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, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

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

BRIEF ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND CERTAIN INDIVIDUAL STATE LEGISLATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SETH L. COOPER
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
1101 Vermont Ave. NW, Fl. 11
Washington, DC 20005
(202) 742-8524

ROBERT O'BRIEN
Counsel of Record
JONATHAN E. PHILLIPS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
(213) 443-7512

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. ALEC has a number of interests in this litigation, as reflected in its official policies and publications.

ALEC's *Resolution on the Federal Consent Decree Fairness Act* (2006) sets forth ALEC's firm belief "that federal consent decrees [should be] narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." The *Resolution* is included in its entirety in Appendix.

ALEC's *Education Principles* state its mission concerning public education: "To promote excellence in the nation's educational system by advocating education reform policies that promote parental choice and school accountability, consistent with Jeffersonian principles of free markets and federalism." ALEC members hold leadership positions in state Senate and House chambers, as well as State legislative committees for education, education finance and appropriations. These

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[1] In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.3(a), *amicus* states that all parties consented to the filing of this brief.

legislators must fulfill state constitutional obligations to provide for a public education and a determine how federal legal requirements shall be satisfied.

ALEC supports the No Child Left Behind Act (NCLB). ALEC's *Resolution Supporting the Principles of No Child Left Behind* (2006) reaffirms "that every child be afforded equal opportunity to a quality education regardless of race, creed or background, as recognized in *Brown v. Board of Education* (1954)." It recognizes that "the No Child Left Behind Act fundamentally changes the focus of federal government resources from a system-based focus to a child-based focus," and that "proficiency for all students and closure of the achievement gap, focused on math, science and reading, is fundamentally linked to overall reform of our system of public education through a strong system of accountability and transparency and built on state standards."

Joining with ALEC as *amicus* are the following twenty individual state legislators, all of whom share ALEC's concerns (as expressed in this brief) with the risks inherent in the Ninth Circuit's "inflexible standard" for modification of injunctions and consent decrees:

Delegate William J. Howell
Speaker of the Virginia House of Delegates
2009 National Chairman, American Legislative Exchange Council

Representative Liston Barfield
Member, House Ways & Means Committee
South Carolina House of Representatives

Senator Jim Buck
Indiana Senate

The Honorable Bill G. Carter
Former Representative (1983-2003)
Texas House of Representatives

Representative Stanley Cox
Missouri House of Representatives

Senator W. Edward Goodall, Jr.
Member, Senate Education Committee
Member, Senate Finance Committee
North Carolina Senate

Representative William A. Hamzy
Connecticut House of Representatives

Senator Owen Johnson
Former Chair, Senate Finance Committee (2003-08)
New York Senate

Representative Wes Keller
Member, Education Committee
Alaska House of Representatives

Senator Robert J. Letourneau
Senate Education Committee
New Hampshire Senate

Representative Susan Lynn
Chair, House Government Operations Committee
Tennessee General Assembly

Delegate W. Anthony McConkey
Maryland House of Delegates

Representative Michael R. O'Neal
Speaker of the Kansas House of Representatives
Former Chair, Kansas House Education Committee

Representative Beverly Rodeschin
Member, House Finance Committee
New Hampshire House of Representatives

Senator Nancy Spence
Member, Senate Education Committee
Colorado Senate

Representative Scott Suder
Former Member, Wisconsin Joint Finance Committee
Wisconsin House of Representatives

Representative Kim Thatcher
Member, House Education Committee
Oregon House of Representatives

Representative Jordan G. Ulery
House Ways & Means Committee
New Hampshire House of Representatives

Delegate Ronald N. Walters
West Virginia House of Delegates

Representative Fran Wendelboe
Member, House Finance Committee
New Hampshire House of Representatives

SUMMARY OF ARGUMENT

This institutional reform case, commenced over a decade ago, has embroiled the federal courts in a policy dispute over how Arizona should provide education to English language learners (ELL). The case started as a class action by parents and students against Nogales Unified School District for failure to take "appropriate action" under the Equal Educational Opportunity Act (EEOA) to overcome students' language barriers and provide access to equal education. However, through subsequent decisions of the District Court and the Ninth Circuit – decisions that intrude on the legislative and appropriations power of the Arizona legislature – the case has spun out of control and is now interfering with the Arizona legislature's ability to improve ELL education statewide.

ALEC respectfully urges the Court to reverse the Ninth Circuit and District Court rulings for the following reasons:

1. The District Court's long-term interference with the state legislative process – which has now been approved by the Ninth Circuit – disrupts the ability of the Arizona legislature to make vital policy decisions regarding ELL education in response to ever-changing circumstances and future challenges. Such a result is contrary to sound principles of federalism, separation of powers, and democratic accountability.

2. The Ninth Circuit has improperly allowed the District Court to co-opt the Arizona legislature's appropriations power in order to assert de facto control over Arizona's school system. The District Court's intrusion into the appropriations process has

severe and broad ramifications. It substantially interferes with the legislature's ability to utilize appropriations as a means of effectuating necessary legislative compromises. Even more troubling, the implementation of the ruling at issue has enabled a particular political faction to circumvent the appropriations process entirely, and instead pursue its political agenda through the federal courts.

3. The Ninth Circuit's ruling ignores this Court's long-standing recognition that public education is properly the domain of state and local policymakers. By affirming the District Court's insistence on absolute funding increases instead of the more balanced and effective use of performance standards and accountability, as set forth in NCLB, the Ninth Circuit has placed at risk the ability of Arizona to best educate its youth—including its ELL students.

ARGUMENT

For the reasons discussed below, ALEC respectfully urges the Court to reverse the lower courts' rulings, and by so doing vindicate principles of federalism, separation of powers, and democratic accountability, and ultimately restore control over Arizona's educational system to the state and local authorities best suited to educate Arizona's youth.

I. Long-term Court Interference Disrupts the Ability of State Legislators to Make Vital Policy Decisions and Judgment Calls in Response to Changing Circumstances.

