No. 13-15805

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRIAM FLORES, *et al.*,

Plaintiffs-Appellants

v.

JOHN HUPPENTHAL, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND URGING VACATUR IN PART

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-5361

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the district court erred in failing to properly apply the second and third prongs of *Castaneda* v. *Pickard*, 648 F.2d 989 (5th Cir. 1981), in granting the State's request for relief from the 2000 judgment under Federal Rule of Civil Procedure 60(b)(5).

INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 1703(f) of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701 *et seq.*, which requires state and local education agencies to take "appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs." 20 U.S.C. 1703(f). The Attorney General is authorized to bring civil actions to enforce the EEOA and to intervene in private actions brought under the statute. 20 U.S.C. 1706, 1709. The United States has filed briefs in the appellate courts addressing Section 1703(f) of the EEOA, including a brief before the Supreme Court in this case. See U.S. Br. as Amicus Curiae Supporting Respondents, *Horne* v. *Flores*, 557 U.S. 433 (2009) (Nos. 08-289 & 08-294) (filed Mar. 25, 2009); U.S. Br. as Appellee, *United States* v. *Texas*, 601 F.3d 354 (5th Cir. 2010) (Nos. 08-40858 & 09-40047) (filed Apr. 8, 2009). We file this brief under Federal Rule of Appellate Procedure 29(a).

In the last four years, the Civil Rights Division has opened five state-level EEOA investigations in jurisdictions in this Circuit. In one of these, the Division, together with the Department of Education's Office for Civil Rights (OCR), is investigating, under the EEOA and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, the English Language Development (ELD) program at issue in this case. Thus, the United States has a significant interest in how this

Court interprets the legal obligation of States to adequately develop, implement, and monitor English Language Learner (ELL) programs to enable ELLs to surmount their language barriers and achieve equal participation in the standard instructional program within a reasonable period of time.

STATEMENT OF THE CASE

1. "Appropriate Action" Under The EEOA

a. The EEOA prohibits States from denying equal educational opportunity to any person "on account of his or her race, color, sex, or national origin." 20 U.S.C. 1703. Such a denial occurs when, *inter alia*, a state or local education agency fails "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. 1703(f). Section 1703(f) codifies the central holding of *Lau* v. *Nichols*, 414 U.S. 563, 566-568 (1974), in which the Supreme Court held that failing to provide English language instruction to non-English speaking students denies those students a meaningful opportunity to participate in a State's educational programs, in violation of regulations issued under Title VI.

Neither the text nor legislative history of the EEOA defines "appropriate action" for purposes of Section 1703(f). Over 30 years ago, however, a seminal Fifth Circuit decision—*Castaneda* v. *Pickard*, 648 F.2d 989 (5th Cir. 1981)—established a three-part framework for assessing compliance with Section 1703(f).

Under that framework, a court considers whether: (1) the ELL program chosen by education officials is based upon a sound educational theory; (2) the program, in practice, is reasonably calculated to implement effectively that theory; and (3) the program has been successful after a legitimate trial period. *Id.* at 1009-1010; see *United States* v. *Texas*, 601 F.3d 354, 366-373 (5th Cir. 2010) (applying *Castaneda* to assess state agency compliance).

This Court has yet to expressly adopt *Castaneda*'s three-part inquiry, but it has long recognized that the EEOA "imposes requirements on the State Agency to ensure that * * * language deficiencies are addressed." *Idaho Migrant Council* v. *Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981); see also *Flores* v. *Arizona*, 516 F.3d 1140, 1146 (9th Cir. 2008) (reciting but not adopting *Castaneda*'s framework), rev'd on other grounds sub nom. *Horne* v. *Flores*, 557 U.S. 433 (2009). Relying on *Idaho Migrant Council*, the Seventh Circuit has further instructed States that they "cannot, in the guise of deferring to local conditions, completely delegate in practice their obligations under the EEOA." *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1042-1043 (7th Cir. 1987). Lower courts in this Circuit, and other circuit courts analyzing claims under Section 1703(f), have uniformly adopted *Castaneda*'s framework and applied it in actions against state agencies and local school districts. See, *e.g.*, *Texas*, 601 F.3d at 366-373; *Gomez*, 811 F.2d at 1041-1043; *Valeria G.* v. *Wilson*, 12 F. Supp. 2d 1007,

1017-1021 (N.D. Cal. 1998), aff'd, 307 F.3d 1036 (9th Cir. 2002); *Teresa P.* v. *Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 712-713 (N.D. Cal. 1989).

b. Under *Castaneda*, education officials retain substantial discretion to develop and adopt the types of ELL programs that will be most responsive to student needs. See 648 F.2d at 1008-1009; *Flores*, 557 U.S. at 454. The Fifth Circuit recognized, however, that "by including an obligation to address the problem of language barriers in the EEOA and granting * * * a private right of action to enforce that obligation," Congress intended to ensure that education agencies "made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met." *Castaneda*, 648 F.2d at 1009.

