

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ZUNI PUBLIC SCHOOL DISTRICT :

4 NO. 89, ET AL., :

5 Petitioner :

6 v. : No. 05-1508

7 DEPARTMENT OF EDUCATION, ET AL., :

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9 Washington, D.C.

10 Wednesday, January 10, 2007

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:05 a.m.

15 APPEARANCES:

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17 Petitioner.

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23 Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 05-1508, Zuni Public School District, et al. v. Department of Education.

Mr. Van Amberg.

ORAL ARGUMENT OF RONALD J. VAN AMBERG

ON BEHALF OF THE PETITIONERS

MR. VAN AMBERG: Mr. Chief Justice and may it please the Court:

In 1994, Congress enacted the equalization formula under the Impact Aid Act. It did so clearly and decisively, and described a methodology which was unambiguous, was self-contained, reflected a recognized statistical standard, and assisted in actually promulgating -- and -- the intent of the Impact Aid Act, which is to benefit impacted local educational agencies or school districts and not fund the general educational program of a State.

In so doing, Congress removed from the Secretary the previously delegated authority to establish by regulation the equalization formula. The Secretary in turn in 1996, in enacting his regulations in response to the 1994 legislation, disavowed that he was engaging in any rulemaking or in fact in any

1 interpretation of statute. Instead, the Secretary
2 sought and announced that he was proceeding under an
3 exception to the public notice and comment laws,
4 5 U.S.C. 553(b), by stating that his regulations merely
5 reflected changes in legislation, refining regulatory
6 language.

7 JUSTICE GINSBURG: Mr. Van Amberg, they were
8 essentially the same as the prior regulations, were they
9 not? And those regulations had gone through the notice
10 and comment process.

11 MR. VAN AMBERG: Yes. That is correct,
12 Justice Ginsburg -- Ginsburg. Those were essentially,
13 except for a few words here and there, those were the
14 same regulations. But they were in response to a
15 congressional directive back in 1974 that the Secretary
16 is to create the equalization formula. In 1994,
17 Congress came in with legislation and established that
18 formula.

19 JUSTICE GINSBURG: I thought that the
20 formula was proposed to Congress by the Department of
21 Education. This is not something that Congress did in
22 other words, to stop the Secretary from whatever he was
23 doing. But it was indeed -- wasn't it the Secretary's
24 own language that Congress enacted?

25 MR. VAN AMBERG: The contention is made that

1 this 545-page omnibus education bill --

2 JUSTICE GINSBURG: Well, just as to that,
3 the provision that we're talking about, do you say, you
4 say it wasn't drafted by the Department of Education?

5 MR. VAN AMBERG: I don't think we know
6 exactly who it was drafted by. I think there is --
7 there is some references in the Congressional --
8 Congressional Record that this is an administration
9 bill. But I would, I would like to respond, Justice
10 Ginsburg, based on the assumption that this was the
11 Secretary's bill.

12 Under the statutory formula, the language is
13 clear that what is disregarded in -- in ranking LEAs and
14 eliminating percentiles of LEAs is those LEAs which fall
15 above the 95th percentile --

16 JUSTICE SCALIA: Before you get into the
17 substance let's -- let's finish with this, this problem,
18 whether it was indeed the Secretary's own bill.
19 Was the Secretary who proposed the -- the '94
20 legislation, the same Secretary who had promulgated the
21 prior regulations?

22 MR. VAN AMBERG: No. This --

23 JUSTICE SCALIA: The prior regulations were
24 promulgated when?

25 MR. VAN AMBERG: The former regulations were

1 promulgated in 1976.

2 JUSTICE SCALIA: My goodness, that's a long
3 time before.

4 MR. VAN AMBERG: That's a long time.

5 JUSTICE SCALIA: With a different Secretary
6 now.

7 MR. VAN AMBERG: And a different agency.
8 There wasn't even --

9 JUSTICE SCALIA: So there's no reason to
10 believe that the same Secretary -- that the Secretary
11 continued to have the same view of what was proper, is
12 there?

13 MR. VAN AMBERG: We view that it did not
14 and, and also, Justice Scalia and Justice Ginsburg, we
15 also view that if this was the chief educational officer
16 of the Federal Government, he was more than capable of
17 developing a statute which reflected his methodology
18 of --

19 JUSTICE SCALIA: Indeed he could have copied
20 the regulations that were on the book and just put them
21 in the statute, couldn't he?

22 MR. VAN AMBERG: Well, even in the same act,
23 Your Honor, under when they had the EFIG statute, there
24 Congress was able to reference the regulations of the
25 Secretary. They didn't do so when they were, when they

1 enacted the Impact Aid part of it. So --

2 JUSTICE GINSBURG: Well, as -- as far as the
3 difference in time, it was the Secretary's decision, the
4 later Secretary's decision to retain, as you
5 acknowledged, the, almost the identical regulation. You
6 said it didn't go through notice and comment the second
7 time, but the text was basically the same in '76 and in
8 --

9 MR. VAN AMBERG: He didn't -- if I could,
10 Your Honor, he did not retain the second regulation.
11 This was supposed to be a new regulation which was
12 promulgated by the Secretary because the Impact Aid Act
13 had been repealed --

14 JUSTICE GINSBURG: Yes --

15 MR. VAN AMBERG: -- and reenacted.

16 JUSTICE GINSBURG: -- and I appreciate that.
17 But the text of it, what the regulation said was not
18 significantly different from what the earlier regulation
19 said.

20 MR. VAN AMBERG: No. But it --

21 JUSTICE SCALIA: Was this the same
22 Secretary, by the way, as the Secretary who issued the
23 new regulation, the same Secretary that was in office
24 when the new legislation had been proposed?

25 MR. VAN AMBERG: The new legislation was

1 '94. Secretary enacted it in '96. I think it probably
2 was. I -- I -- it was the same administration.

3 JUSTICE SCALIA: Why, why would the
4 Secretary, if indeed it was his bill, why would he
5 deprive himself of the power to decide what the formula
6 should be? Which is the power he had before. I mean,
7 one must think that there must have been some pressures
8 from elsewhere when the Secretary goes in and says take
9 some power away from me, please.

10 MR. VAN AMBERG: Well, that, and I would
11 agree, Justice Scalia, that that is not a, a usual event
12 where an administration intentionally disgorges from
13 itself its own authority. And, and I would also point
14 out the fact that again, there is a dramatic difference
15 between what, what the statute proposes and, and the
16 methodology described in the regulation. And what's,
17 what's very significant is if you go back to 1976 when
18 the original regulation was promulgated, there was a
19 debate that went on in the public notice and comment
20 portion of these proceedings where they discussed
21 whether you eliminate percentiles of LEAs directly, or
22 whether you add this extra step of eliminating
23 percentage, percentages of pupils and then eliminating
24 LEAs as these pupils are eliminated.

25 I mean, it's a totally different process,

1 totally different philosophy behind them and as we can
2 see in this particular case, in New Mexico and in
3 Alaska, totally different results.

4 JUSTICE ALITO: Well, Mr. Van Amberg, is the
5 statutory language really as unambiguous as you suggest?
6 It says above the 95th percentile or below the 5th
7 percentile, but it doesn't say above the 95th percentile
8 of local education agencies or below the 5th percentile
9 of local education agencies, does it?

10 MR. VAN AMBERG: Well, Justice Alito, I, I
11 think what you, I think it is clear and unambiguous.
12 And the reason is that if you -- in order to run a
13 percentile calculation you need units against which to
14 run that, and then you need these, an identified set of
15 variable standards such as they provided here, the
16 average per-pupil expenditures of each set of these LEAs
17 or districts.