"Citizens are entitled to elect state legislators and other leaders to make policy decisions and do the

business of governing." This fundamental democratic principle, set forth in ALEC's *Resolution on the Federal Consent Decree Fairness Act* (2006) (*"Resolution"*) (included in the attached Appendix), is threatened where, as is the case here, "state and local officials… inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents." *Id.*, 1a.

As such, ALEC agrees with this Court's concern in *Frew* that consent decrees may "improperly deprive future officials of their designated legislative and executive powers," leading to "federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). As reflected in the *Resolution*, ALEC believes that such decrees should be "narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." *Resolution*, App. 1a; *see also Frew*, 540 U.S. at 441-442 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 n.14 (1992)) ("'[P]rinciples of federalism and simple common sense require the [district] court to give significant weight to the views of government officials."). As discussed below, ALEC's position is consistent with this Court's recent decisions regarding institutional reform litigation, and consistent with sound public policy necessary for effective state and local government.

A. Legislatures Require Flexibility to Meet Changing Current Circumstances as Well as Future Challenges.

Legislation does not occur in a vacuum. To the contrary, legislatures are charged with continually

reassessing the needs of their state's citizenry and evaluating the best ways in which to allocate resources to keep pace with changing circumstances. "[A] state...depends upon successor officials, both elected and appointed, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442. Were this not the case, the legislative branch would be largely superfluous, as the executive and judicial branches could together ensure that existing laws are enforced and legislative priorities met. Such marginalization of the legislative branch would be completely inconsistent with principles of federalism, separation of powers, and democratic accountability of state and local governments.

In order to properly fulfill their duties, state legislatures must frequently reassess how best to meet both future and existing challenges, and must retain sufficient flexibility to adjust legislative priorities in light of changing circumstances. As a recent article published by ALEC points out (in the context of federally-mandated spending programs), "[c]arefully designed local programs specifically tailored to solve community problems should not be displaced in favor of one-size-fits-all federal formulas."[2] In other words, flexibility to "specifically tailor" programs best suited to the needs of state and local governments must be protected in order to preserve the proper role of the legislature.

When legislative flexibility is impeded – as it too often is under consent decrees and court-ordered

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[2] Benjamin Barr, *The States' Struggle for Sovereignty: The Consequences of Federal Mandates*, ALEC Policy Forum (Sept. 2008), available at http://www.alec.org/am/pdf/apf/apf_federal_mandates.pdf.

injunctions – there are both immediate and long-term ramifications.

A recent example highlights the immediate risks inherent when legislative flexibility is impeded by injunctions or consent decrees. California Governor Arnold Schwarzenegger and Attorney General Jerry Brown recently sought relief from a district court judge who had seized control of the prison healthcare system three years ago. Apparently, the court-appointed receiver approved an $8-billion plan to renovate prison healthcare clinics.[3] Under this plan, seven "holistic" facilities would be built, each roughly the size of 10 Wal-Mart stores, containing amenities such as "[a]erobics and yoga classes, workout rooms and open-air courtyards."[4] In response to complaints about such lavish spending, the federal receivership's explanation was that these were "mental health treatments already mandated by the courts." *Id.*

Meanwhile, California's legislature was in the midst of a months-long battle to resolve a budget crisis that threatened to cripple the state's ability to operate. The state legislature only recently reached an agreement to close a budget gap exceeding $41 billion.[5] Mere common sense dictates that today's

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[3] Michael Rothfield, "Arnold Schwarzenegger, Jerry Brown will ask U.S. to end oversight of California prison," Los Angeles Times (Jan. 28, 2009) available at http://www.latimes.com/news/local/la-me-prisons28-2009jan28,0,2645570.story.

[4] Phillip Matier and Andrew Ross, "Plush hospitals for state's felons," San Francisco Chronicle (Jan. 12, 2009) available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/12/BAN9156U9N.DTL.

[5] Jordan Rau, Evan Halper and Patrick McGreevy, "With budget stalemate over, next move is up to California voters," Los Angeles Times (Feb. 20, 2009), available at http://www.latimes.com/news/local/la-me-california-budget20-2009feb20,0,2090428,full.story.

legislature could have fashioned a solution to prison healthcare that met federal requirements *without* spending billions of dollars on day spas for prison inmates. Yet because the state was locked into a consent decree from three years ago (when the budget crisis was not yet on the horizon), the legislature's ability to solve today's budget crisis was hamstrung to no small degree by the billions of dollars already committed by this and other consent decrees.

The democratic accountability of state and local government institutions is at even greater risk when legislative flexibility is impeded under injunctions or consent decrees of long duration:

> The upsurge in institutional reform litigation since *Brown v. Board of Education* … has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.

Rufo, 502 U.S. at 380 (citing *Brown,* 347 U.S. 483 (1954)).

The longer the contemplated duration of the injunction or consent decree, the more critical it becomes that district courts recognize that such injunctions and consent decrees must be limited in scope and flexibly administered. If they are not, they ultimately risk binding future elected officials to outdated agreements which are neither grounded in current circumstances nor connected to any ongoing

violation of federal law. Such an undermining of democratic accountability and subverting of the separation of powers has been rejected by this Court. *See, e.g., Frew*, 540 U.S. at 441 ("If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designative legislative and executive powers."); *Rufo*, 502 U.S. at 392 ("To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.")

A flexible approach to modification of injunctions and consent decrees is therefore necessary, both to ensure that previous legislatures have not improperly outsourced critical decision-making powers of state and local elected officials and, if they have, to return those decision-making powers to the legislative branch as soon as reasonably possible.

B. Fundamental and Sound Principles of Federalism Require That Injunctions and Consent Decrees Be Managed in Such a Way as to Avoid Subverting The Democratic and Legislative Processes.

While ALEC maintains that legislative flexibility is essential to proper democratic governance, ALEC also recognizes that this flexibility is sometimes necessarily constrained by the need for federal court intervention to remedy ongoing violations of federal law. However, anytime a federal

court does intervene – regardless of the justification – there is an unavoidable subversion of the democratic and legislative process. Recognizing this, the Court has established a "flexible standard" for modifying federal injunctions and consent decrees that impact state and local governments. *See Rufo,* 502 U.S. at 381 ("The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation"); *Frew*, 540 U.S. at 441 (reiterating that a "'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment") (citing *Rufo*, 502 U.S. at 393).

