No. 08-294
(consolidated with No. 08-289)

In the Supreme Court of the United States

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

Petitioners,

v.

MIRIAM FLORES, ET AL.,

Respondents.

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

BRIEF OF EDUCATION-POLICY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are 21 prominent scholars and researchers in the field of education policy who have extensively studied, researched, and written about the effects of court-ordered funding remedies and institutional reform on student performance.* *Amici* have diverse backgrounds and perspectives. They are:

- David J. Armor, Professor of Public Policy at George Mason University and former member of the Los Angeles Board of Education;
- John E. Chubb, Distinguished Visiting Fellow at the Hoover Institution of Stanford University and founding partner of Edison Schools, Inc.;
- Julie Berry Cullen, Associate Professor of Economics at the University of California, San Diego;
- David Figlio, the Orrington Lunt Professor of Education and Social Policy at Northwestern University;
- Chester E. Finn, Jr., Senior Fellow at the Hoover Institution of Stanford University and former Assistant Secretary for Research and Improvement in the U.S. Department of Education;

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* Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

- Dan Goldhaber, Research Professor at the Center on Reinventing Public Education at the University of Washington Bothell;
- James W. Guthrie, Professor of Public Policy and Education and Director of the Peabody Center for Education Policy at Vanderbilt University;
- Eric A. Hanushek, the Paul and Jean Hanna Senior Fellow at the Hoover Institution of Stanford University;
- James J. Heckman, the Henry Schultz Distinguished Service Professor of Economics at the University of Chicago and a 2000 Nobel Laureate in Economics;
- Frederick M. Hess, Resident Scholar and Director of Education Policy Studies at the American Enterprise Institute and Research Associate at the Harvard University Program on Education Policy and Governance;
- Paul T. Hill, the John and Marguerite Corbally Professor and Director of the Center on Reinventing Public Education at the University of Washington Bothell;
- Tom Loveless, the Herman and George R. Brown Chair and Senior Fellow in Governance Studies at the Brookings Institution;
- Terry M. Moe, the William Bennett Munro Professor of Political Science at Stanford University;
- Paul E. Peterson, the Henry Lee Shattuck Professor of Government and Director of the Program on Education Policy and Governance at Harvard University;

- Michael J. Podgursky, Professor of Economics at the University of Missouri;
- Steven G. Rivkin, Department Chair and Professor of Economics at Amherst College;
- James R. Smith, President and CEO of Management Analysis & Planning, Inc. and former Deputy Superintendent of the California Department of Education;
- Abigail Thernstrom, Adjunct Scholar at the American Enterprise Institute, Vice-Chair of the U.S. Commission on Civil Rights, and former member of the Massachusetts Board of Education;
- Stephan Thernstrom, the Winthrop Research Professor of History at Harvard University;
- Herbert J. Walberg, Emeritus Professor of Education and Psychology at the University of Illinois at Chicago; and
- Martin R. West, Assistant Professor of Education, Political Science, and Public Policy at Brown University.

Amici submit this brief to inform the Court of the effect on school administration and student achievement of school-finance lawsuits that result in funding increases unaccompanied by any meaningful reform. *Amici* believe that the No Child Left Behind Act of 2001 (NCLB or Act), Pub. L. No. 107-110, 115 Stat. 1425 (2002), is a clear reflection of the dominant view of scholars that educational reform should focus on student performance—the output of school systems—rather than inputs such as funding levels.

Amici have a particular interest in ensuring that federal courts do not prevent States from enacting

innovative and comprehensive structural reforms designed to improve student performance by mandating particular funding levels and earmarks for individual programs. *Amici* also have a strong interest in having courts respect the underlying principle reflected in NCLB that a clear outcome-focused approach is central to a sound education policy.

Amici claim no specific legal expertise and submit this brief in their capacity as academics and researchers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals affirmed the district court's injunction directing the State of Arizona to increase funding earmarked for English-language-learner (ELL) programs. *Amici* believe that the injunction reflects a mistaken judgment about education policy and sets a harmful precedent for our Nation's children.