18 So you rank the, the LEAs. You've got the
19 variable values and then it, it's, the statute provides
20 that you find, that you eliminate those LEAs which are
21 above the 95th percentile. And then if you go back to
22 what "such" means and referencing back to other portions
23 of the statute, it's 95th percentile of the revenues and
24 expenditures of the LEAs in the State. It's a very
25 similar process for --

1 JUSTICE BREYER: Yes, but what do you
2 distribute?

3 MR. VAN AMBERG: Pardon?

4 JUSTICE BREYER: What do you distribute? I
5 mean, I agree you have a, some kind of, let's put
6 something on cards, so you have thousands of cards and
7 each has a number on it. What are you distributing,
8 the cards? Are you, are you -- what's distribute --
9 a 5th percentile refers to some kind of distribution.
10 What's it a distribution of?

11 MR. VAN AMBERG: It's the distribution of
12 the percent of the, what is --

13 JUSTICE BREYER: It is a thing --

14 MR. VAN AMBERG: -- a thing --

15 JUSTICE BREYER: -- like a -- like a set of
16 things that you're distributing, what are they?

17 MR. VAN AMBERG: The thing that you're
18 running the percentile against is the total number of,
19 of expenditures and revenues in the State.

20 JUSTICE BREYER: In other words, you take
21 all the -- there is a set of numbers, each number is a
22 different number and the characteristic of each number
23 is there's some school district that spends per, or takes
24 in per-pupil, revenue equal to that number. So we write
25 each one on a card. Is that what we're, is that our

1 distribution? We have like, let's say we have a, a
2 thousand cards. Is that what it is?

3 MR. VAN AMBERG: Well, in our -- in New
4 Mexico's case you have --

5 JUSTICE BREYER: No. No. I'm not, I'm
6 saying what do you think it has to be? What do you
7 think it should be? What are, what is it we are
8 distributing? A simple question, I guess, for a
9 statistician. I unfortunately am not one and can't find
10 one, so I have no idea what this statute means.

11 (Laughter.)

12 MR. VAN AMBERG: Well, the, the -- the value
13 against which --

14 JUSTICE BREYER: Not a value. I want to
15 know what I'm distributing. And if you don't know I
16 would say that this is, I have never seen a case so much
17 better fitted for relying on the views of an agency.

18 JUSTICE SCALIA: Counsel, I thought you said
19 that you did know what it was. I thought you simply
20 quoted the statute, the 5th percentile of "such
21 expenditures or revenues in the State." That's what's
22 being distributed.

23 MR. VAN AMBERG: Yes, but --

24 JUSTICE BREYER: I'm sorry, I don't know how
25 --

1 JUSTICE SCALIA: Such revenues or
2 expenditures in the State consist of, the word "such"
3 obviously refers you back to some prior reference to
4 revenues in the State, and that prior reference in
5 subsection A is a reference to district by district, not
6 pupil by pupil.

7 MR. VAN AMBERG: That, that's correct.

8 JUSTICE BREYER: So, so in other words we
9 are distributing those cards, it's a set of numbers? If
10 you're not certain, isn't it fair to say that this
11 statute is not clear as to what it is you're distributing?

12 MR. VAN AMBERG: Well, I'm sorry, Justice --
13 I'm -- Breyer; I'm having a little trouble understanding
14 --

15 JUSTICE BREYER: Well, I -- I thought not.
16 Is there a --

17 MR. VAN AMBERG: -- the question.

18 CHIEF JUSTICE ROBERTS: You're maybe not
19 certain about the hypothetical but you're certain about
20 the statute, aren't you?

21 MR. VAN AMBERG: I'm certain about the
22 statute. You're provided the variable values that are
23 attributed to each of the LEAs; you rank them; and you
24 provide a percentile. It's a methodology which was
25 described in 1976. It's a methodology employed every

1 day in ranking students and schools.

2 JUSTICE BREYER: Yeah -- that -- right. But
3 I unfortunately don't know enough about this subject, so
4 I thought, not being an expert on it, that when you
5 referred to a percentile, you have some group of things,
6 a set of things that's being distributed in a certain
7 order and there is a top of that and a bottom of that.

8 MR. VAN AMBERG: Correct.

9 JUSTICE BREYER: And if that's what
10 percentile refers to, I just want to know what those
11 things are that are being distributed. And -- and that's
12 where I find the ambiguity. And if there is an
13 ambiguity, I guess we are going to take the view of the
14 agency at least as I understand it. So -- so that's why
15 I asked the question.

16 MR. VAN AMBERG: All right. And, and I
17 think I understand the question now, Justice Breyer.
18 Thank you.

19 The units that are ranked or distributed are
20 the LEAs or the school districts. And they are ranked
21 in order of their per-pupil expenditures and revenues.
22 Those are the units and the component parts of this
23 calculation that are provided for us by Congress.

24 JUSTICE BREYER: And does the statute say
25 you have to do it that way? It has to be the group

1 that's distributed?

2 MR. VAN AMBERG: It's my understanding under
3 -- under Brown and Williamson is if Congress speaks to
4 an issue, Congress is to be obeyed.

5 JUSTICE BREYER: Clearly.

6 MR. VAN AMBERG: There is nothing mysterious
7 about this type of a methodology. And this is the one
8 that Congress chose.

9 JUSTICE BREYER: No, you could do it that
10 way and the reason the Government, I think, says that
11 you shouldn't do it that way is that it would produce an
12 absurd result.

13 MR. VAN AMBERG: All right.

14 JUSTICE BREYER: That the object of the
15 statute is to catch the outliers. And if you, for
16 example, had one giant school district like New York
17 City which was at the top of the list and another giant,
18 poor school district that was at the bottom of the list,
19 you would cut those two out, and you might have cut out
20 half the pupils in the whole State, and those wouldn't be
21 outliers would they? I mean, that's the problem.

22 MR. VAN AMBERG: And you have a similar
23 infirmity associated with the other methodology. That
24 is, if you have a number of LEAs which are small in
25 numbers, as in New Mexico, particularly if you had a

1 number of small LEAs at the bottom, which is I think a
2 huge problem policywise, you were to cut them out and
3 let them to float off in their poverty. I think, I can
4 understand where there is --

5 CHIEF JUSTICE ROBERTS: Doesn't, doesn't
6 subsection b(ii) address outliers? I was surprised
7 there wasn't more discussion of that in the briefing and
8 maybe it's, it's because of some reason I'm unaware of.
9 That says that the Secretary in making this
10 determination can take into account particular types of
11 LEAs where there is extra, additional costs. I would
12 have thought for example if you had a very small LEA
13 with only 20 students and the cost is particularly high
14 because you don't have economies of scale, that you
15 haven't -- that that would, could be knocked out for
16 that reason. Is that not how that works?

17 MR. VAN AMBERG: Yes. And this is the, the
18 whole problem, that we can argue philosophically how
19 whether Congress's methodology or the Secretary's
20 methodology is better, but the backdrop of this is that
21 the, the statute and also the regulation allows for
22 school, for the States to back out all these
23 disqualifying expenditures so that you, you make an
24 adjustment to more or less end up with a baseline per
25 pupil expenditure. And there is really no reason after

1 you do that for having a wide disparity, even between
2 the top and the bottom LEA.

3 The Secretary's formula, and I don't think
4 we should be arguing whose formula is better, because if
5 they are different, Congress wins, but nevertheless, the
6 Secretary's formula, it eliminates 26 percent of the
7 school districts. And under New Mexico, if you, if you
8 look at the top and the bottom school district even
9 after the eliminating of these funding differentials,
10 you've got a 244 percent disparity.

