

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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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	KENNETH W. STARR, ESQ.	
4	On behalf of the Petitioners	4
5	SRI SRINIVASAN, ESQ.	
6	On behalf of the Respondents	28
7	NICOLE A. SAHARSKY, ESQ.	
8	On behalf of the United States, as amicus	
9	curiae, supporting the Respondents	49
10	REBUTTAL ARGUMENT OF	
11	KENNETH W. STARR, ESQ.	
12	On behalf of the Petitioners	61
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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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 -- 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 that, I take it. The district said, you've got to do

1 something. This is our plan.

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

9 MR. STARR: You are correct.

10 JUSTICE SOUTER: Okay.

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

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

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

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

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

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

23 JUSTICE BREYER: Nogales was doing great? I
24 mean, I asked my clerk to go get some figures out of the
25 record and she says in 2008 in the sixth grade, just to

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

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

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

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

19 MR. STARR: But the point is the -- the exam
20 that you should look at is the AZELA exam.

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

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

3 JUSTICE SCALIA: If you can't answer that, I
4 think Justice Breyer can. But I would like to know what
5 comparison --

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

8 (Laughter.)

9 JUSTICE SCALIA: I don't. That's -- that's
10 exactly true. But --

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

13 MR. STARR: Thank you.

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

20 And then if you go to the superintendent's
21 Petition Appendix, you will see -- this is the relevant
22 information under No Child Left Behind, which is one of
23 the changed circumstances -- the Nogales students are,
24 in fact, doing better than across the State. The key is
25 to measure the progress that has, in fact, been made and

1 that is not disputed. Everyone agrees.

2 CHIEF JUSTICE ROBERTS: Well, I still don't
3 have an answer to Justice Breyer's -- I guess
4 Justice Scalia's question following up on Justice
5 Breyer's. What are the parameters or the -- the data
6 with respect to the figures Justice Breyer gave you?

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

15 CHIEF JUSTICE ROBERTS: So the answer is
16 that Justice Breyer's figures are correct with respect
17 to the appropriate bases of children. You are just
18 saying that you want to use a different test than the
19 one that he was quoting?

20 MR. STARR: Well, again, my quarrel with his
21 figures had to do with the nature of the test being
22 exam. There are different tests being administered.

23 CHIEF JUSTICE ROBERTS: Right. The figures
24 are accurate. You just think a different test should be
25 used?

1 MR. STARR: That one shouldn't take too
2 seriously a test that is --

3 JUSTICE BREYER: All right. Let's take the
4 one you mentioned. Let's take the one you mention. The
5 one you mentioned, I take it the student academic
6 achievement in mathematics, which is something called
7 the AYP guidelines test, they are for high school, which
8 you mentioned. It has -- I think it's 2008, maybe it's
9 2007 -- we have limited English proficient students,
10 this is passing their test, 22.4 percent of the English
11 learners are at students scoring at or above proficient.
12 The overall rate is 68 percent. So it seems like about
13 a third.

14 Now, if you look at the reading language
15 arts, the average is 73.5. Limited English proficient
16 is 15.4. And that's quite a difference, 75 percent as
17 to 15.4, in the high schools, on the tests that you have
18 mentioned.

19 So I just say -- my only point is that we
20 have a couple of findings here; you are right, they have
21 made progress, but they are not quite home yet. And I
22 would say that, looking at this record, it seems to
23 suggest that.

24 MR. STARR: But not home yet, Your Honor,
25 is, in fact, the key question. What is home? And that

1 brings us to --

2 JUSTICE BREYER: Let's do another one. What
3 they started out in the year 2000 is they said one
4 problem with this State is we don't know what it costs
5 the average -- the increased program. They haven't done
6 a good study to tell what it costs. But we think it's
7 somewhere around \$1500, maybe it's \$1300, maybe it's
8 \$1400 per student. And as of this very moment, the
9 State is providing 3 to \$400, leaving it up to the
10 school district to find the rest of the money, which it
11 has to take from other things like English, or -- is
12 that right?

13 MR. STARR: No, that is incorrect, Your
14 Honor. First of all, there has been a substantial
15 increase in funding, which we supply and summarize at
16 pages 22 and 23 of the opening brief. And you will see
17 throughout the testimony -- the testimony is absolutely
18 clear, including the plaintiffs', the Respondents', key
19 witness, Dr. Zumudio, agreed that there has, in fact,
20 been substantial progress, indeed there is an effective
21 program in place.

22 And so our fundamental quarrel with the
23 approach of the district court is it blinded itself to
24 the significant changes structurally as well as the
25 progress that had been made and just said it doesn't

1 matter because this is all about funding, and that is
2 not true.

3 JUSTICE GINSBURG: Mr. Starr, can I take you
4 back to the beginning of the 60(b) motion, because you
5 seem to have shifted ground? The 60(b) motion as
6 presented to the district court said that this new law
7 passed by the Arizona legislature, 2064 -- "2064 creates
8 a plan for adequate funding of programs for the ELL
9 students."

10 That was the whole basis for the 60(b)
11 motion, whether the new law was supplied adequate
12 funding, and the Speaker of the House and the Senate
13 intervened specifically for the purpose of defending the
14 new law. Your current argument is detached from the new
15 law.

16 MR. STARR: It is not detached, but our
17 submission is, in fact, that we look to what the
18 district court had before it in the 60(b)(5) hearing.
19 It had an eight-day evidentiary hearing. It was not
20 simply legal argument over that particular bill. And
21 that evidence --

22 JUSTICE GINSBURG: But that was the basis
23 for the 64(b) motion, that 2064 provided adequate
24 funding.

25 MR. STARR: Your Honor, there were a variety

1 of points made, and the 60(b) submission was not limited
2 to this new bill. Rather, it was a totality of the
3 circumstances, here are the changed circumstances.
4 That's what the whole eight-day trial was about. The
5 eight-day trial was about what are the new funding
6 mechanisms, what is happening on the ground in Nogales.
7 And as I say, even the Respondents' own key witness said
8 that there is an effective ELL program now in place, and
9 that, in fact, progress --

10 JUSTICE GINSBURG: Do we -- do we have
11 the -- the intervention application in the papers before
12 us and the 60(b) motion?

13 MR. STARR: Yes, you do -- you do have it
14 before you. And there is no question that the Speaker
15 and the President were, in fact, submitting to the
16 district court HB 2064 as part of the submission.

17 My point is the evidentiary hearing went
18 much more broadly and here's the key: Under the EEOA,
19 all that is required under the Castaneda framework is,
20 in fact, good faith efforts toward compliance. The
21 questions that are flowing suggest there has been no
22 good faith effort at compliance, and there has been.
23 That's what the eight-day hearing was all about. That's
24 one of the things that Superintendent Cooper testified
25 to and discredited.

1 JUSTICE SOUTER: Well, I -- help me out
2 then. I thought the -- the issue was not whether there
3 had been any good faith attempt at compliance, but
4 whether there were two deficiencies under the scheme,
5 under the -- I forget the statute -- the new bill. One
6 deficiency was that it limited the funding for any given
7 student subject to -- to ELL -- to two-year funding
8 when, in fact, the evidence showed that you couldn't get
9 a kid up to par with two years of education.

10 The second deficiency was that the -- that
11 the State funds -- strike that, I'm sorry -- that
12 Federal funds were being used to supplant what should
13 have been a State responsibility rather than merely
14 supplementing. I take it that is simply a matter of
15 degree, but that was the problem.

16 I thought those were the two problems,
17 two-year funding, supplantation. Am I -- am I wrong?
18 So there was no -- my point is that there was no denial
19 that some good faith efforts had been made. The finding
20 was that there were two deficiencies and these were the
21 two deficiencies; is that correct?

22 MR. STARR: As -- that is correct. But as
23 to the latter with respect to the Federal funds,
24 supplant versus supplement, all that we have is -- and
25 this is an issue that is entrusted to the Department of

1 Education. It's not trusted to the district courts
2 under No Child Left Behind. This is an apparatus that
3 Congress has determined there should no longer be -- not
4 that EEOA doesn't -- it has its beachhead, it has its
5 place, but now No Child Left Behind has a very elaborate
6 process including a plan, and Arizona is in compliance
7 with that plan.

8 The point is the HB 2064 points completely
9 blinded the district court to what was actually before
10 him, and we think that that is wrong.

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

14 MR. STARR: There is no question that there
15 is disagreement within the house with respect to that.
16 But, Your Honor, there is no authority on the part of a
17 Federal court under No Child Left Behind to render this
18 kind of interpretation. And it has blinded us --
19 ultimately, it is irrelevant. It has blinded us to the
20 issue --

21 JUSTICE GINSBURG: Well, what is it -- No
22 Child Left Behind I thought has a specific saving
23 clause, "Nothing in this part shall be construed in a
24 manner inconsistent with any Federal law guaranteeing a
25 civil right." And the EEOA is such a law.

1 MR. STARR: That is correct. The point that
2 I am making is the interpretation of supplemental versus
3 supplant is in fact one that is entrusted to the
4 Department of Education. We only have a letter. That's
5 not final agency action. But I want to return to what
6 we think is the key in a 60(b)(5) hearing.

7 What is key in 60(b)(5) is to listen to the
8 changed circumstances. What are the changed
9 circumstances? And the Court blinded itself to these
10 very important changes in terms of State funding --

11 JUSTICE BREYER: What is the one State
12 funding? Because I looked at your brief, page 22 to 23,
13 and if I understand it correctly it says that the
14 educational expenditures, that is to say monies,
15 increased in this Nogales and USD --

16 MR. STARR: Yes.

17 JUSTICE BREYER: -- maintenance and
18 operation budget, by 30 percent. Well, I'm sure they
19 did. But that's I take it the entire maintenance and
20 operation budget. The numbers I had -- and I am quite
21 interested to know if they are wrong -- the numbers that
22 I have is that the only survey they've done across the
23 State, or the most recent one, says that the English
24 language instructional costs range between 1570 and
25 \$3300 per pupil. And then if you look at the amount the

1 State provides outside of the reading, writing and
2 arithmetic, which they provide, et cetera, for all
3 students, what they provide is -- currently it's \$340,
4 and if that law had gone into effect, 2064, it would
5 have been \$450. Now, are those numbers totally wrong?

6 MR. STARR: The numbers are not wrong, Your
7 Honor, but the numbers are in fact not the pivotal
8 point. The EEOA is not a funding statute, and let me
9 come to the specific point of cost studies. The State
10 of Arizona did in fact seek to undertake a statewide
11 cost study. And our -- one of our fundamental problems
12 here in this case is no longer about Nogales. It has
13 been expanded. Even though it was a class action
14 limited to Nogales, it has been expanded to include an
15 intrusion into the prerogatives of the State.

16 JUSTICE GINSBURG: That was the fault of the
17 Arizona attorney general, who told the court: You
18 cannot deal with Nogales alone because under the Arizona
19 Constitution the -- all -- all the school districts have
20 to be treated equally. So, it wasn't the plaintiffs
21 that initiated that move to make it statewide; it was in
22 fact the Arizona attorney general.

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

25 JUSTICE SOUTER: Well, it should -- has the

1 state law changed?

2 MR. STARR: What has changed --

3 JUSTICE SOUTER: I mean, the reason -- the
4 reason for getting into this is that the State required
5 it. Has the State law changed?

6 MR. STARR: The State law does not require
7 specific earmarked funding, district by district, and
8 here's the key --

9 JUSTICE SCALIA: I assume it's --

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

12 JUSTICE SCALIA: I also assume the State law
13 does not require that any -- any judicial decree with
14 respect to a particular district be expanded to the
15 whole State. It seems to me you could comply with the
16 State Constitution. If and when a judgment is rendered
17 as to the district, it would then be, under the State
18 Constitution, the responsibility of the State executive
19 to make sure that the other -- other districts are
20 equalized.

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

25 MR. STARR: It's why the district

1 court should have been on guard --

2 JUSTICE SOUTER: What is the district court
3 supposed to do? The attorney general for the State
4 comes in and says, do it this way. It seems to me that
5 the State has no standing later on to say: Oh, gee, the
6 district court should have said: Sorry, Mr. Attorney
7 General; you don't know anything about your State law;
8 we won't do it this way.

9 MR. STARR: Your Honor, we are not trying to
10 relitigate the original judgment. We quarrel with it,
11 but that's not why we're here. We're here --

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

14 MR. STARR: It was --

15 JUSTICE SCALIA: The State attorney general
16 wanted the decree.

17 MR. STARR: There is -- there is no question
18 that there was a division of the opinion within the
19 State and that in fact the attorney general was
20 essentially siding with the plaintiffs in their
21 litigation. There is now a very different perspective
22 and you have that before you, that the governor who
23 controls the litigation in the State is the chief
24 executive of the State in terms of determining what the
25 State's position is --

1 JUSTICE KENNEDY: Could you tell me what
2 your submission is with respect to the error you see in
3 the findings and the order made after the eight-day
4 hearing? First, are you saying that after No Child Left
5 Behind that the duty of the State with respect to
6 educating the students who have a different language was
7 less onerous?

8 MR. STARR: No, it's not less onerous, but
9 there is a different methodology and a different
10 approach.

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

14 MR. STARR: A funding remedy is in fact
15 inappropriate presumptively statewide. That is our key
16 submission, because of the variation in costs, district
17 by district.

