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In The
Supreme Court of the United States

William K. Suter, Clerk

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. By interpreting the phrase "appropriate action" under Section 1703(f) of the Equal Education Opportunity Act as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated for English Language Learner programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in Section 1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

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Thomas C. Horne, Superintendent of Public Instruction of the State of Arizona (the "Superintendent") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed February 22, 2008, is published at 516 F.3d 1140, and is reprinted in the Appendix at 1-92.[1] An earlier Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed August 23, 2006, is reprinted in the Appendix at 116-120. The order of the United States District Court for the District of Arizona, issued March 22, 2007, is published at 480 F. Supp. 2d 1157, and is reprinted in the Appendix at 93-115. The original judgment from which the Petitioner sought Rule 60(b)(5) relief was issued on January 24, 2000

[1] "App." refers to the Appendix. "CR" refers to record items as enumerated on the District Court's docket sheet. All references to the transcript of the evidentiary hearing that took place in January 2007 are cited as follows: Tr., Day ___, p. ___. The days of the hearing transcript are as follows: Day 1 – January 9, 2007; Day 2 – January 10, 2007; Day 3 – January 11, 2007; Day 4 – January 12, 2007; Day 5 – January 17, 2007; Day 6 – January 18, 2007; Day 7 – January 24, 2007; Day 8 – January 25, 2007. "TE" refers to Trial Exhibit and is followed by the exhibit number.

and is published at 172 F. Supp. 2d 1225, and is reprinted in the Appendix at 154-191.

JURISDICTION

The Ninth Circuit filed its decision on February 22, 2008, and entered an order denying Petitioner's motion for panel rehearing and alternative motion for rehearing *en banc* on April 17, 2008. On July 8, 2008, this Court granted an extension to file this Petition on or before September 1, 2008. Pursuant to 28 U.S.C. § 1254(1), the Court has jurisdiction to review the decision of the circuit court on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The Equal Education Opportunity Act of 1974 ("EEOA"), 20 U.S.C. § 1703(f) states:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . .
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The provisions of the No Child Left Behind Act ("NCLB"), 20 U.S.C. § 6801, *et seq.*, are extremely

lengthy and, therefore, set out in the Appendix at 196-261, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. The Original 2000 Order

Plaintiffs instituted a class action lawsuit against Defendants (including Petitioner Superintendent) for failing to provide English Language Learners ("ELL") students of the Nogales Unified School District ("NUSD") with a program reasonably calculated to teach them English, in violation of § 1703(f) of the EEOA.[2]

The District Court declared in January 2000 ("original 2000 order") that Arizona's system for financing education at that time, which involved base level funding for all students and additional so-called Group "B" weight funding for ELL and other types of students,[3] was arbitrary and had led to a series of ELL deficiencies such as large classes, unqualified

[2] The class was defined as all minority at risk and ELL students "now or hereafter enrolled in the Nogales Unified School District ('NUSD') as well as their parents and guardians." (CR 105).

[3] As explained in the original 2000 order, a Group "B" weight increases the base funding by the State by weighing various factors such as type of student, experience of teaching staff, and size of school district. In 2000, the Group "B" weight for ELL students was $156.00. By 2006, it was $349.00. (TE 225, p. 8).

teachers, and insufficient educational materials. App. at 187. In the language of the statute, the District Court concluded that Arizona violated the EEOA because Arizona had not taken "appropriate action to remedy language barriers in NUSD" and had "failed to follow through with practices, resources and personnel necessary to transform theory into reality." App. at 188.

2. The Sanction Orders and First Appeal

A series of remedial orders followed the original 2000 order. The gist of those orders instructed Arizona to "rationally fund" its ELL programs. (CR 209, 226, 257).

In December 2005, the District Court imposed a graduated sanction payment against the State that leveled off at $2,000,000.00 per day until and unless the legislature failed to pass a law that "appropriately funded ELL programs." App. at 152. The Superintendent appealed the order. In March 2006, the Superintendent and Legislative Intervenor-Defendants also filed Rule 60(b)(5), Federal Rules of Civil Procedure, motions to have the original 2000 order declared satisfied. The motions were denied on April 26, 2006, and appeals were taken from those denials. App. at 121-132. All of those appeals were consolidated (the "First Appeal") and the Ninth Circuit issued a decision on August 23, 2006, in which the sanction orders of the District Court were vacated.

The Ninth Circuit remanded the First Appeal, stating:

> In light of the changes in education programs and funding since the original 2000 order, the district court should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order or otherwise had a bearing on the appropriate remedy.

App. at 120.