The Fifth Circuit explained that courts must determine whether an ELL program is reasonably calculated to implement effectively an informed educational theory; a school system cannot be said to have taken "appropriate action" where "despite the adoption of a promising theory, [it] fails to follow through with practices, resources and personnel necessary to transform the theory into reality." *Castaneda*, 648 F.2d at 1010; see also *Gomez*, 811 F.2d at 1042 ("[P]ractical effect must be given to the pedagogical method adopted."). The Fifth Circuit in *Castaneda* held that education officials may implement programs that emphasize

English-language development "during the early period of [students'] school career[s]," in order to lay the foundation for eventual success in all areas of the curriculum, "even if the result of such a program is an interim sacrifice of learning in other areas during this period." 648 F.2d at 1011.

The court cautioned, however, that "[i]n order to be able ultimately to participate equally with the students who entered school with an English language background, [ELLs] will have to * * * recoup any deficits which they may incur in other areas of the curriculum as a result of th[e] extra expenditure of time on [ELD]." *Castaneda*, 648 F.2d at 1011. The court thus reasoned that Section 1703(f) "impose[s] on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide [ELLs] with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred [while] participat[ing] in" an ELL program. *Ibid.* If no such opportunity to recoup academic deficits is provided, the court explained, "the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to [ELLs'] equal participation in the regular instructional program." *Ibid.* Thus, although education officials can adopt either a sequential or simultaneous ELL program, that program must be "reasonably calculated to enable [ELLs] to attain parity of participation in the standard instructional program within a reasonable length of time." *Ibid.*

Finally, the Fifth Circuit emphasized that "a determination that a school system has adopted a sound [ELL] program * * * and made bona fide efforts to make the program work does not necessarily end the court's inquiry." *Castaneda*, 648 F.2d at 1010. Rather, if, "after being employed for a period of time sufficient to give the plan a legitimate trial," the program fails to produce results indicating that students are actually surmounting their language barriers, then it no longer constitutes "appropriate action." *Ibid.*; see also *Texas*, 601 F.3d at 370. The court explained that it did not believe that Congress intended that "a school would be free to persist in a policy which * * * has, in practice, proved a failure." *Castaneda*, 648 F.2d at 1010; see also *Gomez*, 811 F.2d at 1042 (noting an otherwise legitimate program may violate the EEOA "either because the theory upon which it was based did not ultimately provide the desired results or because the authorities failed to adapt the program to the demands that arose in its application").

2. Proceedings Below

a. This appeal arises from litigation that began in 1992, when a group of students and parents in Nogales Unified School District filed a class action lawsuit against the State of Arizona, its Superintendent of Public Instruction, and its Board of Education (collectively, the State) alleging violations of Section 1703(f) of the EEOA based on the State's failure to adequately oversee, administer, and fund

ELL education in Nogales. In 2000, the district court issued a declaratory judgment finding the State in violation of the EEOA. See *Flores* v. *Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000). Over the next several years, the court issued numerous remedial orders and, based on state-law funding requirements, extended the injunctive relief statewide.

In 2006, after the State passed a new law addressing ELL programming and funding, the Speaker of the Arizona House of Representatives and the President of the Senate intervened in this case and, along with the Superintendent of Public Instruction, moved to dissolve the remedial orders under Rule 60(b)(5). Following two hearings in the district court and two appeals to this Court, the denial of the Rule 60(b)(5) motion reached the Supreme Court.

In a split decision, the Supreme Court held that both this Court and the district court had applied too narrow and too strict a standard under Rule 60(b)(5). See *Horne* v. *Flores*, *supra*. The Court emphasized that "when EEOA compliance has been achieved[,] responsibility for discharging the State's obligations must be returned promptly to the State." *Flores*, 557 U.S. at 452 (internal quotation marks and brackets omitted). Thus, the Court explained that this Court should have determined whether "ongoing enforcement of the original order was supported by an ongoing violation of federal law (here, the EEOA)." *Id.* at 454. The Court stated that the district court likewise should have focused on whether changed

circumstances showed that the State now was taking "appropriate action" under Section 1703(f). *Id.* at 455-456.