11 JUSTICE BREYER: It, it eliminates 26 school
12 districts but those 26 school districts account for 5
13 percent or 10 percent of the pupils. And I guess what
14 we are interested in here is not school districts; they
15 are not a thing -- they are a thing of a kind, but we
16 are interested in students, real people who get money.
17 And so that it, that it -- it eliminates 26 percent of
18 the school districts would seem to be a good thing, not
19 a bad thing, because what we are really interested in
20 are the pupils and it keeps in 90 percent of the pupils.

21 MR. VAN AMBERG: And Justice Breyer, I think
22 Congress and in its methodology has disagreed with that
23 view, because it does not rely strictly upon pupils, and
24 pupils are not necessarily the driving force in how we
25 work this formula.

1 JUSTICE SCALIA: I thought the problem was
2 disparity in school districts. Since much of the
3 funding for education is local funding, in some places
4 there are very rich school districts and very, very
5 poor, poor school districts. And I thought that the
6 purpose of this was to make sure that there is not an
7 enormous disparity, not pupil to pupil but district to
8 district. It makes perfect sense, it seems to me.

9 MR. VAN AMBERG: And that is correct.
10 Because these districts particularly in New Mexico serve
11 a unique purpose. New Mexico has pockets of -- of urban
12 and populations, and then they have got small
13 traditional villages; they have got farming communities;
14 they have got Indian lands; they have got military
15 bases. And a school district whether it educates 100
16 children or 1,000 children or 5,000 children has a
17 special value in the State and in our educational
18 process. And simply because a child in New Mexico
19 attends a school district that does not have
20 particularly many students in it doesn't mean that he
21 has to suffer a poorer education than his brethren and
22 brothers and sisters in a metropolitan area.

23 JUSTICE GINSBURG: Mr. Van Amberg, if there
24 is any ambiguity in the statute, one relevant
25 consideration might be how would this work across

1 States. And I think it's true, is it not, that your
2 reading would lead to wildly different, wildly different
3 results from State to State depending on whether they
4 have large districts or small districts at the top and
5 the bottom, whereas the other way, counting pupils
6 rather than school districts regardless of size, you
7 would get uniformity going from State to State.

8 MR. VAN AMBERG: Justice Ginsburg, the
9 Secretary recognized in 1976 that both methodologies
10 have their problems, depending on how your districts,
11 the number of districts that you have in a State, their
12 relative populations, how they line up. And --

13 JUSTICE STEVENS: May I ask this question?
14 Is -- am I correct in understanding that at the end of
15 the line here, if you win, the Federal money will go to
16 your two districts, whereas if the other side wins, the
17 Federal money will go to the States? Is that what the
18 bottom line is?

19 MR. VAN AMBERG: That's the bottom line.

20 JUSTICE STEVENS: Yes.

21 MR. VAN AMBERG: And I would point out,
22 Justice Stevens, that Congress has made it clear that
23 the Impact Aid is supposed to go to the impacted
24 districts. It is not supposed to fund the general
25 educational program of a State. The money that the

1 State, that the State of New Mexico seeks to retain is
2 under a limited exception that has been created and it
3 is, it is not that we are trying to take the State's
4 money as the bottom line. It is that the State has
5 taken the Impact Aid dollars and doesn't have an
6 equalized system. New Mexico could equalize if it wants
7 to. It established its equalization formula --

8 JUSTICE STEVENS: Let me ask another general
9 question if I may. If it were true, and I don't think
10 it is in this case, that the biggest district was the
11 one that got the most per-pupil money -- the two biggest
12 districts that were at the opposite ends of the
13 spectrum, they would all be taken out, wouldn't they,
14 under your view?

15 MR. VAN AMBERG: Well, it actually
16 depends -- you get into statistical approaches, but if,
17 let's say, there were less than 20 districts, you just
18 had let's say 18 districts or 19 districts, then if you
19 do the percentile against, if you work the percentile in
20 that particular setting, nobody gets eliminated.

21 JUSTICE KENNEDY: But you have the same
22 problem if it's students, I take it? You'd have the
23 same statistical question whether you, you use districts
24 or students?

25 MR. VAN AMBERG: Correct, because you would

1 run -- because if you had districts, big districts at
2 both ends, you run your 5 percent on both ends with the
3 students, you end up not eliminating anybody.

4 JUSTICE BREYER: That's all right. I
5 wouldn't think that was a problem. But what about
6 Justice Stevens' question. There are 20 districts in
7 our State -- it's exaggerated, let me exaggerate it --
8 and the rich district has twenty -- has a quarter of the
9 students, and poor district has another quarter. So
10 our outliers in that situation which we're eliminating
11 from our calculation are the rich district and the poor
12 district. One's at the top, one's at the bottom. And
13 now we're left with 18 districts to figure out whether
14 they're equalized. But those 18 districts account for
15 less than half or about half of all the students.
16 That's the problem. It seems that isn't very
17 representative and we're trying to get
18 representativeness.

19 MR. VAN AMBERG: Well, Justice Breyer, I, I
20 would respectfully like to go back, not to what we are
21 trying to accomplish through a judicial decision, but
22 what Congress accomplished through its decision.

23 JUSTICE BREYER: I understand that. If the
24 language doesn't permit it you can't do it, they can't,
25 and you win. But if the language does permit it, the

1 reason -- you have to stretch the language, I suspect,
2 in my view to get to the Government's result. It might
3 just barely permit it. But one of the things on their
4 side is that if we take your view it produces an absurd
5 result, because of what Justice Ginsburg said, because
6 there is such variation in the number of pupils among
7 school districts in different States.

8 MR. VAN AMBERG: Right. If I could address
9 that, Your Honor. The only argument I see the State has
10 is the argument about absurdity. This debate that we're
11 having now was the debate that took place in 1976 in
12 front of the Secretary. He recognized that there were
13 two methodologies that he was considering. He
14 recognized that they both had their problems. But in
15 1994, Congress had before it at least or had available
16 to it information as to the, whether, what, how this
17 particular formula would work. There were only three
18 and perhaps -- three States, Kansas, Alaska, New Mexico,
19 and perhaps Arizona -- that had -- that were trying to
20 take advantage of the, of this narrow exception. So
21 they knew the configuration and the composition of these
22 school districts.

23 And so they could look if they wanted to --
24 and there's no legislative history to this, but they
25 could have looked if they had wanted to, to exactly what

1 the practical effect would be of these two formulas.
2 And the practical effect is that in New Mexico the
3 formula which the Respondents contend is absurd reduced
4 only 11 percent of the LEAs. And with the backdrop that
5 this, that these LEAs should have been more or less
6 equalized anyhow because of removing the disparate
7 funding, that's, that's much more reasonable and
8 certainly doesn't reflect an absurdity, and when you
9 compare that to the Secretary's approach which
10 eliminates 26 percent and cuts loose 23 school districts
11 out of 89 from any consideration and you end up with
12 kind of a core block in their 14 or 15 percent
13 disparity, I think there may be those who could argue
14 forcefully that that's an absurdity.

15 JUSTICE KENNEDY: I see your white light is
16 on. I don't want to take -- would the other States make
17 that same answer that you just made?

18 MR. VAN AMBERG: Kansas equalizes under any
19 formula, as New Mexico did, it could do. Alaska, you
20 eliminate 22 percent in order for them to just kind of
21 squeak by. If they applied Congress's formula they
22 would just equalize. This is an option I contend that's
23 available to every State that wants to take advantage.
24 If you give them a 25 percent disparity allowance, you
25 allow them to back out disequalizing expenditures.

1 There's really no explanation that's been offered why
2 there's any disequalization at all.

3 With that, if there is any time -- unless
4 there are any further questions.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Srinivasan.

