English language learners face unique challenges. Like all children, they have to learn history, math, reading, science, and other subjects. They also have to learn a new language at the same time. Those challenges are not easy, and we owe it to those children to ensure that their schools have the resources and support to provide them with the education they need and deserve.[1]
-Hon. Dale Kildee, Chairman,
Subcommittee on Early Childhood, Elementary, and Secondary Education

Flores v. Arizona: Education for English Learners in an Anti-Immigrant State

On March 16, 1972, President Richard Nixon addressed the nation, employing the all-too-familiar rhetoric of equality.[2] He proposed what would become the Equal Educational Opportunities Act of 1974 ("EEOA"), saying that "[f]or the first time in our history, the cherished American ideal of equality of educational opportunity would be affirmed in the law of the land by the elected representatives of the people in Congress."[3] He added that this Act would "establish an educational bill of rights for Mexican-Americans, Puerto Ricans, Indians, and others who start their education under language handicaps, to make certain that they, too, will have equal opportunity."[4] Twenty years later, in the border town of Nogales, Arizona, this affirmation would be challenged. And almost another twenty years later the fight would continue, to ensure that English Language Learner ("ELL") students in Arizona have educational opportunities equal to their native-English-speaking peers.

The EEOA guarantees that States will "take appropriate action to overcome language

[1] *Impact of No Child Left Behind on English Language Learners: Hearing Before the Subcommittee on Early Childhood, Elementary, and Secondary Education*, 110th Cong. (2007).
[2] 8 Weekly Comp Pres Docs 590 (Mar. 16, 1972).
[3] *Id.*
[4] *Id.*

barriers that impede equal participation by its students in its instructional programs."[5] But the application of this federal law to states and local school districts has been a source of much debate. Parents in Nogales believed that their children did not receive the promised equal education, and thus began the almost twenty year legal challenge of Arizona's evolving ELL program.

The Fight for Equality Began on the Border with Spanish-Speaking Plaintiffs

Nogales, Arizona is a small town that shares its name, its heritage, and, to a certain extent, its language with its cross-border sister city, Nogales, Sonora, Mexico.[6] These two cities together are called Ambos Nogales, or Both Nogales, and in many ways function as one community. Despite the international border separating the two cities, economic and social activity flows rather smoothly between them, as many families and businesses figuratively straddle the border.[7] However, access between the two international counterparts is becoming increasingly restricted.[8] Together these two cities have about 175,000 residents: about 25,000 of them living on the U.S. side of the border and the other 150,000 living on the Mexican side of the border. The main local English newspaper in Nogales, Arizona is *Nogales International*, with both the U.S. and Mexican flags creating its logo.[9] The main Nogales, Sonora newspaper is *Nuevodía Nogales*, written in Spanish and including in its local section news from Nogales and Phoenix, Arizona as well as from neighboring Mexican cities.[10]

Residents can relatively easily get around Nogales, Arizona speaking only Spanish. Many businesses in Nogales operate mainly in Spanish and rely on Mexican residents crossing the

[5] 20 U.S.C.A. 1703.
[6] City of Nogales, Arizona Website (2011), http://www.nogalesaz.gov/About-Nogales/.
[7] *Id.*
[8] *Id.*
[9] *Nogales International* (2011), http://www.nogalesinternational.com/news/.
[10] *Nuevodia Nogales* (2011), http://www.nuevodia.com.mx/seccion/local/.

border and purchasing food and goods to maintain a steady profit.[11] But these businesses are suffering as fewer Mexican residents choose to cross the border due to the recession and the growing inconvenience due to immigration policy.[12] Since 2004, legal border crossings have dropped by about 1 million per year in Arizona.[13] As a result of the recession, many U.S. factories on the Mexican side of the border have laid off employees, meaning families now have less money to spend in Arizona.[14] There is also additional security and hassle involved with crossing the border, making it more convenient and feasible for Mexican residents to simply utilize the resources they have in their much larger side of the joint community than to cross into Arizona and benefit "that" Nogales' economy.[15]

The Nogales Unified School District (NUSD) serves approximately 6,200 students from pre-Kindergarten to high school.[16] Of these students, 98.48% are Hispanic.[17] About 28% of NUSD's students are classified as ELLs.[18] Given the fluidity across the border of the Ambos Nogales community, there have always been children whose parents live on the Mexico side of the border who attend school on the U.S. side of the border because public U.S. education provides them with greater opportunity.[19]

Since 2004, republican officials have been trying to weed out the undocumented students whose parents reside in Mexico but who attend school in the U.S.[20] Some of these students cross the border every day and some stay with relatives in Arizona on weekdays, visiting their parents