The Court remanded the case to the district court, directing it to consider the State's motion in light of four changes: (1) the State's adoption of a new instructional methodology for ELLs; (2) Congress's enactment of the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6801 *et seq.*; (3) structural and management reforms in Nogales; and (4) increased overall education funding. *Flores*, 557 U.S. at 459. The Court noted that the district court should examine current conditions in Nogales, stating that the EEOA's "ultimate focus is on the quality of the educational programming and services provided to [ELLs]." *Id.* at 466-467. As for the entry of statewide relief, the Court questioned whether it was proper on evidentiary and jurisdictional grounds, see *id.* at 470-471, stating that, if Arizona objected to such relief on remand, the district court "should vacate the injunction insofar as it extends beyond Nogales unless the court concludes that Arizona is violating the EEOA on a statewide basis," *id.* at 472.

b. On remand, Plaintiffs argued that relief under Rule 60(b)(5) in Nogales was not warranted, and that statewide injunctive relief remained appropriate, because the State's predominant ELD model (a) unnecessarily segregates ELLs from non-ELLs four hours per day until ELLs attain English proficiency; (b) results in lost academic content over time, with no state plan or requirement to

recoup such content, and the inability of ELLs in high school to graduate on time; and (c) has yet to prove effective. Doc. 872 at 5-9.[1] Prior to the evidentiary hearing—for which the court stated Arizona would bear the burden of showing changed circumstances in Nogales, and Plaintiffs would bear the burden of showing that Arizona's implementation of its self-contained four-hour ELD model constituted a statewide violation of the EEOA (Doc. 883 at 1-2)—the State moved to dismiss Plaintiffs' claim for statewide relief (Doc. 955). With the State's motion pending, the case proceeded to an evidentiary hearing.

c. In March 2013, the district court granted the State relief from the 2000 judgment under Rule 60(b)(5) and dismissed Plaintiffs' claim for statewide relief. See E.R. 1-23 (Order). The court directed the entry of judgment in favor of the State and ordered the case closed. Order 23.

i. In its factual findings, the court stated that Arizona replaced its bilingual program with a Structured English Immersion (SEI) program, and that a state-mandated Task Force is responsible by law for developing and promulgating research-based models for SEI instruction. Order 4. In 2007, the Task Force adopted SEI models that included a daily minimum of four hours of ELD instruction, with a goal of having ELLs attain proficiency in one year. Order 4, 7-

[1] "Doc. ___" refers to the docket entry below in this case. "E.R." refers to Plaintiffs-Appellants' excerpts of record.

8. Schools throughout Arizona must adopt the Task Force's models or obtain rarely granted approval to implement an alternative model. Order 5. By law, Arizona's Office of English Language Acquisition Services (OELAS) is responsible for monitoring districts' implementation of and compliance with the models. Order 5. State law requires the Task Force to review the models each year and modify them as needed; the court found that the Task Force has not made any meaningful modifications to the models. Order 6.

The court found that the State requires schools to group ELLs by proficiency and grade level, and to place ELLs whenever possible into self-contained classrooms for ELD instruction. Order 9.[2] The court further found that Arizona requires the four hours of ELD instruction to be allocated to the grammar, vocabulary, reading, writing, and oral skills of the Discrete Skills Inventory (DSI) (Order 6-8), and that "[c]lass textbooks, materials[,] and assessments * * * must be aligned to the Arizona K-12 [ELL] Proficiency Standards and the [DSI]" (Order 7). The court found that ELD "is distinguished from other types of instruction, e.g., math, science, or social science, in that the content of ELD emphasizes the English

[2] In schools with smaller ELL enrollments, the State allows Individual Language Learner Plans (ILLPs), under which ELLs also receive four hours of ELD per day but in core content classes enrolling non-ELLs. E.R. 34, 42-49. Also, the State has permitted some schools to offer "mixed" classrooms in which ELLs are educated alongside non-ELLs. E.R. 64-66.

language itself" (Order 6), and that ELD "teachers do not explicitly address academic standards in their instruction" (Order 9).

Though the court noted that the extent to which ELLs are exposed to other academic content differs across schools, the court found that "even at school districts that claim to teach academic content as part of the four hours of ELD," the "content provided to [ELLs] is not the same, and is less than, what is provided to English proficient students." Order 9. The court found that the State does not "require school districts to provide [ELLs] with an opportunity to recover [missed] academic content," nor does it "make[] [any] effort to determine whether [ELLs] have been deprived of academic content as a result of being placed in four hours of ELD." Order 10. The court further found that state law requires "compensatory instruction" only for ELD, not for other content ELLs may have missed as a result of participating in the State's ELD program. Order 8-9. In addition, to the extent the court tried to ascertain how long ELLs would remain in the program, Arizona could not "provide [it] with information regarding the average length of time it takes for ELL students to test proficient." Order 18.