3. The Evidentiary Record Following Remand of the First Appeal

Following the order of remand, an evidentiary hearing occurred in January 2007. The uncontradicted evidence demonstrated that a confluence of factors occurring since the original 2000 order operated to upend virtually every finding of fact previously adopted by the District Court. In the ensuing years, there had been large infusions of new money for education resulting from state voter initiatives, state legislative action, local overrides, and federal funding. (TE 225, 226, 227, 228, 229, 230, 231, 232, 240, 244, and 246). NCLB, enacted in 2001, made ELL students a core constituency of that Act, and state compliance with detailed federal program requirements a prerequisite for federal funding. App. at 196. State-funded Group "B" weight money for ELL students doubled. (TE 225, p. 8). State oversight and technical assistance for school district ELL

programs, virtually non-existent in 2000, became a driving force for ELL education. (TE 202, 203, 204, 206, 207, 209; Tr. Day 1, p. 63-68, 70-76). In addition, Arizona voters enacted Proposition 203, which eliminated bilingual education (the methodology used at NUSD in 2000 and upon which the original 2000 order was based) and mandated Structured English Immersion ("SEI") strategies.[4] App. at 280-285. Finally, immediately after the original 2000 order, NUSD hired a new district superintendent, Kelt Cooper, who instituted new, effective management techniques. (Tr. Day 3, pp. 201-213, 216-218, Day 4, pp. 7-8, 15-46, 64-66). His actions coupled with larger and current funding levels led to an invigorated program of ELL education with significantly lower class sizes, qualified teachers, an abundance of teaching materials, tutoring, and intervention strategies. (TE 206, 213, 214, 225, p. 7; Tr. Day 1, pp. 57-60; Tr. Day 1, pp. 163-169, 174, 181; Tr. Day 3, pp. 201-213, 222; Tr. Day 4, pp. 5-8, 62-63). The record was unrefuted that by 2006, the deleterious conditions at NUSD at the time of the original 2000 order had been cured, and that there were sufficient monies to operate an effective ELL program at NUSD. Indeed, every expert, including Plaintiffs' own witness, testified that by 2006, NUSD conducted effective ELL programs and met the requirements of § 1703(f). (Tr.

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[4] *See United States v. Texas,* 680 F.2d 356, 372 (5th Cir. 1982) (district court erred in denying post-trial motion to vacate injunctive relief where state legislature subsequently enacted substitute language program act).

Day 1, pp. 96-99, 113-114, 192; Tr. Day 3, p. 180; Tr. Day 4, p. 67; Tr. Day 5, p. 134).

Nevertheless, both the District Court and the Ninth Circuit eschewed these changes and denied Rule 60(b)(5) relief. The District Court, while noting that both Arizona and NUSD made substantial strides in delivering ELL programs, focused solely on the propriety of a recently enacted statute that provided a mechanism for additional funding for ELL programs, Arizona House Bill 2064.[5] On appeal, the Ninth Circuit affirmed the District Court and, rather than determining whether NUSD had "take[n] appropriate action to overcome language barriers" (the performance requirement of the EEOA § 1703(f)), instead defined compliance in terms of whether Arizona's entire school funding scheme specifically earmarked sufficient monies (a requirement not imposed by the EEOA) to cover the incremental costs of ELL programs.[6] App. at 40-45, 46-48, 62-64, 68-72.

4. The Ninth Circuit Exceeded Its Powers

The gravamen of the Superintendent's Petition is that the Ninth Circuit mandated special state-wide funding legislation to benefit ELL learners to redress

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[5] HB 2064 was enacted in the face of the fines imposed by the District Court, which rose to $2,000,000.00 per day.

[6] Incremental costs are those ELL costs that are in addition to those costs for conducting programs for English proficient students.

a violation of EEOA § 1703(f), notwithstanding undisputed evidence that NUSD, the only subject school district, cured its ELL deficiencies at current funding levels. The Ninth Circuit fixated on this sole remedy regardless of the fact that the deleterious conditions noted in the original 2000 order no longer existed and the remedy was unnecessary and not within the scope of the EEOA. It fixated on this remedy even though substantial general funding increases that benefited all students, together with good management techniques, provided ELL students with a reasonable opportunity to learn English and advance academically. The goal of § 1703(f) is effective ELL programs. The Ninth Circuit lost sight of this goal.

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Needed to Correct the Ninth Circuit's Misinterpretation of § 1703(f) as *Requiring the State to Enact Legislation* and Create an Earmarked Funding Source for ELL Programs when Other Less Intrusive Actions Cured the Original Violation.