The flexible standard set forth in *Frew* shows the Court's respect for the sovereign powers of states and the limited nature of judicial equitable powers in utilizing injunctions and consent decrees to ensure compliance with federal law. The importance of placing reasonable limitations on the use of consent decrees cannot be overstated, as "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381, (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)). It is therefore ALEC's belief that a "flexible standard" is the *only* principled way to balance the need for district courts to enforce federal law with the need to support the democratic accountability of state and local governments.

Moreover, this "flexible standard" has been aptly described as "consistent with one of the most basic principles of municipal law that holds that neither a government nor its officials may contract

away the power to govern."[6] As this Court once declared, "[a]ll agree that the legislature cannot bargain away the police power of a State." *Stone v. State of Mississippi,* 101 U.S. 814, 817 (1879). Similarly, "a departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992). This Court, in *Frew*, "speaks to this reality by instructing judges and litigants that they are not to forget the values associated with local democracy and flexibility, nor the difficult reality or costs of social change. Judges walk a fine line when affirmatively dictating how government will deliver services."[7]

Finally, federal courts should be even more leery of substituting their policy judgment for lawmakers' judgment when the issue is hotly debated and subject to a wide likelihood of outcomes. In such contexts, there is a very real risk that politicians who are unable to obtain their favored policy outcome through the legislative process may instead seek to subvert the legislative process through consent decrees or injunctions.[8] *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993); *People Who Care v. Rockford Board of Educ. School Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992). Just such conduct occurred here. The former Governor of Arizona, along with

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[6] Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. Sch. L. Rev. 915, 923-924 (2005).

[7] Sandler & Schoenbrod, *supra,* at 929.

[8] This potential subversion of the legislative process is discussed in greater detail below (in Section II.B) with regards to the appropriations process.

various state education officials, have allowed the injunction and declaratory judgment to continue for reasons personal to their own political agendas and contrary to the collective will of the democratically-elected legislature. The continued support of the injunction by these government officials is indicative only of their unchanged individual policy preferences, and thus is no justification for the lower courts' decisions.

Federal courts should avoid taking sides in such policy debates, and should only assert their equitable power over state institutions where there is a continuing violation of federal law. *Evans*, 10 F.3d at 477-80; *Dowell*, 498 U.S. at 247.

C. The Ninth Circuit's Decision Ignores this Court's Long-Standing Precedent and Replaces it with a Standard That Flies in the Face of Democratic Accountability, Separation of Powers, and Principles of Federalism.

As the above discussion demonstrates, there are very real and very troubling risks associated with even the most necessary institutional reform litigation injunctions or consent decrees—and indeed it is these concerns that underlie the Court's "flexible standard" for granting relief under Federal Rule of Civil Procedure 60(b)(5). At the very least, district courts must recognize that an ongoing injunction exceeds "appropriate limits" when there is no continuing violation of federal law. *Evans*, 10 F.3d at 477-80; *Dowell*, 498 U.S. at 247. Here, the Ninth Circuit wrongly ignored this basic requirement – and indeed the entire "flexible standard" required under

this Court's precedent and applied by the Fourth, Sixth, Seventh and Eleventh Circuit Courts of Appeal[9] – and instead held that the injunction at issue here could only be modified upon a showing either "that the basic factual premises of the district court's central incremental funding determination had been swept away," or "some change in the legal landscape that makes the original ruling now improper."[10]

Such an interpretation treats the District Court's injunction and declaratory judgment as ends in themselves rather than as means of ensuring compliance with federal law, and is thus improper. Reversal of the ruling is necessary to vindicate this Court's "flexible standard" to modifying injunctions and consent decrees, and to revitalize important principles of democratic accountability, separation of powers, and federalism.

II. The Ninth Circuit Has Allowed the District Court to Co-opt the State Legislative Power of Appropriations in Order to Assert De Facto Control Over Arizona's Education System.

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[9] *See Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996); *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996); *Evans v. City of Chicago*, 10 F.3d 474, 477-479 (7th Cir. 1993); *O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-865 (7th Cir. 2005); *Reynolds v. McInnes*, 338 F.3d 1221, 1226 (11th Cir. 2003); *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1563-1566 (11th Cir. 2003).

[10] Pet. App. 63a.

Not only has the District Court here deprived the Arizona legislature of the flexibility needed to best educate both current and future ELL students, the Ninth Circuit has allowed the District Court to do so by improperly intruding on the domain of state legislative appropriations. This intrusion is improper on many levels, not the least of which is its disregard for the constitutional mandate that appropriations are properly a legislative function,[11] a principle that has been long recognized by both federal and state courts. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 763 (1986) ("appropriating funds is a peculiarly legislative function"); *Hunter v. State*, 177 Vt. 339, 346-349, 865 A.2d 381 (Vt. 2004) (and cases discussed therein); *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 96-102, 69 N.W. 373 (Neb. 1896).

Of course, ALEC recognizes that there is an unavoidable tension between legislative appropriations power and a district court's equitable authority to enforce federal law in the context of institutional reform litigation. It is inevitable that compliance with consent decrees and/or injunctions will require at least some (and often substantial) state expenditures. However, under the separation of powers doctrine, courts addressing institutional reform litigation should not ignore the importance of preserving legislative appropriations authority: "Financial constraints may not be used to justify the creation or perpetuation of constitutional violations,

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[11] *See* U.S. Const. art I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").

but they are a legitimate concern of government defendants in institutional reform litigation *and therefore are appropriately considered* in tailoring a consent decree modification." *Rufo*, 502 U.S. at 392-393 (emphasis added).

In order to balance the need to enforce federal law with the need to preserve legislative appropriations authority, ALEC believes that courts considering requests for modification of an injunction or consent decree should account for at least the following three related issues: (A) the complex and often contentious nature of the appropriations process; (B) the risk that institutional reform litigation can be used to circumvent the appropriations process; and (C) the inherent dangers in allowing earmark funding achieved through injunctions or consent decrees. As discussed below, failure to consider these key issues increases the likelihood that injunctions and consent decrees arising out of institutional reform litigation will far exceed their original purpose (i.e., addressing ongoing violations of federal law) and instead become mere political tools used to further particular political agendas.