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

20 MR. STARR: Not in terms of changed
21 circumstances, because of what has in fact happened on
22 the ground. Namely, one of the thing when we go back to
23 the original order --

24 CHIEF JUSTICE ROBERTS: You lost me.

25 JUSTICE KENNEDY: Are you saying -- are you

1 saying that the order the district court gave with
2 respect just to Nogales --

3 MR. STARR: Yes.

4 JUSTICE KENNEDY: -- is inappropriate
5 because it used a funding remedy or a funding measure of
6 compliance when it should have used blank, and then fill
7 in the blank?

8 MR. STARR: Yes. It should have simply
9 determined under Castaneda the three-part test. It
10 should not have said the EEOA requires a particular
11 level of funding. That's precisely what Castaneda --

12 JUSTICE SOUTER: But that isn't what it -- I
13 don't understand that it has ever said that. I thought
14 the funding point was basically this: You, Nogales,
15 have come up with plan A. You have come up with funding
16 B. Funding B is not enough money to fund plan A. It is
17 your plan, you've got to fund your plan.

18 That is not saying that the Federal statute
19 requires a particular level of funding. It's not saying
20 that the district court can take over the responsibility
21 of deciding what is appropriate funding in a school
22 district. It's simply saying, "If you choose plan A,
23 you have got to pay for plan A."

24 MR. STARR: And --

25 JUSTICE SOUTER: Am I -- am I wrong? Did it

1 ever go beyond that?

2 MR. STARR: It did go beyond that in this
3 sense. It did not in fact determine whether in fact
4 there was an effective program in place. That's the
5 oddity about this case --

6 JUSTICE SOUTER: In other words, it should
7 have said: Before I decide whether your funding for
8 plan A is good enough, I have got to decide whether plan
9 A itself is worth anything? I mean, I have got to
10 evaluate plan A?

11 MR. STARR: No. The difficulty is seeking
12 to enforce a specific funding order, and particularly
13 statewide, which intrudes --

14 JUSTICE SOUTER: All right. Let's go back
15 to Justice Kennedy's point a moment ago. Let's just
16 talk about Nogales for a minute. With respect to plan
17 A, that was Nogales' plan. And the district court said:
18 You can't fund that plan with the amount of money that
19 you have appropriated. Did the district court go beyond
20 that with respect to Nogales?

21 MR. STARR: The district court failed to
22 note that plan A had changed. There was no longer a
23 plan A. It was strategic English immersion which has an
24 entirely different methodology. And what it also --

25 JUSTICE GINSBURG: But that came in in 2000

1 and this case was going on for, what, eight, nine years
2 before there was ever an argument. I mean in all of
3 these orders that were not appealed, don't those
4 judgments, unappealed judgments, settle anything?

5 MR. STARR: Of -- of course. They let that
6 judgment stand during that period of time. But the
7 whole purpose of 60(b)(5) is relief from finality. It's
8 a --

9 JUSTICE SCALIA: Yes, but didn't -- didn't
10 the court -- you say plan A is no longer in effect; they
11 have a new plan under the No Child Left Behind Act. But
12 didn't the -- didn't the district court find that the
13 funding for that plan is inadequate, for the two reasons
14 that were mentioned earlier?

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

1 Inputs -- now we look at -- we test, we
2 determine what progress is being made and, we are
3 requiring progress to be made.

4 JUSTICE GINSBURG: I didn't think there was
5 in the district judge's declaratory judgment, spend this
6 much on teachers aides, that much on the other. It was:
7 You need a plan and you have to figure out how much it
8 costs, and then you have to appropriate money that
9 matches the cost.

10 But the district court -- I may be wrong
11 about this, but I thought that the original declaratory
12 judgment didn't try to tell them what the components of
13 that plan had to be.

14 MR. STARR: You are precisely right, but the
15 point I'm making is that the objects of that underlying
16 decree shifted by virtue of the new methodology that was
17 in fact adequately funded through a whole variety of
18 funds. The funds that Justice Breyer has referred to
19 are only part of the basket of funds that have been made
20 available.

21 JUSTICE SOUTER: No. But doesn't it --
22 doesn't it -- don't we come back to Justice Scalia's
23 question of a moment ago? Even with the -- the changed
24 plan to immersion, isn't the finding that two years of
25 funding per child is not enough? And you are

1 supplanting, not supplementing. Isn't that still the
2 problem?

3 MR. STARR: We believe not. We believe that
4 ultimately those two issues are irrelevant to the issue
5 that is before the Court.

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

8 MR. STARR: Wrongly, because that's --
9 that's part of our quarrel, THAT the district court
10 simply focused on these two elements of HB 2064, and
11 blinded itself to the evidence --

12 JUSTICE BREYER: There is a minor thing that
13 I -- I think -- I'm not sure that Justice Ginsburg said.
14 I thought that the funding order was not fund the plan
15 you come up with; but rather, come up with a funding
16 plan that bears a rational relationship to -- to the
17 plan you come up with. So is that right?

18 MR. STARR: That is correct, and that is --

19 JUSTICE BREYER: All right. And now the
20 district court is at considerable remove. He says they
21 have not yet come up with a study and a plan that seems
22 satisfactory, and they haven't shown how the funding is
23 rational in relation to the plan that they haven't fully
24 developed, though they've made progress. That's where
25 we are -- is that where we are?

1 MR. STARR: Three brief points. On the
2 study, the State did undertake a study, and this is in
3 the record. And the National Conference of State
4 Legislators said: We throw up our hands because we
5 can't do this statewide. I would invite the Court to
6 refocus on Nogales as a district versus statewide.

7 What was entered here in this order, which
8 makes it so extraordinary, is that the entire State
9 funding mechanism has been interfered with by the order.
10 This case started out in Nogales. And so the statewide
11 study was in fact undertaken. But we could not do it.
12 The National Conference of State Legislatures said: We
13 throw up our hands. We can do a local study, and it was
14 done. And if the Court refocuses on the various
15 tranches of funding, including in Nogales itself and
16 from the State, one will see that there has been a very
17 substantial increase in the actual funding as well as
18 progress.

19 JUSTICE SCALIA: Well, I -- I agree with
20 that. I think it was a vast mistake to extend a lawsuit
21 that applied only to Nogales to the whole State, but the
22 State attorney general wanted that done.

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

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

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

4 JUSTICE SOUTER: What has 60(b) got to do
5 with the question of whether the attorney general
6 represents the State before the court? If the attorney
7 general comes back into court and says, no longer do we
8 want this statewide, then you've got an issue. If the
9 -- if the attorney general speaking for the State does
10 not do that, then I don't see why Justice Scalia's point
11 is not the answer.

12 MR. STARR: Not under Arizona law. It is
13 the governor who speaks and the attorney general is
14 beholden --

15 JUSTICE SOUTER: So the district court is
16 supposed to referee a fight between the governor and the
17 attorney general at this point? Is that what's going
18 on?

19 MR. STARR: No, Your Honor. The district
20 court is to listen to what the State has to say through
21 -- once the legislature was fine. It was brought in.
22 It should have listened to the --

23 JUSTICE SOUTER: Doesn't the attorney
24 general speak for the State?

25 MR. STARR: No, Your Honor, not in Arizona.

1 The attorney general speaks for the State when the
2 governor directs him or her to do that.

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

9 JUSTICE SCALIA: Which would be good enough
10 to fix Nogales. So you are quite right. There is a
11 vast difference in each district. But that attorney
12 general wanted enough money to fund the whole State the
13 way you have to fund to -- to fix Nogales. That's what
14 he wanted.

15 MR. STARR: And former officials shouldn't
16 continue to be able to bind the State. I would like to
17 reserve the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Srinivasan.

20 ORAL ARGUMENT OF SRI SRINIVASAN

21 ON BEHALF OF THE RESPONDENTS

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

24 When the district court issued its initial
25 judgment in 2000, what the court found was that there

1 was a systemic violation of the EEOA. And the court
2 further found that the program deficiencies were the
3 result of the lack of funding rationally related to the
4 programs.

5 JUSTICE SCALIA: Can I ask whether the
6 requirements of the EEOA are at all affected
7 by Congress's later enactment of the No Child Left
8 Behind Act? I mean, you know, it's a very vague
9 requirement that you make a good faith effort to -- to
10 provide language assistance to children.

11 Why shouldn't the courts decide that what
12 constitutes a good faith effort is pretty much what
13 Congress thought was necessary in the -- in the No Child
14 Left Behind Act, and if you comply with that, you are
15 doing okay?

16 MR. SRINIVASAN: Justice Scalia, just one
17 point of clarification on -- in our view on what the
18 EEOA requires, and then I will address the No Child Left
19 Behind point. The EEOA doesn't really require good
20 faith efforts. It requires efforts that are in fact
21 reasonably calculated to overcome language barriers.

22 JUSTICE SCALIA: Okay. I would call that
23 good faith, but that's fine.

24 MR. SRINIVASAN: With that -- With that
25 clarification, thank you.

1 JUSTICE SCALIA: That's fine.

2 MR. SRINIVASAN: With that clarification on
3 the question of whether No Child Left Behind sets the
4 standard for compliance with the EEOA, which is, I
5 think, what the petitioners' position is, we think the
6 answer is no for two fundamental reasons. First is just
7 a textual point. The text of No Child Left Behind
8 doesn't say anywhere that it displaces the standards for
9 compliance with the EEOA.

10 JUSTICE ALITO: I don't think that's their
11 argument, counsel. I don't think that it is their
12 argument that No Child Left Behind supplants the earlier
13 act. It is simply their -- their argument is that it
14 informs an interpretation of the language of EEOA, which
15 is that the State is required to take appropriate
16 action, which is a very vague standard.

17 MR. SRINIVASAN: I think their argument at
18 the end of the day, Justice Scalia, is that if you
19 comply with No Child Left Behind -- and I will get to in
20 a moment what compliance with No Child Left Behind can
21 mean -- then you have necessarily complied with the
22 EEOA. That compliance with the No Child Left Behind
23 sets the standard for compliance with the EEOA.

24 And I don't think that is workable
25 particularly when you take into account what petitioners

1 mean by "compliance with No Child Left Behind."

2 JUSTICE ALITO: Can I ask you this question
3 about the Ninth Circuit's decision, which is what we are
4 reviewing? Suppose -- I know there -- there is a debate
5 about how well Nogales is doing at this time. But let's
6 suppose Nogales came in, and they said this: We had
7 plan A back when this was originally litigated, and now
8 we have an entirely different plan, and this plan
9 doesn't cost one penny more than what we were spending
10 in 2000. But it is a very good plan, and it has
11 produced very good results.

12 As I read the Ninth Circuit's decision, they
13 would not grant relief from the judgment under those
14 circumstances, because they focus exclusively on
15 incremental funding for EEL programs and Arizona's
16 funding model. Isn't that correct?

17 MR. SRINIVASAN: Well, I -- I don't know
18 that that is a correct interpretation of the EEOA. What
19 we would say is that if the State came forward with a
20 showing that completely regardless of funding the
21 programs on the ground work, well, that would be
22 something that the district court would have to take
23 into account. But the state hasn't --

24 JUSTICE ALITO: No, but isn't -- that isn't
25 really my question. Isn't -- isn't it the case that the

1 Ninth Circuit judged the -- the permissibility of relief
2 under 60(b) solely with regard to incremental funding
3 and Arizona's funding model?

4 MR. SRINIVASAN: The Ninth Circuit focused
5 on funding, Justice Alito, because that is the way the
6 case has been litigated from the outset. And that's the
7 way the State has said from the outset that it would
8 achieve compliance with the --

9 JUSTICE ALITO: That's the way it was
10 litigated originally, but I thought the whole focus of
11 the motion for relief from the judgment was: We have a
12 new plan, and it is not tied to funding, and it will
13 produce good results without looking at incremental EEL
14 funding. And wasn't the Ninth Circuit obligated to look
15 at that?

16 MR. SRINIVASAN: Well, I think the Ninth
17 Circuit was -- was required certainly to review the
18 district court's inquiry into that. And what the
19 district court found is at page 100-A of the appendix to
20 the petition filed by the legislative intervenors. And
21 what the district court found there is that the
22 improvements today, although significant, failed to
23 reach the high school; that they were fleeting. And --
24 and this is particularly significant. In addition, the
25 district court also explained that it was premature to

1 make an assessment of many of the changes, because many
2 of the new standards are still evolving.

3 And the reason the district court said that
4 is that -- is because of the enactment in 2006 of
5 Arizona HB 2064, which changes the framework for
6 administration and funding of ELL programs in a way that
7 I think fortifies the district court's denial of
8 complete dissolution of its judgment and -- and ensuing
9 orders.