[11] Peter O'Dowd, *Nogales Diary: Border Town Sees Business Decline* (2009), http://www.npr.org/templates/story/story.php?storyId=120062409.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Nogales Unified School District Website* (2011), http://www.nusd.k12.az.us/index.cfm?pID=3374.
[17] *Id.*
[18] Nogales Unified School District Statistics (2011), http://www.education.com/schoolfinder/us/arizona/district/nogales-unified-district/#learn-more.
[19] Tim Vanderpool, *Southwestern Schools Root Out Illegal Pupils*, THE CHRISTIAN SCI. MONITOR, (Mar. 26, 2004), http://www.csmonitor.com/2004/0326/p01s02-ussc.html.
[20] *Id.*

in Mexico on weekends or whenever they can.[21] Republicans complain that educating these undocumented students costs a lot, and that the struggling education system cannot handle the extra burden they put on border school districts such as NUSD.[22] This year, conservative legislators proposed that Arizona pass legislation that would require the parents of students to provide proof of their children's legal residency in the U.S.[23] The democratic minority joined by moderate Republicans blocked this bill, but it shows the political struggle surrounding the education of Mexican-American students and the implications for their parents.[24] The debate about the education of ELLs in Arizona, both documented and undocumented, and the fair allocation of funding continues in the community, the legislature, and the court.

Miriam Flores, a Spanish-speaking Mexican-American mom, decided to get involved in litigation when she saw the struggles her daughter, also named Miriam Flores, was having in her classes as they switched from being taught partially in Spanish to being taught completely in English.[25] Although she only spoke Spanish fluently, she desperately wanted her children to receive a quality education, including learning English and all other subject matters.[26] The young Miriam became frustrated because, despite her effort, all of a sudden she was receiving poor grades.[27] When she was in third grade, the school district told her mom that she was not paying attention to the teacher and that she would be held back.[28] She explained to her mom that she did not understand what the teacher was saying and had to ask her classmates to clarify.[29] Flores

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[21] *Id.*
[22] *Id.*
[23] S.B. 1611, 50th Leg., 1st Sess. (Ariz. 2011).
[24] Paul Teitelbaum, *Anti-Immigrant Bills Defeated in Arizona Senate*, WORKERS WORLD (Apr. 1, 2011), http://www.msnbc.msn.com/id/42141268/ns/local_news-phoenix_az/.
[25] Mary Ann Zehr, *Roots of Federal ELL Case Run Deep*, EDUCATION *WEEK* (Apr. 6 2009), http://www.edweek.org/ew/articles/2009/04/08/28flores.h28.html.
[26] *Id.*
[27] *Id.*
[28] *National Campaign to Restore Civil Rights* (2011), http://www.rollbackcampaign.org/multimedia/.
[29] *Id.*

confronted the school district about her daughter not being able to understand the instruction because she did not understand English well enough, but the school district told her it was not their problem.[30] Flores agreed to be a plaintiff, and hoped that the litigation would allow her children, and all children, to attain the education she envisioned for them.[31]

Education of ELL Students

Five different English language acquisition programs dominate within school districts in the U.S.: an English-language monolingual program, where ELLs are in mainstream classrooms with English-proficient peers and only English is spoken; an English-monolingual-plus-English-as-a-Second-Language program, where ELLs are in mainstream classrooms, but work with a specialist who provides extra language support (in either the pull-out or push-in model); a transitional bilingual education program, where ELLs receive instruction in English and their native language, with English gradually replacing the native language; a maintenance bilingual education program, where ELLs receive instruction in both English and their native language, with the goal being to develop proficiency in both languages; and a structured immersion program, where all instruction is in English, but in a manner designed to be easier ELLs to understand.[32] Educators and researchers disagree about the merits of each program, with different studies finding different programs more or less effective.[33] This lack of consensus surrounding English language acquisition has led to legal and political debate.[34] Others before Miriam Flores attempted to change the way schools funded and planned ELL programs as well.

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[30] *Id.*
[31] Zehr, *supra* note 25.
[32] Andrea Honigsfeld, *ELL Programs: Not "One Size Fits All,"* 45 KAPPA DELTA PI RECORD 166, 167 (Summer 2009).
[33] *Id.* at 171.
[34] *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974); Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Ariz. Rev. Stat. Ann. § 15-752 (2000).