The court also examined the three other changes that the Supreme Court identified in *Horne* v. *Flores*, *supra*. The court found that, pursuant to NCLB, the State had adopted standards setting forth specific objectives that students must meet before being reclassified as proficient, as well as annual target reclassification

rates for each district, and that Nogales, in 2009, had met its target. Order 10. The court further found that Nogales had implemented structural and management reforms that elevated its performance. Order 11-12. And the court stated that Nogales was in better financial condition than before, with several funding streams dedicated to education and ELL programs in particular. Order 12-13. This increased overall funding, combined with decreased student enrollment, substantially increased per student funding in Nogales over the last decade. Order 14.

The court concluded by finding that "Nogales has an effective ELD program," as shown by "higher" test scores in reading, writing, and mathematics among former ELLs in elementary and middle school, and that Nogales' "reclassification rates consistently have placed at the top or near the top of nine sister districts at the border." Order 14.

ii. In its conclusions of law, the court stated that "[i]n order to make a statewide claim, Plaintiffs must present evidence that the EEOA is being violated in every Arizona school district and in the same manner." Order 14. The court dismissed Plaintiffs' claim, concluding that it was not "'statewide' in nature, but rather depend[ed] on specific implementation choices made at the district level, thus requiring a district-by-district analysis," and that Plaintiffs had not established

standing. Order 18-19. The court thus limited its review of the Rule 60(b)(5) motion to conditions in Nogales. Order 19.

In examining the State's ELD program, the court noted that States have flexibility and discretion in designing ELL programs and that those programs may be sequential or simultaneous. Order 19. Based on the evidence presented, the court concluded that "the SEI Method and the four hour model are valid educational theories" and that Nogales "has made a good faith effort to remedy the language barriers faced by ELL students." Order 21. The court noted that Nogales' reclassification rates have exceeded statewide averages, and that former ELLs in Nogales "routinely" score higher than their "mainstream counterparts" in elementary and middle school. Order 16-18, 20. But apart from citing aggregate reclassification rates, which include ELLs both within and outside of the self-contained model, the court did not state whether those ELLs in Nogales educated under the self-contained model are actually surmounting their language barriers and achieving equal participation in the standard instructional program within a reasonable period of time.

The court concluded that Nogales is EEOA-compliant, that neither the self-contained four-hour model nor the State's "initial implementation" of that model violates the EEOA, and that the "judgment previously entered in th[e] case has been satisfied, or at the very least, that prospective application of the judgment is

no longer equitable." Order 22. The court credited Nogales, not the State, for most of the district's success, but nevertheless granted the State's request for relief. Order 22. The court, however, questioned the merits of Arizona's approach: "It may turn out to be penny wise and pound foolish as at the end of the day, speaking English, and not having other educational gains in science, math, etc. will still leave some children behind." Order 22-23.

SUMMARY OF ARGUMENT

Because the district court erred in assessing the State's EEOA compliance in Nogales, this Court should vacate the grant of relief under Rule 60(b)(5) and remand the case for further proceedings. In so doing, this Court should adopt the three-part framework from *Castaneda* v. *Pickard*, *supra*, as the governing standard for analyzing alleged violations of Section 1703(f). Adopting the *Castaneda* standard would ensure that state and local officials provide ELLs not only with appropriate ELL programs, but also with adequate assistance to recover any academic content they may have missed as a result of participating in a state-mandated ELL program. Without both, ELLs cannot achieve "equal participation" in "instructional programs" within a reasonable period of time, as Section 1703(f) requires.

The district court in this case failed to adhere to the analysis required under prongs two and three of *Castaneda*. Thus, it could not properly have determined

for purposes of Rule 60(b)(5) that the State was EEOA-compliant in Nogales and had implemented a durable remedy to protect against further EEOA violations. Indeed, some of the court's findings and conclusions strongly suggest that the State has largely ignored its obligation to help ELLs overcome any deficiencies they may have incurred in other academic areas. Moreover, the court had insufficient data to draw any meaningful conclusions about the success of Arizona's self-contained program.

Finally, the United States takes no position on Plaintiffs' claim for statewide relief. The court's statement of what is required for such relief, however, misstates the law, is unduly onerous, and would hamper effective enforcement of the EEOA.