This case raises far-reaching national concerns. There are seventeen states that have similar funding schemes to Arizona's.[7] Based on the Ninth Circuit's

[7] In addition to Arizona, the following seventeen states also provide base level funding for all students, including ELL students, plus a weighted formula that provides additional sums exclusively for ELL students: Alaska [Alaska Stat. § 14.17.420

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ruling, Arizona and these other jurisdictions may be required by the federal judiciary to enact grossly expensive earmarked funding mechanisms for ELL students that are unnecessary and disconnected to a violation of federal law.

Education is "perhaps the most important function of state and local governments." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Board of Education,* 347 U.S. 483, 493 (1954)). In particular, "no matter has been more consistently placed upon the shoulders of local government than that of financing

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(1998)]; Florida [Fla. Stat. § 1011.62 (2002)]; Georgia [Ga. Code Ann. § 20-2-161 (1985)]; Hawaii [Haw Rev. Stat. § 302A-1303.6 (2004)]; Iowa [Iowa Code § 280.4 (1974)]; Kansas [Kan. Stat. Ann. § 72-9509 (1979)]; Kentucky [703 Ky. Admin. Regs. 5:001 (2004)]; Maine [Me. Rev. Stat. Ann. tit. 20-A, § 15671 (2001)]; Maryland, [Md. Code Ann., Educ. § 5-208 (2002)]; Missouri [Mo. Rev. Stat. § 163.011 (1963)]; Nebraska [Neb. Rev. Stat. § 79-1007.08(2) (2006)]; New Mexico [N.M. Stat. § 22-8-22 (1974)]; North Dakota [N.D. Cent. Code § 15.1-27-03.1 (2007)]; Oklahoma [Okla. Stat tit. 70, § 18-201.1(B)(1) (1996)]; Oregon [Or. Rev. Stat. § 327.013(7)(a)(B) (1991)]; Texas [Tex. Educ. Code Ann. § 42.153(a) (Vernon 1995)]; and Vermont [Vt. Stat. Ann. tit. 16, § 4010(e) (1997)].

Further, there are at least seven additional states that provide specific sums for ELL students in addition to basic state aid. These states are: Alabama [Ala. Code § 16-613-3 (1995)]; Arkansas [Ark. Code Ann. § 6-2-2305 (2003)]; Colorado [Colo. Rev. Stat. 22-24-104(4)(c)(I)-(II) (1998)]; Connecticut [Conn. Gen. Stat. § 10-17g (1977)]; Delaware [Del. Code Ann. tit. 14, § 1716(g) (1978)]; Illinois [105 Ill. Comp. Stat. 5/14C-12 (2005)]; Indiana [Ind. Code § 20-30-9-1-13 (2005)]; New Hampshire [N.H. Rev. Stat. Ann. § 198:40-b(I)(d) (2005)]; and Washington [Wash. Rev. Code § 28A.180.080 (2006)].

public schools." *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990). "The very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that . . . 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547 (1972)). The Ninth Circuit ignored these deeply rooted principles.

In ruling that Arizona must enact legislation and create an earmarked funding source to fund the "incremental costs" of ELL education, the Ninth Circuit not only misconstrued the requirements of § 1703(f), but also refused to allow the State to show that the purpose of the statute was fulfilled with less intrusive actions. Section 1703(f) is not a funding statute. It is a performance statute. The Ninth Circuit's decision to compel Arizona to adopt special funding legislation to benefit ELL students without even considering the impact, effectiveness, or need for such funding is an overreaching remedy infringing upon the State's right to regulate its schools[8] and warranting this Court's intervention.

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[8] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418

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In *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a regimen of steep fines against members of a City Council because the District Court failed to "exercise the least possible power adequate to the end proposed." In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. Once again, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. It admonished the lower court to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. These cases underscore the need for district courts to exercise restraint, respect the allocation of powers within the federal system, and show deference for local and state governments, which bear the primary responsibility of assessing, solving, and dealing with problems of institutional reform.

Missouri v. Jenkins, 515 U.S. 70 (1995), provides another example of a comprehensive judicial remedy

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U.S. 717, 741-42 (1974) (*Milliken I*). "[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that 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. 70, 99 (1995) (citations omitted).

that failed to directly relate to the original constitutional violation of *de jure* segregation. This Court rejected the district court's imposition of various inter-district remedies intended to attract "white students" from the suburbs to desegregate an urban school district. It found that this remedy lacked a sufficient nexus to the intra-district violation. In so doing, this Court reaffirmed the three-part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Missouri v. Jenkins,* embraces the principle that a remedy must be sufficiently tailored to cure the violation.