Federal law regarding the education of ELL students gained national attention in 1974 with *Lau v. Nichols*.[35] In this case, Chinese-American plaintiffs in San Francisco challenged the school system for putting non-English speakers in a "regular" classroom and then ignoring them, thus denying them access to all education.[36] The Civil Rights Act of 1964 and its defining guidelines required "federally funded school districts to address any obstacles to learning posed by enrolled students' lack of English language proficiency."[37] Even though California purported to provide "equal" education to all students, the Supreme Court acknowledged that this "equal" education was only nominal when no efforts were made to ensure ELL students could access the curriculum.[38] The Supreme Court determined that the lack of English language instruction for ELLs violated Title VI of the Civil Rights Act.[39]

Both Congress and the Department of Health, Education, and Welfare ("HEW") responded to this Supreme Court opinion:[40] Congress enacted the EEOA, and HEW issued "Lau Guidelines" to assist schools in complying with Title VI.[41] The Fifth Circuit addressed both of these in *Castaneda v. Pickard*.[42] *Castaneda* limited the scope of the "Lau Guidelines" in holding that a school district did not violate them.[43] It described the guidelines as applicable *only* to "school districts which, as a result of Lau, were in violation of Title VI because they failed to provide *any* English language assistance to students having limited English proficiency."[44] *Castaneda* also specified that the "Lau Guidelines" were not binding and suggested that, as long

[35] Lau v. Nichols, 414 U.S. 563 (1974).
[36] *Id.*
[37] Thomas F. Felton, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 Cath. U. L. Rev. 843, 855 (1999). 35 Fed. Reg. 11,595, 11,595 (1970).
[38] *See* Lau v. Nichols, 414 U.S. 563 (1974).
[39] *See* Lau v. Nichols, 414 U.S. 563, 566 (1974).
[40] Felton, *supra* note 37.
[41] *Id.*
[42] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
[43] *Id.* at 1006.
[44] *Id.*

as a school district choose any one of many acceptable language remediation plans, it would comply with Title VI.[45] On the other hand, *Castaneda* bolstered the EEOA and set out important benchmarks against which schools are to be measured in determining whether they meet their EEOA obligations.[46]

Castaneda v. Pickard's EEOA Test

The three-part test established by the Fifth Circuit in 1981 in *Castaneda v. Pickard* for determining if bilingual education programs meet the requirements of the EEOA recognizes that state and local authorities have substantial latitude in choosing how to educate their ELL students, but requires a "genuine and good-faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students."[47] While it does not question how local resources are acquired, it puts the responsibility on the State to ensure that local school districts have the resources necessary to assist ELL students.[48]

In applying the test, the court must first carefully examine the soundness of the educational theory underlying the challenged English language acquisition program and ascertain whether the "school system is pursing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."[49] But "appropriate action" as required by the EEOA requires more than just the adoption of a sound theory. The second step of the test looks at whether the system follows through with practices, resources, and personnel reasonably calculated to transform the chosen educational

[45] *Id.*
[46] *Id.* at 1009-10.
[47] *Id.* at 1009.
[48] *Id.*
[49] *Id.*

theory into reality.[50] And the third part of the test requires the court to evaluate the on-going success of the adopted education program:

> If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action.[51]

In *Castaneda*, the English acquisition program failed at the second step of the test; while sound in theory, the Fifth Circuit found deficiencies in the program's implementation due to the inadequate efforts "made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program."[52] Thus, the remedy required the school district to "undertake further measures to improve the ability of any teacher . . . to teach effectively in a bilingual classroom."[53]

Since the Fifth Circuit applied this test to bilingual education programs under the EEOA, "[n]o Circuit Court has denied its validity."[54]

Origins at the District Court

Flores v. Arizona got off to a slow start. William E. Morris originally filed the case on behalf of plaintiffs from Nogales and Douglas that eventually dropped out of the litigation.[55] He was an attorney with Southern Arizona Legal Aid, a non-profit law firm striving "[t]o provide quality legal service to people who would not otherwise have equal access to justice, in ways

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[50] *Id.* at 1010.
[51] *Id.*
[52] *Id.* at 1013.
[53] *Id.*
[54] Horne v. Flores, 129 S. Ct. 2579, 2610, 174 L. Ed. 2d 406 (2009) (dissent).
[55] Telephone interview with Timothy M. Hogan, Executive Director, Arizona Center For Law in the Public Interest (Mar. 2, 2011) [hereinafter Hogan interview].