ARGUMENT

THIS COURT SHOULD VACATE THE ORDER GRANTING RULE 60(B)(5) RELIEF IN NOGALES AND REMAND THE CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH *CASTANEDA* V. *PICKARD*

A. This Court Should Apply Castaneda*'s Three-Part Framework To Claims Arising Under Section 1703(f) Of The EEOA*

Although neither the text nor legislative history of the EEOA defines "appropriate action," this Court has recognized that both state and local education agencies have a duty under Section 1703(f) to address students' language deficiencies. See *Idaho Migrant Council* v. *Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981). This Court cited the three-part framework established in *Castaneda* v.

Pickard, 648 F.2d 989 (5th Cir. 1981), when this case was last before this Court, see *Flores* v. *Arizona*, 516 F.3d 1140, 1146, 1172-1174 (9th Cir. 2008), rev'd on other grounds sub nom. *Horne* v. *Flores*, 557 U.S. 433 (2009), but has yet to expressly adopt that framework as its own. Because *Castaneda*'s three-part inquiry is well-established, analytically sound, and ensures that the EEOA is given practical force, the Court should adopt it as this Circuit's governing standard for analyzing alleged violations of Section 1703(f).

The *Castaneda* court interpreted Section 1703(f) as requiring States and school districts to adopt educationally sound ELL programs that not only allow ELLs to attain English proficiency, but also "enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system." 648 F.2d at 1011. Thus, state and local obligations under the EEOA do not end simply because a child becomes English proficient. Rather, to avoid "deny[ing] equal educational opportunity" under Section 1703(f), States and school districts must ensure that their ELL programs do not disadvantage ELLs in the standard instructional program. It is only when English proficiency is achieved and any academic deficits incurred are recouped that a child's language barriers will no longer impede his or her equal participation. See 20 U.S.C. 1703(f); *Castaneda*, 648 F.2d at 1011.

Both States and school districts must comply with the EEOA. Where a State requires districts to use a particular ELL program, mandates how they implement that program, and strictly monitors them to ensure they adhere to state-mandated requirements, it still retains its independent obligation, as does the district, to ensure its actions comply with Section 1703(f). This includes the obligation of state and local officials to provide ELLs "with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's [ELL] program." *Castaneda*, 648 F.2d at 1011. Although a State might decide that districts know how best to meet their students' needs and thus should have latitude in developing academic remediation programs for ELLs, States must ensure that the overall education actually offered to ELLs includes appropriate language and academic remediation programs. See *ibid.*; *Flores*, 516 F.3d at 1173; *Idaho Migrant Council*, 647 F.2d at 71.

Thus, for a State to comply with Section 1703(f)'s "appropriate action" standard, it must ensure both that the ELL requirements it imposes do not impede students from participating equally in the standard instructional program within a reasonable period of time, and that districts (a) identify any academic deficits that ELLs incur while in the State's ELL programs, and (b) provide ELLs with the assistance they need to recoup lost content. Moreover, if a State's monitoring of

district-level outcomes indicates that ELLs are not achieving equal participation within a reasonable period of time, the State must modify its program to avoid an EEOA violation. See *United States* v. *Texas*, 601 F.3d 354, 370 (5th Cir. 2010); *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1042 (7th Cir. 1987).

B. In Determining Whether To Grant The State Rule 60(b)(5) Relief, The District Court Failed To Properly Apply Castaneda

When the Supreme Court remanded this case to the district court, it instructed that the State should be granted relief under Rule 60(b)(5) in Nogales if it has satisfied the EEOA's "appropriate action" standard and has implemented a "durable remedy." *Flores*, 557 U.S. at 450; see also *id.* at 452, 454, 458 n.7. To determine whether Arizona's change from bilingual education to SEI-based instruction constituted a significant change that remedied the EEOA violation in Nogales, the district court should have applied *Castaneda*'s three-part framework. Yet the court failed to adequately consider (a) whether the State's self-contained four-hour ELD model is reasonably calculated to enable ELLs to achieve equal participation in the standard instructional program within a reasonable amount of time, and (b) whether performance data of students in and exited from the self-contained model indicates that the model actually enables equal participation and provides a "durable remedy" that ensures Nogales' compliance with the EEOA. Because the district court failed to give sufficient attention to the second and third prongs of *Castaneda* and to apply those standards to the State's conduct, this Court

should vacate the grant of Rule 60(b)(5) relief in Nogales and remand for further proceedings consistent with the analysis required under *Castaneda*.[3]

1. Failure To Ensure ELLs Recoup Lost Academic Content

The court in *Castaneda* made clear that when education officials exercise their discretion to implement a sequential ELL program but then fail to provide ELLs assistance to recover missed academic content, ELLs are unlikely to achieve equal participation in the standard instructional program within a reasonable period of time. See 648 F.2d at 1011. Thus, to satisfy Section 1703(f), state and local officials must provide ELLs an opportunity to recoup lost academic content. See *ibid.*; see also *Texas*, 601 F.3d at 366-367 (applying *Castaneda* to state-level defendants). Here, the district court failed to properly apply *Castaneda* in order to determine whether Arizona has met its independent obligation to ensure that ELLs in Nogales receive the assistance they need to overcome any academic deficits they have incurred as a result of participating in the State's intensive, ELD-focused program.