7 ORAL ARGUMENT OF SRI SRINIVASAN, ESQ.

8 ON BEHALF OF THE FEDERAL RESPONDENT

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

11 JUSTICE SCALIA: Mr. Srinivasan, you don't
12 want us to stretch the language, do you?

13 MR. SRINIVASAN: Well, I don't think you
14 need to stretch the language, Justice Scalia.

15 JUSTICE SCALIA: And you wouldn't urge us to
16 do that either, would you?

17 MR. SRINIVASAN: Well, it depends on what
18 you mean by "stretch."

19 (Laughter.)

20 MR. SRINIVASAN: The question, the question
21 before the Court is whether the Secretary's formula is
22 unambiguously foreclosed by the statutory text, not
23 whether it's the better reading, but whether it's
24 unambiguously foreclosed. And we happen to think it's
25 the better reading, but we certainly think it's not

1 unambiguously foreclosed. And maybe the clearest
2 indication that Congress did not unambiguously foreclose
3 the Secretary's methodology --

4 JUSTICE KENNEDY: What's the case that
5 says "unambiguously foreclosed"?

6 MR. SRINIVASAN: Well, Brand X says that,
7 but it's a characterization of the step one inquiry
8 under Chevron. And we can use "foreclosed" if you like,
9 Your Honor.

10 But the clearest indication that the statute
11 does not foreclose the Secretary's methodology is a
12 provision that I think hasn't been addressed thus far in
13 the argument and that's that in the very same act of
14 Congress in which Congress enacted section 7709, the
15 provision at issue here, Congress also explicitly
16 endorsed and incorporated the Secretary's equalization --

17 CHIEF JUSTICE ROBERTS: You begin with an
18 argument that cuts directly against your position. They
19 knew how to do it under the -- I assume you're referring
20 to the education finance and incentive grant program?

21 MR. SRINIVASAN: I am.

22 CHIEF JUSTICE ROBERTS: Well, they did it
23 there, they didn't do it here. To me that suggests the
24 opposite of the inference you're trying to draw.

25 MR. SRINIVASAN: I don't think so, Mr. Chief

1 Justice, with respect. There are two education finance
2 incentive grant program, or EFIG, provisions that we
3 identified in the briefs and one of them I would
4 acknowledge is susceptible to that line of argument,
5 although I don't think it's persuasive. But it's the
6 other one that I'm focusing on, and what the other one
7 does is to explicitly incorporate the Secretary's
8 regulations and so what Congress said in 1994 is that
9 for purposes --

10 CHIEF JUSTICE ROBERTS: Which they did not
11 say in this act.

12 MR. SRINIVASAN: They didn't, but I think it
13 would be very odd to attribute to Congress the intention
14 on one hand to say, we like your regulation, so much so
15 that we want to use it and we want you to continue to
16 use it for purposes of the EFIG program --

17 JUSTICE SCALIA: Different purposes.

18 MR. SRINIVASAN: They're not --

19 JUSTICE SCALIA: They're for different
20 purposes.

21 MR. SRINIVASAN: They're not different
22 purposes at all, Justice Scalia, with respect. They're
23 the exact same purpose. In both programs what Congress
24 wanted to do was to get an assessment of the extent to
25 which education expenditures were equalized in a State

1 among school districts. They're the very same purpose.

2 CHIEF JUSTICE ROBERTS: But for different
3 purposes. In the one case, in this act we're worried
4 about an extensive Federal presence that has an effect
5 on the tax base available for schools and under the EFIG
6 program it's an entirely different question of
7 equalization.

8 MR. SRINIVASAN: Well, at that level of
9 generality you might be right, but with respect to the
10 purpose of the equalization provisions of both of those
11 acts the purpose is exactly the same. In Impact Aid,
12 just like in EFIG, the question is to what extent has
13 the State equalized expenditures across school
14 districts. It's the very same question.

15 CHIEF JUSTICE ROBERTS: Well, maybe
16 ask it directly. If they could so easily just say we
17 incorporate the Secretary's regulation in EFIG, why
18 didn't they do it here?

19 MR. SRINIVASAN: Well, because --

20 CHIEF JUSTICE ROBERTS: They instead went to
21 the trouble of mimicking part of the regulation, but not
22 mimicking the appendix, which is where your calculation
23 methodology is.

24 MR. SRINIVASAN: Well, they didn't mimic it.
25 They incorporated it. And so far as the argument is

1 that they incorporated just the regulation qua
2 regulation and not the appendix to the regulation, I
3 don't think that that argument can be squared with the
4 statutory text or the regulatory text.

5 CHIEF JUSTICE ROBERTS: Can I ask, is there
6 a difference legally between a regulation and an
7 appendix to the regulation?

8 MR. SRINIVASAN: I don't think so, at least
9 not in the circumstances of this case, where the
10 regulation by its own terms incorporates the appendix.
11 And so when Congress incorporated the regulation it
12 necessarily incorporated the appendix.

13 CHIEF JUSTICE ROBERTS: But you say
14 "incorporated," though. What it did was it took the
15 language and it did not take --

16 MR. SRINIVASAN: No.

17 CHIEF JUSTICE ROBERTS: No?

18 MR. SRINIVASAN: No, I don't think so, Your
19 Honor. The text of the statute in 1994 is set forth at
20 the top of page 30 of the Government's brief, and I'm
21 quoting from the second line of page 30 and what
22 Congress said in the EFIG statute in 1994, again in the
23 very same act that enacted this language --

24 CHIEF JUSTICE ROBERTS: In the EFIG statute?

25 MR. SRINIVASAN: In the EFIG statute.

1 CHIEF JUSTICE ROBERTS: But in this statute
2 the regulation says look to the, look at the appendix.
3 Congress as I understood it when it enacted our statute,
4 it took language from the regulation; it didn't take the
5 part that said look to the appendix.

6 MR. SRINIVASAN: Well, it didn't take the
7 part that said look to the appendix because I don't know
8 that that would have been a sensible thing to do when
9 you're enacting a statute. But the point I'm trying to
10 make is that when Congress in the EFIG statute
11 incorporated the regulation it specifically referred to
12 the regulation that the Secretary had in place at that
13 time.

14 CHIEF JUSTICE ROBERTS: And it didn't do
15 that here?

16 MR. SRINIVASAN: It didn't do that here, but
17 it didn't have to. It makes sense --

18 JUSTICE SCALIA: I still think it cuts
19 against you rather than for you, the fact that they
20 could have done the same thing here and we wouldn't have
21 this case.

22 MR. SRINIVASAN: Well, let me just make one
23 more point on this regard, and then I'll move to
24 the text of Section 7709, because I do think that this
25 point has a great deal of force. The reason that

1 Congress would have incorporated the regulation
2 explicitly in EFIG but not in Impact Aid is because
3 we're dealing with an Impact Aid regulation. So the
4 Secretary ordinarily wouldn't have thought that he
5 should apply the Impact Aid regulation for purposes of
6 EFIG unless Congress told him to do that and that's why
7 Congress did. But with respect to Impact Aid, there's
8 no reason to incorporate the regulation. The regulation
9 already existed, and the question is did Congress in
10 this act foreclose the Secretary from continuing to
11 apply that longstanding regulatory methodology. And I
12 would suggest that if Congress --

13 JUSTICE SCALIA: Mr. Srinivasan, if we could
14 come to the, to the text that you're talking about.

15 MR. SRINIVASAN: Sure.

16 JUSTICE SCALIA: What I don't understand
17 about the Government's position is why you use this,
18 this per-pupil theory for purposes of (B)(i), but don't
19 use it for purposes of (A). You, you don't -- in the
20 major computation portions, namely for purposes of
21 paragraph 1, a program of State aid equalizes
22 expenditures among local education if in the second
23 fiscal year is made the amount of per-pupil expenditures
24 made by or per-pupil revenue available to each agency.
25 You do it agency by agency, don't you? You don't apply

1 this, you know, it depends on how many pupils in each
2 agency. Why don't you do it for both?