which affirm the individual and collective dignity, integrity, and power."[56] A few years into the pre-trial preparation, Morris recruited Tim Hogan of the Arizona Center for Law in the Public Interest because of his experience with school finance litigation and familiarity with Arizona public education.[57] A couple of years after Hogan joined, they recruited Miriam Flores and her daughter to serve as new named plaintiffs of the class of "all minority 'at-risk' and limited English proficient children now or hereafter, enrolled in [NUSD] as well as their parents and guardians."[58] They selected Flores because she fit the mold of plaintiff they desired and because she trusted the legal process enough to give this litigation a shot. While she did not play a large role in the direction of the litigation, Flores did open herself and her family to questions about their education, their choices, and their livelihoods. Morris and Hogan hoped that through this litigation, Arizona would provide ELL students in Nogales and elsewhere with an appropriate education that ensured English acquisition along with complete subject matter instruction equal to that received by English-proficient students. They saw the program used to educate ELLs as insufficient and the amount of resources used to educate the large number of ELL students in NUSD as severely inadequate for their needs.[59] While Morris and Hogan initially envisioned this litigation as only directly challenging practices in Nogales, Arizona's attorney general requested that the entire state be included in the case and request for relief.[60]

Morris initially filed the action seeking declaratory relief in federal court in 1992, but due to various delays, no decision was made on the merits of the case for eight years, after Hogan and Flores had both joined the litigation.[61] The dilatory procedural history of this case includes

[56] Southern Arizona Legal Aid, Inc. (2004), http://www.sazlegalaid.org/mission.html
[57] Hogan interview, *supra* note 55.
[58] *Id.*; *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1120-21 (D. Ariz. 2005) *vacated and remanded sub nom.* Flores v. Rzeslawski, 204 F. App'x. 580 (9th Cir. 2006).
[59] Hogan interview, *supra* note 55.
[60] *Id.*
[61] *Id.*

motions to amend and dismiss, certification as a class action, and repeated extensions of deadlines among other things.[62]

In April of 1999, the District Court finally set trial "to determine Plaintiffs' charge that Defendants [were] violating federal law in their oversight of *Lau* programs in Arizona's school districts,"[63] to determine whether Arizona's "financing scheme enable[d] school districts to implement effective *Lau* programs,"[64] and to analyze evidence "relevant to establish the success or failure of the *Lau* programs."[65] The court held a three-day bench trial in August of the same year, and on January 24, 2000, generated sixty-four "Findings of Fact" and eleven "Conclusions of Law" finding for the Plaintiffs on the EEOA issue and three "Conclusions of Law" finding against the Plaintiffs' Civil Rights Act Claim.[66]

The findings of fact highlight various deficiencies within NUSD and Arizona as a whole. They explain the intricacies of how Arizona allocated money to fund the education of ELL students, the various types of English acquisition programs schools in NUSD implemented, the lack of qualified ELL and bilingual instructors, the lack of resources for NUSD's language-acquisition programs, and NUSD responses to the Office for Civil Rights' 1992 compliance review.[67] Based on these findings of fact, the court concluded, among other things, that "[t]he State's minimum $150 appropriation per ELL student, in combination with its property based financing scheme, [was] inadequate and . . . resulted in the following *Lau* program deficiencies: 1) too many students in a classroom, 2) not enough classrooms, 3) not enough qualified teachers, including teachers to teach English as a Second Language and bilingual teachers to teach content

[62] Flores v. Arizona, 48 F. Supp. 2d 937, 942-44 (1999).
[63] *Id.* at 955.
[64] *Id.* at 956.
[65] *Id.* at 957.
[66] Flores v. Arizona, 172 F. Supp. 2d 1225 (2000).
[67] *Id.* at 1225-37.

area studies, 4) not enough teacher aides, 5) an inadequate tutoring program, and 6) insufficient teaching materials for both ESL classes and content area courses."[68] Under *Castaneda v. Pickard's* three-part EEOA test, these deficiencies violated the second part of the test "because the State . . . despite the adoption of a recognized *Lau* program in NUSD, the State has failed to follow through with practices, resources, and personnel necessary to transform theory into reality" and Arizona's "arbitrary and capricious *Lau* appropriation is not reasonably calculated to effectively implement the *Lau* educational theory which it approved, and NUSD adopted."[69] Based on these conclusions of law, the court ordered declaratory relief in favor of the Plaintiffs, requiring the State to take certain actions, explained below, regarding its allocation of funding for ELL students in NUSD (and thus all of Arizona's school districts because of Arizona's Constitution's school district uniformity requirement).[70]

Legislative Resistance to Court Orders

The declaratory relief granted at the beginning of 2000 satisfied, however briefly, Tim Hogan, Bill Morris and Miriam Flores. The court noted that the State Legislature must follow through with the cost study it said it was conducting "to determine the amount of funding provided by the State and Federal governments for English instruction of ELL students and the amount of money being spent by schools to educate those students."[71] Additionally, Plaintiffs entered into a consent order with the State providing for "procedural and substantive revisions to the State *Lau* programs."[72]

[68] *Id.* at 1239.
[69] *Id.*
[70] *Id.* at 1240.
[71] Flores v. Arizona, 160 F. Supp. 2d 1043, 1044 (2000).
[72] *Id.* at 1045. *See* Speaker of the Arizona House of Representatives v. Flores, 2009 WL 483939 (U.S.), 19 (U.S. 2009).