A. Exercise of Appropriations Power Often Involves Complex, Contentious Trade-Offs that Belong Squarely in the Legislative Arena.

Appropriations decisions are often among the most contentious decisions made in state legislatures. Majority and minority political party caucuses in each chamber wrestle over spending priorities, competing interests are weighed, and compromises are reached through the political

process. State Senate and State House bodies duel with one another for weeks – or even months, as seen most recently in California – over spending items, sending budget proposals back and forth. In the final days of state legislative sessions, last-minute spending compromises often require painstaking negotiation.

It is not surprising that appropriations decisions necessarily include such difficulties, complexities, and trade-offs, particularly given that different and competing government agencies, public programs, and citizen constituencies vie for state funding from a limited (and too often dwindling) state treasury. "Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else." *Rufo*, 502 U.S. at 396 (O'Connor, J., concurring).

The weighing of different public policies and their related economic and social costs simply cannot be carried out according to bright-line formulas. To the contrary, consideration of innumerable variables is called for in reaching political compromises. It goes without saying that such a political process, characterized as it is by contentious debate and political compromise – is also a process ripe for abuse. It is thus vital that the appropriations process remain centered within the legislature, which, while not immune to abuse, is safeguarded by built-in democratic accountability. When appropriations are removed or distanced from the legislative process, the potential for abuse too often becomes reality.

B. Frustrated Political Factions Can Improperly Use Institutional Reform Litigation to Circumvent the Legislative Appropriations Process.

The purpose of injunctions or consent decrees in institutional reform cases is to address current and ongoing violations of federal law, and as such should ideally remain separated from the political dimensions attendant to appropriation matters. *Missouri v. Jenkins*, 515 U.S. 70, 130-33 (1995) (Thomas, J., *concurring*). Unfortunately, institutional reform litigation is often seen by rival political factions as merely another battlefield for their political disputes.[12]

For example, defendant state and local officials can enter into a consent decree (or choose not to contest an injunction) in hopes of obtaining benefits (e.g., funding) for an institution or program that they have failed to obtain through the legislative appropriations process. In other words, institutional reform litigation in such cases is used to transfer the debate over appropriations out of the legislature and into the federal courts.

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[12] *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 271 (1987):

> [O]fficials in different agencies at different levels of authority are engaged in continuous pulling and hauling over resources, priorities, and subtle gradations of policy. A consent decree can be an all too ready handle for officials at one level to manipulate their superiors or rivals.

Other government officials may enter into consent decrees in order to dodge negative publicity by abdicating responsibility to the federal courts for unpopular initiatives and/or funding decisions.[13] In this sense, many institutional reform litigation cases – including this case – are used by vying political factions to shift the venue of ongoing public policy disputes from the court of public opinion to a court of law.

Regardless of the motivation for entering into a consent decree, or for choosing not to fight an injunction, the mere fact that a particular appropriations issue is taken over by the federal courts has both short-term and long-term implications on the appropriations process generally.

In the short term, it must be recognized (as it surely is by the government officials involved), that the particular issue addressed through the consent decree or injunction is effectively taken off the appropriations bargaining table. As discussed above, appropriations decisions are often reached as a result of negotiation, bartering, and compromise. By obtaining one of their appropriations goals outside of the legislative process, the political faction

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[13] Sandler & Schoenbrod, *supra,* at 927:

> Governors and mayors generally share the goals of the litigation; they desire to avoid being labeled as lawbreakers and to be seen instead as problem solvers. They cannot reliably be depended upon to withhold consent from decrees that set out obligations in excess of, or different from, the federal statute, or which imposes details of compliance and milestones that would under other circumstances be left to the managers of the program.

supporting the consent decree will have preserved political capital and negotiating leverage. In turn, they can utilize this leverage to gain additional appropriations concessions that they never would have obtained otherwise. Thus, even where a district court asserts allegedly "narrow" control over a particular issue (here, ELL funding), such control in reality has a broad and profound effect on the overall appropriations process.

The long term impact of injunctions or consent decrees that invade the appropriations process is equally profound, and perhaps even more troubling. First, the short term negotiation/leverage issue discussed above does not dissipate with time. To the contrary, each year the political faction having obtained the injunction or consent decree will approach the appropriations bargaining table with an ace up their sleeve. Second, where the injunction or consent decree dictates long-term spending on a particular issue (as is the case here), there is a very real possibility that a type of "funding inertia" will develop, such that the state may be unable to decrease the funding level even *after* the consent decree or injunction is ultimately modified or rescinded.[14] Thus, what should properly be a

[14] This concern is not merely theoretical. Some state governors are considering rejecting funds being provided to states through the recent stimulus legislation for similar reasons. They fear that, while the stimulus funding is temporary, the increased spending will become a habit their states cannot break. *See, e.g.,* Brad Haynes, "Tennessee's Democratic Governor Weighs Rejecting Stimulus Funds," The Wall Street Journal (Feb. 24, 2009) (reporting that Tennessee's Governor Phil Bredesen "is concerned that accepting $141 million for Tennessee's unemployment insurance would force the state to expand the program and leave state taxpayers with the bill in two years'

temporary and focused solution to particular violations of federal law can, when used instead as a means to circumvent the appropriations process, evolve into permanent earmark funding.

C. The Ninth Circuit's Decision Risks Subjecting State Legislatures to an Increasing Number of District Court Injunctions Requiring Earmarks.

By giving federal district courts broad latitude to impose particular mechanisms for appropriations based on novel federal legal requirements, the Ninth Circuit has empowered district courts to enter ongoing public policy battles by controlling funding of state and local institutions and programs. As a result, state and local governments now face greater likelihood that institutional reform plaintiffs (and often the government defendants themselves) will seek earmark appropriations by judicial order.