3 MR. SRINIVASAN: Well, if you look at (2)(a),
4 Your Honor, what that says is that the disparity, the
5 disparity standard at its broadest level deals with
6 whether the per-pupil revenues for the highest ranked
7 local educational agency exceeds the per-pupil revenues
8 for the lowest one by 25 percent.

9 JUSTICE SCALIA: Right.

10 MR. SRINIVASAN: It would make no difference
11 if you took into account pupils for that part of the
12 analysis, and here's the reason why. When you take into
13 account pupils with respect to a local educational
14 agency and you weight the local, the figure by the
15 number of pupils served by the local educational agency,
16 the per-pupil figure that you're going to attach to each
17 of those individual pupils is the same. It's the same
18 per-pupil figure for each one. It's just that you
19 multiply it by the number of pupils.

20 So for purposes of this part of the statute,
21 where you're comparing the highest to the lowest,
22 whether you took into account the number of pupils or
23 not you'd still be dealing with the same two figures.
24 You'd be dealing with a figure that applies to the
25 highest ranked local educational agency and you'd be

1 dealing with a figure that applies to the lowest ranked
2 local educational agency.

3 JUSTICE SCALIA: You're saying it comes to
4 the same, but the fact remains you don't use that
5 methodology in A, because you don't think the language
6 requires that methodology. And it is the same language
7 in B.

8 MR. SRINIVASAN: No, there would be -- I
9 don't know that we use one or the other. It's just that
10 there would be absolutely no purpose served by using
11 pupils with respect to --

12 JUSTICE SCALIA: Well, the purpose would be
13 to follow the language of the statute, and if you think
14 that the language in B requires this kind of an approach
15 you should take the same approach in A, especially if it
16 makes no difference.

17 MR. SRINIVASAN: Well, no; especially
18 because it makes no difference, because with respect to
19 the B part of it, the 95th and 5th percentile
20 exclusions, it makes all the difference in the world
21 whether you take into account --

22 CHIEF JUSTICE ROBERTS: I have a conceptual
23 difficulty, and it may be my limitations with the way
24 you do it. You take students and you assign a per-pupil
25 number to each individual student.

1 MR. SRINIVASAN: Effectively.

2 CHIEF JUSTICE ROBERTS: But I would have
3 thought the per-pupil concept only makes sense if you're
4 dealing with LEAs. They have a per-pupil number because
5 they've got a bunch of pupils. You take individual
6 students, and you know for example in that school
7 district you don't spend the same amount of money on the
8 kindergartner that you spend on the eighth grader. And
9 yet, you give the kindergartner a per-pupil number and
10 the eighth grader a per-pupil number that is the same.
11 It's an artificial association. It makes sense to speak
12 of per-pupil numbers when you're referring to the LEAs
13 because they have so many pupils, they get so much
14 money, you can do the calculation. It doesn't make
15 sense to say, you know, John Smith the kindergartner has
16 a per-pupil expenditure of a thousand dollars. He may
17 have \$200 and the eighth grader \$2,000, so why are you
18 creating this artificial association and then using,
19 using that methodology?

20 MR. SRINIVASAN: Well, it's an approximation
21 to be sure, and per-pupil revenues by definition deal
22 with approximations across the swath of students that
23 are covered by local educational agencies.

24 CHIEF JUSTICE ROBERTS: And it only makes
25 sense to rank them if you have an entity that has a

1 swath of students, the district, that's the way it
2 should be ranked. When you're ranking it by pupils,
3 maybe if you ranked them by pupils and you had the
4 actual numbers of course, which nobody does, your
5 methodology would make sense.

6 MR. SRINIVASAN: Well, I think what we're
7 really doing, Your Honor, is weighting each figure by
8 the amount of pupils in the school district, and the
9 reason we're doing that is to get a more accurate
10 picture of the extent to which any one school district's
11 per-pupil revenue figure contributes to the overall
12 revenue pictures in the State. And if I could use one
13 example which I think might help to crystallize why it's
14 necessary to do this sort of weighting and why education
15 finance practitioners routinely prescribe that you have
16 to do this sort of weighting in order to avoid distorted
17 results, if you consider the example of a State that has
18 two school districts, and I'll use real examples from
19 New Mexico. One would be the district that has the
20 highest per-pupil revenues in the state, the Mosquero
21 district, which serves 57 pupils. And the other
22 would be the Albuquerque School District, the largest
23 school district in the State, which serves 84,000
24 pupils.

25 Now the per-pupil revenues for Albuquerque

1 are roughly \$3,000 and the per-pupil revenues for
2 Mosquero, the smaller school district, are roughly
3 \$7,000. And if you imagine a State that consists of
4 just those two districts, and you ask the question to
5 pair with the statutory language, what is the 50th
6 percentile, and I'll use 50th just for ease of analysis,
7 what is the 50th percentile of such per-pupil revenues
8 in the State? One answer would be that you take the
9 number for Mosquero, the 7,000 and you take the number
10 for Albuquerque, the 3,000, you split the difference and
11 you say the 50th percentile of per-pupil revenues in the
12 State is \$5,000. But I think that would present a very
13 misleading picture of what's actually going on in the
14 State.

15 CHIEF JUSTICE ROBERTS: No --

16 MR. SRINIVASAN: Because --

17 CHIEF JUSTICE ROBERTS: Well, because it's
18 an absurd hypothetical. What is the --

19 MR. SRINIVASAN: I don't -- I -- it is not
20 --

21 CHIEF JUSTICE ROBERTS: What is the
22 smallest number of districts, what is the smallest
23 number of school districts in a State?

24 MR. SRINIVASAN: One.

25 CHIEF JUSTICE ROBERTS: Which State has one

1 school district?

2 MR. SRINIVASAN: Hawaii. Hawaii has one
3 which is a special case but there are states that have a
4 relatively small number of school districts.

5 CHIEF JUSTICE ROBERTS: In the, in the
6 hypothetical you posed why couldn't the Secretary
7 address that disparity under (B)(ii)? In other words,
8 the school district which has only 57 students, it seems
9 to me could be taken out of the calculation under
10 (B)(ii), and then you would be dealing only with more
11 representative school districts, not the special case of
12 a particularly isolated school district or whatever.

13 MR. SRINIVASAN: Two points on (B)(ii),
14 Mr. Chief Justice. The first is that by -- by the
15 statutory text, (B)(ii) is over and above what you do in
16 (B)(i), the 95th and 5th percentiles exclusions. So
17 you first have to do that. But the more relevant
18 point --

19 CHIEF JUSTICE ROBERTS: Why do you have to
20 do that? Why do you have to do it first? It says you
21 can take into account this -- extent to which the
22 program reflects additional costs in particular
23 districts.

24 MR. SRINIVASAN: No, my point is simply that
25 under (B)(i) the statute says the Secretary shall

1 disregard local educational agencies that are above the
2 95th and below the 5th percentile. So I think the
3 Secretary has to do that. Now (B)(ii) in some sense
4 could be seen as an additional option for the Secretary
5 over and above the exclusions, but there is a more
6 fundamental point which is that with (B)(ii), it says
7 take into account the extent to which a program of State
8 aid reflects the additional costs.

9 And so what that does is it piggybacks on the
10 way that the State approaches the situation. So this,
11 as -- this provision as the Secretary understands it
12 allows it to give effect to a State that gives effect to
13 those sorts of considerations, but it's not an
14 independent grant of authority for the Secretary himself
15 to take those considerations into account.