Sadly, in March of 2000, Morris passed away, leaving Hogan as lead counsel on the case. Despite this setback, things seemed to be looking up for young Miriam: She was in junior high, and this ruling could improve the instruction she received in high school, improving her chances of going to college and fulfilling her dream. By this time, through much practice inside and outside of school, her English had improved and she was becoming more successful in her classes, but she and her mom knew there was more that the school should be doing to make sure she was getting the well-rounded education other native English-speaking students received.[73]

The gratification was short-lived, however, as the State did not follow through with its study, arguing that it should be allowed an additional two years to complete it. The newly-established English as a Second Language and Bilingual Education Study Committee had submitted its cost-study report to the Governor's office as planned, but Judge Marquez noted that it did not contain the recommendations for funding levels necessary to establish a minimum base funding level for *Lau* programs that would not be arbitrary and capricious.[74] Plaintiffs accordingly requested that the legislature perform the ordered cost study, but a Senate bill and various amendments that would have provided funding for the cost study were defeated and the legislative session ended without action.[75] Governor Hull convened a special session on education and the legislature approved an increase in state sales tax for educational programs, but funding specifically earmarked for the cost study was denied, as was funding for *Lau* programs "at a level reasonably calculated to make ELL students proficient in speaking, understanding, reading, and writing English."[76] Because of this inaction, the plaintiffs went back to court and asked the judge to order the cost study be carried out by November 1, 2000, so that

[73] Zehr, *supra* note 25.
[74] Flores v. Arizona, 160 F. Supp. 2d 1043, 1044 (2000).
[75] *Id*. at 1045.
[76] *Id*.

the legislature could appropriately fund the programs during its next legislative session at the beginning of 2001.[77]

In response, the defendants claimed that because of the changes to the *Lau* program agreed to in the consent decree entered into in June 2000, the legislative session schedule, and referendum item Proposition 203 to be voted on in November, the cost study should be delayed. Arizona would wait until changes to the program were implemented for a long enough time to evaluate their success, until the Department of Education met for a regularly-scheduled legislative session to ask for funding to conduct the study, and until the results of the Proposition 203 determined whether Arizona would adopt a one-year sheltered-English immersion ("SEI") program and repeal bilingual education and other English-acquisition programs. Fortunately for the plaintiffs, the court saw no reason to wait to conduct the cost study and to address the cost of the deficiencies of NUSD's implementation of its adopted *Lau* model.[78] The court did not view the potential changes to Arizona's English-acquisition programs as a persuasive reason to delay the cost study, and saw the costs associated with any changes to NUSD's program as similar enough to the existing program that the cost study should be conducted in a timely fashion, as the plaintiffs requested.[79]

Arizona complied with the court's order to commission a cost study before its January 2001 legislative session, but it failed to fund the *Lau* programs in response to the findings of the study.[80] Rather than research the actual cost of appropriately educating ELL students, the specially-commissioned consulting group simply gathered data about how much money was actually spent on ELL students in several districts nationwide and noted that NUSD spending

[77] *Id.*
[78] *Id.* at 1046.
[79] *Id.*
[80] Flores v. Arizona, 2001 WL 1028369 (D. Ariz.) (2001).

was toward the bottom and thus might be inadequate to meet the unique needs of ELL students.[81] The staff of several Democratic legislators also prepared a separate study estimating the cost of educating ELL students at $1,527 (more than $1,000 more than NUSD was spending per ELL student), which was ignored by the legislature.[82] Dismayed by Arizona's continued failure to improve its English-acquisition programs, the plaintiffs again sought the court's help. This time, plaintiffs requested that the court set a deadline for Arizona to remedy the arbitrary and capricious nature of its ELL funding. The court indeed ordered on June 25, 2001 that by January 31, 2002, "the State's minimum base level of funding per [ELL] student . . . bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools so that ELL students may achieve mastery of the State's specified 'essential skills.' "[83] This would require Arizona, during the 2001-2002 school year, to remedy the arbitrariness of the funding for ELL programs at the same time that the new voter-approved Proposition 203, modeled after California's Proposition 227 ("Prop 227"), would require all ELLs to be taught only in English.