The lower courts found that Arizona was not doing enough to improve the performance of its ELL students and ordered the State to appropriate more money for the specific purpose of funding ELL instruction. This remedy—like most court-ordered funding remedies—is destined to fail. There is virtually no evidence that ordering an increase in funding by itself leads to a significant positive effect on student achievement. It is far more important for States to focus on structural reform and on how their money is spent than on the bottom line of the education budget. More funding is effective only when it is coupled with an effort to eliminate waste and inefficiency and to institute effective programs and hiring policies. States and school districts will have no in-

centive to make difficult choices if courts continue to make increased funding the centerpiece of their remedies.

Federal judges lack the experience and expertise to make decisions about the administration of schools and the allocation of State resources. Instead of ordering more funding, courts should allow States the flexibility to find solutions to their educational problems by focusing on outcomes and accountability. This is the consensus view of education-policy experts, and there is substantial evidence that it works. Indeed, it has been proven to work *in this case*. When Arizona and the Nogales Unified School District (Nogales) began to spend their money more efficiently and to monitor the progress of ELL students, they saw significant improvement in achievement. It is precisely this type of outcome-based innovation that courts should be encouraging, rather than restricting it by rigidly adhering to the view that funding is the answer.

In passing NCLB with the strong support of various civil-rights groups, Congress recognized that this thinking on education policy was the best way to improve the achievement of America's schoolchildren and that simply looking at inputs did not lead to desired results. NCLB provides for accountability by setting objective standards and measuring progress toward achievement goals. It allows States the flexibility to determine how to meet these goals, thus ensuring that education-policy decisions are made by those best suited to the task. Measuring student performance on state assessments is a means to evaluate whether States and school districts are making progress in a meaningful way, instead of simply deciding whether they are spending enough

money. Arizona and its school districts are on the right track, having made difficult decisions that reflect sound education-policy judgments. Their efforts should be given the opportunity to succeed.

ARGUMENT

SOUND EDUCATION POLICY FOCUSES ON SETTING STANDARDS AND MEASURING RESULTS, NOT SIMPLY ON INCREASING RESOURCES

The court of appeals upheld the district court's funding mandate as a remedy for perceived deficiencies in the administration of Arizona's school systems. The lower courts' approach continues a disturbing trend that reinforces bad education policy through court-ordered funding remedies. As we explain in this brief, the dominant approach to education policy focuses on the outcomes of school administration and seeks to hold States accountable for student performance.

Studies have overwhelmingly shown that court-ordered funding remedies—attempts to improve student performance just by varying the inputs—are consistently ineffective. See *infra* Point A. As a consequence, courts should resist imposing these types of remedies, which restrict States' options for improving student performance; instead, States and schools should be focused on meeting objective performance standards. See *infra* Point B. Federal passage of NCLB reflects this consensus approach to education policy: it supports an output-focused framework where States are allowed the flexibility to decide how to meet their learning standards, and it provides a clear way to evaluate progress towards

accomplishing that task based on student achievement. See *infra* Point C.

A. Increased Education Funding Has Not Led To Improved Student Performance

There is scant evidence that past judicial actions concerning school finance have had any beneficial effect on student performance. Indeed, even without courts' involvement, general spending on K-12 education has grown substantially over the last 30 to 40 years; but despite an almost four-fold increase in resources since 1960, national test scores have shown very little progress in student achievement. See Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 33, 62-63 (Eric A. Hanushek ed. 2006). When courts get involved, the results are equally stark:

> Virtually no peer-reviewed or other credible articles or studies claim to have found significant, positive effects [of court-ordered funding remedies] on student achievement * * *. The harsh reality is that in those states where a court-ordered remedy has been in effect long enough for a fair evaluation, patterns of student failure, especially for poor and minority students, have not significantly changed.

ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 146 (forthcoming May 2009).

Amicus Eric Hanushek and his co-author Alfred Lindseth recently examined the performance of stu-

dents in four States—Kentucky, Massachusetts, New Jersey, and Wyoming—that experienced extraordinary funding increases as a result of court-ordered remedies in "adequacy" suits, actions directed at States that have allegedly failed to provide a level of education sufficient to satisfy the requirements of the state constitution. Focusing on the National Assessment of Educational Progress scores for the students who historically performed worst and were the principal target of court-ordered remedial dollars, the authors found that, relative to the rest of the Nation, the results in three of the four States were "largely disappointing." HANUSHEK & LINDSETH, *supra*, at 170.