This specter of earmark appropriations through federal district court consent decrees and injunctions threatens states in a multitude of areas. For example, in the health care arena, states are increasingly taking on greater obligations to their citizens through Medicaid programs,[15] and are

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time") available at http://blogs.wsj.com/washwire/2009/02/24/tennessees-democratic-governor-weighs-rejecting-stimulus-funds/.

[15] National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of States* 8 (Dec. 2008) ("Medicaid accounted for 20.7 percent of total state spending in fiscal 2008.... Since Medicaid spending makes up such a large portion of state budgets, the growth rates relative to overall budget increases have a significant impact the allocation of

projected to face serious long-term budgetary difficulties in meeting these obligations.[16] Medicaid comes with significant federal requirements that states must meet to obtain matching federal grants, and state compliance with these federal requirements has already been the subject of institutional reform litigation. *See, e.g, Frew*, 540

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state spending") available at http://www.nasbo.org/Publications/PDFs/Fall2008FiscalSurvey.pdf.

[16] Government Accountability Office, *State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years* 1 (Washington, DC: GAO, January, 2008) ("in the absence of policy changes, large and recurring fiscal challenges for the states and local sector will begin to emerge within a decade" and observing that "the growth in the health-related costs serves as the primary driver of the fiscal challenges facing the state and local government sector") available at www.gao.gov/new.items/d08317.pdf. *See also* Stanley J. Czerwinski, Government Accountability Office, *State and Local Fiscal Challenges: Rising Health Care Costs Drive Long-term and Immediate Pressures,* 1 (Washington, DC: GAO, January, 2008):

> Growth in health-related spending [] drives the long-term fiscal challenges facing state and local governments. The magnitude of these pressures presents vexing long-term sustainability challenges for all levels of government. The current turmoil in the financial sector adds to the immediate fiscal and budgetary challenges for these governments as they attempt to remain in balance in a rapidly changing and uncertain budget environment. States and localities are facing increased demand for services during a period of declining revenues and reduced access to capital.

U.S. at 433 ("State participation [in Medicaid] is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements"). In light of these long-term difficulties, ALEC has expressed misgivings with a district court's oversight of Tennessee's Medicaid program. Reforms approved in 2004 by Tennessee's governor and the state legislature were blocked because of consent decrees dating to 1979. *See Grier v. Goetz*, 402 F.Sup.2d 871 (M.D. Tenn. 2005), amended by, motion denied by *Grier v. Goetz*, 2006 U.S. Dist. LEXIS 11211 (M.D. Tenn., Mar. 15, 2006). The result from these cases, at least initially, was that only some of the legislatively-approved reforms were allowed to go forward.[17] In turn, taxpayers were saddled with increased costs and many Medicaid enrollees lost their coverage..

ALEC has also expressed concerns with a number of other institutional reform litigation consent decrees. For example, *Jose P. v. Ambach* was a class action brought under the Individuals with Disabilities Education Act (IDEA). *Jose P. v. Ambach*, No. 9 Civ. 270 (E.D.N.Y. Feb. 1979); 20 U.S.C. §§ 1400 et seq. As a consequence of this litigation, special education in New York City has been subject to a consent decree since 1979, thwarting efforts by successive mayors and school officials to make reforms and update policies for implementing IDEA. Due to budget constraints, the decree has reduced money available for students in non-special education courses, as plaintiffs' attorneys

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[17] The Sixth Circuit did eventually reverse two of the district court's orders. *See Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005); *Rosen v. Goetz*, 129 Fed. Appx. 167 (April, 12, 2005).

have retained control over significant portions of the city's budget. Thus, under the decree, the City Council has been shut out of important policy-making decisions, and outdated policies have been locked into place without any meaningful review of their effectiveness or continuing appropriateness.

ALEC has likewise voiced concern with the decree controlling the Los Angeles County Metropolitan Transit Authority. *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001), cert. denied, 535 U.S. 951 (2002). By decree, the Transit Authority has been required to give busing 47 percent of its budget resources, with all remaining transportation necessities receiving a little over half of the budget. *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, No. CV 94-5936 (C.D. Cal. Oct 31, 1996). This inflexible budget mandate has severely hampered the Transit Authority's ability to address the evolving transportation needs of Los Angeles and its surrounding counties (e.g., by developing more extensive mass transit).

The above cases are only a few of the numerous examples of the inherent dangers when the judiciary co-opts the legislature's appropriations role. The Ninth Circuit's inflexible approach to the modification of district court injunctions and consent decrees could dramatically increase institutional reform litigation seeking similar earmarked spending. By creating nearly impossible hurdles for modifying existing injunctions and consent decrees, the Ninth Circuit has created a perverse incentive for some politicians and government officials to manipulate institutional reform litigation (regardless of the actual merits of the litigation) in order to

obtain benefits for institutions or programs that otherwise could not be achieved through the legislative process. Once earmarked funding has been obtained through a consent decree or injunction, the Ninth Circuit's new inflexible standard insulates these earmarks from future shifts in political power.

Such use of institutional reform litigation necessarily undermines the separation of powers, allowing district courts to elevate discretionary policy choices involving legislative appropriations into specific federal requirements—and doing so here while holding the Arizona legislature hostage with threats of multi-million dollar daily fines. This Court's vindication of the flexible standard for administering injunctions and consent decrees is crucial to correcting the Ninth Circuit's troubling backslide.

III. Public Education Is Properly the Domain of State Policymakers—Not Federal Courts.

The policy considerations and legal implications discussed above are nowhere more important than in the context of public education and ELL services. As this Court has repeatedly recognized, public education is a primary responsibility of states. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Even when addressing highly-charged constitutional issues, such as school desegregation, the maintenance of public education should ultimately rest in the hands of state and local officials: "federal judicial supervision of local school systems was intended as a temporary measure," with the ultimate objective being "to return school

districts to the control of local authorities." *Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992).

Furthermore, it is not only the setting of curriculums or the training and overseeing of teachers that ultimately belongs under local control. The Court has also recognized that financing of public education is itself a significant function of state and local governments. *See, e.g., San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States.").