California's Prop 227

California voted into effect Prop 227, a law requiring ELLs "to be taught English by being taught in English" in June 1998.[84] Prop 227 mandated that ELLs be taught in SEI classrooms.[85] In limited circumstances, parents could waive the requirement that their children be taught overwhelmingly in English, in which case the student would be taught in a bilingual

[81] Flores v. Arizona, 516 F.3d 1140, 1149 (9th Cir. 2008) *rev'd sub nom. Horne v. Flores*, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[82] *Id.*
[83] Flores v. Arizona, 2001 WL 1028369, 2 (D. Ariz.) (2001).
[84] SCHOOLS AND SCHOOL DISTRICTS—ENGLISH LANGUAGE IN PUBLIC SCHOOLS—INITIATIVE STATUTE, 1998 Cal. Legis. Serv. Prop. 227, § 305 (WEST).
[85] *Id.*

education classroom or other approved educational methodology.[86] Prop 227 suggested that ELLs would learn English sufficiently to be reclassified as English-proficient after one year in the SEI classroom.[87]

At the time Prop 227 passed, about 25% of students in California, or 1.44 million students, were ELLs.[88] Of these ELL students, about 80% of them spoke Spanish natively.[89] On behalf of these students, various civil rights groups, including Multicultural, Education, Training and Advocacy ("META"); the American Civil Liberties Union-Northern California ("ACLU-NC"); the Employment Law Center; and the Mexican-American Legal Defense and Educational Fund ("MALDEF"), requested a preliminary injunction to block implementation of Prop 227.[90] Relying on *Castaneda* and pointing out (in response to Plaintiffs' EEOA claim) that some experts and educational theory support Prop 227 as an effective methodology,[91] the district court judge denied the motion for a preliminary injunction and ELLs had to be taught with SEI beginning that fall.[92]

A preliminary analysis of test scores after just one year of Prop 227's implementation showed that in early grades, those ELLs in SEI classrooms performed better than ELLs in bilingual classrooms, but that by 5th grade, those students in bilingual classrooms performed better.[93] Both those for and against Prop 227 saw these results as supporting "their side."[94] Prop 227 advocates touted the higher scores in the younger grades as evidence that these students

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[86] *Id.* at § 310
[87] *Id.* at § 305.
[88] Proposition 227: The Difficulty of Insuring English Language Learners' Rights, 33 Colum. J.L. & Soc. Probs. 1, 3 (1999)
[89] *Id.* at 4.
[90] Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998), aff'd sub. nom. Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002).
[91] *Id.* at 1021.
[92] *Id.* at 1027.
[93] Michael Bazeley, *Proposition 227: Teachers and Parents Debate Why Achievement Results Improved in the Wake of New Limits on Bilingual Education*, SAN JOSE MERCURY NEWS, Dec. 26, 1999, *available at* http://www.onenation.org/9912/122699.html.
[94] *Id.*

were learning English more quickly than they would in a bilingual classroom and that this would allow them to "catch-up" with the substantive material they missed out on more quickly.[95] Bilingual education advocates, on the other hand, saw these results (often along with their own classroom observations) as evidence that students might learn basic English skills more quickly in SEI classrooms, but that those student weren't understanding academic content as well and that they were better off not falling behind in academic content and learning English more deeply at a slower pace.[96]

As the years passed, the studies and debate continued. But by 2008, the percentage of English learners receiving primary language instruction in California decreased to about 6%.[97] The Civil Rights Project at UCLA performed a study in 2008 of the impact of Prop 227 on English learners, analyzing data from the California Standards Test ("CST") from 2003 to 2007.[98] The study found results mixed based on grade level; specifically, it showed that Prop 227 had a positive effect on ELLs in grades 3, 5, 6, and 7, but a negative effect on grades 2, 4, and 8.[99] The researchers failed to determine a coherent explanation for this effect. They provided various divergent hypotheses for why the results came out the way they did, but ultimately conclude little more than that further studies needed to be done.[100] They established that California's students' (including ELLs') CST scores improved over this time period, but could not definitely attribute the increase in ELL scores to Prop 227, because of other significant changes in the public education system such as No Child Left Behind.[101]

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[95] *Id.*
[96] *Id.*
[97] LAURA MCCLOSKEY ET AL., PROPOSITION 227 IN CALIFORNIA: A LONG-TERM APPRAISAL OF ITS IMPACT ON LANGUAGE MINORITY STUDENT ACHIEVEMENT 3 (2008).
[98] *Id.* at 6.
[99] *Id.* at 8.
[100] *Id.* at 9-15.
[101] *Id.* at 15.