In Kentucky and Wyoming, after 15 years of increases in expenditures, students were performing no better relative to the rest of the country—and in some cases, particularly those involving minorities, were performing worse—than in the period prior to the court-ordered remedy. HANUSHEK & LINDSETH, *supra*, at 151, 154, 157. In New Jersey, which spends more per pupil than any State in the country (roughly 60 percent higher than the average), student performance was not materially different at the end of the 15-year period than at the beginning. *Id.* at 162, 164-166. Only in Massachusetts, where the court-ordered increase in spending was coupled with structural reforms like rigorous academic standards, graduation tests, and accountability measures, was there evidence of marked improvement in student achievement. *Id.* at 169-170. Hanushek and Lindseth thus concluded that, "while court-ordered dollars have bought a host of services and facilities for schools[,] * * * these appear not to have generally bought the improved student performance so long sought and so urgently needed." *Id.* at 170.

These findings are not surprising. Studies have consistently found that *how* money is spent is much more important than *how much* money is spent. Increased spending—either through legislative efforts or through court-ordered funding remedies—is nothing more than window dressing on more fundamental problems impeding student performance. This is particularly true with respect to ELL programs—the type of program at issue in this case. Studies have shown that "state efforts to help local districts provide adequate programming opportunities for [ELL students] are often poorly conceived or applied," and "funding policies that are neither rational nor equitable" will not improve their performance. Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 BILINGUAL RES. J. 659, 678 (2002). Rather than effecting genuine change, increased funding—in the ELL context and elsewhere—is likely to be a purely cosmetic remedy.

Yet courts have long pushed for increased spending on schools to remedy perceived constitutional and statutory violations, because the conventional wisdom has been that money is the key to success. Courts prefer financial remedies because they are simple to order, monitor, and enforce (most often through injunctive relief), and they do not require courts to become involved in the day-to-day operation of school systems. While courts are right to stay out of the business of school administration, students still lose when courts delve into appropriation decisions to redress problems at the state and local level.

If courts ignore structural problems in favor of more funding, the message States and school districts receive is that they can always get more money

no matter how they manage their schools. This is a perverse result. Without any incentive to take effective measures to improve student performance, most school systems do not make any meaningful changes—or, worse, funnel money away from the problems that need to be remedied.

"Will politics, ideologies, or the institutional structure of districts (including susceptibility to corruption) tend to divert money into paths and projects that do not advance student achievement?" Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, in COURTING FAILURE, *supra*, at 103, 105. The answer, unfortunately, is yes. Those who too often trumpet victory in school-funding cases—special interests and bureaucrats—continue the vicious cycle of input-based incentives: to capture as much money as possible for schools without any evidence of improvement in student achievement. See *id*. at 174, 176-178.

The type of funding remedy ordered in this case—a requirement that a certain amount of funds be earmarked for a particular program (here, ELL students), see 08-294 Pet. App. 64a-65a, 115a-116a, 186a-187a—can be particularly problematic, because school districts could rationally decide to keep ELL students languishing in the program and segregated from other students to ensure that funding for ELL programming does not diminish or disappear, see HANUSHEK & LINDSETH, *supra*, at 228. This is the exact opposite of the intent behind both the Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, 88 Stat. 514, and the district court's remedial order: to integrate ELL students and provide them with the same educational opportunities afforded all students. See 20 U.S.C. § 1701(a).

Funding earmarked for particular programs also hamstrings legislatures and prevents them from exploring creative, meaningful reforms that are necessary to improve student performance.

B. Court-Ordered Remedies Should Afford States The Flexibility To Make Decisions About Inputs As Long As They Are Obtaining The Desired Outcomes

Because of their tendency to, in effect, throw money at education problems, courts do not have an impressive track record of improving student performance. For too long, courts have handicapped themselves by following antiquated thinking on education policy and attempting to fashion remedies that focus exclusively on measuring inputs to schools. Not only has this system proved unsuccessful; it has forced courts to stay involved in school-performance cases for many years and locked in ineffective programs, while restricting the options of States to develop better ones. Courts should play only a limited role in school administration and provide States and schools with the flexibility to craft solutions that focus on outcomes and accountability.