The court's factual findings and conclusions of law indicate that the State's self-contained model likely would hinder ELLs from achieving equal participation in the standard instructional program within a reasonable amount of time after

[3] Given the substantial discretion accorded the State to pursue a theory of instruction, see *Flores*, 557 U.S. at 454, we do not address *Castaneda*'s first prong.

entering the school system. In particular, the court found that Arizona requires that: "four hours of daily [ELD] be provided to all ELL students" regardless of their time or progress in the self-contained model; those four hours be anchored to the DSI; "[c]lass textbooks, materials[,] and assessments * * * be aligned to the Arizona K-12 [ELL] Proficiency Standards and the [DSI];" and that ELD "[be] distinguished from other types instruction, e.g., math, science, or social science." Order 6-8. The court also found that "[c]ompensatory instruction [under state law] does not include providing instruction to ELL students in academic content areas that they may have missed as a result of participating in the four hour model." Order 9.

The court further found that the State "does not require school districts * * * to recover the academic content that [ELLs] missed while they were in the four hour model and makes no effort to determine whether ELL students have been deprived of academic content as a result of being placed in four hours of ELD." Order 10. The court also determined that "the academic content provided to ELL students is not the same, and is less than, what is provided to English proficient students." Order 9. And the court questioned the merits of Arizona's model, indicating that it might place ELLs behind their English-proficient peers: "It may turn out to be penny wise and pound foolish, as at the end of the day, speaking

English, and not having other educational gains * * * will still leave some children behind." Order 22-23.

Although the court found that Nogales had established "various compensatory education programs" (Order 12), it made no findings as to whether and how these programs help ELLs recoup academic content that they may have missed as a result of participating in state-mandated ELD classes four hours per day. And while the court cited promising statistics about former ELLs' progress in reading, writing, and math, these data did not include ELLs educated under the self-contained model (as explained below). Moreover, the court made no findings regarding ELLs' performance in other academic areas to which they have little to no exposure (*e.g.*, science and social studies) while in the self-contained model. Conversely, the court did find that the State (a) does not require school districts to help ELLs recover any core academic content that they have missed while in the ELD program, and (b) makes no effort to determine whether such deficits are actually incurred. Order 10. And to the extent the court tried to gauge the likelihood of such deficits based on how long ELLs remain in the program, the court could not because Arizona "was unable to provide [it] with information regarding the average length of time it takes for ELL students to test proficient." Order 18.

The court's findings indicate that the State largely has ignored its obligation under the EEOA to take "appropriate action" to develop, implement, and oversee ELL programs that are "reasonably calculated to enable [ELLs] to attain parity of participation in the standard instructional program within a reasonable length of time," *Castaneda*, 648 F.2d at 1011, and to ensure that districts address the barriers that impede ELLs from achieving equal participation. Indeed, if ELLs incur academic deficits that cannot be remedied within a reasonable period of time given how long students remain in the State's ELD program, there would be an EEOA violation traceable to the State's program requirements. And if districts do not remedy lost content, the State would be liable under the EEOA for its failure to monitor districts to ensure they are helping ELLs recoup any lost content. See Ariz. Rev. Stat. § 15-756.08 (2006) (directing OELAS to monitor districts' implementation of the models and compliance with state and federal law); *Castaneda*, 648 F.2d at 1011; *Texas*, 601 F.3d at 366. Although the EEOA does not require Arizona to dictate the precise content of schools' academic remediation programs, it does require the State to ensure that such programs are offered to ELLs where necessary for them to achieve equal participation in the standard instructional program. See *Castaneda*, 648 F.2d at 1011; cf. *Flores*, 516 F.3d at 1173; *Idaho Migrant Council*, 647 F.2d at 71.

2. Insufficient Data To Demonstrate Successful Outcomes Under The Model

The district court failed to consider at all, under the third prong of *Castaneda*, whether results indicate that ELLs in the self-contained model are surmounting their language barriers and achieving equal participation in the standard instructional program. Thus, the court prematurely determined that the State has complied with the EEOA in Nogales and has implemented a "durable remedy" to ensure future compliance.