Justice Thomas, in his concurring opinion, raised deep concern about the "extravagant uses of judicial power" and elaborated on the third prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independent dignity of the

> federal courts and intrude into areas in which they have little expertise.
>
> . . . .
>
> But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The decision of the Ninth Circuit flies in the face of the foregoing principles of judicial restraint. First, the Ninth Circuit usurped the power of the State government and ordered it to provide a special stream of income for ELL students without identifying existing problems with NUSD's ELL program, which that stream of income was purportedly intended to fix. Essentially, it ordered the State to appropriate funds without specifying the need or end use of those funds.[9] Second, the Ninth Circuit refused

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[9] "It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518 (D. Colo. 1983).

> Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of bilingual education to all limited English speaking students.

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to recognize that other sources of income, better management, and reallocation of resources and priorities were all that was necessary to provide effective ELL programs (and in fact had occurred). Finally, the Ninth Circuit, in requiring a special stream of income to cover the incremental costs of ELL education, made this decision in a vacuum without knowing what was actually needed to ensure a viable ELL program. Instead of weighing these critical factors, the Ninth Circuit usurped the legislative functions of the State and refused to be deferential to those who are politically accountable to the voters.

The District Court in 2000 was dealing with a different era when it came to State funding. There have been significant infusions of State money since 2000. Uncontroverted evidence demonstrated that monies from State, county, and local sources increased the NUSD maintenance and operations budget from $21,588,806.00 in 2000 to $29,129,092.00 in 2006, while the number of students at NUSD slightly decreased during that time frame. This general funding increase most certainly enabled

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> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.

Castañeda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).

NUSD to lower class sizes, hire better teachers, and implement remedial, tutoring, and intervention programs for ELL students.[10] (TE 229, 246). The Ninth Circuit refused to consider that general funding increases benefited all students, including ELL students. The Ninth Circuit overstepped its judicial authority by insisting on a separate funding source (rather than confining its scrutiny to the EEOA requirement of "appropriate action") when current funding is sufficient to operate an effective ELL program.[11] NUSD did not need any earmarked money

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[10] Indeed, the Ninth Circuit ignored the inconvenient fact that the Scottsdale Unified School District spends substantially more money than NUSD for its ELL students, maintains an incredible class size ratio of 10:1, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than NUSD's ELL 10th graders. (TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12). Such facts drive home the point that requiring Arizona to provide a dedicated stream of income is not the critical factor in determining positive outcomes for ELL students. What is critical is effective school management and good ELL programs. "The law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1519 (D. Colo. 1983).

[11] While the unique character of every school system has prevented the Supreme Court from promulgating detailed rules concerning what a court must do to remedy a constitutional violation, the Supreme Court has specified what a court may not do in such a case. *A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable.* The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. . . .

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to eliminate the deleterious conditions that previously existed.

The Ninth Circuit minimized uncontradicted testimony that NUSD now conducts an effective ELL program and that the adverse conditions described in the original 2000 order no longer exist. The Ninth Circuit did so by evaluating the performance of ELL students on Arizona's "AIMS" academic achievement tests in comparison to their English-speaking counterparts, and determined that the NUSD's progress is limited because ELL students lag behind *all* students in terms of ELL scores on AIMS. Reliance on such tests scores to measure the effectiveness of an ELL program is misplaced and inappropriate. AIMS tests are given in English. ELL students are not yet proficient in English. When they achieve English proficiency, they cease being ELL students. It is self-evident that ELL students would not do well on AIMS and certainly would significantly lag behind those who are literate in English. Further, using such test scores as a touchstone for success can be quite misleading. The District Court, in its original 2000 order, acknowledged that low test scores for ELL

> *The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects.* "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of Education*, *supra*, 402 U.S. at 16, 91 S.Ct. at 1276.

Evans v. Buchanan, 555 F.2d 373, 379-80 (3d Cir. 1977) (emphasis added).

students could be due to socio-economic and other factors. App. at 189-190. This court, in *Missouri v. Jenkins*, rejected the notion that scoring below "national norms" on tests should be a factor in deciding whether a school district achieved partial unitary status unless the constitutional violation caused low test scores. 515 U.S. at 101-102. Here, there has never been a showing that money had any connection with low ELL scores on AIMS tests.

The Ninth Circuit's flawed focus on test scores is matched by its striking failure to discuss the achievements of NUSD on its annual measurement achievement objectives ("AMAO"), NCLB's accountability standards for ELL students.[12] NUSD's ELL students met those standards in every category, which means that sufficient numbers of ELL students not only made appropriate progress in learning English, but also became proficient. App. at 312. This is a far more relevant measure of effective ELL programs than how well non-English speaking students score on achievement tests given in English.