Another study based on language census data from the California Department of Education found that five years after English only programs were introduced in California, only two of every five students previously classified as ELL had become proficient in English.[102] In a single year, only about one of every thirteen ELLs knew English well enough to be redesignated as English proficient.[103] Additionally, redesignation rates remained largely unchanged and many students that had been mainstreamed into classes for native English speakers did not receive extra support, despite being limited-English proficient.[104]

Voter Initiatives and Legislative Action Regarding Education in Arizona

Back in Arizona, Miriam Flores would mostly stay out of court for the next four years, but changes in Arizona's education landscape between 2000 and 2005 would affect the instruction of ELL students and the subsequent Ninth Circuit decision. Voters and the legislature would take turns deciding education policy, mostly divided along Republican and Democratic party lines.

In November 2000, Arizona's Prop 203 passed by almost a two to one margin despite uncertainty over whether English-only education was having a positive effect in California.[105] Parents and educators in Tucson began pushing for a ballot initiative that would end bilingual education in Arizona just a month after Prop 227 passed in June 1998.[106] They founded "English for the Children--Arizona" and got California millionaire Ron Unz, who had successfully backed Proposition 227 in California, to support them.[107] These anti-bilingual advocates gave various

[102] James Crawford, *A Few Things Ron Unz Would Prefer You Didn't Know About English Learners in California*, Aug. 23, 2003, http://www.humnet.ucla.edu/linguistics/people/grads/macswan/castats.htm.
[103] *Id*.
[104] *Id*.
[105] Ariz. Rev. Stat. Ann. § 15-752 (2000).
[106] Ruben Navarrette, *Effort Begins to Kill Bilingual Education in Arizona*, ARIZ. REPUBLIC (Jul. 15, 1998), http://www.onenation.org/0798/071598d.html.
[107] Sara Tully Tapia, *Statewide Push to Kill Bilingual Education Gains*, ARIZ. DAILY STAR (Aug. 2, 1998), http://www.onenation.org/0898/080298b.html.

rationales for their position. Some thought that allowing languages other than English in the classroom provided a crutch that would slow ELL students' English acquisition. Some claimed that it disadvantaged ELL students whose native language was not Spanish.[108] Some simply seemed to despise the idea of using any language other than English in public schools in America.[109] And it did not help that a month before, the Arizona Department of Education found that only 2.8% of ELL students become proficient enough in English to succeed in the academic mainstream.[110] Prop 203 proponents highlighted this report as showing deficiencies in bilingual education, even though the report included data from schools that taught ELLs using bilingual classes, English-only classes, and other models.[111] By June 2000, English for the Children--Arizona had gathered 165,000 signatures to put a measure dismantling bilingual education on the November ballot.[112] Prop 203 passed, requiring schools to educate ELLs using only English beginning in fall 2001.[113] It also expressed that this SEI transition period should not exceed one year, at which point ELLs would join English-proficient students in mainstream classes.[114]

More changes in Arizona's ELL education landscape resulted from House Bill 2010, enacted in December 2001.[115] HB 2010 was the legislature's attempt to bring Arizona into compliance with the District Court's order.[116] It required the State Board of Education to create guidelines for ELL placement and evaluation,[117] and the Arizona Department of Education to develop guidelines for monitoring compliance and to create an annual report of federal monies

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[108] *Id.*
[109] One Nation (1997), http://www.onenation.org/lopez.html.
[110] Ruben Navarrette, *Effort Begins to Kill Bilingual Education in Arizona*, ARIZ. REPUBLIC (Jul. 15, 1998), http://www.onenation.org/0798/071598d.html.
[111] Tapia, *supra* note 107.
[112] English for the Children of Arizona, *"English for the Children" Submits 165,000 Signatures for Arizona Ballot Initiative*, ONE NATION (June 27, 2000), http://www.onenation.org/0006/pr062700.html.
[113] Ariz. Rev. Stat. Ann. § 15-752 (2000).
[114] *Id.*
[115] Arizona State Legislature (2011), http://www.azleg.state.az.us/legtext/45leg/2s/summary/h.hb2010_12-19-01_astransmittedtogovernor.doc.htm [hereinafter AZ Legislature].
[116] *Id.*; HB 2010 "Defines *ELL* and removes the definition of *LEP* from statute."
[117] AZ Legislature, *supra* note 115.