Data collected by States to assess student progress provide a means for examining whether a State's ELL program actually enables students to participate equally in instructional programs, as required under Section 1703(f). In particular, a court should examine longitudinal data—*i.e.*, data tracking the same type of information on the same subjects at multiple points in time—on how ELLs and former ELLs in an ELL program perform relative to their non-ELL peers to determine if the former achieve equal participation within a reasonable period of time. See *Castaneda*, 648 F.2d at 1011, 1014 (discussing student achievement scores under the third prong); *Flores*, 557 U.S. at 464 n.16 ("[An] absence of longitudinal data in the record precludes useful comparisons."); *Texas*, 601 F.3d at 371 (discussing achievement scores, drop-out rates, retention rates, and participation rates in advanced courses, and the need for longitudinal data, under prong three); *Keyes* v. *Denver Sch. Dist. No. 1*, 576 F. Supp. 1503, 1519 (D. Colo.

1983) (expressing concern over high drop-out rates of Hispanic students). Moreover, when a particular program is challenged, as the self-contained model is here, the data must be disaggregated by program type to ensure that the data reflect the disputed program's outcomes. Here, the data that the court considered were insufficient to establish that ELLs in Nogales who are enrolled in the self-contained model are overcoming their language barriers and participating equally in the standard instructional program within a reasonable period of time.

When the court concluded that the State's self-contained four-hour ELD model complied with the EEOA, and that Nogales in particular was EEOA-compliant, the court had before it only two years of information about the current ELD program (from the 2008-2009 and 2009-2010 school years). But those two years of information provided the court with very little relevant data regarding actual student success under the program. First, the court's findings indicate that program outcomes for those two years, as measured by reclassification rates, were not readily apparent. See, *e.g.*, Order 17 ("Th[e] increase in reclassification rates in Nogales between the 2007-2008 school year and 2008-2009 school year * * * was not attributable to the implementation of the four hour model."); Order 18 ("Since the four hour model was implemented in Nogales, reclassification rates

have fluctuated at schools within the district.").[4] Second, the State used a new language proficiency exam, AZELLA2, beginning in the 2009-2010 school year. Order 16-17. The use of this new exam limited the court's ability to draw any meaningful comparisons between reclassification rates for each of the two years in which the new model was implemented in Nogales, as well as between those two years and prior years. Thus, the court could rely on, at most, only one year of potentially relevant data in order to assess whether the State's self-contained model had been successful. And the court never considered the requisite program-disaggregated data to make that assessment.

[4] In August 2012, the Departments of Justice and Education determined that Arizona's reclassification exam had prematurely exited from its ELL programs, in violation of the EEOA and Title VI, tens of thousands of ELLs who had not achieved sufficient English proficiency. See Letter from J. Aaron Romine, Director, OCR Denver Enforcement Office, U.S. Dep't of Educ., and Emily H. McCarthy, Deputy Chief, Educ. Opportunities Section, Civil Rights Division, U.S. Dep't of Justice, to John Huppenthal, Superintendent of Public Instruction, Arizona Dep't of Educ., and Jordan Ell, Assistant Attorney General, Arizona Office of the Attorney General (Aug. 31, 2012), available at www.ed.gov/about/offices/list/ocr/docs/investigations/08064006-a.pdf. This determination included exams administered in 2008-2009 and 2009-2010. *Id.* at 4-5. Thus, the United States does not find what little reclassification data even exist to indicate reliably the effectiveness of Nogales' program.

Only disaggregated, longitudinal AIMS[5] and other performance and graduation data of former ELLs who were in the self-contained four-hour ELD model compared with the same data of non-ELLs could answer *Castaneda*'s critical question of whether the self-contained model enables ELLs to recoup academic content and achieve parity with non-ELLs within a reasonable period of time. Because approximately 10,000 ELLs in Arizona are on ILLPs and other ELLs are educated in "mixed" classrooms, see p.11 n.2, *supra*, these data must be disaggregated by the particular program in which ELLs are educated. Moreover, when the court found that "Nogales has an effective ELD program" because "[i]ts FEP-2s rank higher on AIMS reading, writing, and mathematics at all elementary and middle grades" (Order 14), the court erroneously relied on AIMS data of former ELLs who were never in this self-contained model.[6] Thus, the court lacked both sufficient and relevant data from which to draw any meaningful conclusion about the effectiveness of the State's self-contained four-hour ELD model in Nogales.

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[5] "AIMS," or Arizona's Instrument to Measure Standards, is a statewide assessment test measuring student proficiency in writing, reading, math, and science.