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[12] NCLB was enacted after the original 2000 order and includes more specific ELL compliance requirements that were lacking with the EEOA. NCLB imposes comprehensive programming and accountability requirements on states so that ELL students learn English. As urged in the second argument herein, it is illogical to contend that Arizona simultaneously meets NCLB's detailed requirements to provide effective ELL programs and be accountable for the progress of ELL students and yet fails to satisfy EEOA § 1703(f)'s vague requirement that it take "appropriate action."

This Court admonished in *Missouri v. Jenkins*, that remedies must be narrowly tailored to cure the conditions that violate federal law. 515 U.S. at 88. To do that, there needs to be a clear understanding of the conditions that require correction. Further, to assure that the remedy is narrow, it is critical to devise the least intrusive means to solve the identified problems. The Ninth Circuit failed to even identify any problems at NUSD[13] that continue to violate

[13] In an attempt to diminish the success of NUSD's program for ELL students, the Ninth Circuit referred to testimony of Dr. Guillermo Zamudio, Cooper's successor as NUSD superintendent. Zamudio complained that NUSD relied on "long-term substitutes" and "emergency certified teachers," and stated that it was difficult to recruit fully qualified teachers because starting salaries in NUSD lagged behind the statewide average. Finally, Zamudio testified that he would like to reduce ELL class ratios to 15:1. No nexus was ever drawn between these complaints and the ineffectiveness or effectiveness of the ELL program. There was no testimony that "substitute" or "emergency certified" teachers could not provide effective ELL instruction. There was no testimony that difficulties in hiring new teachers caused a deleterious impact on ELL programs. Finally, no one ever indicated that a school district needed to reduce its classroom ratios of ELL students to 15:1 to have an effective program. Indeed, there was testimony that such ratios were not only unnecessary, but far outside national norms. Zamudio's complaints were nothing more than a wish list. Similar wish lists could be obtained from any superintendent of any school district in the United States. Neither the Ninth Circuit nor the District Court weighed alternatives to the imposition of earmarked funding. There was evidence in the record that NUSD's teacher salaries overall were at the state average and that substantial cost savings could be obtained by ending wasteful programs. Yet, changing some of the priorities of the school district and utilizing more efficient management of limited resources were

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federal law and compounded that failure by refusing to weigh less intrusive remedies.[14]

The reason that the Ninth Circuit failed to identify remaining deficiencies in the ELL program that violated federal law is that those prior deficiencies were cured. Every expert who opined on the condition of NUSD's ELL program found it to be effective and in compliance with § 1703(f). Even Plaintiffs' own witness, Dr. Zamudio, testified to current compliance with § 1703(f). He stated:

> Q. With your current ELL program, it is an effective program but it can become better? Have I said that right?
>
> A. Yes sir.
>
> . . . .
>
> Q. Your district currently meets federal requirements relative to English language learners, correct?

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foreclosed by the lower courts' imposition of an earmarked funding requirement that is not authorized by the EEOA.

[14] "In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose *only such remedies as are essential to correct* particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added) (this is the remedial provision of the EEOA).

A. To my knowledge, we make every assurance that we meet the requirements set forth.

(Tr. Day 6, pp. 84, 98).

The Ninth Circuit provided no evaluation of the need or benefits that would result from earmarked funding because the problems noted in the original 2000 order had been solved. It mandated an infusion of earmarked funding that was completely unfettered to any violation of § 1703(f). As previously noted, the Ninth Circuit ignored the fact that § 1703(f) is not a funding statute, but is a performance statute. If a state through its funding system, oversight, and technical assistance ensures that NUSD's students have a reasonable opportunity to learn English, no more is required. Respect for federalism should have caused the Ninth Circuit to measure the need and effectiveness of the remedy before it usurped the ability of the State to manage its own affairs.

The ruling of the Ninth Circuit constitutes excessive interference with the operations of State government.[15] Arizona's funding scheme ensures that

[15] The EEOA § 1703(f) term "appropriate action" is not defined and no legislative history gives these words context or definition. When the original 2000 order was issued, the District Court relied on *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). The *Castañeda* court, in the absence of any legislative guidelines, judicially crafted a three-part test as a framework to evaluate "appropriate action." In doing so, the *Castañeda* court stated that its intention was to "fulfill the responsibility Congress has assigned to [the courts] without unduly substituting

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school districts receive a certain level of general or base funding for all students plus Group "B" weight funding for students with special needs such as ELL students. The Ninth Circuit has ruled that in light of this system, all incremental costs of ELL students must be paid from an earmarked stream of income, regardless of whether an underlying violation of EEOA § 1703(f) has previously been remedied by increases in general funding, State oversight, and effective management and leadership efforts at the local level. According to the Ninth Circuit, ELL costs and funding must be viewed in isolation without reference to any other resources.

The State of Arizona and its local school districts are in a far better position to assess and solve ELL problems, establish priorities, and determine what combination of funding, programs, and leadership is needed to deal with the complicated issue of overcoming language deficiencies.[16] If the State can cure a

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our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." *Id.* at 1009.

[16] In the context of school desegregation, this Court has emphasized that "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977). "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." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973). "It would be an unfathomable intrusion into a state's affairs – and a violation of the most basic notions of federalism – for a federal court to determine the allocation of a

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§ 1703(f) violation with significant general funding and Group "B" weight increases, better programming and oversight, and good leadership at a school district, it is entitled to do so.

II. This Court's Review Is Also Needed to Clarify that State Compliance with the Detailed Program Requirements of the No Child Left Behind Act Requires a Finding that the State Has Complied with the Vague Requirements of § 1703(f) of the EEOA.

This case is critically important for another reason. Section 1703(f) of the EEOA of 1974 obligates the State to take "appropriate action to overcome language barriers" that prevent ELL students from equal participation in the educational process. The statute does not define "appropriate action."[17] Under the EEOA, states had been free to craft their own notion of what is needed. After NCLB was enacted in 2001, the federal government was given substantial authority over ELL education by tying substantial

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state's financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty." *Stanley v. Darlington County School District*, 84 F.3d 707, 716 (4th Cir. 1996).

[17] "[I]t is noted that the legislative mandate to take 'appropriate action to overcome language barriers' appearing in § 1703(f) is not a particularly helpful contribution." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1521 (D. Colo. 1983).

federal monies to federally approved programs and accountability standards.

Courts have grappled with the meaning of "appropriate action." In *Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978), the Ninth Circuit noted that there is "very little legislative history" for § 1703(f) and that there had been no decision interpreting the "appropriate action requirement" of § 1703(f). *Id.* at 1030. Later, in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), the Fifth Circuit judicially crafted a three-part test to give definition to the words "appropriate action."[18] The *Castañeda* court also described the lack of legislative history to divine congressional intent, but stated two things about the words "appropriate action." First, it underscored that the vague term "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations" under § 1703(f). *Id.* at 1009. Second, the *Castañeda* court observed that the lack of Congressional guidance as to the meaning of "appropriate action" forced that court to prescribe standards, although it was "ill equipped to

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[18] The three-prong test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a period of time, that language barriers are being overcome. 648 F.2d at 1009-1010.

do so" and such a task was better "reserved to other levels and branches of government." *Id.*

The *Castañeda* test has been employed by various courts since 1981. *See Valencia Co. v. Wilson*, 12 F. Supp. 2d 1007, 1017-1018 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002); *Teresa P. by T.P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983). Indeed, the District Court applied the *Castañeda* test in this case in the original 2000 order. App. at 184-185.

Congress, under NCLB, has now prescribed those standards which the *Castañeda* court previously lamented were lacking. NCLB amended the Elementary and Second Education Act of 1965. NCLB specifically includes within its scope, improving the academic achievement of language instruction for limited English proficient and immigrant students. 20 U.S.C. § 6801 *et seq.* Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the state and local school districts to carry out the goals of Title I. *Id.*

The purpose of both EEOA § 1703(f) and NCLB is to ensure that there are effective ELL programs. The stated statutory purpose of NCLB with respect to ELL students is:

> *To help ensure that children who are limited English proficient,* including immigrant children and youth, *attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student achievement standards as all children are expected to meet.*

20 U.S.C. § 6812(1) (emphasis added). EEOA § 1703(f) (emphasis added) requires an educational agency to "*take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.*" There is no daylight between the two statutory goals.[19]

Although the purposes of the two statutes are the same, there is a major difference. NCLB, as a condition of funding, tells the state what it must do to create effective ELL programs, while EEOA § 1703(f)

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[19] The Ninth Circuit rejected this position and found that the purpose of the two statutes was different. It stated that NCLB is about a "general plan gradually to improve overall performance" of schools, but § 1703(f) is an "equality-based civil rights statute" designed to deal with the immediate rights of ELL students. No one disagrees that the two statutory schemes involve different remedies and may, depending on the circumstances, seek to redress different wrongs. But § 1703(f) requires "appropriate action" which can only mean a program reasonably calculated to teach ELL students English. NCLB actually delineates what programs states must implement to make sure school districts provide ELL students with a reasonable opportunity to learn English. In this fashion NCLB supplements and defines EEOA § 1703(f).

provides no such guidance. NCLB prescribes a series of programs that a state must undertake so that ELL students achieve English fluency and academic achievement: teacher certification (20 U.S.C. § 6826(c)); effective language curricula (20 U.S.C. § 6826(d)); establishment of proficiency standards and benchmarks with proficiency standards aligned to the state's academic standards (20 U.S.C. § 6823(b)); annual assessments to measure proficiency (20 U.S.C. § 6823(b)); submission of detailed plans to the United States Department of Education[20] with standards and objectives as well as enforcement of school district accountability (20 U.S.C. § 6823(b) & (c) and 20 U.S.C. § 6826(a) & (b)).

Arizona put into place an extensive curricular and instructional foundation to demonstrate to the federal government that Arizona school districts meet the programmatic and accountability requirements imposed by NCLB. Every other state receiving funding under NCLB must also meet these fundamental

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[20] The United States Department of Education is deeply involved in the education of ELL students under NCLB. NCLB requires states to provide effective programs and be accountable for the progress of ELL students. It is no longer necessary to judicially craft notions of what Congress intended regarding the "appropriate action" requirement of § 1703(f) because those requirements are now spelled out. The subsequent and detailed statutory scheme of NCLB should control the interpretation of the prior enacted and general statute, § 1703(f), when, as here, both statutes touch upon the same area and seek to achieve the exact same purposes.

requirements.[21] The federal government deems Arizona in compliance with NCLB and Arizona has worked closely with the United States Department of Education to ensure that its programs meet with

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[21] The Arizona Department of Education ("ADE"), to comply with NCLB requirements, made major structural changes to ensure that ELL learners receive "appropriate action" from their local school districts. For example, ELL Proficiency Standards were promulgated to provide benchmarks for learning English, allow school districts to design proper curriculum, and permit ELL students to seamlessly meet Arizona's language arts academic standards. (TE 202; Tr. Day 1, pp. 36-45). Arizona also adopted uniform assessment standards that school districts must use annually to identify and evaluate ELL students. That system classifies ELL students, determines when they are proficient, and provides a tracking system to ensure that fluent English proficient students ("FEP") remain proficient. (TE 203, 204; Tr. Day 1, pp. 46-54). Further, Arizona requires all teachers to undergo training and obtain Structured English Immersion ("SEI") endorsements so that they can effectively teach ELL students. These SEI endorsements together with additional training programs undertaken by ADE throughout the State, have become critical factors in ELL learning. (TE 207, 208, Tr. Day 1, pp. 55-70). Many of these steps were approved by the federal government and none of them existed before NCLB. (Tr. Day 1, pp. 36, 43, 45, 47, 50, 55, 65, 70, 158).

NCLB also sets certain minimum targets requiring that specified percentages of a school district's or charter school's ELL students must (1) make progress towards proficiency; (2) achieve proficiency; and (3) achieve success academically (AYP) on Arizona's AIMS tests. (Tr. Day 1, pp. 158-159). Those achievement benchmarks are documented annually through an AMAO. (Tr. Day 1, p. 160). Arizona's required percentages have been approved by the United States Department of Education. (Tr. Day 1, pp. 160, 187). NUSD met all AMAO requirements for 2006. (TE 218; Tr. Day 1, p. 188). *See also* App. at 312.

federal approval. (Tr. Day 1, pp. 36-45, 47, 50, 55, 65, 70, 158, 160, 187).

It is both unfair and irrational for the federal government, on one hand, to approve Arizona's ELL programs as effective under NCLB, but, on the other hand, to allow the federal judiciary to rule that Arizona has failed to take "appropriate action" to assure effective ELL programs under EEOA § 1703(f). States should not be subject to the vague requirement of "appropriate action" under EEOA § 1703(f) when NCLB spells out in detail the definition of what is "appropriate." States should be subject to only one standard – the standard spelled out by Congress in NCLB and implemented by the United States Department of Education.

There is no Supreme Court decision regarding the intersection between EEOA § 1703(f) and ELL requirements under NCLB. States need certainty so that when they provide ELL programming that is approved by the United States Department of Education pursuant to NCLB, they do not remain subject to suit by a plaintiff alleging that the state's ELL framework for education is inadequate under a different set of standards. Unfortunately, as a result of the Ninth Circuit's opinion, Arizona (and other states with similar funding statutes) has been put into precisely that predicament.

The District Court in its March 22, 2007 order, did acknowledge that NCLB "significantly changed" Arizona's approach to education and that "*the Act*

required the State to effectively educate and be accountable for the progress of ELL students." App. at 98-99 (emphasis added). However, it made no specific findings regarding federal requirements imposed on Arizona to provide challenging programs for ELL achievement in both academics and English proficiency. Nor did it address the Superintendent's position that Arizona's compliance with the detailed programming requirement of NCLB mandated a finding of compliance with § 1703(f).

The Ninth Circuit affirmatively rejected the Superintendent's position. It stated that NCLB is merely a "general plan gradually to improve overall performance" of schools, while EEOA § 1703(f) is an "equality-based civil rights statute" designed to deal with the "immediate rights" of ELL students. It further stated that NCLB does not deal with the right of ELL students to redress wrongs under § 1703(f). To support this position, the Ninth Circuit narrowly focused on the accountability requirement of NCLB which requires ELL students to meet "annual measurement achievement objectives ['AMAO'] . . . including . . . making adequate yearly progress" and concluded that acceptance of the Superintendent's position would effectively repeal § 1703(f). The Ninth Circuit claimed that if an AMAO was met one year and not the next, enforcement rights under § 1703(f) would "wink in and out of existence."

The Ninth Circuit mischaracterized the Superintendent's position. An individual ELL student, in a proper case, would be entitled to bring an action

under § 1703(f) to remedy abuses which denied that student an opportunity to learn English. That is not what this case is about. This case is not about an individual student who was denied ELL services at a particular school. Ultimately, this case arose from a claim that Arizona systemically failed to ensure that there was effective ELL programming at NUSD. Arizona now meets specific programming requirements of NCLB so that NUSD ELL students can learn English at the local school district level.

The State programs required by NCLB are not in the planning stage, but are in full force and effect. These programs do not "wink in and out of existence." Nor are they dependent on test scores. They are central, in the District Court's words, to NCLB's requirement that Arizona "effectively educate . . . ELL students." Plaintiffs cannot now contend that Arizona fails to provide a systemic program to ensure school districts such as NUSD institute effective ELL programs when Arizona fully complies with the requirements of NCLB.

To the extent that the term "appropriate action" is not defined in the EEOA and is ambiguous, as acknowledged in *Guadalupe* and *Castañeda*, it is well settled that subsequent legislation may be considered to interpret prior legislation on the same subject. *Busic v. United States*, 446 U.S. 398 (1980); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942); *State v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Further, different statutes which address the same

subject matter should be read together such that the ambiguities in one may be resolved by the other. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001).

Arizona now complies with the extensive accountability system of NCLB to ensure that ELL students master English and meet challenging academic requirements. The extensive requirements of NCLB for ELL students did not exist when the original 2000 order issued. They do now, and states know what they must do to comply with federal mandates regarding the advancement of ELL education. Arizona complies with those mandates. It is illogical to claim that Arizona can simultaneously comply with the stringent requirements of NCLB and still violate the vague requirement of § 1703(f) to "take appropriate action."

A change in law will factor heavily in warranting Rule 60(b)(5) relief in public interest litigation. *Agostini v. Felton*, 521 U.S. 203 (1997). When a government entity seeks modification of a prospective judgment, a flexible and significant change in facts or law standard has been adopted. *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367 (1992). Further, when the ends of a judgment have been achieved, that judgment should be terminated. *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991). The Ninth Circuit noted in *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249 (9th Cir. 1999) that "the *Rufo-Agostini* approach allows courts to fulfill their traditional equity role: to take all the circumstances

into account in determining whether to modify or vacate a prior injunction or consent decree." 165 F.3d at 1256. In this case, the lower courts should have found that the State's compliance with the ELL program requirements of NCLB and the effective program established at NUSD had satisfied the requirements of the EEOA and granted the requested Rule 60(b)(5) relief.

CONCLUSION

This case concerns the power of the federal judiciary to require the State of Arizona to provide earmarked funding for ELL students as the sole means of satisfying a judgment declaring Arizona to be in violation of § 1703(f) of the EEOA. Here, the Ninth Circuit required special funding although the purpose of § 1703(f) was fulfilled by general funding increases, delivery of new state programs, the enactment of NCLB, and better management of ELL services. Because this case involves the exercise of excessive judicial power that overrides notions of federalism, comity, and the need to tailor the scope of the remedy to fit the statutory violation, certiorari is warranted. Certiorari should also be accepted to interpret the vague "appropriate action" requirement of EEOA § 1703(f) in the context of the subsequently enacted specific standards pursuant to Congress' NCLB Act. States should not be left exposed to claims that they violated the EEOA when they are in full compliance with NCLB. The two statutes should be

reconciled and interpreted consistently. Guidance from this Court is needed.

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted.

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