Maximizing local control of public education is sound policy. ALEC believes that public education and finance decisions are necessarily local and intimate in nature, and recognizes an interconnectedness between parents, taxpayers, and government officials that forms the crux of public education administration. Indeed, "local autonomy of school districts is a vital national tradition, and… a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri v. Jenkins*, 515 U.S. at 99; *Dowell*, 498 U.S. at 248 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit that needs.").

Here, the Ninth Circuit has disregarded this fundamental recognition of the importance of local, democratically-informed control and funding of education, and instead has allowed the District Court to seize control of Arizona's statewide ELL services.

Make no mistake about it: the Ninth Circuit's opinion, if upheld, will impact every aspect of Arizona's ELL services at some level—from financing, to curriculum, to training and staffing. By impeding the Arizona Legislature's ability to work with local school districts to pursue innovative ELL solutions – solutions that include good incentives, standards, and accountability – the Ninth Circuit and the District Court have wrestled control of Arizona's ELL services away from those best suited to educate Arizona's youth.

In short, the Ninth Circuit has allowed the District Court to further its own educational agenda by inserting itself into an education policy dispute between the political branches of Arizona. This Court's long-standing precedent simply does not allow the federal courts to override state and local control of education absent a current and ongoing violation of federal law. *Rufo*, 502 U.S. at 389. As discussed below, it is ALEC's firm belief that to allow otherwise is both improper and inefficient, and ultimately will severely undercut the ability of Arizona's schools to best educate their ELL students.

A. States Must Balance Competing Interests While Managing Interconnected and Ever-evolving Educational Challenges.

Today's educational landscape is more complex and demanding than ever before. Managing the interconnected relationship of education constituencies involves myriad complexities, competing policy choices, and trade-offs. It is local authorities who are on the front lines of addressing these competing interests, and local authorities who

have the ultimate mandate to manage their districts properly. Thus, local institutions must be allowed to utilize a variety of policy approaches to ensure proper accountability, standards, and funding for their educational programs. Simultaneously, states must ensure that the interests of local control are balanced by performance-driven accountability standards. Particularly in light of the current economic uncertainty, it is vital that states retain flexibility to make appropriations decisions that allow them to manage these competing interests, meet increasing federal mandates, and avoid disastrous budget shortfalls.

1. Without Proper Accountability, More Money Does Not Result in Improved ELL Services.

Complicating these issues further, and thus buttressing the importance of a system centered on local control, is the fact that the most effective methods for achieving improved educational performance is a matter of ongoing debate.

Early advocates for education reform (in the 1970s and 1980s) pushed for increases in absolute funding as the primary means by which reform should be obtained. However, as ALEC's studies of educational spending have demonstrated, rigorous performance standards and financial accountability mechanisms are crucial to improving public education, and increases in educational spending without standards and accountability will most likely be ineffective. This is not news to this Court. Indeed, the Court has recognized that "one of the major sources of controversy concerns the extent to

which there is a demonstrable correlation between educational expenditures and the quality of education." *Rodriguez*, 411 U.S. at 42-43.

The policy debate regarding the effectiveness of increased spending as the primary approach to improving overall educational performance continues today. For instance, ALEC's recent study of educational spending increases and student achievement test results raised questions as to the effectiveness of spending increases alone in improving performance.[18] This study established that factors such as per pupil expenditures, teacher salaries, and funds received from the federal government do not – either taken together or alone – explain differences in school achievement. *Id.* By negative inference, then, there must be factors other than funding that do explain these achievement differences.

Another study suggests that factors such as financial accountability and academic standards – as opposed to merely increasing absolute spending – have profound effects on educational performance. [19]

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[18] Andrew T. LeFevre, *Report Card on American Education: A State-by-State Analysis* (15t ed.) 132-133, American Legislative Exchange Council (Feb. 2009) available at: http://www.alec.org/am/pdf/ReportCard08.pdf.

[19] U.S. Chamber of Commerce, *Leaders and Laggards: A State-by-State Report Card on Educational Effectiveness* 7 (Feb. 2007) available at http://www.uschamber.com/NR/rdonlyres/e6vj565iidmycznvk4ikm3mryxo5nslm7iq2uyrta5vrqdxsagjvkxafz6r3buzaopo4uxv4o4ep4nvhmc3ppc7drjd/USChamberLeadersandLaggards.pdf.

See also Dan Lips, Shanea J. Watkins, and John Fleming, *Does Spending More on Education Improve Academic Achievement?* 6, The Heritage Foundation (Sept. 8, 2008)

Additionally, scholarly debate exists over whether it is effective to mandate educational spending increases through litigation in the first instance.[20] Recent scholarship suggests that while court mandates for education spending may have some short-term results, the long-term impact has not been particularly positive.[21]

Finally, it is not only scholars and advocacy groups that have recognized the inadequacy of relying solely on increased spending to increase ELL effectiveness. There was a bipartisan recognition of the need for stricter accountability and standards that led to Congress enacting NCLB in 2002. Title III of NCLB specifically addresses the issues of ELL. Moving beyond the "appropriate action" required under the EEOA, Congress required states and

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available at http://www.heritage.org/Research/Education/bg21789.cfm ("Long-term measures of American students' academic achievement … show that the performance of American students has not improved dramatically in recent decades, despite substantial spending increases").

[20] *See, e.g.,* Matthew G. Springer and James W. Guthrie, "Adequacy's Politicization of the School Finance Legal Process," *in* School Money Trials 121 (Martin West, ed., Brookings Institution Press) (2007) ("Legislative and executive branch deliberations are better adapted to accommodating uncertainty, deconstructing complexity and considering trade-offs since their operational arrangements permit a far wider opportunity for constructive criticism and successive approximation to take place").

[21] *See* Frederick Hess, "Adequacy Judgments and School Reform," *in* School Money Trials 185 (Martin West, ed., Brookings Institution Press) (2007) ("successful adequacy efforts modestly boosted total spending but had no discernable effect on teacher pay or class size").

school districts to implement new programs, develop quantifiable performance benchmarks, and annually report progress. *See* 20 U.S.C. §§ 6301, *et seq*. *See also Claremont Sch. Dist. v. Governor*, 147 N.H. 499, 508-509 (N.H. 2002) (concluding that accountability standards are an essential component of the State's constitutional duty to provide adequate education).

2. The Ninth Circuit's Decision Disregards the Congressional Mandate for Accountability and Standards, Insisting Instead that Earmarked Spending Is the Only "Appropriate Action."

If nothing else, the above discussion demonstrates that there are no bright-line solutions to the challenges facing schools endeavoring to improve educational performance. For this reason, ALEC believes it is vital that state and local governments fulfill their responsibilities within the context of democratic accountability and separation of powers. Thus, while it is undisputed that federal district courts may ensure that public education meets the requirements of federal law, it is state and local governments that are best equipped to determine the means by which that end is met. *See Freeman,* 503 U.S. at 489 ("the court's end purpose must be to remedy the violation and, *in addition*, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution) (emphasis added). Put another way, district courts must remain focused on whether public education is in compliance with the standards of federal law, not take sides in contested educational

policy debates over the most effective methods for obtaining such compliance. Under the Ninth Circuit's decision, district courts can usurp the role of state and local governments in order to promote disputed policy viewpoints under the guise of enforcing federal law. This approach undermines (indeed nearly obliterates) democratic accountability and separation of powers.

The negative impact of such a role-reversal is highlighted by the Ninth Circuit's decision here. The District Court posited that increased educational spending correlates with ELL educational success—supposedly fulfilling the requirements of EEOA § 1703(f). By implication, more balanced policy approaches – such as those that include performance standards and financial accountability – are unsatisfactory. But, as discussed above, throw-more-money-at-the-problem approach ignores the fact that the correlation between increased spending and improved performance is questionable at best. Thus, while the original finding of a violation of the EEOA and subsequent injunction and consent decree purported to ensure that Arizona schools meet federal requirements for ELL, in reality it has likely had the opposite effect. The goal of achieving equal access to educational opportunities for ELL students has been replaced by a policy decision that specific earmark funding for ELL programs is the only way to comply with the EEOA—notwithstanding that the requirements imposed by the District Court clearly exceed the terms of the EEOA and NCLB.

Remarkably, this policy decision has been endorsed by both the Ninth Circuit and the District Court despite their recognition that Arizona has "substantially complied" with the purpose of the

original injunction. In other words, the Ninth Circuit and District Court have unnecessarily placed means above ends in purporting to ensure compliance with federal law.

B. Reversal Is Necessary to Restore Control Over the Education of Arizona's Youth to Arizona's Democratically Elected Leaders.

The encroachment on the Arizona legislature's responsibilities and powers has only been exacerbated by the Ninth Circuit's inflexible approach to the modification of the injunction. The Ninth Circuit failed to consider whether an injunction could even be obtained under current factual circumstances or under current law. Pet. App. 63a. In particular, it refused to consider changed factual circumstances owing to the Arizona Legislature's newly-adopted accountability standards and increased spending for education under HB 2064, and similarly refused to consider changed federal legal requirements under NCLB. *Id.* In so doing, the Ninth Circuit disregarded this Court's guidance with regards to employing a "flexible standard" for the modification of injunctions and consent decrees, and instead improperly allowed the District Court to choose a particular public policy for addressing a core state function.

Reversal of the lower courts' rulings by this Court is necessary to reassert the inherent limits of federal district courts' equitable powers. In *Rufo*, this Court observed that "the public interest and '[c]onsiderations based on the allocation of powers within our federal system,' …require that the district court defer to local government administrators, who

have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Rufo,* 502 U.S. at 392 (quoting *Dowell*, 498 U.S. at 248 and *Brown*, 349 U.S. at 299). The Ninth Circuit's inflexible approach enables district courts to disregard principles of federalism by failing to defer to states' discretionary authority in providing public education. As a result, the Arizona legislature has been deprived of the most effective methods of satisfying federal requirements—namely through implementing policies emphasizing performance standards and financial accountability.

This Court must once again recognize that the federal judiciary cannot go it alone in formulating a one-size-fits-all regime whereby more spending, coupled with little else by way of accountability and performance-based standards, is the law of the land. Instead, the Court should return the authority to make local public education decisions to its rightful owners—those legislators and local officials who are entrusted by parents and taxpayers to make such decisions. The Arizona legislature has held fast to its understanding that it takes more than simply money to accomplish the multifaceted goals of a successful ELL system. The legislature has refused to cave to the enticing allure of simply "throwing money" at the problem. Instead, the legislature has carefully examined other approaches, in addition to absolute spending, that the state may adopt to best meet the federal compliance mandates while reaching its own educational goals. The Court should reward these efforts; not discourage them.

IV. Petitioners Have Standing to Appeal the Rulings of the Lower Courts in this Matter.

Finally, ALEC is compelled to briefly address the Ninth Circuit's questions regarding the Arizona legislature's standing in this matter. The Ninth Circuit noted that plaintiffs had challenged "the standing of the two Legislative Intervenors, as they speak only for themselves and do not represent the legislature as a whole, have no judgment against them, and no apparent direct interest in the judgment outside of an abstract policy interest." *Flores v. Arizona*, 516 F.3d 1140, 1165 (9th Cir. 2008). While the Ninth Circuit went on to dismiss the issue of standing ("[p]arties need not have standing to intervene in our circuit"), it did so only after claiming that "the extent and degree of the standing of individual legislatures under these circumstances is in very serious question." *Id.*

This statement is perplexing. There is no question that the Speaker of the Arizona House of Representatives and the President of the Arizona Senate intervened here not as "individual legislators," but rather as the duly-appointed leaders of their respective legislative bodies. *See* JA 80-85. Thus, *Raines v. Byrd*, 521 U.S. 811, the case relied on by the Ninth Circuit as raising this "serious question" of standing, is inapplicable on these facts. In *Raines*, the appellees were six individual members of Congress, and they brought their action unquestionably as individual members. *Id.* at 821. In holding that the individual members lacked standing, the Court explicitly emphasized "the fact that appellees have not been authorized to represent

their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.* at 829.

The opposite is the case here. Both the Speaker of the Arizona House of Representatives and the President of the Arizona Senate have been authorized to represent their respective legislative bodies, and the legislature supports their actions in appealing the lower courts' rulings. *See* JA 80-85.

The only question, then, is whether Arizona's legislative bodies have standing. Of this there can be no doubt. *See Warth v. Seldin,* 422 U.S. 490, 498, (the question of standing concerns whether the litigant has a stake in the outcome and whether the litigant "is entitled to have the court decide the merits of the dispute or of particular issues"). There is no question that the Arizona legislature has a stake in the outcome of this matter. Under the District Court's December 16, 2005 order, the legislature was given a series of deadlines by which to comply with the District Court's ELL funding mandates. Failure to meet these deadlines resulted in escalating fines levied directly against the Arizona legislature, culminating with fines of up to $2 million per day if the legislature was not in compliance after the close of the 2006 legislative session. Faced with these escalating fines – relating to an injunction from a case to which the legislature was not even a party – the Arizona legislature intervened on March 8 2006.

In short, the legislature is precisely the party to respond to the direct threat of millions of dollars in daily fines, as well as to the indirect attacks on its legislative efforts and authority. This is why the legislature properly intervened in the first place, and

why the legislature, through its duly-appointed leaders, has standing to appeal the lower courts' decisions. This matter has therefore properly been brought before the Court by petitioners.

CONCLUSION

This case has nationwide ramifications for federalism and separation of powers. The Ninth Circuit has departed from this Court's "flexible standard" to modifying injunctions and consent decrees, and is refusing to accord state elected officials deference in making complex public policy choices. Such a ruling paves the way for increasingly rigid injunctions and consent decrees, issued against state and local government institutions, based upon novel readings of federal law that are grounded more in district court policy preference than straightforward readings of federal statutes.

Further, such an exercise of judicial power will increase the temptation by political factions to seek relief from the courts that they were unable to obtain in the political process. The consequences of such moves are, of course, manifest and negative for the courts and the political system.

Reversal of the Ninth Circuit's ruling is especially important given its impact in the realm of public education. ALEC firmly believes that standards and accountability are crucial to public educational success. The ability of legislators to take state and local dynamics into account while setting educational policy is undermined by inflexible district court decrees and injunctions unreflective of changes in factual circumstances or law. The ability of states to adopt innovative new approaches to providing education is diminished when district

courts micro-manage educational policy, especially if spurred on by one political faction or another. As such, ALEC respectfully requests that the Court grant the relief requested by petitioners.

Respectfully submitted,

ROBERT O'BRIEN
Counsel of Record
JONATHAN E. PHILLIPS
ARENT FOX
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
(213) 443-7512

SETH L. COOPER
AMERICAN LEGISLATIVE
EXCHANGE COUNCIL
1101 Vermont Ave, NW, Fl.11
Washington, DC 20005
(202) 742-8524

Counsel for Amicus Curiae

APPENDIX

ALEC's Resolution on the Federal Consent Decree Fairness Act

PURPOSE: Urging Congress to enact the Federal Consent Decree Fairness Act to ensure that federal consent decrees are narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments.

WHEREAS, in a growing number of cases involving state and local governments across the nation, consent decrees have become a means by which federal judges make policy decisions that are best left in the hands of state and local officials; and

WHEREAS, consent decrees can remain in place for decades and lock-in policies that were agreed to by state and local officials who are no longer in office; and

WHEREAS, newly-elected state and local officials often inherit overbroad or outdated consent decrees that limit their ability govern and respond to the priorities and concerns of their constituents; and

WHEREAS, existing procedures discourage current state and local officials from trying to modify or terminate a consent decree, even where such a decree no longer represents the best approach for local communities; and

WHEREAS, in one recent example, reforms to Tennessee's Medicaid program – proposed by the

governor and approved by the state legislature in 2004 – were blocked in federal court because they ran afoul of consent decrees dating back to 1979, and only some of the reforms were permitted to go forward, resulting in increased costs for taxpayers and the loss of coverage for many Medicaid enrollees; and

WHEREAS, in another example, consent decrees have forced the Los Angeles County Metropolitan Transit Authority to spend 47 percent of its budget on buses, leaving just over half the budget to pay for the county's remaining transportation needs; and

WHEREAS, in a further example, special education in New York City has been governed by a consent decree since 1979, thwarting efforts by successive mayors and schools chancellors to implement new reforms and updated policies for implementation of the Individuals with Disabilities Education Act (IDEA); and

WHEREAS, in Frew v. Hawkins, 540 U.S. 431 (2004), the U.S. Supreme Court – while upholding the consent decree in question – expressed its concern that consent decrees may "improperly deprive future officials of their designated legislative and executive powers," which may lead to "federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law."; and

WHEREAS, the Federal Consent Decree Fairness Act, now pending in Congress, is bipartisan legislation that addresses weaknesses in the current

system while preserving consent decrees as a mechanism for settling legal disputes; and

WHEREAS, the Federal Consent Decree Fairness Act provides a three-pronged approach to address these weaknesses by: (1) allowing a state or local government to file a motion in federal court to modify or vacate a consent decree after four years or after the state or local official who provided consent leaves office, whichever comes sooner; and (2) after a motion to modify or vacate a consent decree has been filed, shifting the burden of proof to the plaintiffs to demonstrate why management of a program should continue to rest with the court rather than be returned to hands of elected officials; and (3) setting out a series of findings, based on the U.S. Supreme Court's decision in Frew, to provide guidance to federal courts to ensure that for future consent decrees are narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments; and

WHEREAS, this legislation goes to the very heart of democracy, in that citizens are entitled to elect state legislators and other leaders to make policy decisions and do the business of governing, and federal judges are neither public policy experts nor accountable to the electorate for the choices they make.

THEREFORE, BE IT RESOLVED, that the American Legislative Exchange Council supports the principle that federal consent decrees should be narrowly drafted, limited in duration, and respectful of state and local interests and policy judgements; and

BE IT FURTHER RESOLVED, that Congress should enact the Federal Consent Decree Fairness Act.

Adopted by ALEC's Civil Justice Task Force at the Annual Meeting July 20, 2006. Approved by the ALEC Board of Directors August, 2006.