[6] "FEP-2s," or Fluent English Proficient-Year 2, are former ELLs who have become English proficient and are in their second year of post-ELL classes. The AIMS data in evidence was only through the 2008-2009 school year; FEP-2s in that dataset would have exited Nogales' ELL programs in the 2006-2007 school year, before the four-hour program took effect.

The court's failure to properly apply *Castaneda*'s third prong before finding the State EEOA-compliant is apparent given its findings that Arizona lacks the types of indicators that would enable it to identify deficiencies in the self-contained model and modify it as needed. For example, the court found that the State "makes no effort to determine whether ELL students have been deprived of academic content as a result of being placed in four hours of ELD." Order 10. It also stated that, despite a goal of having ELLs attain English proficiency within one year, the State "was unable to provide the [c]ourt with information regarding the average length of time it takes for ELL students to test proficient on the language assessment test." Order 18. Indeed, the court acknowledged that the State's program may "leave some children behind." Order 22-23. The court, however, needed precisely this sort of information from the State to determine whether ELLs educated under the self-contained model have attained English proficiency and achieved equal participation in the standard instructional program within a reasonable amount of time. Cf. *Flores*, 516 F.3d at 1177 n.51 (questioning whether, in light of *Castaneda*'s third prong, a district court could declare the State in compliance with the EEOA under Rule 60(b)(5) immediately upon adoption of a facially appropriate ELD program); *Gomez*, 811 F.2d at 1042 (noting a program may fail *Castaneda*'s third step "either because the theory upon which it was based

did not ultimately provide the desired results or because the authorities failed to adapt the program to the demands that arose in its application").

Because the court lacked sufficient and relevant data to determine the actual success of ELLs in Nogales under the self-contained four-hour model, it could not properly have concluded that the State was taking "appropriate action" under Section 1703(f) and had implemented a "durable remedy" that warranted Rule 60(b)(5) relief. Accordingly, this Court should remand this case to the district court to apply the second and third steps of *Castaneda* to the State's conduct in Nogales on a current and more developed record.

C. The District Court Misstated The Law In Imposing An Unduly Onerous Standard For Obtaining Statewide Relief

The United States takes no position on Plaintiffs' claim for statewide relief. In dismissing Plaintiffs' claim, however, the court asserted that, "[i]n order to make a statewide claim, Plaintiffs must present evidence that the EEOA is being violated in every Arizona school district and in the same manner." Order 14 (citing *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). The court misstated the law and imposed an overly demanding standard for obtaining statewide relief.

First, *Lewis* does not require a plaintiff to show that a federal statute is being violated in every institution in a statewide system and in the same manner before systemwide relief can be granted. Rather, *Lewis* stated only that "the success of [a] systemic challenge" depends on plaintiffs' "ability to show widespread actual

injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic * * * violation invalid." 518 U.S. at 349; see also *id.* at 358-360 & nn.6-7. Moreover, based on the nature of the claims and the evidentiary record in any given case, a court has equitable authority to order statewide relief under the EEOA if it is "essential to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. 1712; see *Flores* 557 U.S. at 472. Indeed, this Court has recognized that broad relief is appropriate where, *inter alia*, the State has a duty to provide the sought-after relief under federal law or has imposed an unlawful policy in the same manner systemwide. See *Katie A.* v. *Los Angeles Cnty.*, 481 F.3d 1150, 1156-1157 (9th Cir. 2007) (explaining state-level defendant could be ordered to provide services required under federal law to statewide class of foster children); *Clement* v. *California Dep't of Corr.*, 364 F.3d 1148, 1152-1153 (9th Cir. 2004) (in a single-plaintiff case, upholding a statewide injunction as necessary to remedy a proven constitutional violation where the unlawful policy was enacted similarly in other state prisons and "ha[d] become sufficiently pervasive to warrant system-wide relief").

If this Court were to adopt the district court's statement of the law, it would hamper effective enforcement of the EEOA and significantly impede the ability of the government and private plaintiffs to obtain appropriate statewide relief. This

Court should reject the district court's statement of the required showing for statewide relief under the EEOA. Accordingly, this Court should hold, consistent with governing law, that statewide relief is appropriate whenever it is commensurate with the proven injury and "essential to correct particular denials of equal educational opportunity or equal protection of the laws," 20 U.S.C. 1712.

CONCLUSION

This Court should vacate the order granting Rule 60(b)(5) relief in Nogales and remand for further proceedings consistent with this Court's order.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Erin H. Flynn
DENNIS J. DIMSEY
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-5361

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains 7000 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All case participants are registered CM/ECF users and will be served by the Appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney