

Nos. 08-289 & 08-294

IN THE
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA
PUBLIC INSTRUCTION, SPEAKER OF THE ARIZONA
HOUSE OF REPRESENTATIVES AND PRESIDENT

Petitioners,

v.

Respondents.

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Remade in America: The Newest Immigrants

IN THE
Supreme Court of the United States

Nos. 08-289 & 08-294

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA
PUBLIC INSTRUCTION, SPEAKER OF THE ARIZONA
HOUSE OF REPRESENTATIVES AND DEPUTY

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondent.

The National School Boards Association ("NSBA")

is a federation of state associations of school boards

from throughout the United States the Hawai'i

State Board of Education and the local school boards

The Arizona Education Association (“AEA”) represents more than 30,000 public school educators and education support professionals throughout Arizona. AEA members include teachers, counselors, speech pathologists, and student teachers.

NSBA and the other *amici* regularly represent their members’ interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving issues of importance to educators. See e.g. *Fitzgerald v.*

Barnstable Sch. Comm., 129 S. Ct. 788 (2009); *Forest*

Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 987 (2009) (Case No. 08-305); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Morse v. Frederick*, 551 U.S. 393 (2007); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

The education of English language learners (“ELLs”) is one of the most important issues currently faced by *amici*. The United States has recently experienced the “greatest surge in immigration since the early 20th century.” *Remade in America: The Newest Immigrants and Their Impact*, N.Y. Times, March 15, 2009, at A16. As a result, there are more than 5 million students in the Nation’s public schools who are non-native English

State of California, Department of Education

Programs and Data Fiscal Year 2007, at i (Apr. 2008). Moreover, as immigration patterns have

changed in the last decade, school districts throughout the Nation in communities that previously did not have significant numbers of

acquisition are vital to providing these students an equal opportunity to learn. The State of Arizona's persistent failure to provide even minimally adequate funding and support for the education of English language learners violates the EEOA. The

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

have meaningful and equal access to the educational program offered. Pet. App. 97a.

The court of appeals also rejected Petitioners' novel theory that the No Child Left Behind Act of 2001 ("NCLB"), Pub. L. No.107-110, 115 Stat. 1425, eliminated the students' right to equal education.

the past five decades to ensure equal educational opportunities. This special and longstanding role includes ensuring non-discriminatory treatment for minority groups, including language minority students. It is well-settled, moreover, that judicial remedies for constitutional and federal statutory violations may affect the manner in which state and local governments manage and fund public education systems. With ELL populations growing in more states and school districts nationwide, this would be a particularly inopportune time for the Court to abdicate its crucial responsibility in this regard.

Petitioners attempt to evade the District Court's clearly correct factual finding that Arizona fails to provide local school districts with the resources

cloud the issue: Arizona's funding failures violate the EEOA.

ARIZONA

**I. ARIZONA'S INADEQUATE FUNDING
OF EDUCATIONAL PROGRAMS FOR**

While Arizona adopted a highly controversial method of instruction when it passed H.B. 2064 in 2006, that is the State's prerogative under *Castaneda*, 648 F.2d at 1009. SEI is now the State's

latitude in choosing the programs and techniques.”
Castaneda, 648 F.2d at 1009.

The obligations of states and school districts under
the EEOA, however, do not stop with the mere
selection of an approved Title III program to be used

At the eight-day hearing held by the District Court, five different Arizona school districts provided

Arizona also conducted its own studies in 2004, relying in part on panels of State and national experts. The national expert panel recommended a

3. In addition, Arizona's two-year limit on ELL-funding also is arbitrary and capricious because most ELL students need more than two years to achieve English proficiency, a fact that is uncontestable on this record. All of Arizona's per-pupil ELL funding stops once a student has been classified as an ELL

present study of six *Asinara* school districts found

requests for State ELL funding by a percentage of the federal funding they receive. *See* Ariz. Rev. Stat. §§ 15-756.01(I)(1)-(3), 15-756.11(E). Under federal law, however, even if a school district does or can use some federal money for ELL programs, the State cannot legally reduce its funding of ELL instruction based on the federal funds. *See, e.g.*, 20 U.S.C. § 7902. During the District Court’s evidentiary hearing, the State’s own expert, a 29-year veteran of the United States Department of Education, testified that he had “never seen such a blatant violation” of federal anti-supplanting laws. Pet. App. 106a.

B. Educational Research Supports The

Ninth Circuit’s Determination That Arizona’s ELL Students Receive

Second, Petitioners' argument is also inconsistent

addresses the unique instructional needs of ELL students. Finally, even if general educational theory had changed and it was established that appropriate educational resources make no difference in teaching

Hundreds of additional studies also have demonstrated the effects of school-system inputs

(such as additional funding) on school-system

Janet S. Hansen, eds., *Making Money Matter: Financing America's Schools* 140-141 (Nat'l Research Council 1999). Petitioners, however, rely on the work of a single economist, Eric Hanushek, as educational gospel, misusing Hanushek's work to argue that there is no point in providing additional

Student Achievement and Adult Success at 9, 15
(Burtless, ed. 1996).

Among other critiques, scholars have pointed out

inaccurate proxies when attempting to understand,
for example, the importance of class size. *Id.*; see
also Ladd, *Making Money Matter*, *supra*, at 142-143.
Those scholars who have corrected for these errors

Statement of Sen. Kennedy, Sen. Hearing 107-479
Before the Sen. Comm. on Health, Education, Labor,
& Pensions at 9 (May 23, 2002) (referring to NCLB).

2. Even if there were some consensus that,
generally, educational resources do not matter, it
would be irrelevant to this case. Here, the evidence

of general theories of education funding provides no basis for disturbing this finding.

with ample discretion in crafting special programs

for ELL students. 342 F.3d at 1000 (affirming).

local school districts is appropriately broad.

In examining “the soundness of the educational theory” adopted by a state or school district, federal courts are not concerned with “discerning the

request rather than to obstruct local control. The

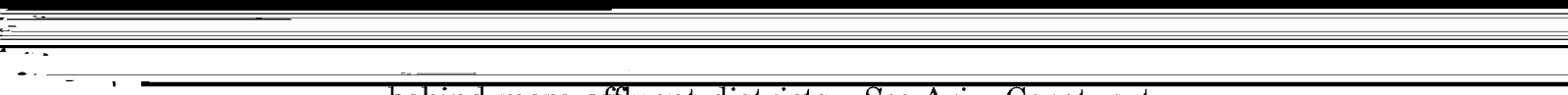
leave state and local educational authorities a

educational excellence.’” *Milliken* 418 U.S. at 742.
As residents of the communities they serve, school

The District Court did nothing more than require Arizona to provide local districts with the means of effectively implementing the method of ELL instruction mandated by the State itself. Moreover, ~~not only did the District Court defer to Arizona's~~



chosen method of ELL instruction, but it also tailored its limited remedy to fit the overall education funding scheme adopted by the State. For example, Arizona's Constitution requires a system for equalizing school funding so that local school ~~districts with lower tax bases do not fall too far~~



~~behind more affluent districts. See Ariz. Const. art.~~

very low overall education funding compared to other states.⁹

The inadequacy of resources to meet the needs of

facing the State's local school districts. Speaker

while Petitioners attempt to drape themselves in the honorable mantle of “local control,” they not only have taken positions directly contrary to the interests of locally elected school boards throughout

representative of the State’s interests.

C. The Federal Courts Have An Important Role In Protecting Meaningful Local Control.

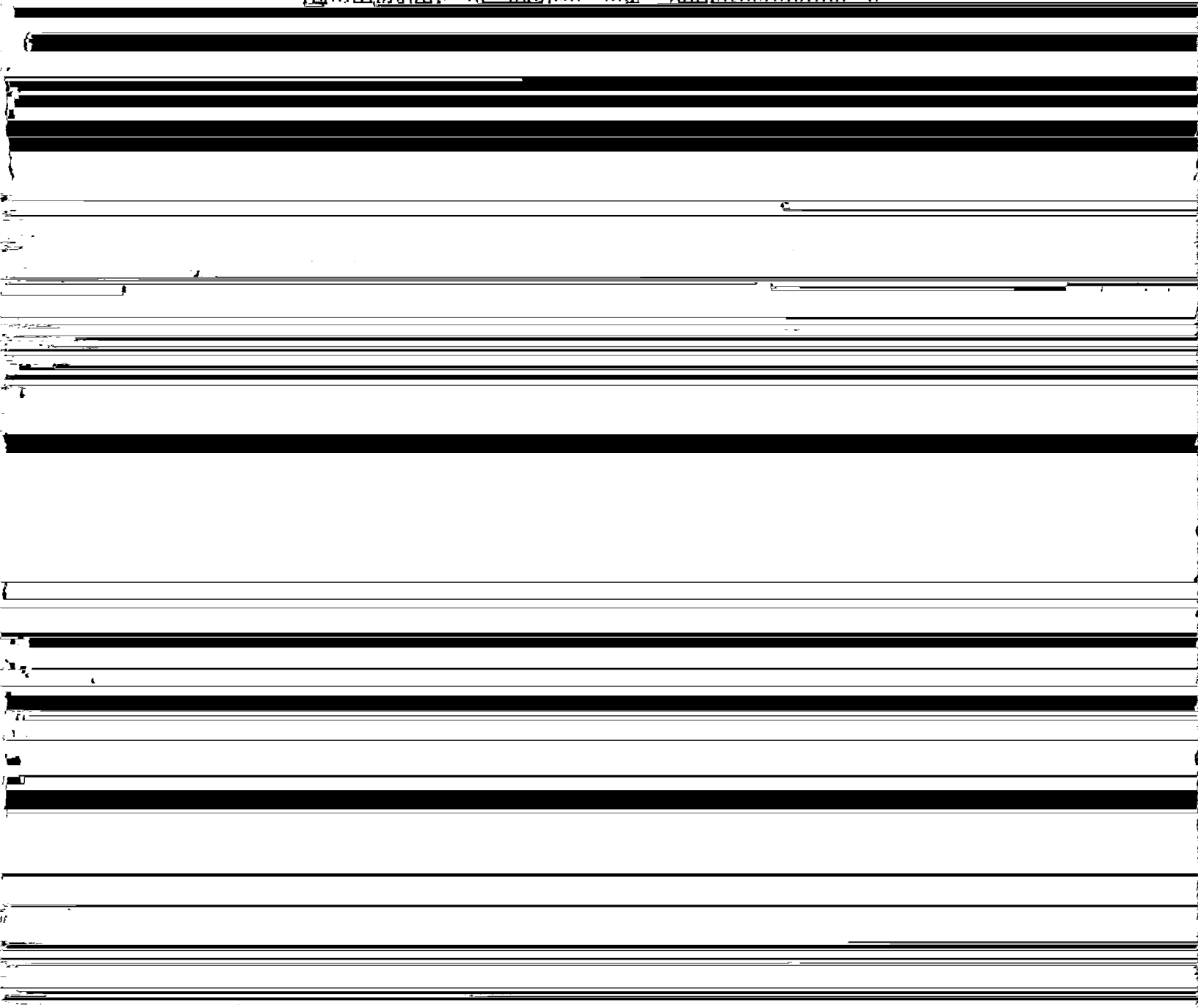
While state and local authorities have primary

authority over education funding decisions as well as educational policies, Petitioners are wrong to suggest that federal courts are powerless to ensure effective

~~remedies for constitutional violations~~

discrimination, a public school system in Prince Edward County, like that operated in other counties in Virginia. [*Id.* at 233.]

Similarly, in *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court again upheld the power of the federal district courts to impose funding obligations on state and local authorities: "Federal courts [may] enjoin state officials to conform their conduct to requirements of federal law notwithstanding a



enable them to participate in the instructional program of the district”).

To ensure that “all children enrolled in public schools are entitled to equal educational

and local schools to meet "objective, measurable
~~student performance standards" (NCLB's original~~

purpose is to allow the federal government to
 measure the effectiveness of its investment in
 education and provide some sanctions to promote
 accountability.

“annual measurable achievement objectives * * *
 includ[ing] * * *making adequate yearly progress for
 limited English proficient children.” 20 U.S.C.

§§ 6821-26, 6842. As the court below aptly
 articulated, “this means annual improvement plans

U.S. at 566. To prevent such meaningless and unintelligible educational experiences, numerous courts have recognized that the EEOA and *Lau* require school districts to provide special programs for ELL students that afford them the opportunity for meaningful participation in the school's

must be (1) based on sound educational theory (2)

passed to strengthen the Government's hand" in ensuring increased accountability for the educational outcomes for ELL students. *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 133-134 (2003).

Congress presumably is well aware of "the general rule that records, by implication, are disclosed"

Hagen v. Utah 510 U.S. 399, 416 (1994), yet it gave absolutely no indication that it intended to reveal the

Nothing in the NCLB undermines, abrogates, or changes the legal obligation under the EEOA to take affirmative steps to ensure equal access for all students, including ELL students. The EEOA is

[REDACTED]

concerned with the current rights of individual students; NCLB is concerned with ensuring gradual improvement over time at the school and district level. Pet. App. 75a. As the court below aptly recognized, these two statutes work together to ensure that “[a]n individual student whose needs are not being met under the EEOA need not wait for help just because, year after year, his school as a whole makes ‘adequate yearly progress’ towards improving academic achievement overall, including for ELL students.” *Id.*

**C. Petitioners’ Bizarre Interpretation Of
NCLB Would Undermine The EEOA**

[REDACTED]

adequate yearly progress the *individual* student

abrogates the rights of ELL students protected by
the EEOA because NCLB requires states and school

~~districts to adopt the same standards for all students~~

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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