argument is that it
7 informs an interpretation of the language of EEOA, which
8 is that the State is required to take appropriate
9 action, which is a very vague standard.

10 MR. SRINIVASAN: I think their argument at
11 the end of the day, Justice Alito, is that if you comply
12 with No Child Left Behind -- and I will get to in a
13 moment what compliance with No Child Left Behind can
14 mean -- then you have necessarily complied with the
15 EEOA, that compliance with the No Child Left Behind sets
16 the standard for compliance with the EEOA.

17 And I don't think that's workable
18 particularly when you take into account what Petitioners
19 mean by "compliance with No Child Left Behind."

20 JUSTICE ALITO: Can I ask you this question
21 about the Ninth Circuit's decision, which is what we are
22 reviewing? Suppose -- I know there -- there's a debate
23 about how well Nogales is doing at this time. But let's
24 suppose Nogales came in, and they said this: We had
25 plan A back when this was originally litigated, and now

1 we have an entirely different plan, and this plan
2 doesn't cost one penny more than what we were spending
3 in 2000. But it is a very good plan, and it has
4 produced very good results.

5 As I read the Ninth Circuit's decision, they
6 would not grant relief from the judgment under those
7 circumstances, because they focus exclusively on
8 incremental funding for EEL programs and Arizona's
9 funding model. Isn't that correct?

10 MR. SRINIVASAN: Well, I -- I don't know
11 that that's a correct interpretation of the EEOA. What
12 we would say is that if the State came forward with a
13 showing that, completely regardless of funding, the
14 programs on the ground work, well, that would be
15 something that the district court would have to take
16 into account. But the State hasn't --

17 JUSTICE ALITO: No, but isn't -- that isn't
18 really my question. Isn't -- isn't it the case that the
19 Ninth Circuit judged the -- the permissibility of relief
20 under 60(b) solely with regard to incremental funding
21 and Arizona's funding model?

22 MR. SRINIVASAN: The Ninth Circuit focused
23 on funding, Justice Alito, because that's the way the
24 case has been litigated from the outset. And that's the
25 way the State has said from the outset that it would

1 achieve compliance with the EEOA.

2 JUSTICE ALITO: That's the way it was
3 litigated originally, but I thought the whole focus of
4 the motion for relief from the judgment was: We have a
5 new plan, and it is not tied to funding, and it won't
6 produce good results without looking at incremental EEL
7 funding. And wasn't this -- the Ninth Circuit obligated
8 to look at that?

9 MR. SRINIVASAN: Well, I think the Ninth
10 Circuit was -- was required certainly to review the
11 district court's inquiry into that. And what the
12 district court found is at page 100a of the appendix to
13 the petition filed by the legislative intervenors. And
14 what the district court found there is that the
15 improvements today, although significant, failed to
16 reach the high school; that they were fleeting; and --
17 and this is particularly significant. In addition, the
18 district court also explained that it was premature to
19 make an assessment of many of the changes, because many
20 of the new standards are still evolving.

21 And the reason the district court said that
22 is that -- is because of the enactment in 2006 of
23 Arizona HB 2064, which changes the framework for
24 administration and funding of ELL programs in a way that
25 I think fortifies the district court's denial of

1 complete dissolution of its judgment and -- and ensuing
2 orders, and --

3 CHIEF JUSTICE ROBERTS: But I guess, as I
4 understand Justice Alito's question, if the prior order
5 is based on funding a particular plan and the State
6 comes back and says, this is a new approach -- it could
7 be for any number of reasons -- say that, you know, the
8 plan is not working or there have been other budgetary
9 crises in the State that strain what we can afford to
10 spend on this particular program. Here's another plan.
11 The funding levels are different. You should look at
12 it.

13 MR. SRINIVASAN: Yes, that --

14 CHIEF JUSTICE ROBERTS: What's wrong with
15 that?

16 MR. SRINIVASAN: There's nothing wrong with
17 that, and it should be looked at. And the district
18 court did look at it, and what the district court found
19 was that the claims of progress, although there had been
20 progress, the progress hadn't reached the high school,
21 that progress was fleeting, and that it was premature --

22 CHIEF JUSTICE ROBERTS: It's not a question
23 of progress; it's a question of the plan and the
24 approach. And I understood the Ninth Circuit -- I'm
25 looking at page 72a -- it talks about the ELL's specific

1 funding that was based on the prior order. And I
2 understood the State's submission to be -- look at what
3 the superintendent has done in this particular case, and
4 so on, so that those specific funding levels aren't
5 applicable.

6 And I would have thought it an extraordinary
7 enough thing for a district court to tell a State
8 legislature: Pass this budget, and you, Legislature,
9 pass it, and -- I guess -- you, Governor, sign it, or
10 you are not going to be in compliance. And if they've
11 come up with a different way with different funding
12 requirements, I don't know why that's not a changed
13 circumstance that justifies looking at the judgment --

14 MR. SRINIVASAN: Well, the district court
15 didn't issue that sort of order. And -- and the Ninth
16 Circuit -- if you look at page 66a -- it did review the
17 evidence in the record and fortified the district
18 court's conclusion that the new plan, Your Honor,
19 Mr. Chief Justice, that was presented, which is to the
20 effect that, regardless of funding, we have made
21 advances based on management improvements that should
22 satisfy the statute. That was the claim that was made
23 by Petitioners. I think that's what you're alluding to.
24 And the district court rejected that at page 100a, and
25 the Ninth Circuit fortified the district court's

1 rejection of it by looking at the evidence in the record
2 concerning --

3 JUSTICE SCALIA: What -- what page is this?

4 MR. SRINIVASAN: It's at 66a. That the
5 court of appeals reviews some of the testimony and
6 fortifies the district court's conclusion that, based on
7 the advances to date, there's still work left to be
8 done. Because at the end of the day you have to have a
9 plan in place.

10 CHIEF JUSTICE ROBERTS: Well, I don't think
11 the State -- I didn't understand the State to disagree
12 that there's still work to be done. I thought that the
13 plan -- the point was that their approach had changed,
14 including by No Child Left Behind, that they don't have
15 to reach the same specific funding levels that the
16 district court order required. And what I understood
17 the Ninth Circuit to say is, no, those specific funding
18 levels are still in place.

19 MR. SRINIVASAN: Well, there's two
20 fundamentally different assertions being made by
21 Petitioners, if I understand it: One is what
22 Justice Scalia alluded to earlier, which is that No
23 Child Left Behind changed the legal landscape in a way
24 such that compliance with No Child Left Behind, such as
25 it is, sets the standard for compliance with the EEOA.

1 Now, there's a distinct argument that's also
2 being made which is that conditions on the ground have
3 improved as a consequence of management improvements.
4 Regardless of No Child Left Behind, this is a factual
5 argument, that factually things have changed in a way
6 that ought to let us from underneath the district
7 court's supervision.

8 Now, the -- they are different points, and I
9 think the district court addressed both of them. With
10 respect to the second one, where there's the facts on
11 the ground, what's critical is that, in order to justify
12 complete dissolution in a case like this, the
13 Petitioners would have to show, not only that conditions
14 have improved, but they have improved in a way that's
15 durable and sustainable over time. And the district
16 court --

17 JUSTICE SCALIA: And what --

18 MR. SRINIVASAN: -- doubted that.

19 JUSTICE SCALIA: What degree of improvement
20 do you think is necessary? Do you agree with the Ninth
21 -- the Ninth Circuit says, "We cannot say the district
22 court clearly erred when it found this burden was not
23 met. A district in which the majority of ELL tenth
24 graders fail to meet state achievement standards while
25 the majority of native English speakers pass is not one

1 whose performance demonstrates that the state is
2 adequately funding ELL programs."

3 You really think that you haven't complied
4 with adequate funding of ELL programs until you raise
5 all of the ELL students up to the level of native
6 English speakers?

7 MR. SRINIVASAN: No, I don't think the EEOA
8 requires raising everyone. I think it requires --

9 JUSTICE SCALIA: Well, that's all this says.
10 The majority doesn't --

11 MR. SRINIVASAN: Well --

12 JUSTICE SCALIA: -- doesn't meet the -- a
13 majority of ELL tenth graders fail to meet the
14 standards, but the majority of native English speakers
15 do.

16 MR. SRINIVASAN: Well, that's part of what
17 it says, and I think what the Ninth Circuit is also
18 alluding to with respect to the high school in
19 particular that, if you look at State survey that
20 Petitioners rely on in -- in touting the improvements in
21 certain schools, it also with respect to the high school
22 shows that the two high schools in Nogales was ranked --
23 were ranked at the very bottom of the survey for ELL
24 students.

25 So there's problems on the ground, but what

1 the district court focused on concerns the enactment of
2 2064, which is that no matter what you think about the
3 improvements that have -- that have been made to date,
4 the landscape fundamentally shifts upon the enactment of
5 2064 because the administration and funding of ELL plans
6 changes at that point. And it's --

7 JUSTICE GINSBURG: That's the new plan that
8 we're talking about, is 20 -- there have been references
9 -- well, now they have a new plan. Does everybody agree
10 at least that the new plan is 2064?

11 MR. SRINIVASAN: I -- I think we would agree
12 because that sets the charter for provision of programs
13 to ELL students going forward from its enactment.
14 That's the infrastructure from -- from here on out.

15 And that -- there's three particular
16 features of that that I think are significant and that
17 fortify the district court's conclusion that complete
18 dissolution was unwarranted.

19 The first is the one that was raised by
20 Justice Souter, which is that whatever you think of the
21 progress that has been made to date -- and the district
22 court found that, while it was significant, it didn't
23 suffice -- that changes from what can be brought to bear
24 from here on out as half the resources that were
25 available before, because that's the net effect of 2064.

1 That's what the district court found, at pages 107 to
2 108a of the Petition Appendix. And when you have half
3 the resources to work with, at the very least I think
4 what the district court thought in saying that it was
5 premature to make an assessment is that we have to have
6 some period to assess what happens on the ground as a
7 consequence --

8 CHIEF JUSTICE ROBERTS: Is there any --

9 MR. SRINIVASAN: -- of this new funding
10 recipe.

11 CHIEF JUSTICE ROBERTS: Does -- then does
12 that stay true without regard to what is happening
13 economically to the State? In other words, the district
14 court can say: You've got to spend this much money on
15 this program, and I don't care what it means for jails,
16 roads, anything else, when there are profound changes in
17 economic circumstances of the sort everybody's
18 experiencing lately.

19 MR. SRINIVASAN: No, the -- the district --
20 the State would have to present that, Your Honor, and I
21 don't read the State to have done that so far. But the
22 State would have to make the argument that funding
23 constraints are in existence in a way that doesn't allow
24 us to -- to use one example -- to -- to put together an
25 optimal program, and so here's the program that we want

1 to put in place in --

2 JUSTICE SCALIA: Counsel, I --

3 MR. SRINIVASAN: -- jurisdictions.

4 JUSTICE SCALIA: I find it bizarre that we
5 are sitting here talking about what the whole State has
6 to do on the basis of one district which is concededly
7 the district that has most nonnative English speakers
8 and has been a problem district all along. And we are
9 saying whatever this district court says for -- for this
10 school district applies statewide. Now, that is
11 bizarre.

12 MR. SRINIVASAN: Well --

13 JUSTICE SCALIA: And the mere fact that the
14 State attorney general acquiesced in that kind -- kind
15 of a system at the outset, does that force us to still
16 accept at this time that whatever is -- is necessary for
17 Nogales is also necessary for the entire State?

18 MR. SRINIVASAN: Justice Scalia, I think
19 that that issue becomes largely an academic one for the
20 following reason: that the reason that the State
21 attorney general made the acknowledgment that he did is
22 that, under the Arizona State Constitution, funding
23 decisions don't vary from district to district. So
24 whatever funding menu is put into place in order to
25 achieve compliance with the EEOA with respect to Nogales

1 is going to be the same one that exists throughout the
2 State.

3 JUSTICE SCALIA: I'll let --

4 MR. SRINIVASAN: It's --

5 JUSTICE SCALIA: I'll let Arizona worry
6 about that. It's -- it's another matter to have a
7 district court decree that the whole State has to do
8 this thing. And whether -- whether it's done equally or
9 not would be a matter for the State courts to determine,
10 instead of for this district judge to determine, right?

11 MR. SRINIVASAN: Well, it could be, but I
12 don't think there's really much of a dispute that the
13 statewide funding measure doesn't really affect what the
14 State's going to do in this case, because --

15 JUSTICE KENNEDY: Well, it seems to me very
16 odd that -- assume you have a constitutional provision
17 which says funding must be equal in each district. Then
18 you find one district that's way behind, and that is,
19 we'll assume, has -- has been deficient in -- in
20 providing language education. You are saying that if
21 the court orders more money spent for that district, it
22 must automatically order money -- additional money for
23 every other district in the State?

24 MR. SRINIVASAN: No, absolutely not. Not --
25 certainly not in the abstract.

1 JUSTICE KENNEDY: But -- yes, but that seems
2 to me the necessary conclusion of your argument in the
3 answer you gave Justice Scalia.

4 MR. SRINIVASAN: I don't think it's the
5 necessary conclusion of my argument, Justice Kennedy. I
6 think it's a conclusion that rests on where we are in
7 this litigation in this particular context, given the
8 Arizona Constitution's uniformity clause. It's as a
9 consequence of that clause that this issue even arises.
10 And I think the attorney general --

11 JUSTICE KENNEDY: But, again, what you're --
12 you're saying that any time a district court in a single
13 district orders more money to remedy a constitutional
14 problem, that because of that clause it has to apply to
15 every other district. That just can't be.

16 MR. SRINIVASAN: Well, if the --

17 JUSTICE KENNEDY: And if -- and if it is,
18 then that is a very good reason for the district court
19 to cede its jurisdiction to the State authorities.

20 MR. SRINIVASAN: Well, if the litigation had
21 come up in a different way, Justice Kennedy, such that
22 it had always focused exclusively on what happened in
23 Nogales, including the funding aspect of the case, then
24 I think what would have been appropriate is that the
25 district court would have inquired about what funding

1 resources belong to Nogales in particular. And then
2 what would have happened by operation of State law would
3 be that, whatever the funding calculus was with respect
4 to Nogales, it would automatically apply across the
5 State because of the Arizona Constitution's uniformity
6 clause.

7 Now, in this case, the litigation -- the
8 complaint was assessed against the entire State, and the
9 attorney general accepted that, and I don't think at
10 this point in time we can revisit that, particularly
11 when it's largely an academic question given the
12 uniformity clause --

13 CHIEF JUSTICE ROBERTS: But I gather it's
14 often the case in institutional litigation of this sort
15 that the political figures, whether it's the governor or
16 the attorney general, can't go to the voters and say,
17 look, we should spend more money on this. So they go to
18 the district court judge and say, make us spend more
19 money on this. And they get the same result they'd
20 wanted in a non-democratic way, particularly when
21 there's a division, such as here the legislature doesn't
22 want to do something, and the governor or the attorney
23 general does.

24 So why should we put a lot of weight on what
25 the representation is when we are at least concerned

1 that it might be a -- I don't mean it in a pejorative
2 sense -- but a collusive piece of litigation?

3 MR. SRINIVASAN: Well, two points,
4 Mr. Chief Justice, and first -- and I don't mean to
5 quibble, but the attorney general did contest the
6 litigation at the outset. What happened is, after a
7 judgment was issued against the State, then I think
8 there was an acquiescence in the statewide nature of it.
9 But, for the --

10 CHIEF JUSTICE ROBERTS: Well, it's hard for
11 the attorney general to get funding from the legislature
12 for all he wants to do, and this is a way for him to get
13 it, to go to the legislature and say, look, you don't
14 have a choice.

15 MR. SRINIVASAN: Well, sure,
16 Mr. Chief Justice, but I think what the Court did in
17 both Rufo and Frew is it accommodated those concerns,
18 and it accommodated the interest in finality that comes
19 from judgments, and the interests in allowing a
20 different set of State officials to suggest new programs
21 to make that suggestion to the district court. And it
22 accommodated those in a way that requires a showing at
23 the outset that there has been a significant change in
24 facts or a significant change in law. And on --

25 CHIEF JUSTICE ROBERTS: Can I ask just a

1 question that was confusing to me? What standard for
2 changed circumstances do you understand the Ninth
3 Circuit to have applied?

4 MR. SRINIVASAN: The one that was outlined
5 by this Court in Rufo.

6 CHIEF JUSTICE ROBERTS: Which is?

7 MR. SRINIVASAN: A significant change in
8 facts or a significant change in law. And the --

9 CHIEF JUSTICE ROBERTS: I am looking at page
10 72a of the Ninth Circuit opinion, and the standard they
11 use there is radically changed, not significantly
12 changed.

13 MR. SRINIVASAN: Well, on page 49a they
14 invoke the precise wording of this Court, cite Rufo for
15 that proposition, and also --

16 CHIEF JUSTICE ROBERTS: So, if we have a --
17 if we are confused as to which standard they applied,
18 because at one point they say significantly changed and
19 at another point they say radically changed, what should
20 we do?

21 MR. SRINIVASAN: Well, I -- I would give
22 effect to the -- to the articulation of the standard in
23 the standard of review question section of the opinion.
24 Of course, you could remand if you felt that it was
25 necessary, but I think the reason why the Ninth Circuit

1 uses the language such as Your Honor found at 72a is
2 that it has to be considered in the context of the
3 nature of the violation and the nature of the relief
4 sought.

5 The violation was a systematic one; the
6 relief sought is a complete dissolution of the judgment
7 and the ensuing orders, and in that context I think it's
8 fair to say that what is significant is more significant
9 than what would be the case in -- for example, in Rufo,
10 where what was sought was a relatively modest
11 modification of the consent order concerning whether you
12 would have single bunking or double bunking.

13 Now, on the question of whether there is in
14 fact a significant change or significant change in facts
15 or significant change in law, on No Child Left Behind,
16 Justice Scalia, to return to the question that you
17 asked, the reason that No Child Left Behind in our view
18 doesn't displace the standard for EEOA is that
19 Petitioners' standard is that as long as the State has
20 an approved No Child Left Behind plan, which is true of
21 all 50 States, that they necessarily satisfy the EEOA.
22 And what that would mean is that even if a State didn't
23 implement their plan, even if a State didn't -- didn't
24 have accountability measures that it in fact followed,
25 that required school districts to achieve the annual

1 measurement of progress that would be laid out in the
2 plan -- notwithstanding all of that, a plaintiff would
3 lack authority to come into the court and -- and
4 litigate his private cause of action under the EEOA and
5 get a court order that requires the State to take
6 appropriate action --

7 JUSTICE SCALIA: Right, but --

8 MR. SRINIVASAN: -- simply because the State
9 will have had an approved plan.

10 JUSTICE SCALIA: I understand that. You
11 could get the plan approved and then not fund it. But
12 at least the additional funding demanded by the district
13 court should be whatever additional funding is necessary
14 to comply with the No Child Left Behind Act. Right?

15 MR. SRINIVASAN: I -- I don't think so.
16 Because --

17 JUSTICE SCALIA: Well, then -- then it's not
18 as simple as you made it.

19 MR. SRINIVASAN: Well -- well --

20 JUSTICE SCALIA: Of course, I agree with the
21 fact that if you get approved under the No Child Left
22 Behind Act and then don't fund it, of course that --
23 that won't satisfy your obligation. But if you have
24 gotten approved, the test for whether you are satisfying
25 your obligation should be how much money would it cost

1 to implement the program that you have gotten approved
2 under the No Child Left Behind Act.

3 MR. SRINIVASAN: The -- the No Child Left
4 Behind Act doesn't -- it doesn't approve a particular
5 program. What it imposes are voluntarily accepted
6 funding conditions, and that includes --

7 JUSTICE SCALIA: It doesn't approve
8 programs? I --

9 MR. SRINIVASAN: No --

10 JUSTICE SCALIA: I thought the States had to
11 submit a program.

12 MR. SRINIVASAN: What the EEOA concerns is
13 programs that are reasonably calculated to achieve --

14 JUSTICE SCALIA: Right.

15 MR. SRINIVASAN: -- overcoming language
16 barriers.

17 JUSTICE SCALIA: Right.

18 MR. SRINIVASAN: What No Child Left Behind
19 concerns if -- is if there is a testing program in place
20 that calls for certain improvements in testing over
21 time. As long as the plan describes the tests that will
22 be taken and the progress that will be achieved or
23 sought to be achieved over time, a plan will be
24 approved. Now, even if the State doesn't achieve the
25 plan -- the progress --

1 JUSTICE SCALIA: I see.

2 MR. SRINIVASAN: -- that's called for by No
3 Child Left Behind --

4 JUSTICE SCALIA: So you are saying you can't
5 calculate costs.

6 MR. SRINIVASAN: Right.

7 JUSTICE SCALIA: You cannot calculate costs
8 under the plan that's approved by the Secretary --

9 MR. SRINIVASAN: I --

10 JUSTICE SCALIA: -- because all the -- all
11 the plan is, is testing.

12 MR. SRINIVASAN: Right. It's about tests.

13 JUSTICE SCALIA: Okay.

14 MR. SRINIVASAN: And even if you don't make
15 the progress -- and if I could finish this one point,
16 Mr. Chief Justice. And it bears noting that in Nogales
17 the progress called for No Child Left Behind in fact
18 hasn't been made in the last 2 years, according to the
19 superintendent's Website. Even if you don't make that
20 progress, there's no way under Petitioners' approach to
21 vindicate the EEOA cause of action to obtain appropriate
22 action.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Saharsky.

1 ORAL ARGUMENT OF NICOLE A. SAHARSKY
2 ON BEHALF OF UNITED STATES,
3 AS AMICUS CURIAE,
4 SUPPORTING THE RESPONDENTS

5 MS. SAHARSKY: Mr. Chief Justice, and may it
6 please the Court:

7 It's important to recognize what Petitioners
8 asked for here at the Rule 60(b)(5) stage. That was
9 complete dissolution of the court's remedial orders. It
10 was not to just limit those orders to Nogales; it was
11 not to improve -- or to approve improvements in Nogales
12 as an interim measure. As a result, the burden was
13 on them to show either full compliance with the orders
14 the district court had entered or material changed
15 circumstances that made compliance unnecessary.

16 JUSTICE GINSBURG: But couldn't the district
17 court give them the relief to which they were entitled
18 even if it was less than what they sought?

19 MS. SAHARSKY: Certainly. But they didn't
20 demonstrate that -- entitlement to that relief either.
21 To the extent that we're talking about the question of
22 whether conditions had changed in Nogales that there was
23 no longer an ongoing violation of Federal law, the
24 district court held an 8-day evidentiary hearing, and it
25 made factual findings showing that the problems had not

1 ceased in Nogales.

2 And as you noted, Justice Ginsburg, this
3 changed circumstances argument that is now heavily
4 relied upon by Petitioners was not the primary thrust of
5 their argument before the district court.

6 The primary thrust of their argument was
7 that HB 2064, which is the State's scheme for ELL
8 education, had some serious -- would -- would satisfy
9 the judgment; and their other argument was that No Child
10 Left Behind completely pre-empts -- that was the
11 language they use -- "completely pre-empts" and renders
12 obsolete the EEOA.

13 CHIEF JUSTICE ROBERTS: Counsel, when you
14 were starting out, I heard you articulate a third
15 standard: materially changed. What is your
16 understanding of the standard applied by the Ninth
17 Circuit? Was it materially changed, significantly
18 changed, or radically changed?

19 MS. SAHARSKY: I understand it to be
20 significant change, which, I don't see "significant" and
21 "material" as being all that different. I think that
22 the --

23 CHIEF JUSTICE ROBERTS: Well, I don't
24 either, but I see both of them being different from
25 "radically changed."

1 MS. SAHARSKY: Again, I think if you look at
2 the Ninth Circuit's opinion, particularly where it
3 starts out with the standard of review, it cites this
4 Court's precedents in Rufo and Agostini; it talks about
5 the need for significant changed circumstances.

6 I understand that there are portions of the
7 Ninth Circuit's opinion that say -- that have the
8 "radical change" language. And, again, I -- I think
9 that that language is -- just reflects the arguments
10 that Petitioners were making, that they wanted complete
11 relief from these remedial orders and that, you know,
12 the underlying judgment here was a systematic violation.
13 I mean, it's --

14 JUSTICE KENNEDY: Did the district court on
15 -- on the 8-day hearing on remand make a finding that
16 its incremental funding determinations that it had made
17 earlier were an accurate way to measure compliance and
18 to insist on compliance under the new immersion program?

19 MS. SAHARSKY: If I understand your question
20 correctly, and please correct me if I don't, but the
21 district court considered two different arguments. The
22 first was under House Bill 2064, which considered to
23 have -- which continued to have this incremental
24 funding. It's that we have two problems with House Bill
25 2064, which were the 2-year cutoff and Federal funding

1 problem.

2 On the second question which -- the second
3 argument Petitioners made, which said everything is fine
4 in Nogales because we have money from other funds, the
5 district court said, no, there's -- there's been an
6 ongoing violation of Federal law; you haven't met your
7 burden of showing me that that violation ceased because
8 things aren't better in Nogales; students are still --

9 JUSTICE ALITO: Why does it matter that --
10 that there's -- why focus on incremental funding for ELL
11 programs exclusively? What difference does it make
12 where the money comes from -- where it comes from,
13 putting aside Federal money that can't be supplanted? I
14 just don't understand that.

15 MS. SAHARSKY: I think the reason the
16 district court was focused on that because that was
17 always the State's position that, in terms of the
18 statewide scheme, that that's how they were going to
19 fund ELL education. Now, if -- and so the State was
20 always, from 2000 up to the time of the district court's
21 Rule 60(b) hearing, going down this path whereby it
22 would put in place an ELL program and then give this
23 amount of funding to --

24 JUSTICE ALITO: Well, that may have been
25 their -- that may have been their position originally,

1 but at the time of the 60(b) hearing, what difference
2 does it make whether the money came from funds that were
3 designated for ELL program, or from general State funds,
4 or from county funds? What difference does it make
5 whether the money was taken from some other program that
6 the school was operating?

7 Suppose they fund -- they take the money for
8 the ELL programs from money that was previously used for
9 music instruction or art or gym or teaching German or
10 anything else. Now, those may all be bad things, but
11 what does that have to be with the EEOA?

12 MS. SAHARSKY: Well, the district court
13 could have found that the plan had changed and that
14 funding could come from -- from different places.
15 That's right. If the State had changed its plan or
16 that Nogales otherwise would have sufficient funding
17 from other circumstances, that -- or from other sources,
18 that would be one thing. But the district court found
19 that Nogales doesn't have that funding from other --
20 other sources. For example, it can't use the Federal
21 funding that it -- that the Petitioners claim could be
22 used to solve its problem under the EEOA. There are
23 specific conditions on Federal grant programs that --
24 that forbid that.

25 It also could not raise any significant

1 amounts of funding through county tax overrides, which
2 was another source the Petitioners had said would --
3 would provide sufficient funding.

4 So the question the district court had to
5 ask is: There has been an ongoing violation of Federal
6 law -- has that violation of Federal -- Federal law
7 ceased because the State has put in place, Nogales has
8 put in place programs that are reasonably calculated to
9 help these kids learn English?

10 And the district court said Nogales has
11 cobbled together these sources of funding, and it is
12 doing the best they can.

13 JUSTICE ALITO: But the fact that you keep
14 talking about the district court emphasizes my concern
15 about the decision of the Ninth Circuit, which is what
16 we are reviewing. And as I read the decision of the
17 Ninth Circuit, they focused exclusively on incremental
18 costs associated with ELL programs and the educational
19 funding model that the State had at that time.

20 MS. SAHARSKY: With respect, I don't think
21 that that was their exclusive focus. I understand that
22 it was a primary focus of that decision, and the reason
23 for that was because the primary argument --

24 JUSTICE ALITO: Well, they say. They were
25 required -- the Petitioners were required to demonstrate

1 either that there are no longer incremental costs
2 associated with ELL programs in Arizona or that
3 Arizona's funding model was so altered as to make
4 incremental costs irrelevant. That -- that's their
5 explanation of their holding, 60 -- 63a of the Speaker's
6 Appendix.

7 MS. SAHARSKY: That's right. And what I
8 understand that to mean is that they were required to
9 either show compliance with the judgment, which was that
10 they would put together a plan that funded ELL education
11 based on incremental costs, or that the State was going
12 to go down a different path and come up with the funding
13 some other way, and that would result in a program
14 reasonably calculated to help ELL students learn
15 English.

16 And the district court found that there were
17 neither, and the court of appeals found that there were
18 neither. And the court of appeals did go through the
19 alleged changed circumstances in Nogales and issued a
20 91-page opinion that talked about the significant
21 resource constraints that still exist in Nogales and the
22 persistent achievement gaps that still exist in Nogales.
23 So --

24 CHIEF JUSTICE ROBERTS: I still have trouble
25 with the idea of district courts ordering State

1 legislatures to fund it. Isn't the preferable approach
2 for the district court to say, you have a violation, you
3 have to fix it, and I'm going check to see if you fixed
4 it at particular intervals, and it's up to you, the
5 State, to determine how you are going to fix it?

6 And the State might change its mind. They
7 may start out by saying we have got all of this extra
8 money, and that's how we're going to fix it. Then
9 there's a budget crisis, of a kind that we are familiar
10 with, and he says we can't do the money, we are going to
11 do it some other way, and here's the way.

12 But that's kind of the judgment of the
13 State, not for the district court.

14 MS. SAHARSKY: And I think the district
15 court was appropriately deferential to the State
16 throughout this litigation. You'll note at the time of
17 the 2000 judgment that the district court didn't put any
18 remedial order in place. And that's because at the time
19 of trial the State said, look, we are going to put in
20 place an ELL program that everyone in the State can use
21 and figure out how much it costs, what works and what
22 doesn't. We are going to do a cost study. So please
23 let us do that cost study, and we'll come back to the
24 court. And the district court said fine. And 10 months
25 later that didn't happen.

1 Now, there was a change, as Petitioners
2 note, to a different theory of ELL education, Structured
3 English Immersion, and the court said, okay, do your
4 program based on Structured English Immersion, and just
5 tell me how much it costs, tell me how you'd rationally
6 fund it, and that will be fine. The district court here
7 did not want to be in the business of micromanaging
8 State education. Through this entire litigation, the
9 district court was --

10 CHIEF JUSTICE ROBERTS: Why does it order
11 then -- why did its order specify and be linked to the
12 termination of the legislative session, and say you have
13 there 12 days left, whatever it was, in the session, and
14 that's how many days you have to -- to enact this
15 budget?

16 MS. SAHARSKY: I think it's because the
17 State kept coming back to the district court and saying
18 that the legislature had -- had asked for this cost
19 study. There was an interim bill, House Bill 2010,
20 where the legislature said, we've put in place another
21 study that we are going to perform. And it's because
22 the State said -- constantly said the legislature is
23 going to do this cost study, figure out how much good
24 programs cost, the school -- the State board will be
25 involved, et cetera, that the district court entered its

1 orders looking to the time period in which it expected
2 action to occur. I mean, this happened over a 9-year
3 period.

4 The district court, to be clear -- I think
5 this is a very important point -- never said you need to
6 do any special kind of ELL program, bilingual,
7 Structured English Immersion, you need to have any
8 certain number of teachers -- nothing like that. And it
9 never said you need to put this certain amount of
10 funding in place, \$200, \$300 per student -- anything
11 like that.

12 And Petitioners at the Rule 60(b)(5) stage
13 faced a heavy burden to show if what they wanted to show
14 was that the State was now going to go down this new and
15 different path, because even at the time of the Rule
16 60(b)(5) hearing, the State was on the same path. It
17 had just passed House Bill 2064, which, just like at the
18 time of the 2000 judgment, said we are going to put a
19 statewide program in place for ELL education --

20 JUSTICE GINSBURG: But the district -- the
21 district judge said that that 2064 did not have enough.
22 It raised it to 450 or whatever. And the district court
23 said there are three things wrong with it: the 2 years;
24 using the Federal funds to -- to supplant, not
25 supplement; and that the \$450 figure wasn't enough.

1 And the only way that \$450 figure was going
2 to get changed was through legislation, right?

3 MS. SAHARSKY: Could I answer that?

4 I think the problem with the \$450 figure is
5 that the district court was never told what the State
6 was planning to buy with that, what that \$450 was for.
7 The State -- the district court just said to the State,
8 please tell me what your programs are going to do and
9 then approximately how much it costs to fund them. And
10 that 450 wasn't tied to any particular ELL programs.
11 That was the problem.

12 JUSTICE SCALIA: Ms. Saharsky, I have one --

13 MS. SAHARSKY: Oh, I'm sorry.

14 JUSTICE SCALIA: -- one late arriving
15 question. Do you think that the constitutional -- State
16 constitutional provision -- at least there has to be
17 equivalent funding in districts -- do you think that
18 would be called into play if the Federal Government
19 under a Federal program gave additional funds to a
20 particular district? Which I am sure it does. You
21 know, those districts that have Federal facilities
22 probably get additional -- additional money. Would --
23 would all the rest of -- under this constitutional
24 provision, would all the rest of the State have to belly
25 up to that -- to that same level?

1 MS. SAHARSKY: No, as I understand it --

2 JUSTICE SCALIA: I doubt it.

3 MS. SAHARSKY: -- when it's talking about a
4 uniform --

5 JUSTICE SCALIA: Yes.

6 MS. SAHARSKY: -- and equal amount, it's
7 talking about the amount that the State --

8 JUSTICE SCALIA: That the State --

9 MS. SAHARSKY: -- gives to the school
10 districts. It's not with respect to any Federal funding
11 from other sources.

12 JUSTICE SCALIA: Well, if Federal funding
13 doesn't count, why would a Federal decree applicable
14 only to a particular school district count?

15 MS. SAHARSKY: I think that the idea was
16 that there needed to be -- the State determined that
17 there needed to be -- it was going to solve the problem
18 statewide, not only because of the concern under the
19 State constitution, that it would provide for all ELL
20 students. And it was not that it would provide the same
21 amount to each school district, but just the same amount
22 per ELL student. The -- the State had decided that it
23 was going to fill that responsibility because -- both
24 because of the constitution and because it's responsible
25 for supervising education statewide.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MS. SAHARSKY: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Starr, you have
4 3 minutes.

5 REBUTTAL ARGUMENT OF KENNETH W. STARR

6 ON BEHALF OF THE PETITIONERS

7 MR. STARR: Thank you, Mr. Chief Justice.

8 JUSTICE KENNEDY: It seems to me, Mr. Starr,
9 based on this last argument, that it actually is in your
10 favor if the order of the court as to one district
11 automatically requires additional expenditure for every
12 other district. That's simply one more measure that the
13 court should use in -- in finding an alternate remedy.

14 MR. STARR: Yes, Your Honor. The State
15 funding remedy here is extraordinarily intrusive and
16 overreaching. It is something that has not been done
17 under the EEOA ever, and certainly the No Child Left
18 Behind provision should inform now this particular
19 remedy. The remedy was originally, of course, designed
20 to address the situation in Nogales, but it was
21 expanded --

22 JUSTICE SCALIA: There's no content to the
23 Equal Child Left -- No Child Left Behind. There's no
24 content to it. All it requires is testing.

25 MR. STARR: It's part --

1 JUSTICE SCALIA: You can't say how much it's
2 going to cost.

3 MR. STARR: But, Your Honor, there is a very
4 elaborate plan that is submitted and then a
5 determination is made by the Federal Government about
6 funds under Title I and Title III.

7 But here's our fundamental submission: The
8 Ninth Circuit simply applied the wrong 60(b) standard.
9 It, in fact, used this remarkable language, but it also
10 -- of "radical change" -- but it also gave undue weight
11 -- it said it 10 times -- to the fact that the original
12 judgment was unappealed, and then it simply did not pay
13 heed to the incredibly intrusive nature of a statewide
14 funding remedy in light of the fact that we can now look
15 at what has happened in Nogales. We see the changes
16 that have, in fact, been there.

17 And certainly the EEOA by its design, in
18 section 1712 of EEOA, makes it very clear that the
19 remedial reach of the EEOA is quite limited. It's
20 limited to particular circumstances. Here the EEOA has
21 been transmogrified to apply statewide. That has not
22 been done before. It should not have been done in the
23 first instance but certainly in light of the changed
24 circumstances.

25 And the changed circumstances,

1 Justice Ginsburg, go back to Structured English
2 Immersion. They did not begin with the passage of HB
3 2064. Structured English immersion came in, in the year
4 2000. That is why the legislature then came in and put
5 these facts in evidence before the district court, which
6 made no factual findings statewide at all, ever. There
7 are no statewide factual findings in this record
8 whatsoever, none. And therefore a statewide funding
9 remedy should not have been permitted. 60(b)(5) relief
10 should be granted.

11 I thank the Court.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 12:09 p.m., the case in the
15 above-entitled matter was submitted.)

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