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

20 MR. SRINIVASAN: Yes, that --

21 CHIEF JUSTICE ROBERTS: What's wrong with
22 that?

23 MR. SRINIVASAN: There is nothing wrong with
24 that, and it should be looked at. And the district
25 court did look at it, and what the district court found

1 was that the claims of progress, although there had been
2 progress, the progress hadn't reached the high school.
3 The progress was fleeting and that it was premature --

4 CHIEF JUSTICE ROBERTS: It's not a question
5 of progress; it's a question of the plan and the
6 approach. And I understood the Ninth Circuit -- I'm
7 looking at page 72a -- it talks about the ELL's specific
8 funding that was based on the prior order. And what I
9 understood the State's submission to be -- look at what
10 the superintendent has done in this particular case, and
11 so on, so that those specific funding levels aren't
12 applicable. And I would have thought it an
13 extraordinary enough thing for a district court to tell
14 a State legislature: Pass this budget, and you,
15 Legislature, pass it, and -- I guess -- you, Governor,
16 sign it, or you are not going to be in compliance. And
17 if they've come up with a different way with different
18 funding requirements, I don't know why that's not a
19 changed circumstance that justifies looking at the
20 judgment --

21 MR. SRINIVASAN: Well, the district court
22 didn't issue that sort of order. And -- and the Ninth
23 Circuit -- if you look at page 66a -- it did review the
24 evidence in the record and fortified the district
25 court's conclusion that the new plan, Your Honor,

1 Mr. Chief Justice, that was presented, which is to the
2 effect that, regardless of funding, we have made
3 advances based on management improvements that should
4 satisfy the statute. That was the claim that was made
5 by Petitioners. I think that's what you're alluding to.
6 And the district court rejected that at page 100a, and
7 the Ninth Circuit fortified the district court's
8 rejection of it by looking at the evidence in the record
9 concerning --

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

11 MR. SRINIVASAN: It's at 66a. That the
12 court of appeals reviews the testimony and fortifies the
13 district court's conclusion that, based on the advances
14 to date, there's still work left to be done. Because at
15 the end of the day you have to have a plan in place.

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

25 MR. SRINIVASAN: Well, there's two

1 fundamentally different assertions being made by
2 Petitioners, if I understand it: One is what
3 Justice Scalia alluded to earlier, which is that No
4 Child Left Behind changed the legal landscape in a way
5 such that compliance with No Child Left Behind, such as
6 it is, sets the standard for compliance with the EEOA.

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

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

23 JUSTICE SCALIA: What degree --

24 MR. SRINIVASAN: -- doubted that.

25 JUSTICE SCALIA: What degree of improvement

1 do you think is necessary? Do you agree with the Ninth
2 -- the Ninth Circuit says, "We cannot say the district
3 court clearly erred when it found this burden was not
4 met. A district in which the majority of ELL tenth
5 graders failed to meet State achievement standards while
6 the majority of native English speakers passed is not
7 one whose performance demonstrates that the State is
8 adequately funding ELL programs."

9 Do you really think that you haven't
10 complied with adequate funding of ELL programs until you
11 raise all of the ELL students up to the level of native
12 English speakers?

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

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

17 MR. SRINIVASAN: Well --

18 JUSTICE SCALIA: -- doesn't meet the -- a
19 majority of ELL tenth graders fail to meet the
20 standards, but the majority of native English speakers
21 do.

22 MR. SRINIVASAN: Well, that's part of what
23 it says, and I think what the Ninth Circuit is also
24 alluding to with respect to the high school in
25 particular that, if you look at State survey that

1 Petitioners rely on in -- in touting the improvements in
2 certain schools, it also with respect to the high school
3 shows that the two high schools in Nogales was ranked --
4 were ranked at the very bottom of the survey for ELL
5 students.

6 So there's problems on the ground, but what
7 the district court focused on concerns the enactment of
8 2064, which is that no matter was think about the
9 improvements that have -- that have been made to date,
10 the landscape fundamentally shifts upon the enactment of
11 2064 because the administration and funding of ELL plans
12 changes at that point. And it's --

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

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

21 And that -- there's three particular
22 features of that that I think are significant and that
23 fortify the district court's conclusion that complete
24 dissolution was unwarranted.

25 The first is the one that was raised by

1 Justice Souter, which is that whatever you think of the
2 progress that has been made to date -- and the district
3 court found that, while it was significant, it didn't
4 suffice -- that changes from what can be brought to bear
5 from here on out as half the resources that were
6 available before, because that's the net effect of 2064.
7 That's what the district court found, at pages 107 to
8 108a of the Petition Appendix. And when you have half
9 resources to work with -- at the very least I think what
10 the district court thought in saying that it was
11 premature to make an assessment is that we have to have
12 some period to assess what happens on the ground as a
13 consequence --

14 CHIEF JUSTICE ROBERTS: Is there any --

15 MR. SRINIVASAN: -- of this new funding
16 recipe.

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

25 MR. SRINIVASAN: No, the -- the district --

1 the State would have to present that, Your Honor, and I
2 don't believe the State to have done that so far. But
3 the State would have to make the argument that funding
4 constraints are inexistence in a way that doesn't allow
5 us to -- to use one example -- to -- to put together an
6 optimal program, and so here's the program that we want
7 to put in place in --

8 JUSTICE SCALIA: Counsel, I --

9 MR. SRINIVASAN: -- jurisdictions.

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

18 MR. SRINIVASAN: Well --

19 JUSTICE SCALIA: And the mere fact that the
20 State Attorney General acquiesced in that kind -- kind
21 of a system at the outset, does that force us to still
22 accept at this time that whatever is -- is necessary for
23 Nogales is also necessary for the entire State?

24 MR. SRINIVASAN: Justice Scalia, I think
25 that that issue becomes largely an academic one for the

1 following reason: that the reason that the State
2 Attorney General made the acknowledgment that he did is
3 that, under the Arizona State Constitution, funding
4 decisions don't vary from district to district. So
5 whatever funding menu is put into place in order to
6 achieve compliance with the EEOA with respect to Nogales
7 is going to be the same one that exists throughout the
8 State.

9 JUSTICE SCALIA: I'll let --

10 MR. SRINIVASAN: It's --

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

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

21 JUSTICE KENNEDY: Well, it seems to me very
22 odd that -- assume you have a constitutional provision
23 which says funding must be equal in each district. Then
24 you find one district that's way behind, and that is, we
25 will assume, is -- has been deficient in -- in providing

1 language education. You are saying that if the court
2 orders more money spent for that district, it must
3 automatically order money -- additional money for every
4 other district in the State?

5 MR. SRINIVASAN: No, absolutely not. Not --
6 certainly not in the abstract.

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

10 MR. SRINIVASAN: I don't think it's a
11 necessary conclusion of my argument, Justice Kennedy. I
12 think it's a conclusion that rests on we are in this
13 litigation in this particular context, given the Arizona
14 Constitution's uniformity clause. It's as a consequence
15 of that clause that this issue even arises. And I think
16 the Attorney General --

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

22 MR. SRINIVASAN: Well, if the --

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

1 MR. SRINIVASAN: Well, if the litigation had
2 come up in a different way, Justice Kennedy, such that
3 it had always focused exclusively on what happened in
4 Nogales, including the funding aspect of the case, but I
5 think what would have been appropriate is that the
6 district court would have inquired about what funding
7 resources belong to Nogales in particular. And then
8 what would have happened by operation of State law would
9 be that, whatever the funding calculus with respect to
10 Nogales, it would automatically apply across the State
11 because of the Arizona Constitution's uniformity clause.

12 Now, in this case, the litigation -- the
13 complaint was assessed against the entire State, and the
14 Attorney General accepted that, and I don't think at
15 this point in time we can revisit that, particularly
16 when it's largely an academic question given the
17 uniformity clause --

18 CHIEF JUSTICE ROBERTS: But I gather it's
19 often the case in institutional litigation of this sort
20 that the political figures, whether it's the Governor or
21 the Attorney General, can't go to the voters say, look,
22 we should spend more money on this. So they go to the
23 district court judge and say, make us spend more money
24 on this. And they get the same result they'd wanted in
25 a non-democratic way, particularly when there's a

1 division, such as here the legislature doesn't want to
2 do something, and the Governor or the Attorney General
3 does.

4 So why should we put a lot of weight on what
5 the representation is when we are at least concerned
6 that it might be a -- I don't mean it in a pejorative
7 sense -- but a collusive piece of litigation?

8 MR. SRINIVASAN: Well, two points,
9 Mr. Chief Justice, and first -- and I don't mean to
10 quibble, but the Attorney General did contest the
11 litigation at the outset. What happened is, after a
12 judgment was issued against the State, then I think
13 there was an acquiescence in the --

14 CHIEF JUSTICE ROBERTS: Well, it's hard for
15 the Attorney General to get funding from the legislature
16 for all he wants to do, and this is a way for him to get
17 it, to go to the legislature and say look, you don't
18 have a choice.

19 MR. SRINIVASAN: Well, sure,
20 Mr. Chief Justice, but I think what the Court did in
21 both Rufo and Frew is it accommodated those concerns,
22 and it accommodated the interest in finality that comes
23 from judgments, and the interests in allowing a
24 different set of State officials to suggest new programs
25 to make that suggestion to the district court. And it

1 accommodated those in a way that requires a showing at
2 the outset that there has been a significant change in
3 facts or a significant change in law. And on --

4 CHIEF JUSTICE ROBERTS: Can I ask just a
5 question that was confusing to me? What standard for
6 changed circumstances do you understand the Ninth
7 Circuit to have applied?

8 MR. SRINIVASAN: The one that was outlined
9 by this Court in Rufo.

10 CHIEF JUSTICE ROBERTS: Which is?

11 MR. SRINIVASAN: A significant change of
12 facts or a significant change of law. And the --

13 CHIEF JUSTICE ROBERTS: I am looking at page
14 72a of the Ninth Circuit opinion, and the standard they
15 use there is radically changed, not significantly
16 changed.

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

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

25 MR. SRINIVASAN: Well, I -- I would give

1 effect to the articulation of the standard in the
2 standard review question section of the opinion. Of
3 course you could remand if you felt that it was
4 necessary, but I think the reason why the Ninth Circuit
5 uses the language such as Your Honor found in 72a is
6 that it has to be considered in the context of the
7 nature of the violation and the nature of the relief
8 sought.

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

17 Now on the question of whether there is in
18 fact a significant change or significant change of facts
19 or significant change in law, on No Child Left Behind,
20 Justice Scalia, to return to the question that you
21 asked, the reason that No Child Left Behind in our view
22 doesn't displace the standard for EEOA is that
23 Petitioner's standard is that as long as the State has
24 an approved No Child Left Behind plan, which is true of
25 all 50 States, that they necessarily satisfy the EEOA;

1 and what that would mean is that even if a State didn't
2 implement that plan, even if the State didn't -- didn't
3 -- didn't have accountability measures that it in fact
4 followed, that required school districts to achieve the
5 annual measurement of progress that would be laid out in
6 the plan -- notwithstanding all of that, a plaintiff
7 would lack authority to come into the court and litigate
8 his private cause of action under the EEOA and get a
9 court order that requires the State to take appropriate
10 action --

11 JUSTICE SCALIA: Right but --

12 MR. SRINIVASAN: -- simply because the State
13 will have had an approved plan.

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

19 MR. SRINIVASAN: I -- I don't think so.
20 Because --

21 JUSTICE SCALIA: Well, then -- then it's not
22 as simple as you made it. Of course, I agree with the
23 fact that if you get approved under the No Child Left
24 Behind Act and then don't fund it, of course that --
25 that won't satisfy your obligation. But if you have

1 gotten approved, the test for whether you are satisfying
2 your obligation should be how much money would it cost
3 to implement the program that you have gotten approved
4 under the No Child Left Behind Act.

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

9 JUSTICE SCALIA: It doesn't approve
10 programs?

11 MR. SRINIVASAN: No --

12 JUSTICE SCALIA: I thought the States had to
13 submit a program.

14 MR. SRINIVASAN: What the EEOA concerns are
15 programs that are reasonably calculated to achieve
16 overcoming language barriers.

17 JUSTICE SCALIA: Right. Right.

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

1 JUSTICE SCALIA: So you are saying you can't
2 calculate costs.

3 MR. SRINIVASAN: Right.

4 JUSTICE SCALIA: You cannot calculate costs
5 under the plan approved by the Secretary --

6 MR. SRINIVASAN: I --

7 JUSTICE SCALIA: -- because all the plan is
8 is testing.

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

10 JUSTICE SCALIA: Okay.

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

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Ms. Saharsky.

23 ORAL ARGUMENT OF NICOLE A. SAHARSKY

24 OF BEHALF OF UNITED STATES,

25 AS AMICUS CURIAE,

1 SUPPORTING THE RESPONDENTS

2 MS. SAHARSKY: Mr. Chief Justice, and may it
3 please the Court:

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

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

16 MS. SAHARSKY: Certainly. But they didn't
17 demonstrate that -- entitlement to that relief either.
18 To the extended we are talking about the question of
19 whether conditions had changed in Nogales that there was
20 no longer an ongoing violation of Federal law, the
21 district court held an 8-day evidentiary hearing, and it
22 made factual findings showing that the problems had not
23 ceased in Nogales. And as you noted, Justice Ginsburg,
24 this changed circumstances argument that is now heavily
25 relied upon by Petitioners was not the primary thrust of

1 their argument before the district court.

2 The primary thrust of their argument was
3 that HB 2064, which is the State's scheme for ELL
4 education, had some serious -- would -- would satisfy
5 the judgment; and their other argument was that No Child
6 Left Behind completely preempts -- that was the language
7 they use -- completely preempts and renders obsolete the
8 EEOA.

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

15 MS. SAHARSKY: I understand it to be
16 significant change, which, I don't see significant and
17 material as being all that different. I think that
18 the --

19 CHIEF JUSTICE ROBERTS: Well, I don't either
20 but I see both of them being different from radically
21 changed.

22 MS. SAHARSKY: Again, I think if you look at
23 the Ninth Circuit's opinion, particularly where it
24 starts out with the standard of review, it cites this
25 Court's precedents in Rufo and Agostini; it talks about

1 the need for significant changed circumstances. I
2 understand that there are portions of the Ninth
3 Circuit's opinion that say -- that have the radical
4 change language, and again, I -- I think that that
5 language is -- just reflects the arguments that
6 Petitioners were making, that they wanted complete
7 relief from these remedial orders and that, you know,
8 the underlying judgment here was a systemic violation.
9 I mean, it's --

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

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

23 On the second question which -- the second
24 argument Petitioners made which said, everything is fine
25 in Nogales because we have money from other funds, the

1 district court said no, there's -- there's been an
2 ongoing violation of Federal. Law you haven't met your
3 burden of showing me that violation ceased because
4 things aren't better in Nogales. Do --

5 JUSTICE ALITO: Why does it matter that
6 there is -- why focus on incremental funding for ELL
7 programs exclusively? What difference does it make
8 where the money comes from -- where it comes from,
9 putting aside federal money that can't be supplanted? I
10 just don't understand that.

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

20 JUSTICE ALITO: Well, that may have been
21 their -- that may have been their position originally,
22 but at the time of the 60(b) hearing, what difference
23 does it make whether the money came from funds that were
24 designated for ELL program, or from general State funds,
25 or from county funds? What difference does it make

1 whether the money was taken from some other program that
2 the school was operating?

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

8 MS. SAHARSKY: Well, the district court
9 could have found that the plan had changed and that
10 funding could come from -- from different places.
11 That's right, if the State had changed its plans or that
12 Nogales otherwise would have sufficient funding from
13 circumstances that -- or from other source, that would
14 be one thing. But the district court found that Nogales
15 doesn't have that funding from other sources.

16 For example, it can't use the federal
17 funding that it -- that the Petitioners claim could be
18 used to solve its problem under the EEOA. There are
19 specific conditions on federal grant programs that
20 forbid that.

21 It also could not raise any significant
22 amounts of funding through county tax overrides, which
23 was another source the Petitioners had said would --
24 would provide sufficient funding. So the question the
25 district court had to ask is, there has been an ongoing

1 violation of federal law, has that violation of
2 federal -- federal law ceased because the State has put
3 in place, Nogales has put in place programs that are
4 reasonably calculated to help these kids learn English?

5 And the district court said Nogales has
6 cobbled together these sources of funding. And it is
7 doing the best they can.

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

15 MS. SAHARSKY: With respect, I don't think
16 that that was their exclusive focus. I understand that
17 it was a primary focus of that decision, and the reason
18 for that was because the primary argument --

19 JUSTICE ALITO: Well, they say. They were
20 required -- the Petitioners were required to demonstrate
21 either that there are no longer incremental costs
22 associated with ELL programs in Arizona or that
23 Arizona's funding model was so altered as to make
24 incremental costs issue relevant. That was their
25 explanation of the holding, 60 -- 63A of the Speaker's

1 appendix.

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

10 And the district court found there were
11 neither and the court of appeals found there were
12 neither. And the court of appeals did go through the
13 alleged changed circumstances, and Nogales had issued a
14 91-page opinion that talked about the significant
15 resource constraints that still exist in Nogales and the
16 persistent achievement gaps that still exist in Nogales.

17 CHIEF JUSTICE ROBERTS: I still have trouble
18 with the idea of district courts ordering State
19 legislatures to fund it. Isn't the preferable approach
20 for the district court to say you have a violation, you
21 have to fix it, and I'm going check to see if you fixed
22 it at particular intervals? And it's up to you, the
23 State, to determine how you are going to fix it.

24 And the State might change its mind. They
25 may start out by saying we have got all of this extra

1 money and that's how we will fix it. Then there is a
2 budget crisis, the kind that we are familiar with, and
3 he says we can't the money, we are going to do it some
4 other way, and here's the way.

5 But that's kind of the judgment of the
6 State, not for the district court.

7 MS. SAHARSKY: And I think the district
8 court was appropriately differential to the State
9 throughout this litigation. You will note at the time
10 of the 2000 judgment that the district court didn't put
11 any remedial order in place. And that's because at the
12 time of trial the State said, look, we are going to put
13 in place an ELL program that everyone in the State can
14 use and figure out how much it costs, what works and
15 what doesn't. We are going to do a cost study, so
16 please let us do the cost study and we will come back to
17 the court.

18 And the district court said fine. And ten
19 months later that didn't happen.

20 Now, there was a change, as Petitioners
21 note, to a different theory of ELL education, structured
22 English immersion and the court said, okay, do your
23 program based on structured English immersion and just
24 tell me how much it costs, tell me how you rationally
25 fund it, and that will be fine. The district court here

1 did not want to be in the business of micromanaging
2 State education. Through this entire litigation the
3 district court was --

4 CHIEF JUSTICE ROBERTS: Why does it order
5 then -- why did its order specify and be linked to the
6 termination of the legislative session, and say you have
7 12 days left in the session and that's how many days you
8 have to enact this budget?

9 MS. SAHARSKY: I think it's because the
10 State kept coming back to the district court and saying
11 that the legislature had asked for this cost study,
12 there was an interim bill, House Bill 2010, where the
13 legislature said we put in place another study that we
14 are going to perform. And it's because the State
15 said -- constantly said the legislature is going to do
16 this cost study, figure out how much good programs cost,
17 the school -- the State board will be involved,
18 et cetera, that the district court entered its orders
19 looking to the time period in which it expected action
20 to occur.

21 I mean, this happened over a nine-year
22 period. The district court, to be clear -- I think this
23 is a very important point -- never said you need to do
24 any special kind of ELL program, bilingual, structured
25 English immersion, you need to have any certain number

1 of teachers, nothing like that. And it never said you
2 need to put this certain amount of funding in place,
3 \$200, \$300 per student, anything like that.

4 And Petitioners at the rule 60(b)(5) stage
5 faced a heavy burden to show if what they wanted to show
6 was that the State was now going to go down this new and
7 different path, because even at the time of the rule
8 60(b)(5) hearing, the state was on the same path. It
9 had just passed House Bill 2064, which just like at the
10 time of the 2000 judgment said we are going to put a
11 statewide program in place for ELL education --

12 JUSTICE GINSBURG: But the district -- the
13 district judge said that that 2064 did not have enough,
14 it raised it to 450 or whatever. And the district court
15 said there are three things wrong with it, the two
16 years, using the federal funds to -- to supplant not
17 supplement, and that the \$450 figure wasn't enough.

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

20 MS. SAHARSKY: Could I answer that? I think
21 the problem with the \$450 figure is that the district
22 court was never told what the State was planning to buy
23 with that, what that \$450 was for. The State -- the
24 district court just said to the State, please tell me
25 what your programs are going to do and approximately how

1 much it costs to fund them. And that 450 wasn't tied to
2 any particular ELL programs. That was the problem.

3 JUSTICE SCALIA: Ms. Saharsky, I have one
4 late arriving question. Do you think that the
5 constitutional -- State constitutional provision at
6 least there has to be equivalent funding in districts,
7 do you think that would be called into play if the
8 Federal Government under a federal program gave
9 additional funds to a particular district? Which I am
10 sure it does, those districts that have federal
11 facilities probably get additional -- additional money,
12 would all the rest -- under this constitutional
13 provision, would all the rest of the State have to belly
14 up to that -- to that same level?

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

16 JUSTICE SCALIA: I doubt it.

17 MS. SAHARSKY: -- when it's talking about a
18 uniform --

19 JUSTICE SCALIA: Yeah.

20 MS. SAHARSKY: -- and equal amount, it's
21 talking about the amount that the State gives to the
22 school districts. It's not with respect to any federal
23 funding from other sources.

24 JUSTICE SCALIA: Well, if federal funding
25 doesn't count, why would a federal decree applicable

1 only to a particular school district count?

2 MS. SAHARSKY: I think that the idea was
3 that there needed to be -- the State determined that
4 there needed to be -- it was going to solve the problem
5 statewide not only because of the concern under the
6 State constitutions, that it would provide for all ELL
7 students. And it was not that it would provide the same
8 amount to each school district, but just the same amount
9 per ELL student. That the State had decided that it was
10 going to fill that responsibility because -- both
11 because of the Constitution and because it's responsible
12 for supervising education statewide. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Starr, you have three minutes.

15 REBUTTAL ARGUMENT OF KENNETH W. STARR

16 ON BEHALF OF THE PETITIONERS

17 MR. STARR: Thank you.

18 JUSTICE KENNEDY: It seems to me, Mr. Starr,
19 based on this last argument, that it actually is in your
20 favor if the order of the court as to one district
21 automatically requires additional expenditure for every
22 other district, that is simply one more measure that the
23 Court should use in finding an alternate remedy.

24 MR. STARR: Yes, Your Honor. The state
25 funding remedy here is extraordinarily intrusive and

1 overreaching. It is something that has not been done
2 under the EEOA ever, and certainly the No Child Left
3 Behind provision should inform now this particular
4 remedy. The remedy was originally, of course, designed
5 to address the situation in Nogales, but it was
6 expanded --

7 JUSTICE SCALIA: It is no content to the
8 equal child -- No Child Left Behind. There is no
9 content to it. All it requires is testing.

10 MR. STARR: It's part --

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

13 MR. STARR: But, Your Honor, there is a very
14 elaborate plan that is submitted and then a
15 determination is made by the Federal Government about
16 funds under Title 1 and Title 3, but here is our
17 fundamental submission. The Ninth Circuit simply
18 applied the wrong 60(b) standard.

19 It, in fact, used this remarkable language,
20 but it also of radical change, but it also gave undue
21 weight. It said it ten times to the fact that the
22 original judgment was on appeal, and then it simply did
23 not pay heed to the incredibly intrusive nature of a
24 statewide funding remedy in light of the fact that we
25 can now look at what has happened in Nogales. We see

1 the changes that have, in fact, been there, and
2 certainly the EEOA by its design in section 1712 of EEOA
3 makes it very clear that the remedial reach of the EEOA
4 is quite limited. It's limited to particular
5 circumstances.

6 Here the EEOA has been transmogrified to
7 apply statewide. That has not been done before. It
8 should not have been done in the first instance but
9 certainly in light of the changed circumstances.

10 And the changed circumstances,
11 Justice Ginsburg, go back to structured English
12 immersion. They did not begin with the passage of HB
13 2064. Structured English immersion came in in the year
14 2000. That is why the legislature then came in and put
15 these facts in evidence before the district court, which
16 made no factual findings statewide at all, ever. There
17 are no statewide factual findings in this record
18 whatsoever, none. And therefore statewide funding
19 remedy should not have been permitted. Sixty (b)(5)
20 relief should be granted. I thank the Court.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.

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

25

A				
ability 27:2	additional 42:3 47:16,17 60:9	amount 16:25 22:18 53:19	approve 48:6,9 50:8	39:11
able 26:23 28:16	60:11,11 61:21	59:2 60:20,21	approved 46:24 47:13,15,23	assistance 29:10
above-entitled 1:21 63:24	address 29:18 62:5	61:8,8	48:1,3,23 49:5	Assistant 2:4
absolutely 11:17 42:5	addressed 36:15	amounts 54:22	approximately 59:25	associated 55:13 55:22
abstract 42:6	adequate 12:8 12:11,23 37:10	Angeles 1:25	April 1:19	assume 18:9,12 41:22,25
academic 10:5 40:25 43:16	adequately 24:17 28:7	annual 47:5	argument 1:22 3:2,10 4:4,7	attempt 14:3
accept 40:22	37:8	answer 8:3,12 9:3,15 27:11	12:14,20 23:2	attorney 17:17 17:22 18:21
accepted 43:14 48:7	administered 9:11,22	30:6 42:9	28:20 30:11,12	19:3,6,15,19
accommodated 44:21,22 45:1	administration 33:6 38:11	59:20	30:13,17 36:7	26:22 27:5,6,9
accomplish 4:18	adopted 4:19 5:7	Ap 8:15	36:11 40:3	27:13,17,23
account 30:25 31:23	advances 35:3 35:13	apparatus 15:2	42:8,11 49:23	28:1,11 40:20
accountability 47:3	affect 41:19	appeal 6:10 28:5 62:22	50:24 51:1,2,5	41:2 42:16
accurate 9:24 52:13	afford 33:17	appealed 6:7 23:3 28:6	52:24 55:18	43:14,21 44:2
achieve 32:8 41:6 47:4	agency 16:5	appeals 35:12 56:11,12	61:15,19	44:10,15
48:15,24	ago 22:15 24:23	APPEARAN... 1:24	arguments 52:5 52:17	authorities 42:25
achieved 7:12 48:22,23	Agostini 51:25	appendix 8:15 8:21 9:8 32:19	arises 42:15	authority 15:16 47:7
achievement 10:6 37:5	agree 26:19 37:1 38:15,17 47:22	39:8 56:1	arithmetic 17:2	automatically 42:3 43:10
56:16	agreed 4:24 11:19	applicable 34:12 60:25	Arizona 1:4,12 4:12 12:7 15:6	61:21
acknowledgm... 41:2	agrees 9:1	application 13:11	15:12 17:10,17	available 24:20 39:6
acquiesced 40:20	aides 23:23,25 24:6	applied 26:21 45:7,21 51:12	17:18,22 27:12	average 10:15 11:5
acquiescence 44:13	AL 1:8,16	62:18	27:25 28:6	AYP 10:7
acquisition 28:8	Alito 30:10 31:2 31:24 32:5,9	applies 40:16	33:5 41:3,11	AZELA 7:20
act 23:11 29:8 29:14 30:13	53:5,20 55:8	apply 42:20 43:10 63:7	42:13 43:11	a.m 1:23 4:2
47:18,24 48:4	55:19	approach 11:23 20:10 33:13	55:22	
48:6	Alito's 33:11	34:6 35:19	Arizona's 31:15 32:3 55:23	B
action 16:5 17:13 30:16	alleged 56:13	49:17 56:19	arriving 60:4	b 21:16,16 63:19
47:8,10 49:18	allow 40:4	appropriate 9:17 20:13	art 54:5	back 12:4 20:22 22:14 24:22
49:19 58:19	allowing 44:23	21:21 24:8	articulate 51:10 46:1	27:7 31:7
actual 26:17	alluded 36:3	30:15 43:5	articulation 46:1	33:13 57:16
addition 32:24	alluding 35:5 37:24	47:9 49:18	arts 10:15	58:10 63:11
	altered 55:23	appropriated 22:19	aside 53:9	bad 54:6
	alternate 61:23	appropriately 57:8	asked 6:24 46:21 50:5	barriers 29:21 48:16
	amicus 2:6 3:8 49:25		58:11	based 20:12 33:12 34:8
			aspect 43:4	35:3,13 56:6
			assertions 36:1	57:23 61:19
			assess 39:12	bases 9:17
			assessed 43:13	
			assessment 33:1	

<p>basically 21:14 basis 12:10,22 40:12 basket 24:19 beachhead 15:4 bear 39:4 bears 25:16 49:13 began 5:23 beginning 12:4 behalf 1:25 2:2 2:6 3:4,6,8,12 4:8 28:21 49:24 61:16 beholden 27:14 believe 25:3,3 40:2 belly 60:13 belong 43:7 best 55:7 better 8:18,24 53:4 beyond 22:1,2 22:19 bilingual 5:21 58:24 bill 12:20 13:2 14:5 52:18,20 58:12,12 59:9 bind 28:16 bizarre 40:10,17 blank 21:6,7 blinded 11:23 15:9,18,19 16:9 25:11 board 15:12 58:17 bottom 38:4 Breyer 6:23 7:17 8:4,6 9:6 10:3 11:2 16:11,17 24:18 25:12,19 Breyer's 9:3,5 9:16 briar 19:13 brief 11:16</p>	<p>16:12 26:1 brings 11:1 broadly 13:18 brought 27:21 39:4 budget 16:18,20 34:14 57:2 58:8 budgetary 33:16 bunking 46:16 46:16 burden 37:3 50:9 53:3 59:5 business 58:1 buy 59:22</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 1:3 3:1 4:1 Cal 1:25 calculate 49:2,4 calculated 29:21 48:15 55:4 56:9 calculus 43:9 call 29:22 called 10:6 48:25 49:14 60:7 calls 48:20 care 39:21 case 4:4,5 17:12 22:5 23:1 26:10 31:25 32:6 34:10 36:18 41:20 43:4,12,19 46:13 63:22,23 Castaneda 13:19 21:9,11 cause 6:10 47:8 49:18 ceased 50:23 53:3 55:2 cede 42:25 certain 38:2 48:20 58:25 59:2</p>	<p>certainly 32:17 42:6 50:16 62:2 63:2,9 cetera 17:2 58:18 change 5:14,20 45:2,3,11,12 46:18,18,19 51:16 52:4 56:24 57:20 62:20 changed 5:13 6:17,18 8:23 13:3 16:8,8 18:1,2,5 20:20 22:22 24:23 34:19 35:19 36:4,11 45:6 45:15,16,22,23 50:12,19,24 51:11,13,14,14 51:21 52:1 54:9,11 56:13 59:19 63:9,10 changes 11:24 16:10 33:1,5 38:12 39:4,22 63:1 charter 38:18 check 56:21 chief 4:3,9 8:11 9:2,15,23 19:23 20:24 28:18,22 33:10 33:21 34:4 35:1,16 39:14 39:17 43:18 44:9,14,20 45:4,10,13,20 49:13,21 50:2 51:9,19 56:17 58:4 61:13 63:21 child 8:22 15:2,5 15:17,22 20:4 23:11,25 24:25 29:7,13,18</p>	<p>30:3,7,12,19 30:20,22 31:1 35:20 36:4,5 36:10 46:19,21 46:24 47:18,23 48:4,5,18,25 49:14 51:5 62:2,8,8 children 7:18 9:17 29:10 choice 44:18 choose 21:22 Circuit 6:16 32:1,4,14,17 34:6,23 35:7 35:23 37:2,23 45:7,14 46:4 51:13 55:10,12 62:17 Circuit's 8:17 31:3,12 51:23 52:3 circumstance 34:19 circumstances 5:13 6:17,18 8:23 13:3,3 16:8,9 20:21 23:21 31:14 39:23 45:6 50:12,24 52:1 54:13 56:13 63:5,9,10 cite 45:18 cites 51:24 civil 15:25 claim 35:4 54:17 claims 34:1 clarification 29:17,25 30:2 class 17:13 clause 15:23 42:14,15,20 43:11,17 clear 11:18 58:22 63:3 clearly 37:3</p>	<p>clerk 6:24 cobbled 55:6 collusive 44:7 come 5:5,6 17:9 18:21 21:15,15 24:22 25:15,15 25:17,21 34:17 43:2 47:7 54:10 56:7 57:16 comes 19:4 23:22 27:7 33:13 44:22 53:8,8 coming 58:10 commanded 6:16 compared 7:2,4 7:6 comparison 8:5 complaint 23:19 43:13 complete 33:8 36:18 38:23 46:10 50:6 52:6 completely 15:8 31:20 51:6,7 compliance 13:20,22 14:3 15:6 21:6 30:4 30:9,20,22,23 31:1 32:8 34:16 36:5,6 41:6 50:10,12 52:13,14 56:4 complied 23:18 30:21 37:10 comply 18:15 29:14 30:19 47:18 components 24:12 concededly 40:12 concern 6:11 55:9 61:5</p>
--	---	---	--	---

<p>concerned 44:5 concerning 35:9 46:15 concerns 38:7 44:21 48:14,19 concluded 4:12 9:14 conclusion 34:25 35:13 38:23 42:8,11 42:12 conditions 36:8 36:19 48:8 50:19 54:19 Conference 26:3 26:12 confused 45:21 confusing 45:5 Congress 15:3 29:13 Congress's 29:7 consent 46:15 consequence 36:9 39:13 42:14 consider 6:16,17 considerable 25:20 considered 46:6 52:17,18 consolidated 4:5 constantly 58:15 constitutes 29:12 Constitution 17:19 18:16,18 41:3 61:11 constitutional 41:22 42:19 60:5,5,12 constitutions 61:6 Constitution's 42:14 43:11 constraints 40:4 56:15 construed 15:23</p>	<p>content 62:7,9 contest 44:10 context 42:13 46:6,11 continue 28:16 continued 52:19 controls 19:23 Cooper 6:19 13:24 23:22 correct 5:9 9:16 14:21,22 16:1 25:18 31:16,18 52:16 correctly 16:13 52:16 cost 6:3 17:9,11 24:9 28:7 31:9 48:2 57:15,16 58:11,16,16 62:12 costs 11:4,6 16:24 20:16 24:8 49:2,4 55:13,21,24 56:6 57:14,24 60:1 counsel 8:12 28:18 30:11 40:8 49:21 51:9 61:13 63:21 count 60:25 61:1 county 53:25 54:22 couple 10:20 course 23:5 46:3 47:22,24 62:4 court 1:1,22 4:10,11 5:2,4 6:2,15 9:8,14 11:23 12:6,18 13:16 15:9,17 16:9 17:17 18:22 19:1,2,6 21:1,20 22:17 22:19,21 23:10 23:12,16 24:10</p>	<p>25:5,7,9,20 26:5,14 27:2,6 27:7,15,20 28:23,24,25 29:1 31:22 32:19,21,25 33:3,25,25 34:13,21 35:6 35:12,22 36:15 36:22 37:3 38:7 39:3,7,10 39:20 40:15 41:13 42:1,18 42:24 43:6,23 44:20,25 45:9 45:18 47:7,9 47:17 50:3,11 50:14,21 51:1 52:10,17 53:1 53:12 54:8,14 54:25 55:5,9 56:10,11,12,20 57:6,8,10,17 57:18,22,25 58:3,10,18,22 59:14,22,24 61:20,23 63:15 63:20 courts 15:1 29:11 41:15 56:18 court's 32:18 33:7 34:25 35:7,13 36:13 38:23 50:6 51:25 53:16 creates 12:7 crises 33:16 crisis 57:2 critical 36:17 curiae 2:7 3:9 49:25 current 12:14 currently 17:3 cut 8:2 cutoff 52:21</p>	<p style="text-align: center;">D</p> <p>D 4:1 dam 26:25 data 9:5 date 35:14 38:9 39:2 day 30:18 35:15 days 58:7,7 deal 17:18 dealing 6:12 debate 31:4 decide 22:7,8 29:11 decided 61:9 deciding 21:21 decision 31:3,12 55:10,11,17 decisions 41:4 declaratory 6:5 24:5,11 decree 6:5 18:13 19:16 24:16 41:13 60:25 defending 12:13 deficiencies 14:4 14:20,21 29:2 deficiency 14:6 14:10 deficient 41:25 degree 14:15 36:23,25 demanded 47:16 demonstrate 50:17 55:20 demonstrates 37:7 denial 14:18 33:7 Department 2:5 14:25 16:4 describes 48:21 design 63:2 designated 53:24 designed 62:4 detached 12:14</p>	<p>12:16 determination 4:17 62:15 determinations 52:12 determine 22:3 24:2 28:7 41:15,16 56:23 determined 15:3 21:9 61:3 determining 19:24 developed 8:19 23:16 25:24 difference 10:16 28:11 53:7,22 53:25 different 9:18 9:22,24 19:21 20:6,9,9 22:24 23:20,21 31:8 33:18 34:17,17 36:1,14 43:2 44:24 51:17,20 52:17 54:10 56:7 57:21 59:7 differential 57:8 difficulty 22:11 directs 28:2 disagree 35:17 disagreement 15:15 discredited 13:25 displace 46:22 displaces 30:8 dispute 41:18 disputed 9:1 dissolution 33:8 36:18 38:24 46:10 50:6 distinct 36:7 district 4:11,15 4:19,24,25 5:2 5:3,4 6:1 9:14 11:10,23 12:6</p>
--	--	--	--	--

12:18 13:16 15:1,9 18:7,7 18:14,17,25 19:2,6 20:16 20:17 21:1,20 21:22 22:17,19 22:21 23:12 24:5,10 25:9 25:20 26:6 27:15,19 28:11 28:24 31:22 32:18,19,21,25 33:3,7,24,25 34:13,21,24 35:6,7,13,22 36:12,15,21 37:2,4 38:7,23 39:2,7,10,19 39:25 40:12,13 40:14,15,16 41:4,4,13,16 41:23,24 42:2 42:4,18,19,21 42:24 43:6,23 44:25 47:16 50:11,13,21 51:1 52:10,17 53:1,12,16 54:8,14,25 55:5,9 56:10 56:18,20 57:6 57:7,10,18,25 58:3,10,18,22 59:12,13,14,21 59:24 60:9 61:1,8,20,22 63:15 districts 5:24 17:19 18:19 47:4 60:6,10 60:22 division 19:18 44:1 doing 6:18,23 8:18,24 29:15 31:5 55:7 double 46:16	doubt 60:16 doubted 36:24 Dr 11:19 dramatically 5:13 durable 36:21 duty 20:5 D.C 1:18 2:2,6 <hr/> E E 3:1 4:1,1 earlier 23:14 30:12 36:3 52:13 earmarked 18:7 earn 56:9 economic 39:23 economically 39:19 educating 20:6 education 5:21 6:14 14:9 15:1 15:13 16:4 42:1 51:4 53:15 56:5 57:21 58:2 59:11 61:12 educational 4:13 5:15 16:14 55:13 EEL 31:15 32:13 EEOA 13:18 15:4,25 17:8 21:10 29:1,6 29:18,19 30:4 30:9,14,22,23 31:18 36:6 37:13 41:6 46:22,25 47:8 48:14 49:18 51:8 54:7,18 62:2 63:2,2,3,6 effect 17:4 23:10 35:2 39:6 46:1 effective 6:4 11:20 13:8	22:4 effort 13:22 29:9 29:12 efforts 13:20 14:19 29:20,20 eight 23:1 eight-day 12:19 13:4,5,23 20:3 either 50:10,17 51:19 55:21 56:4 elaborate 4:22 15:5 62:14 elements 25:10 ELL 12:8 13:8 14:7 23:17 33:6 37:4,8,10 37:11,19 38:4 38:11,19 51:3 53:6,15,18,24 54:4 55:13,22 56:5,9 57:13 57:21 58:24 59:11 60:2 61:6,9 ELL's 34:7 emphasizes 55:9 enact 58:8 enactment 29:7 33:4 38:7,10 38:19 enforce 22:12 English 4:14 5:17 7:1,6,14 7:18,24 10:9 10:10,15 11:11 16:23 22:23 28:8 37:6,12 37:20 40:13 55:4 56:9 57:22,23 58:25 63:11,13 ensuing 33:8 46:11 entered 26:7 50:11 58:18 entire 16:19	26:8 40:23 43:13 58:2 entirely 22:24 31:8 entitled 50:14 entitlement 50:17 entrusted 14:25 16:3 equal 4:13 18:23 41:23 60:20 62:8 equalized 18:20 equally 17:20 41:14 equivalent 60:6 erred 37:3 error 20:2 especially 6:12 ESQ 1:25 2:2,4 3:3,5,7,11 essentially 19:20 et 1:8,16 17:2 58:18 evaluate 22:10 everybody 38:15 everybody's 39:23 evidence 12:21 14:8 25:11 34:24 35:8 63:15 evidentiary 12:19 13:17 50:21 evolving 33:2 exactly 8:10 exam 7:4,5,14 7:19,20 9:22 example 7:1 23:21 40:5 46:13 54:16 exams 9:10 exceptions 6:11 exchange 7:22 exclusive 55:16	exclusively 31:14 43:3 53:7 55:12 Excuse 7:21 executive 18:18 19:24 exist 56:15,16 exists 41:7 expanded 17:13 17:14 18:14 62:6 expected 58:19 expenditure 61:21 expenditures 16:14 experiencing 39:24 explain 15:12 explained 32:25 explanation 55:25 extend 26:20 extended 50:18 extra 56:25 extraordinarily 61:25 extraordinary 26:8 34:13 <hr/> F faced 59:5 facilities 60:11 fact 4:22,23 5:24 6:8,10 8:16,24 8:25 9:13 10:25 11:19 12:17 13:9,15 13:20 14:8 15:12 16:3 17:7,10,22 19:12,19 20:14 20:21 22:3,3 23:20 24:17 26:11 29:20 40:19 46:18 47:3,23 55:8
--	---	--	---	--

62:19,21,24 63:1 facts 36:16 45:3 45:12 46:18 63:15 factual 36:10 50:22 63:16,17 factually 36:11 fail 37:19 failed 4:13,17 7:2,3,5 22:21 32:22 37:5 failure 5:14 6:10 fair 46:12 faith 13:20,22 14:3,19 29:9 29:12,20,23 familiar 57:2 far 40:2 fault 17:16 favor 61:20 feathering 5:23 features 38:22 federal 14:12,23 15:17,24 18:22 21:18 28:7 50:20 52:21 53:2,9 54:16 54:19 55:1,2,2 59:16 60:8,8 60:10,22,24,25 62:15 felt 46:3 fight 27:16 figure 24:7 57:14 58:16 59:17,18,21 figures 6:24 9:6 9:16,21,23 43:20 filed 32:20 fill 21:6 61:10 filled 7:10 final 16:5 finality 6:12 23:7 44:22 find 11:10 23:12	40:10 41:24 finding 4:21 14:19 24:24 52:11 61:23 findings 4:22 10:20 20:3 50:22 63:16,17 fine 27:21 29:23 30:1 52:24 57:18,25 finish 49:12 first 7:13 11:14 20:4 30:6 38:25 44:9 52:18 63:8 fix 28:10,13 fixed 56:21 fleeting 32:23 34:3 Flores 1:8,16 4:4 flowing 13:21 focus 20:19 31:14 32:10 53:6 55:16,17 focused 25:7,10 32:4 38:7 43:3 53:12 55:12 followed 47:4 following 7:22 9:4 41:1 forbid 54:20 force 40:21 forget 14:5 former 28:15 fortified 34:24 35:7 fortifies 33:7 35:12 fortify 38:23 forward 31:19 38:19 found 28:25 29:2 32:19,21 33:25 37:3 39:3,7 46:5	54:9,14 56:10 56:11 fourth 7:5 framework 13:19 33:5 Frew 44:21 full 50:10 fully 25:23 function 6:13 fund 21:16,17 22:18 25:14 28:7,12,13 47:15,24 53:15 54:3 56:19 57:25 60:1 fundamental 11:22 17:11 30:6 62:17 fundamentally 36:1 38:10 funded 24:17 56:5 funding 5:4,5 6:2,21 11:15 12:1,8,12,24 13:5 14:6,7,17 16:10,12 17:8 18:7 20:13,14 21:5,5,11,14 21:15,16,19,21 22:7,12 23:13 23:19 24:25 25:14,15,22 26:9,15,17 29:3 31:15,16 31:20 32:2,3,5 32:12,14 33:6 33:12,18 34:8 34:11,18 35:2 35:21,23 37:8 37:10 38:11 39:15 40:3 41:3,5,19,23 43:4,6,9 44:15 47:16,17 48:8 52:12,19,21 53:6,19 54:10	54:12,15,17,22 54:24 55:6,14 55:23 56:7 59:2 60:6,23 60:24 61:25 62:24 63:18 funds 4:17 14:11 14:12,23 24:18 24:18,19 52:25 53:23,24,25 59:16 60:9 62:16 further 29:2 <hr/> G <hr/> G 4:1 gaps 56:16 gather 43:18 gee 19:5 general 2:5 17:17,22 18:21 19:3,7,15,19 26:22 27:5,7,9 27:13,17,24 28:1,12 40:20 41:2 42:16 43:14,21 44:2 44:10,15 53:24 German 7:15,16 54:5 getting 18:4 Ginsburg 5:19 6:1 12:3,22 13:10 15:21 17:16 22:25 24:4 25:13 28:3 38:13 50:13,23 59:12 63:11 give 45:25 50:14 53:18 given 7:14 14:6 42:13 43:16 gives 9:9 60:21 go 6:24 8:14,17 8:20 20:22 22:1,2,14,19	43:21,22 44:17 56:7,12 59:6 63:11 going 7:15 23:1 27:17 34:16 38:19 41:7,20 53:14,17 56:6 56:21,23 57:3 57:12,15 58:14 58:15 59:6,10 59:18,25 61:4 61:10 62:12 good 11:6 13:20 13:22 14:3,19 22:8 28:9 29:9 29:12,19,23 31:10,11 32:13 42:24 58:16 gotten 48:1,3 Government 60:8 62:15 governor 19:22 27:13,16 28:2 34:15 43:20 44:2 grade 6:25 7:3 graders 7:5 37:5 37:19 grant 31:13 54:19 granted 63:20 great 6:19,23 ground 12:5 13:6 20:22 31:21 36:8,17 38:6 39:12 grounds 6:9 guaranteeing 15:24 guard 19:1 guess 9:3 33:10 34:15 guidelines 10:7 gym 54:5 <hr/> H <hr/> half 39:5,8
---	--	--	---	--

<p>hands 26:4,13 happen 57:19 happened 20:21 43:3,8 44:11 58:21 62:25 happening 13:6 39:18 happens 39:12 hard 44:14 HB 13:16 15:8 25:10 33:5 51:3 63:12 hear 4:3 heard 51:10 hearing 5:12 12:18,19 13:17 13:23 16:6 20:4 50:21 52:11 53:17,22 59:8 heavily 50:24 heavy 59:5 heed 62:23 held 23:16 50:21 help 14:1 55:4 56:9 high 9:12 10:7 10:17 32:23 34:2 37:24 38:2,3 holding 55:25 home 10:21,24 10:25 Honor 4:20 6:22 7:13 10:24 11:14 12:25 15:16 17:7 19:9 27:1,19 27:25 34:25 40:1 46:5 61:24 62:13 Horne 1:3 4:4 house 1:13 12:12 15:15 52:18,20 58:12 59:9</p>	<hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 56:18 61:2 immediate 50:6 immersion 5:17 5:17 22:23 24:24 52:14 57:22,23 58:25 63:12,13 implement 47:2 48:3 important 16:10 50:4 58:23 imposes 48:7 improve 50:8 improved 8:19 23:17 36:9,20 36:20 improvement 36:25 improvements 32:22 35:3 36:9 38:1,9 48:20 50:8 inadequate 23:13 inappropriate 20:15 21:4 include 17:14 includes 48:8 including 9:12 11:18 15:6 26:15 35:20 43:4 inconsistent 15:24 incorrect 11:13 increase 11:15 26:17 increased 11:5 16:15 incredibly 62:23 incremental 31:15 32:2,13 52:12,19 53:6 55:12,21,24 56:6 inexistence 40:4</p>	<p>inform 62:3 information 8:16,22 informed 23:20 informs 30:14 infrastructure 8:19 23:17 38:20 initial 28:24 initiated 17:21 Inputs 24:1 inquired 43:6 inquiry 32:18 insist 52:14 instance 63:8 institutional 43:19 instruction 1:5 6:2 54:5 instructional 16:24 intense 5:17 interest 44:22 interested 16:21 interests 44:23 interfered 26:9 interim 50:9 58:12 interpretation 15:18 16:2 30:14 31:18 intervals 56:22 intervened 12:13 intervenors 32:20 intervention 13:11 intrudes 22:13 intrusion 17:15 intrusive 61:25 62:23 invite 26:5 invoke 45:18 involved 58:17 irrelevant 15:19 25:4</p>	<p>issue 14:2,25 15:20 25:4 27:8 34:22 40:25 42:15 55:24 issued 28:24 44:12 56:13 issues 6:6 25:4,6</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jails 39:21 January 4:11 judge 41:16 43:23 59:13 judged 32:1 judge's 24:5 judgment 6:5 18:16 19:10 23:6,19,20 24:5,12 28:25 31:13 32:11 33:8 34:20 44:12 46:10 51:5 52:8 56:4 57:5,10 59:10 62:22 judgments 23:4 23:4 44:23 judicial 18:13 jurisdiction 42:25 jurisdictions 40:9 Justice 2:5 4:3,9 4:16,24 5:10 5:19 6:1,23 7:17,21 8:3,4,6 8:9,11 9:2,3,4 9:4,6,15,16,23 10:3 11:2 12:3 12:22 13:10 14:1 15:11,21 16:11,17 17:16 17:25 18:3,9 18:10,12 19:2 19:12,15 20:1 20:11,18,24,25</p>	<p>21:4,12,25 22:6,14,15,25 23:9 24:4,18 24:21,22 25:6 25:12,13,19 26:19,24 27:4 27:10,15,23 28:3,9,18,23 29:5,16,22 30:1,10,18 31:2,24 32:5,9 33:10,11,21 34:4 35:1,10 35:16 36:3,23 36:25 37:15,18 38:13 39:1,14 39:17 40:8,10 40:19,24 41:9 41:11,21 42:7 42:9,11,17,23 43:2,18 44:9 44:14,20 45:4 45:10,13,20 46:20 47:11,14 47:21 48:9,12 48:17 49:1,4,7 49:10,13,21 50:2,13,23 51:9,19 52:10 53:5,20 55:8 55:19 56:17 58:4 59:12 60:3,16,19,24 61:13,18 62:7 62:11 63:11,21 justifies 34:19 justify 36:18</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 55:8 Kennedy 20:1 20:11,18,25 21:4 41:21 42:7,11,17,23 43:2 52:10 61:18 Kennedy's</p>
--	---	---	---	---

22:15 KENNETH 1:25 3:3,11 4:7 61:15 kept 6:2 58:10 key 8:24 9:7 10:25 11:18 13:7,18 16:6,7 18:8 20:15 kid 14:9 kids 55:4 kind 7:9,10 15:18 40:20,20 57:2,5 58:24 know 8:4 11:4 16:21 17:24 19:7 29:8 31:4 31:17 33:14 34:18 52:7	learn 7:18 55:4 learners 4:14 7:1,6,24 10:11 leaving 11:9 left 8:22 15:2,5 15:17,22 20:4 23:11,25 29:7 29:14,18 30:3 30:7,12,19,20 30:22 31:1 35:14,20 36:4 36:5,10 46:19 46:21,24 47:18 47:23 48:4,5 48:18,25 49:14 51:6 58:7 62:2 62:8 legal 12:20 36:4 legislation 59:19 legislative 32:20 58:6 Legislators 26:4 legislature 12:7 27:21 34:14,15 44:1,15,17 58:11,13,15 63:14 legislatures 26:12 56:19 letter 16:4 let's 10:3,4 11:2 22:14,15 31:5 level 21:11,19 37:11 60:14 levels 33:18 34:11 35:21,24 light 62:24 63:9 limit 50:7 limited 10:9,15 13:1 14:6 17:14 63:4,4 linked 58:5 listen 16:7 27:20 listened 27:22 litigate 47:7 litigated 31:7 32:6,10	litigation 19:21 19:23 42:13 43:1,12,19 44:7,11 57:9 58:2 local 6:13 26:13 long 46:23 48:21 longer 15:3 17:12 20:13 22:22 23:10 27:7 50:20 55:21 look 7:20 10:14 12:17 16:25 24:1 32:14 33:19,25 34:9 34:23 37:25 43:21 44:17 51:22 57:12 62:25 looked 16:12 33:24 looking 7:9 10:22 32:13 34:7,19 35:8 45:13 58:19 Los 1:25 lost 20:24 lot 44:4	10:6 matter 1:21 12:1 14:14 38:8 41:12,15 53:5 63:24 mean 6:24 18:3 22:9 23:2 29:8 30:21 31:1 44:6,9 47:1 52:9 56:3 58:21 means 39:21 measure 8:25 21:5 41:19 50:9 52:13 61:22 measurement 47:5 measures 47:3 mechanism 26:9 mechanisms 13:6 meet 37:5,18,19 mention 10:4 mentioned 10:4 10:5,8,18 23:14 menu 41:5 mere 40:19 merely 14:13 met 37:4 53:2 methodology 6:21,21 20:9 20:12 22:24 23:20 24:16 micromanaging 58:1 mind 56:24 minor 25:12 minute 22:16 minutes 61:14 MIRIAM 1:8,16 mistake 26:20 model 31:16 32:3 55:14,23 modest 46:14 modification	46:15 moment 11:8 22:15 24:23 30:20 Monday 1:19 money 11:10 21:16 22:18 23:23,24 24:8 28:12 39:20 42:2,3,3,19 43:22,23 48:2 52:25 53:8,9 53:23 54:1,3,4 57:1,3 60:11 monies 16:14 months 57:19 morning 6:9 motion 12:4,5 12:11,23 13:12 32:11 move 17:21 music 54:5
L				N
lack 29:3 47:7 laid 47:5 landscape 36:4 38:10 language 4:14 10:14 16:24 20:6 29:10,21 30:14 42:1 46:5 48:16 51:6 52:4,5 62:19 largely 40:25 43:16 late 60:4 lately 39:24 Laughter 8:8 law 12:6,11,14 12:15 15:24,25 17:4 18:1,5,6 18:12 19:7 27:12 28:7 43:8 45:3,12 46:19 50:20 53:2 55:1,2 lawsuit 26:20 leadership 6:19				N 3:1,1 4:1 National 26:3,12 native 37:6,11 37:20 nature 9:21 46:7 46:7 62:23 necessarily 30:21 46:25 necessary 29:13 37:1 40:22,23 42:8,11 46:4 47:17 need 23:24 24:7 52:1 58:23,25 59:2 needed 4:21,22 61:3,4 needs 5:11 neither 56:11,12 net 39:6 never 58:23 59:1 59:22 new 6:19,21

<p>13:2,5 14:5 23:11 24:16 32:12 33:2,13 34:25 38:13,15 38:16 39:15 44:24 52:14 59:6 NICOLE 2:4 3:7 49:23 nine 23:1 nine-year 58:21 Ninth 6:16 8:17 31:3,12 32:1,4 32:14,16 34:6 34:22 35:7,23 37:1,2,23 45:6 45:14 46:4 51:12,23 52:2 55:10,12 62:17 Nogales 4:12 5:16,18,25 6:18,23 7:2,6 8:18,23 9:14 13:6 16:15 17:12,14,18 20:19,19 21:2 21:14 22:16,17 22:20 26:6,10 26:15,21 28:10 28:13 31:5,6 38:3 40:23 41:6 43:4,7,10 49:13 50:7,9 50:19,23 52:25 53:4 54:12,14 55:3,5 56:13 56:15,16 62:5 62:25 nonnative 40:13 non-democratic 43:25 note 22:22 57:9 57:21 noted 50:23 noting 49:13 notwithstandi... 47:6</p>	<p>November 5:14 5:23 number 33:14 58:25 numbers 16:20 16:21 17:5,6,7 <hr/>O O 3:1 4:1 objectives 7:11 objects 24:15 obligated 32:14 obligation 47:25 48:2 obsolete 51:7 obtain 49:18 occur 58:20 occurred 5:15 odd 41:22 oddity 22:5 officials 27:3 28:15 44:24 Oh 19:5 okay 5:10 29:15 29:22 49:10 57:22 old 5:15 once 27:21 onerous 20:7,8 ongoing 50:20 53:2 54:25 open 6:15 opening 11:16 operating 54:2 operation 16:18 16:20 43:8 opinion 19:18 45:14 46:2 51:23 52:3 56:14 opportunity 4:13 optimal 40:6 oral 1:21 3:2 4:7 28:20 49:23 order 6:6 20:3 20:23 21:1</p>	<p>22:12 25:14 26:7,9 33:11 34:8,22 35:22 36:17 41:5 42:3 46:11,15 47:9 57:11 58:4,5 61:20 ordering 56:18 orders 23:3 33:9 42:2,19 50:6,7 50:11 52:7 58:18 original 6:5 19:10 20:23 23:18,19 24:11 62:22 originally 31:7 32:10 53:21 62:4 ought 36:12 outlined 45:8 outset 32:6,7 40:21 44:11 45:2 outside 17:1 overall 10:12 overcome 29:21 overcoming 48:16 overreaching 62:1 overrides 54:22 <hr/>P P 4:1 page 3:2 8:15 16:12 32:19 34:7,23 35:6 35:10 45:13,17 pages 9:9 11:16 39:7 papers 13:11 par 14:9 parameters 9:5 part 13:16 15:16 15:23 23:25 24:19 25:9</p>	<p>37:22 62:10 particular 4:14 12:20 18:14 21:10,19 33:12 33:17 34:10 37:25 38:21 42:13 43:7 48:6 56:22 60:2,9 61:1 62:3 63:4 particularly 22:12 30:25 32:24 43:15,25 51:23 pass 34:14,15 passage 63:12 passed 12:7 37:6 59:9 passing 10:10 patch 19:13 path 53:17 56:7 59:7,8 pay 21:23 62:23 pejorative 44:6 penny 31:9 percent 7:1,2,3 7:4,5,6 10:10 10:12,16 16:18 percentage 7:23 7:24,25 9:9 perform 58:14 performance 37:7 period 23:6 39:12 58:19,22 permissibility 32:1 permitted 63:19 persistent 56:16 perspective 19:21 Pet 8:15 petition 8:15,21 9:8 32:20 39:8 Petitioner 1:6 1:14 4:8 petitioners 2:1</p>	<p>3:4,12 30:5,25 35:5 36:2,19 38:1 50:4,25 52:6,24 54:17 54:23 55:20 57:20 59:4 61:16 Petitioner's 46:23 49:17 piece 44:7 pivotal 17:7 place 11:21 13:8 15:5 22:4 35:15,24 40:7 41:5 48:19 53:18 55:3,3 57:11,13 58:13 59:2,11 places 54:10 plaintiff 47:6 plaintiffs 11:18 17:20 19:20 plan 4:18,23 5:1 5:7,11 12:8 15:6,7 21:15 21:16,17,17,22 21:23 22:8,8 22:10,16,17,18 22:22,23 23:10 23:11,13 24:7 24:13,24 25:14 25:16,17,21,23 31:7,8,8,10 32:12 33:12,15 33:18 34:5,25 35:15,19 38:13 38:15,16 46:24 47:2,6,13,15 48:21,23,24 49:5,7 54:9 56:5 62:14 planning 59:22 plans 38:11 54:11 play 60:7 please 4:10 28:23 50:3</p>
--	---	---	--	---

52:16 57:16 59:24 point 7:17,19 10:19 13:17 14:18 15:8 16:1 17:8,9 21:14 22:15 24:15 27:10,17 29:17,19 30:7 35:19 38:12 43:15 45:22,23 49:12 58:23 points 13:1 15:8 15:13 26:1 36:14 44:8 policy 5:15 political 43:20 portions 52:2 position 19:25 30:5 53:13,21 precedents 51:25 precise 45:18 precisely 21:11 24:14 preempts 51:6,7 preferable 56:19 premature 32:25 34:3 39:11 prerogatives 17:15 present 40:1 presented 12:6 35:1 President 13:15 presumptively 20:15 pretty 29:12 previously 54:4 primary 50:25 51:2 55:17,18 prior 9:9 33:11 34:8 private 47:8 probably 60:11	problem 11:4 14:15 25:2 40:14 42:20 52:22 54:18 59:21 60:2 61:4 problems 14:16 17:11 38:6 50:22 52:20 process 15:6 produce 32:13 produced 31:11 proficient 10:9 10:11,15 profound 39:22 program 11:5 11:21 13:8 22:4 29:2 33:17 39:21 40:6,6 48:3,7 48:13,19 52:14 53:18,24 54:1 56:8 57:13,23 58:24 59:11 60:8 programming 23:18 28:8 programs 12:8 29:4 31:15,21 33:6 37:8,10 38:18 44:24 48:10,15 53:7 54:4,19 55:3 55:13,22 58:16 59:25 60:2 progress 7:8 8:25 9:10,13 10:21 11:20,25 13:9 24:2,3 25:24 26:18 34:1,2,2,3,5 39:2 47:5 48:22,24 49:12 49:14,17 promptly 5:24 proposition 45:19	provide 4:13,17 6:2 17:2,3 29:10 54:24 61:6,7 provided 12:23 provides 17:1 providing 11:9 41:25 provision 38:18 41:22 60:5,13 62:3 PUBLIC 1:5 pupil 16:25 purpose 12:13 23:7 put 40:5,7 41:5 44:4 53:18 55:2,3 56:5 57:10,12 58:13 59:2,10 63:14 putting 53:9 p.m 63:23	R	referee 27:16 references 38:14 referred 24:18 referring 7:14 reflects 52:5 refocus 26:6 refocuses 26:14 reforms 6:20 regard 32:2 39:18 regardless 31:20 35:2 36:10 rejected 35:6 rejection 35:8 related 5:6 29:3 relates 6:3 relation 25:23 relationship 25:16 relatively 46:14 relevant 8:21 55:24 relied 50:25 relief 17:23 23:7 31:13 32:1,11 46:7,10 50:14 50:17 52:7 63:20 relitigate 19:10 rely 38:1 remainder 28:17 remand 46:3 52:11 remarkable 62:19 remedial 52:7 57:11 63:3 remediation 4:23 remedy 20:12 20:14 21:5 42:19 61:23,25 62:4,4,24 63:19 remove 25:20 render 15:17
		Q		
		quarrel 9:20 11:22 19:10 25:9 question 9:4 10:25 13:14 15:14 19:17 24:23 27:5 30:3 31:2,25 33:11 34:4,5 43:16 45:5 46:2,17,20 50:18 52:15,23 54:24 60:4 questions 8:7 13:21 quibble 44:10 quintessential 6:13 quite 10:16,21 16:20 28:10 63:4 quoting 9:19	reading 7:4,5 10:14 17:1 really 29:19 31:25 37:9 41:18,19 reason 18:3,4 33:3 41:1,1 42:24 46:4,21 53:11 55:17 reasonably 4:18 6:3 29:21 48:15 55:4 56:9 reasons 23:13 30:6 33:14 REBUTTAL 3:10 61:15 recipe 39:16 recognize 50:4 record 6:25 7:10 10:22 26:3 34:24 35:8 63:17 refer 9:7	

<p>rendered 18:16 renders 51:7 renewing 6:2 representation 44:5 REPRESENT... 1:13 represents 27:6 require 18:6,13 29:19 required 13:19 18:4 28:6 30:15 32:17 35:22 47:4 55:20,20 56:3 requirement 29:9 requirements 29:6 34:18 requires 21:10 21:19 29:18,20 37:14,14 45:1 47:9 61:21 62:9 requiring 24:3 reserve 28:17 resource 56:15 resources 39:5,9 43:7 respect 9:6,16 14:23 15:15 18:14 20:2,5 21:2 22:16,20 36:16 37:24 38:2 41:6 43:9 55:15 60:22 respond 5:25 responded 6:20 Respondents 2:3,7 3:6,9 11:18 13:7 23:24 28:21 50:1 responsibility 14:13 18:18 21:20 61:10 responsible</p>	<p>61:11 rest 11:10 60:12 60:13 rests 42:12 result 29:3 43:24 50:9 56:8 results 5:18 31:11 32:13 return 16:5 46:20 review 32:17 34:23 46:2 51:24 reviewing 31:4 55:11 reviews 35:12 revisit 43:15 right 8:7 9:23 10:3,20 11:12 15:25 20:11 22:14 24:14 25:17,19 28:10 41:16 47:11,18 48:17,17 49:3 49:9 54:11 56:2 59:19 roads 39:22 ROBERTS 4:3 8:11 9:2,15,23 20:24 28:18 33:10,21 34:4 35:16 39:14,17 43:18 44:14 45:4,10,13,20 49:21 51:9,19 56:17 58:4 61:13 63:21 Rufo 44:21 45:9 45:18 46:13 51:25 rule 50:5 53:17 59:4,7</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 3:1 4:1 Saharsky 2:4</p>	<p>3:7 49:22,23 50:2,16 51:15 51:22 52:15 53:11 54:8 55:15 56:2 57:7 58:9 59:20 60:3,15 60:17,20 61:2 satisfactory 25:22 satisfy 35:4 46:25 47:25 51:4 satisfying 48:1 saving 15:22 saying 9:18 20:4 20:12,25 21:1 21:18,19,22 39:10 40:15 42:1,18 49:1 56:25 58:10 says 6:25 16:13 16:23 19:4 23:22 25:20 27:7 33:13 37:2,15,23 40:15 41:23 57:3 Scalia 7:21 8:3,9 18:9,12 19:12 19:15 23:9 26:19,24 28:9 29:5,16,22 30:1,18 35:10 36:3,23,25 37:15,18 40:8 40:10,19,24 41:9,11 42:9 46:20 47:11,14 47:21 48:9,12 48:17 49:1,4,7 49:10 60:3,16 60:19,24 62:7 62:11 Scalia's 9:4 24:22 27:10 scheme 5:5 14:4</p>	<p>51:3 53:14 school 4:12 5:3 5:24 9:12 10:7 11:10 17:19 21:21 32:23 34:2 37:24 38:2 40:16 47:4 54:2 58:17 60:22 61:1,8 schools 10:17 38:2,3 scoring 10:11 sea 5:14 second 14:10 36:16 52:23,23 Secretary 49:5 section 46:2 63:2 see 8:21 9:12 11:16 20:2 26:16 27:10 51:16,20 56:21 62:25 seek 17:10 seeking 17:23 22:11 SEI 5:20 6:4 Senate 12:12 sense 22:3 44:7 series 6:6 serious 51:4 seriously 10:2 session 58:6,7 set 23:21 44:24 sets 30:3,23 36:6 38:18 settle 23:4 shifted 12:5 24:16 shifts 38:10 show 36:19 50:10 56:4 59:5,5 showed 14:8 showing 31:20 45:1 50:22</p>	<p>53:3 shown 5:18 25:22 shows 38:3 siding 19:20 sign 34:16 significant 11:24 32:22,24 38:22 39:3 45:2,3,11,12 46:12,12,18,18 46:19 51:16,16 52:1 54:21 56:14 significantly 8:19 23:17 45:15,22 51:13 simple 47:22 simply 5:6 12:20 14:14 21:8,22 25:10 30:13 47:12 61:22 62:17,22 single 42:18 46:16 site 49:16 sitting 40:11 situation 62:5 sixth 6:25 Sixty 63:19 solely 32:2 Solicitor 2:5 solve 54:18 61:4 soon 5:24 sorry 8:2 14:11 18:11 19:6 sort 34:22 39:23 43:19 sought 46:8,10 46:14 48:22 50:15 source 54:13,23 sources 54:15 55:6 60:23 Souter 4:16,24 5:10 14:1 17:25 18:3,10</p>
---	---	---	--	--