16 JUSTICE SOUTER: Mr. Srinivasan, you -- you
17 may have convinced me. I'll stipulate that you have
18 convinced me that the method that you're arguing for
19 would probably be a better method, but you haven't
20 touched the text of (b)(2)(B)(i) yet, and that's where
21 some of us at least are, are having our -- our problems.

22 Do you agree that in the absence of the
23 other program, I forget the, the acronym for it -- that
24 you really would not have any argument that there is
25 ambiguity in the text here?

1 MR. SRINIVASAN: No. No. Absolutely not.

2 JUSTICE SOUTER: Then -- then would you
3 address the text?

4 MR. SRINIVASAN: Sure, I will.

5 It's at page 4a of the appendix to the
6 Government's brief, (B) -- (B)(i). And what the text
7 says is disregard local educational agencies with
8 per-pupil expenditures or revenues above the 95th
9 percentile or below the 5th percentile of such
10 expenditures or revenues in the State.

11 JUSTICE SOUTER: Okay.

12 MR. SRINIVASAN: Now one point I make --

13 JUSTICE SOUTER: So what is supposed to be
14 disregarded are educational agencies.

15 MR. SRINIVASAN: Yes.

16 JUSTICE SOUTER: Right. And the agencies
17 are identified how? How do we identify the agencies
18 that would be disregarded?

19 MR. SRINIVASAN: You identify the agencies
20 to be disregarded by first identifying the 95th and 5th
21 percentiles of per-pupil revenues in the State. And
22 then you disregard --

23 JUSTICE SOUTER: And we identify their
24 per-pupil revenues, too, don't we? Agencies with
25 per-pupil expenditures or revenues above or below,

1 right?

2 MR. SRINIVASAN: Yes, but -- and -- but the
3 critical text is the 95th percentile and 5th percentile
4 of such expenditures or revenues in the State.

5 JUSTICE SOUTER: But that critical text is
6 being applied to an agency which is identified by
7 reference to per-pupil expenditures or revenues,
8 correct?

9 MR. SRINIVASAN: It is. I mean there is no
10 doubt that the per-pupil revenues or expenditure figures
11 that lie on the spectrum are associated with the local
12 educational agencies. That's how --

13 JUSTICE SOUTER: Well, it's not merely that
14 they are associated with. The very definition, the very
15 identification of LEA here is exclusively in terms of
16 per-pupil expenditures or revenues. It's not merely in
17 association. It is a definition, isn't that so?

18 MR. SRINIVASAN: I don't think so. The --

19 JUSTICE SOUTER: Then, then what does the
20 phrase "with per-pupil expenditures or revenues above 95
21 or below 5" mean?

22 MR. SRINIVASAN: Well, that's true that each
23 local education agency has a per-pupil expenditure or
24 revenue. But the critical part of the statute which has
25 95th percentile or 5th percentile of such expenditures

1 or revenues doesn't foreclose weighting. And I think
2 the point that Justice Alito made bears, which is --

3 JUSTICE SOUTER: Well, why doesn't it? It
4 seems to me that the only identification of an entity or
5 person, if you want, to be disregarded is the
6 identification of an LEA, and the LEA is described in
7 terms exclusively of its expenditures or revenues. So
8 why doesn't that foreclose your position?

9 MR. SRINIVASAN: Well, we -- two parts to
10 the answer, Justice Souter. First the Secretary's
11 formulation, no less than Petitioner's formulation, does
12 disregard local educational agencies with per-pupil
13 revenues above the 95th and 5th percentiles.

14 JUSTICE SOUTER: Right. After --

15 MR. SRINIVASAN: Where we disagree is in
16 identifying the 95th exactly.

17 JUSTICE SOUTER: After identifying them in
18 terms of the expenditures or revenues. That's what
19 you're supposed to do.

20 MR. SRINIVASAN: Exactly. And I'd --
21 exactly. And I'd reiterate the point that Justice Alito
22 made earlier, which is that Congress could have
23 compelled the approach that Petitioners compelled --
24 contend, if it would have said --

25 JUSTICE SOUTER: There are lots of things

1 that Congress could have done differently from what it
2 did do, but it -- that doesn't seem to me to inject an
3 ambiguity in the identification in, in this subsection
4 of the LEA that we are talking about. And it doesn't
5 create an ambiguity in, in the clear provision that what
6 is to be disregarded is an LEA as so defined.

7 MR. SRINIVASAN: Well, I think it does, Your
8 Honor, because there are two different ways of ranking
9 the LEAs. One is to take the per-pupil revenues
10 associated with each LEA and simply take that list into
11 account. Another is to take the same list but then
12 weight it by the number of pupils in each LEA.

13 JUSTICE SOUTER: Sure, that's another way to
14 --

15 MR. SRINIVASAN: Nothing in the statute
16 forecloses that approach.

17 JUSTICE SOUTER: -- do it, but tell me why
18 that is consistent with the text.

19 MR. SRINIVASAN: Because the text refers to
20 the 95th and 5th percentiles of such expenditures or
21 revenues in the State, and the list that includes the
22 weighting does represent a list of expenditures or
23 revenues in the State.

24 JUSTICE SCALIA: What does "such" mean -- of
25 "such expenditures or revenues"? That refers back to

1 local educational agencies with per-pupil expenditures
2 or revenues. It's referring you back not to the
3 totality of students but to, to agencies with per-pupil
4 expenditures or revenues.

5 MR. SRINIVASAN: Sure. And I don't, I don't
6 dispute that the per-pupil revenue figures belong to a
7 local educational agency. But again that doesn't mean
8 that you can't take into account the relative extent to
9 which a particular school district contributes to the
10 overall State picture, and the way you do that --

11 CHIEF JUSTICE ROBERTS: Wouldn't the statute
12 have told you, though, to, to disregard pupils according
13 to the ranking? It does tell you to disregard LEAs,
14 which suggests the ranking -- at least to me, that the
15 ranking ought to be of LEAs and not pupils.

16 MR. SRINIVASAN: Well, it is, it is a
17 ranking of LEAs in the first instance and then it's
18 each of those LEA figures is weighted by the number of
19 pupils the way we do it, and we do end up disregarding
20 LEAs. But as Justice Souter pointed out the first step
21 is identifying the 95th and 5th percentiles, and on that
22 step we take into account the number of pupils. It's
23 only at that step that we take into account the number
24 of pupils.

25 JUSTICE STEVENS: May I ask --

1 MR. SRINIVASAN: And nothing in the statute
2 forecloses that. I'm sorry.

3 JUSTICE STEVENS: -- a rather basic
4 question? What if I'm convinced that your opponent's
5 reading is really the only fair reading of the statute,
6 but I'm also convinced by you that that's not what
7 Congress intended. What should I do?

8 (Laughter.)

9 MR. SRINIVASAN: Well, one way or another I
10 think you should rule in our favor.

11 (Laughter.)

12 JUSTICE STEVENS: Well no. Accept, accept
13 my premises. What do you think I should do?

14 MR. SRINIVASAN: Well, I think in that
15 situation you sort of have the sliding scale that we
16 often confront with textual analysis. And if you really
17 think that Congress would have compelled an absurd
18 result, and I think it does verge on that, then you
19 would --

20 JUSTICE STEVENS: I don't think it has to be
21 absurd, it's just, I would measure it by what Congress
22 actually intended. Assume there are two permissible
23 readings, and two -- both of them make sense. And I'm
24 convinced, assume I'm convinced by you, that they really
25 intended to perpetuate the prior method of procedure.

1 May I take that, may I come to that result
2 even though I think the language really says exactly
3 what your opponent says it says?

4 MR. SRINIVASAN: Well, if the language
5 absolutely unambiguously compels that reading, then I
6 think it would be a difficult position. But I don't
7 think it goes, goes to that degree.

8 CHIEF JUSTICE ROBERTS: I would have thought
9 your office had answered that question in countless
10 briefs where it tells us to be guided by the language of
11 the statute and not some unexpressed intent.

12 MR. SRINIVASAN: Well, that's why I said, if
13 you think that the statute unambiguously absolutely
14 compels that reading, then I don't know that we would
15 have a position.

16 JUSTICE SCALIA: Well, you still have a
17 Church of the Holy Trinity team over there somewhere,
18 don't you?

19 (Laughter.)

20 JUSTICE BREYER: Why doesn't it -- why
21 doesn't it absolutely compel it? Where is the ambiguity,
22 you say?

23 MR. SRINIVASAN: It says --

24 JUSTICE BREYER: -- the 5th percentile of
25 such per-pupil expenditure. And that --

1 MR. SRINIVASAN: That's right.

2 JUSTICE BREYER: Now how are you going to
3 get that so it doesn't say just list cards with
4 per-pupil expenditure on it, different ones and take the
5 top five?

6 MR. SRINIVASAN: Well, well it's just the
7 number of cards, ultimately, under your hypothetical,
8 Justice Breyer.

9 JUSTICE BREYER: Do you have a lot of cards
10 that have the same number? You have a lot --

11 MR. SRINIVASAN: They have the same cards,
12 we just have -- they have the numbers, exactly.

13 JUSTICE BREYER: Yes.

14 MR. SRINIVASAN: It's the same cards with
15 the same numbers. We just add more cards in order to
16 reflect the extent to which each LEA contributes to the
17 overall picture.

18 JUSTICE BREYER: And why, why don't you take
19 the top five where we have 10 percent of the students,
20 let's take the second five and it happens to have the
21 same number on the card as the first five, and why don't
22 they fall in the top 5 percent?

23 MR. SRINIVASAN: I'm not sure I understand.

24 JUSTICE BREYER: All right. Forget it.

25 (Laughter.)

1 MR. SRINIVASAN: Sorry.

2 JUSTICE GINSBURG: Can you enlighten us a
3 little bit about how this statute developed?

4 MR. SRINIVASAN: Sure.

5 JUSTICE GINSBURG: As far as I know it was
6 the same Secretary of Education when the statute came on
7 the books and when the regulation was kind of readopted,
8 I think it was --

9 MR. SRINIVASAN: I think that's right,
10 Justice Ginsburg.

11 JUSTICE GINSBURG: But there was a peculiar
12 proposal to drop, it was the Secretary's proposal to
13 drop the bottom five. So it was a different proposal,
14 and what was the reason for that? Why keep, keep the
15 95th percentile but not the 5th?

16 MR. SRINIVASAN: Well, as we point out in a
17 footnote in our brief there were some education finance
18 experts that suggested that there would be no reason to
19 retain the exclusion at the bottom of the range, and I
20 think that's because when you have low per-pupil
21 revenues there is a reason not to exclude those figures.

22 But the important point is the material
23 part of the language, which is 95th percentile
24 of such expenditures or revenues in the State, is
25 exactly what the Secretary proposed and the Secretary of

1 course wouldn't have curtailed his own discretion to
2 continue the same methodology that he had long had in
3 place. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Manasevit.

6 ORAL ARGUMENT OF LEIGH M. MANASEVIT,
7 ON BEHALF OF STATE RESPONDENT

8 MR. MANASEVIT: Mr. Chief Justice, may it
9 please the Court:

10 I'd like to begin with Justice Ginsburg's
11 question, because I think that that is very illuminating
12 to where we are today. This statute began against a
13 history, an 18-year history where the agency had been
14 delegated by Congress virtually carte blanche authority
15 to devise equalization tests. That was the earlier
16 statute. The agency had three tests at the time. One
17 was the 25 percent disparity test that we see today and
18 there were two other tests.

19 In 1994, what happened was the Secretary
20 proposed to the Congress and the Congress following the
21 Secretary's lead eliminated the two other tests.
22 That's, that's what was happening. And Justice Scalia
23 asked well, why would the Secretary tie his hands? What
24 happened was the Secretary no longer was satisfied or
25 liked the other two tests and eliminated those and

1 proposed the test that he had been using for 18 years to
2 the Congress. Congress adopted that test and that's the
3 test that we have today, the 25 percent disparity test.

4 The difference is that whereas the Secretary
5 had the free rein to develop that disparity test,
6 however he wanted, previously, the Secretary -- the
7 Congress now told the Secretary in disparity, do the
8 following things. First of all 25 percent is the
9 maximum disparity that we are going to allow you, number
10 one. And number two, take out the outliers in a range
11 of 5 to --

12 CHIEF JUSTICE ROBERTS: Isn't it -- I'm
13 sorry. Go ahead.

14 JUSTICE SCALIA: You know, I really don't
15 care what the Secretary thought he was doing. I mean,
16 it seems to me we have to ask the question, what would a
17 member of Congress who voted on this thing have thought
18 he was voting for, who had, you know, didn't have this
19 history you're giving us. And more importantly, what
20 would a citizen to whom this language is promulgated
21 think the language means? I don't care what the
22 Secretary had in the back of his mind. Why should that
23 make any difference to us?

24 MR. MANASEVIT: Fair question, Justice
25 Scalia, and that brings us back to the language of the

1 statute, where of course we begin, and we have to look
2 precisely to the language of the statute. The language
3 of the statute, what Petitioners mistake is that the
4 language of the statute here has a two-part process. We
5 don't look at LEAs first. It doesn't say 5th percentile
6 of LEAs. We have to first rank expenditures or revenues
7 in the State. It's above 95th percentile or below 5th
8 percentile of the expenditures.

9 JUSTICE SCALIA: Of such expenditures or
10 revenues.

11 MR. MANASEVIT: Of such.

12 JUSTICE SCALIA: So you've got to find out
13 what "such" refers to.

14 MR. MANASEVIT: And "such" would refer just
15 to the previous usage of that precise term, which is
16 disregard local education agencies with per-pupil
17 expenditures or revenues. So it's that "with per-pupil
18 revenues" that the "such" would refer back to, the most
19 immediate prior reference, so we're still looking at
20 per-pupil revenues or expenditures in the State which we
21 have to rank first. We don't identify LEAs first. It
22 doesn't say 95th percentile of LEAs. It tells us rank
23 per-pupil revenue. The only difference --

24 JUSTICE SOUTER: It says disregard LEAs; it
25 then identifies certain LEAs which are to be

1 disregarded. Nowhere does it say disregard pupils.

2 MR. MANASEVIT: No. It says -- it says --
3 we are disregarding the LEAs. That's the end of the
4 process. But we have to identify the range of values
5 that 5 percent and 95 percent applies to. The range --
6 the percentiles apply to a range of values. We have in
7 New Mexico, we have 89 amounts of per-pupil revenue per
8 district, we have 89 of those. But we also have 377,000
9 per-pupil revenues, because a per-pupil revenue repeats
10 for every time that there's a student, and --

11 CHIEF JUSTICE ROBERTS: No. No. See,
12 that's my conceptual difficulty. It is only per-pupil
13 when you're dealing with an aggregation of the pupils.
14 If you're going to break it down pupil by pupil, which
15 is what you do, you don't have a per-pupil number
16 associated with each pupil. You have a number. Nobody
17 knows what it is because nobody knows how much you spend
18 on each individual. We know how much you give to this
19 district, and therefore, the district has a per-pupil
20 number, and therefore, I would have thought a reference
21 to per-pupil numbers suggests you're grouping according
22 to district.