Courts are unsuited to addressing issues of education policy. Questions involving the administration of a school system—especially the proper disposition of state funds—are highly specialized, extraordinarily complex, and inherently political. State legislatures wrestle daily with such policy questions as the quality of education to provide their students, the level at which their citizens should be taxed to support public education, the portion of the state budget to allocate to schools, the reforms necessary to improve student performance, and the methods of

measuring such performance. See HANUSHEK & LINDSETH, *supra*, at 100.

Unlike state legislatures, courts have no particular experience or expertise in dealing with matters of education or budgetary policy. They also lack the necessary resources, such as staff and specialized committees to provide essential research and guidance on these complex issues. See HANUSHEK & LINDSETH, *supra*, at 139. As this Court has observed, federal judges' "lack of specialized knowledge and experience" therefore "counsels against premature interference with the informed judgments made at the state and local levels." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 131-132 (1995) (Thomas, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make * * * day-to-day policy, curricular, and funding choices * * *.").

In too many school-funding cases, courts act in ways that have a counterproductive effect on efforts to achieve equal and adequate education for all students. Courts most often order blanket increases in education funding as a remedy for the perceived causes of low student achievement. But this one-size-fits-all approach fails to take account of genuine geographic, demographic, and other differences among school districts. Indeed, even when funding is increased, "the amount spent on any one kind of student—say a non-English-speaking student—varies tremendously within a district depending on what

school the student attends." Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate If Nobody Knows How Money Is Spent Now?*, in COURTING FAILURE, *supra*, at 235, 244; see *id.* at 243 (discussing court-ordered remedies and the problems that arise when funding increases "supposedly targeted to needy students are also distributed haphazardly"). Courts should recognize that there are many different causes of low achievement, and they should allow legislatures to find appropriately focused and cost-effective solutions to those problems—financial or otherwise. See Lindseth, *supra*, at 65-66.

Returning control of education policy to States and localities "allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Bd. of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991). Court-ordered funding remedies, by contrast, do not provide state legislatures with the flexibility necessary to pursue alternative measures of educational reform. See Lindseth, *supra*, at 66. For ELL students in particular, it "is unlikely that there will be a one-size-fits-all policy solution to any school funding problem." Baker & Markham, *supra*, at 679. Instead, because of local differences, States should focus on creating a "set of frameworks for developing and adapting funding policies to various state contexts" and on monitoring "the effectiveness of those policies and practices toward achieving specific objectives." *Id.* at 678.

This is the core idea behind the prevailing approach to education policy. Research has taught that money alone does not improve performance. Rather, articulating clear objective standards, and requiring schools to meet the standards, is an essential element of promoting student achievement. The model

works. In this very case, Arizona looked at "objective measures of student performance," monitored the progress of underperforming schools, and began to see immediate results. See JA 199-201.

This movement toward accountability alters the incentives for States and school districts, but it is dependent on their ability to be flexible about the inputs and processes of education necessary to obtain the desired outcome of improved performance. In cases like this one, therefore, courts should recognize their limited ability to effectuate school reform and refrain from formulating bad education policy by simply ordering more funding as a remedy. Instead, upon a finding of liability, courts should ordinarily allow the parties broad latitude to propose their own remedies, and modification of remedies, with appropriate deference to state officials on policy issues. It is both inconsistent and ineffective to direct policies that set outcome goals and simultaneously constrain the inputs. Courts should focus on improving outcomes, not on legislating inputs.

C. NCLB Reflects The Consensus View That Focuses On Output Accountability In Education Policy

The enactment of NCLB provides clear evidence of the two-decade-long shift in thinking about education that has become central to policy in all States. Around 1990, a number of States began to define clear performance standards, introduce testing to measure student achievement, and hold schools accountable for the results. See Jennifer A. O'Day & Marshall S. Smith, *Systemic School Reform and Educational Opportunity*, in DESIGNING COHERENT EDUCATION POLICY 250, 250-252 (Susan H. Fuhrman ed. 1993). States that adopted these accountability

systems early showed faster achievement gains than those that delayed adopting them or never did so at all. See Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL'Y ANALYSIS & MGMT. 297, 298, 309-310 (2005). In 2002, with the introduction of NCLB, Congress determined that federal education policy would embody the spirit of assessment and accountability in an effort to narrow achievement gaps and improve schools across the country. Further, there is evidence that student achievement, especially in lower grades, has improved since its passage. See CTR. ON EDUC. POL'Y, ANSWERING THE QUESTION THAT MATTERS MOST: HAS STUDENT ACHIEVEMENT INCREASED SINCE NO CHILD LEFT BEHIND? 1 (2007).

NCLB reflects Congress' considered judgment that educational reform should be focused on student performance and that, while States must be held accountable for the progress of their students in meeting NCLB's comprehensive standards, they should be allowed the flexibility to develop their own plans for meeting those goals. See 20 U.S.C. § 6812(9). The message to States—*requiring* results *begets* results—shifts the schools' incentives from obtaining as much money as possible to achieving better student performance. This shift benefits both kids and society.

Unlike court-ordered funding remedies, which measure success by how much money gets appropriated without examining whether needed structural reforms have been instituted, accountability for outputs—the federal standard in NCLB—turns attention to student achievement. The Act requires States receiving federal funds to adopt academic-outcome standards that its students must meet by 2014. See

20 U.S.C. § 6311(b)(2)(F). While 2014 is the deadline for overall student proficiency, schools must also show that they are making adequate yearly progress toward the goals. See 20 U.S.C. § 6311(b)(2)(B). And NCLB's required measurement of the performance of different subgroups, including minorities and ELL students, makes it easier to hold schools accountable for all of their students, including those in groups that have historically been left behind. See 20 U.S.C. § 6812(8).

On the basis of experience with its operation, specific aspects of NCLB may change when Congress re-authorizes the legislation. But there is little doubt that the underlying principle of accountability for student outcomes will remain. The focus on achievement, the insistence on transparency of performance by subgroups, and the altered incentives for improving student learning are now thoroughly ingrained in States and schools.

In addition to providing the flexibility and accountability not found in judicial oversight of school funding, NCLB corrects the division of power. The Act places the responsibility for education policy-setting where it belongs—in the legislative and executive branches (Congress and the United States Department of Education)—and places the responsibility for decisions about how to allocate resources where *it* belongs—in the state legislatures.

While NCLB is not perfect, it does reflect sound education policy, and its testing requirements provide a powerful mechanism for holding schools accountable while providing States with the needed flexibility to decide how to obtain results. NCLB offers a way to evaluate the progress of schools under various scenarios. In some—perhaps even many—

cases, States and localities may need more money to meet NCLB's standards. Primarily, though, States will have to address a wide range of problems, both inside and outside the schools, and they will have to do so by developing new and innovative measures, such as stronger accountability systems, charter schools, vouchers, and more effective means of compensating teachers. See HANUSHEK & LINDSETH, *supra*, at 264.

Congress decided that NCLB's output focus is the way to evaluate whether States are making meaningful progress. Courts should not ignore that decision and measure how much money States spend instead. States might struggle to meet standards. But given the failure of past policies keyed to inputs and resources, and the proven effectiveness of standards, accountability, and outcomes, States must be allowed to determine for themselves how to reform their education and finance policies.

That is precisely what Nogales, the school district at the heart of this dispute, attempted to do—and it appears that it was largely successful. Nogales instituted structural reforms to eliminate waste and mismanagement, implemented programs to monitor student achievement, and developed ways to use funding more efficiently. See 08-294 Pet. Br. 45-46 (reciting evidence from 2007 evidentiary hearing). Even the Ninth Circuit acknowledged that Nogales had made "significant strides" as a result of its structural and managerial improvements. 08-294 Pet. App. 34a. And *amici* have no reason to doubt that this improvement will continue. This Court should allow Nogales and the entire State of Arizona to continue to develop their own outcome-based methods of improving student performance without

restricting their flexibility through court-ordered funding remedies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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