<p>19:2 21:12,25 22:6,14 24:21 25:6 27:4,15 27:23 39:1 speak 27:24 Speaker 1:12 12:12 13:14 speakers 37:6 37:12,20 40:14 Speaker's 55:25 speaking 27:9 28:3 speaks 27:13 28:1 special 58:24 specific 4:20 15:22 17:9 18:7 22:12 34:7,11 35:21 35:23 54:19 specifically 12:13 specify 58:5 spend 23:23 24:5 33:17 39:20 43:22,23 spending 31:9 spent 42:2 SRI 2:2 3:5 28:20 Srinivasan 2:2 3:5 28:19,20 28:22 29:16,24 30:2,17 31:17 32:4,16 33:20 33:23 34:21 35:11,25 36:24 37:13,17,22 38:17 39:15,25 40:9,18,24 41:10,17 42:5 42:10,22 43:1 44:8,19 45:8 45:11,17,25 47:12,19 48:5 48:11,14,18 49:3,6,9,11</p>	<p>stage 50:5 59:4 stand 23:6 standard 30:4 30:16,23 36:6 45:5,14,21 46:1,2,22,23 51:11,12,24 standards 30:8 33:2 37:5,20 standing 19:5 23:23 Starr 1:25 3:3 3:11 4:6,7,9,20 5:9,11,20,22 6:8 7:13,19 8:1 8:13 9:7,20 10:1,24 11:13 12:3,16,25 13:13 14:22 15:11,14 16:1 16:16 17:6,23 18:2,6,25 19:9 19:14,17 20:8 20:14,20 21:3 21:8,24 22:2 22:11,21 23:5 23:15 24:14 25:3,8,18 26:1 26:23 27:1,12 27:19,25 28:15 61:14,15,17,18 61:24 62:10,13 start 56:25 started 11:3 26:10 starting 51:10 starts 51:24 state 4:23 5:16 6:13,20 8:18 8:24 9:11 11:4 11:9 14:11,13 15:12 16:10,11 16:23 17:1,9 17:15 18:1,4,5 18:6,12,15,16 18:17,18,23,23 19:3,5,7,15,19</p>	<p>19:23,24 20:5 26:2,3,8,12,16 26:21,22 27:2 27:6,9,20,24 28:1,12,16 30:15 31:19,23 32:7 33:12,16 34:14 35:17,17 37:5,7,25 39:19 40:1,2,3 40:11,20,23 41:1,3,8,13,15 42:4,25 43:8 43:10,13 44:12 44:24 46:23 47:1,2,9,12 48:24 53:15,24 54:11 55:2,14 56:6,18,23,24 57:6,8,12,13 58:2,10,14,17 59:6,8,22,23 59:24 60:5,13 60:21 61:3,6,9 61:24 States 1:1,22 2:6 3:8 46:25 48:12 49:24 statewide 7:3,4 7:7,23,23,24 9:11 17:10,21 20:15 22:13 26:5,6,10 27:8 28:8 40:16 41:19 53:14 59:11 61:5,12 62:24 63:7,16 63:17,18 State's 19:25 34:9 41:20 51:3 53:13 statute 14:5 17:8 21:18 35:4 stay 39:18 STEVENS 15:11 strain 33:16</p>	<p>strategic 5:17 22:23 strike 14:11 structurally 11:24 structured 57:21,23 58:24 63:11,13 student 10:5 11:8 14:7 59:3 61:9 students 7:25 8:23 9:10,13 10:9,11 12:9 17:3 20:6 37:11 38:5,19 56:9 61:7 studies 17:9 study 11:6 17:11 25:21 26:2,2 26:11,13 57:15 57:16 58:11,13 58:16 subject 14:7 submission 6:9 12:17 13:1,16 20:2,16 34:9 62:17 submit 48:13 submitted 62:14 63:22,24 submitting 13:15 substantial 11:14,20 26:17 substantially 8:18 substitute 28:5 suffice 39:4 sufficient 54:12 54:24 suggest 10:23 13:21 44:24 suggestion 44:25 suit 26:25 summarize</p>	<p>11:15 summarized 8:16 superintendent 1:4 6:19 13:24 23:22 34:10 superintenden... 8:20 9:8 49:16 supervising 61:12 supervision 36:13 supplant 14:12 14:24 16:3 59:16 supplantation 14:17 supplanted 53:9 supplanting 25:1 supplants 30:12 supplement 14:24 59:17 supplemental 16:2 supplementing 14:14 25:1 supplied 12:11 supply 11:15 support 4:23 supporting 2:7 3:9 50:1 suppose 31:4,6 54:3 supposed 19:3 27:16 Supreme 1:1,22 sure 7:8 16:18 18:19 25:13 44:19 60:10 survey 16:22 37:25 38:4 sustainable 36:21 system 4:12 5:15 28:8 40:21 systematic 46:9</p>
--	---	---	--	---

systemic 29:1 52:8	10:17 48:21 49:9	34:12 35:18 39:10 48:12	44:8 49:15 52:17,20 59:15	V
T	text 30:7	three 26:1 38:21 59:15 61:14	two-year 14:7 14:17 52:21	v 1:7,15 4:4
T 3:1,1	textual 30:7	three-part 21:9	U	vague 29:8 30:16
take 4:25 7:1 10:1,3,4,5 11:11 12:3 14:14 16:19 21:20 30:15,25 31:22 47:9 54:3	thank 8:13 28:18,22 29:25 49:20,21 61:12 61:13,17 63:20 63:21	throw 26:4,13 thrown 19:13 thrust 50:25 51:2	ultimately 15:19 25:4	valid 20:18
taken 48:21 54:1	theory 57:21	tied 32:12 60:1	unappealed 23:4	variation 20:16
talk 22:16	they'd 43:24	time 5:12 23:6 28:17 31:5 36:21 40:22 42:18 43:15 48:20,23 53:16 53:22 55:14 57:9,12 58:19 59:7,10	underlying 24:15 52:8	variety 12:25 24:17
talked 56:14	thing 7:9,10 20:22 25:12 34:13 41:14 54:14	times 6:3 62:21	underneath 36:12	various 26:14
talking 18:10 38:14 40:11 50:18 55:9 60:17,21	things 11:11 13:24 36:11 53:4 54:6 59:15	Title 62:16,16	understand 7:22 16:13 18:24 21:13 33:11 35:17 36:2 45:6 47:14 51:15 52:2,15 53:10 55:16 56:3 60:15	vary 41:4
talks 34:7 51:25	think 8:1,4 9:24 10:8 11:6 15:10 16:6 24:4 25:13 26:20 30:5,5 30:10,11,17,24 32:16 33:7 35:5,16 36:15 37:1,9,13,14 37:23 38:8,17 38:22 39:1,9 40:24 41:18 42:10,12,15 43:5,14 44:12 44:20 46:4,11 47:19 51:17,22 52:4 53:11 55:15 57:7 58:9,22 59:20 60:4,7 61:2	today 32:22	understanding 51:12	vast 26:20 28:11
tax 54:22		told 17:17 59:22	understood 34:6 34:9 35:22	versus 14:24 16:2 26:6
teach 7:18		totality 13:2	undertake 17:10 26:2	view 29:17 46:21
teachers 23:23 23:25 24:6 59:1		totally 17:5	undertaken 26:11	vindicate 49:18
teaching 54:5		touting 38:1	undue 62:20	violation 29:1 46:7,9 50:20 52:8 53:2,3 55:1,1 56:20
tell 11:6 18:24 20:1 24:12 34:13 57:24,24 59:24		tranches 26:15	uniform 60:18	virtue 24:16
ten 57:18 62:21		transmogrified 63:6	uniformity 42:14 43:11,17	voluntarily 48:7
tenth 7:3 37:4 37:19		treated 17:20	United 1:1,22 2:6 3:8 49:24	voted 5:22
termination 58:6		tremendous 6:20	unnecessary 50:12	voters 5:22 43:21
terms 16:10 19:24 20:20 53:13		trial 13:4,5 57:12	unwarranted 38:24	W
test 9:18,21,24 10:2,7,10 21:9 24:1 48:1	third 10:13 51:10	trouble 56:17	use 9:18 40:5 45:15 51:7 54:16 57:14 61:23	W 1:25 3:3,11 4:7 61:15
testified 13:24	THOMAS 1:3	troubled 15:13	uses 46:5	want 9:18 16:5 23:22 27:8 40:6 44:1 58:1
testimony 11:17 11:17 35:12	thought 4:16 5:2 5:3 14:2,16 15:22 21:13 24:11 25:14 29:13 32:10	true 6:8 8:10,11 12:2 39:18 46:24		wanted 19:12,16 26:22 28:12,14 43:24 52:6 59:5
testing 48:19,20 49:8 62:9		trusted 15:1		wants 44:16
tests 7:2 9:22		truth 18:24		warned 27:2
		try 8:12 24:12		Washington 1:18 2:2,5
		trying 19:9		wasn't 17:20 28:6 32:14 59:17 60:1
		two 14:4,9,16,20 14:21 15:13 23:13 24:24 25:4,10 30:6 35:25 38:3		water 26:24
				way 19:4,8 23:24 28:13 32:5,7,9 33:6

34:17 36:4,11 36:20 40:4 41:24 43:2,25 44:16 45:1 49:17 52:13 56:8 57:4,4 59:18 web 49:16 weight 44:4 62:21 went 13:17 we're 19:11,11 38:14 whatsoever 63:18 witness 11:19 13:7 wording 45:18 words 8:17 22:6 39:19 work 31:21 35:14,18 39:9 workable 30:24 working 33:15 works 57:14 worry 41:11 worth 22:9 writing 17:1 wrong 5:8 14:17 15:10 16:21 17:5,6 21:25 24:10 33:21,23 59:15 62:18 Wrongly 25:8	<hr/> \$ <hr/> \$1300 11:7 \$1400 11:8 \$1500 11:7 \$200 59:3 \$300 59:3 \$3300 16:25 \$340 17:3 \$400 11:9 \$450 17:5 59:17 59:18,21,23 <hr/> 0 <hr/> 08-289 1:7 4:4 08-294 1:15 <hr/> 1 <hr/> 1 62:16 100a 35:6 100-A 32:19 107 39:7 108a 39:8 11:04 4:2 11:05 1:23 12 58:7 12:09 63:23 15.4 10:16,17 1570 16:24 1712 63:2 <hr/> 2 <hr/> 20 1:19 38:14 2000 4:11 5:14 5:23 6:6 11:3 22:25 28:25 31:10 53:16 57:10 59:10 63:14 2006 33:4 2007 10:9 2008 6:25 7:5 10:8 2009 1:19 2010 58:12 2064 12:7,7,23 13:16 15:8 17:4 25:10	33:5 38:8,11 38:16 39:6 51:3 52:18,20 59:9,13 63:13 22 11:16 16:12 22.4 10:10 23 11:16 16:12 28 3:6 <hr/> 3 <hr/> 3 11:9 62:16 30 7:6 16:18 312 9:8 32 7:2 34 7:4 <hr/> 4 <hr/> 4 3:4 450 59:14 60:1 46a 8:15 49 3:9 49a 45:17 <hr/> 5 <hr/> 5 63:19 50 46:25 <hr/> 6 <hr/> 60 55:25 60(b) 5:12 12:4 12:5,10 13:1 13:12 27:1,4 28:4 32:2 53:17,22 60(b)standard 62:18 60(b)(5) 6:11 12:18 16:6,7 23:7 50:5 59:4 59:8 61 3:12 63A 55:25 64(b) 12:23 66a 34:23 35:11 67 7:5 68 10:12 <hr/> 7 <hr/>	72a 34:7 45:14 46:5 73.5 10:15 75 10:16 77 7:1 <hr/> 8 <hr/> 8-day 50:21 52:11 84 7:3 <hr/> 9 <hr/> 91-page 56:14
<hr/> X <hr/> x 1:2,9,11,17 <hr/> Y <hr/> Yeah 60:19 year 5:19,20,21 11:3 63:13 years 14:9 23:1 24:24 28:4,4 49:15 59:16 <hr/> Z <hr/> Zumudio 11:19			