23 MR. MANASEVIT: Mr. Chief Justice, we are
24 not saying that it can't. We're -- all we're saying is
25 that it equally carries both meanings. School finance

1 is an extraordinarily technical area, which is precisely
2 why Congress left this issue to the agency to work this
3 out. When Congress -- when Congress used the terms 5
4 percent and 10 percent, and again I'm not, I'm not
5 reading Congress's mind to say that when Congress used
6 those terms, those percentiles, Congress must have
7 intended some national uniformity. This is a national
8 program and Congress expects these programs to be
9 applied somewhat uniformly across -- across the country.

10 JUSTICE SCALIA: Let me --

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 JUSTICE SCALIA: Let me ask you the same
13 question I asked -- I asked the Government. Why don't
14 you, if this is a natural reading, why don't you apply
15 it to, to (2)(A)? You don't even think of doing that in
16 (2)(A). In (2)(A) you just look at the individual agency,
17 but it's the same language in (2)(A).

18 MR. MANASEVIT: In (2)(A), (2)(A) calls for a
19 different type of comparison. And I also note that in
20 (2)(A) it refers to percent instead of percentile, which
21 refers to two numbers being compared. Percentile refers
22 to an entire ranking of values, so the processes are
23 somewhat different. Now we're not, I'm not contending
24 that this statute is absolutely clear and a model of
25 draftsmanship, but certainly the meaning of "95th

1 percentile or 5th percentile of such expenditures or
2 revenues" is a broad enough term.

3 JUSTICE BREYER: To include the words
4 per-pupil revenue for each pupil, is that what you're
5 saying?

6 MR. MANASEVIT: Well, to --

7 JUSTICE BREYER: How do you want to say it,
8 per-pupil revenue attached to each pupil?

9 MR. MANASEVIT: Well, I believe --

10 JUSTICE BREYER: Or how do you want to say
11 it then?

12 MR. MANASEVIT: I believe simply that the
13 word "per-pupil revenue" can mean the dollar amount per
14 each agency 89 times, or it can mean repeated each time
15 a student generates --

16 JUSTICE BREYER: Which is what is attached to
17 each pupil? You say the word "such" is broad enough to
18 include per-pupil revenue as attached to each pupil?

19 MR. MANASEVIT: Yes. Correct. Remember --

20 JUSTICE BREYER: I don't know where to
21 look to discover if you're right or wrong.

22 MR. MANASEVIT: Well, bear in mind -- bear
23 in mind the nature of many education --

24 JUSTICE BREYER: Is there any statistical
25 text that you could look at to see if that's a way

1 people use the words?

2 MR. MANASEVIT: That answer I couldn't
3 answer, but I can tell you that typically in an
4 education statute, funding is distributed on the basis
5 of numbers of pupils. So if the statute says \$3,000 per
6 pupil shall go somewhere, the -- the statute means you
7 take that dollar amount and you --

8 CHIEF JUSTICE ROBERTS: Well, that must not
9 be right, because otherwise we wouldn't have any
10 disparity to worry about equalization in the first
11 place. Right?

12 MR. MANASEVIT: Well, we always -- we always
13 will have disparity in the real world and that -- and
14 that's because lots of things cause disparity. In this
15 case actually, local tax revenues are not the cause of
16 disparity because there are no significant local tax
17 revenues at issue here. But disparity happens -- in the
18 top three or four districts in New Mexico you have under
19 100 students, or slightly over 100 students. In a
20 district that small, minor things, an insurance recovery
21 for example, a couple hundred thousand dollar insurance
22 recovery in a district of 87 students will generate
23 \$3,000 of revenue per member for that year. It's a
24 distorting figure. That's precisely what Congress is
25 trying to get rid of.

1 But when Congress says 5 percent, presumably
2 Congress intends that 5 percent to have some uniform
3 applicability across the country and not vary with a
4 State like New Mexico where it would just eliminate five
5 districts. Or in our -- in our neighboring State of
6 Maryland, Montgomery County has the highest per-pupil
7 revenues in the State. It has 16 percent of the
8 population. Under Petitioners' view, that -- and it has
9 24 districts, so that district would be eliminated under
10 Petitioners' view. It would completely be eliminated.
11 Yet under our view, the 10 percent would fall within
12 that and we would keep it in. So --

13 CHIEF JUSTICE ROBERTS: Don't you think
14 Congress, if Congress is concerned about the, in this
15 provision, about the impact of the Federal presence, and
16 your reading prevents the money that Congress meant to
17 go to those particular districts from actually reaching
18 the districts, I mean, wouldn't we be inclined to read
19 it the way that, let the money get where Congress meant
20 it to go?

21 MR. MANASEVIT: Thank you, Mr. Chief
22 Justice, because that was on the list of things that I
23 wanted to cover, and I'm sure that Petitioners' counsel
24 inadvertently misspoke. Impact Aid never ever gets
25 diverted from the district. Impact Aid goes from the

1 Federal Government pursuant to a formula --

2 CHIEF JUSTICE ROBERTS: Oh, sure, but then
3 the question is whether the State can consider it when
4 they're figuring out how much money to give it. So in
5 effect it's diverted.

6 MR. MANASEVIT: Well, remember, the State
7 figures a total cost of program for every district
8 starting from zero, number of students and dollars
9 needed to manage those number of students, and the State
10 supplies that amount of money. So where the district
11 gets some of that necessary money from another source,
12 the State under equalization is allowed to just consider
13 that that amount of money, in addition to what the State
14 is going to provide, will provide the entire amount.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. MANASEVIT: Thank you very much.

17 CHIEF JUSTICE ROBERTS: Mr. Van Amberg, you
18 have three minutes remaining.

19 REBUTTAL ARGUMENT OF RONALD J. VAN AMBERG

20 ON BEHALF OF THE PETITIONERS

21 MR. VAN AMBERG: Mr. Chief Justice had a
22 question as to whether or not the, an appendix is
23 something different from a regulation or carries a
24 different weight, and I haven't found anything
25 determinative. But I would refer the Court to Young

1 versus Community Nutrition Institute where it identifies
2 something similar to an appendix as an example, and the
3 Court says an example is just that, an example.

4 And I don't think we need the argument to
5 prevail, but we would submit that it is at best
6 confusion, it's confusing that the Secretary would take
7 the body of the methodology proposed by Congress, put it
8 in his, in the body of his regulation, and then refer
9 the public to an appendix in order to, how to work the
10 methodology. And in this appendix, he then flips what
11 Congress intended and what he had in the body of his own
12 regulation.

13 I would also suggest that Congress cannot be
14 presumed even in this instance to not be, at least have
15 some input as to what was happening. In the Senate
16 bill, my understanding is that there was a suggestion
17 that the disparity figure would only be 10 percent and
18 not 25 percent. That didn't make it through but the
19 statute as it was written, and I think lasted for about
20 a year or so, had the disparity amount going from 25
21 percent to 20 percent. That was subsequently amended
22 and kept back up at the 25 percent level. So the idea
23 that this was not a bill where Congress paid attention,
24 I think, is not a warranted assumption.

25 JUSTICE GINSBURG: Mr. Van Amberg, could a

1 State get to the same result? Let's say your reading of
2 the statute is the only permissible one. By combining
3 school districts, it's no longer going to be the X
4 school district and the Y school district, it will be
5 the XY school district, and then the population would
6 increase. Still only one LEA.

7 MR. VAN AMBERG: There is a provision,
8 Justice Ginsburg, in the Impact Aid Act, and I think
9 it's 7113, in which it basically says that if the
10 Secretary of the Education perceives that a State is
11 manipulating its LEAs in a way in which to take
12 advantage of the, of this limited exception, it can
13 disregard that action. So I think there is built -- I
14 think Congress was one step ahead of us and recognized
15 that possibility and addressed it.

16 JUSTICE GINSBURG: Thank you.

17 MR. VAN AMBERG: Thank you. With that,
18 thank you very much.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:07 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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