used for ELL instruction.[118] It also created a committee to evaluate and make recommendations on ELL programs, abiding by Prop 203's requirements.[119] Beyond the programming recommendations, HB 2010 also allocated state money for a cost study of ELL education, for SEI teacher training, for general ELL instruction, for language acquisition materials, for pilot program implementation, and for an incentive program that would reward teachers whose students were reclassified as English proficient. [120] Finally, it increased the ELL group weight within its education-funding scheme from .065 to .115.[121] Hogan pointed out that although this almost doubled funding per ELL pupil, it was so low to begin with that it still was not appropriate.[122]

The federal No Child Left Behind Act ("NCLB") became law at the beginning of 2002, imposing restrictions on state education designs, funding, and monitoring if the state accepted federal funding.[123] NCLB required that ELL students be tested for English proficiency and for subject-matter achievement every year, with specific rules about when their scores count for the school's overall accountability score.[124] To assess academic achievement, ELLs must take the annual grade-level math exam the first time that the school offers it. ELLs can skip the language testing for their first year in the school, and can take it in their native language for the first three years that they are at a school.[125] The data compiled from annual tests determines a composite score for each school, which determines whether the school will be more or less burdened with

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Hogan interview, *supra* note 55.
[123] 20 U.S.C.A. § 6301 et seq. (2002).
[124] The Center for Public Education, *What NCLB Says About ELL Students* (2009), http://www.centerforpubliceducation.org/Main-Menu/Instruction/What-research-says-about-English-language-learners-At-a-glance/What-NCLB-says-about-ELL-students.html; 20 USCA § 6311 (2002).
[125] The Center for Public Education, *What NCLB Says About ELL Students* (2009), http://www.centerforpubliceducation.org/Main-Menu/Instruction/What-research-says-about-English-language-learners-At-a-glance/What-NCLB-says-about-ELL-students.html.

government oversight and support.[126] NCLB definitely required more standardized testing and compilation of data regarding ELLs, but it did not require the adoption of any certain type of ELL instruction or for appropriate resources to be provided to schools to implement their chosen instruction model.[127]

The Ninth Circuit Affirms with the Governor on its Side

Back at the District Court, the case transferred from Judge Marquez, who had become a Senior Judge, to Judge Raner C. Collins, to rule on Arizona's continued failure to perform an adequate cost study and to fund ELL programs accordingly.[128] Although he had a reputation for being even-tempered,[129] his frustration with the political stalemate showed in his October 31, 2005 order sanctioning the state for civil contempt, enjoining the State from requiring ELL students to pass the AIMS test as a high school graduation requirement, and ordering fines of up to $2 million per day for each day that the State failed to set appropriate funding for ELL programs.[130] This ruling earned him the contempt of many conservatives, including Representative Russell Pearce (R-Mesa), who "described Collins as 'that judge who hasn't read the Constitution,' "[131] and publicly and defiantly declared that he would do what was "right" as the chair of one of Arizona's House Appropriations Committees, not what was ordered by a court.[132]

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[126] *Id.*
[127] *Id.*
[128] Flores v. Arizona, 516 F.3d 1140, 1180 (9th Cir. 2008) *rev'd sub nom. Horne v. Flores*, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009) (footnote 12).
[129] Amanda J. Crawford & Matthew Benson, *Tough Judge in English-learner Case Defies Stereotypes*, THE ARIZ. REPUBLIC (Apr. 2, 2006), http://www.azcentral.com/arizonarepublic/news/articles/0402english-learners0402.html
[130] Flores v. Arizona, 405 F. Supp. 2d 1112, 1120-21 (D. Ariz. 2005) *vacated and remanded sub nom.* Flores v. Rzeslawski, 204 F. App'x. 580 (9th Cir. 2006).
[131] Crawford & Benson, *supra* note 129.
[132] Chip Scutari, *English Deficit at $210 Million: Court Presses Arizona to Comply*, THE ARIZ. REPUBLIC (Feb. 19, 2004), http://hispanic7.com/english_deficit_at_$210_million.htm.

Arizona failed to reach a consensus on how best to comply with Judge Collins' motion, and fines began to accrue, totaling more than $20 million.[133] Democratic Governor Janet Napolitano, wanting to comply with the original consent order and not believing that any of three proposed bills would suffice, quickly vetoed the bills. This pleased the plaintiffs, but she ultimately allowed legislation to go to the judge without her signature, upsetting the plaintiffs.[134] On January 24, 2006 she vetoed Senate Bill 1198, which Republican legislators had rushed through the legislative process in two days.[135] SB 1198 would have inadequately funded ELL programs and left allocation of funds up to a grant process that would deny ELL students in some districts necessary funding.[136] In an evening session on the same day, the House passed an almost identical bill, HB 2220, which merely capped the tax credit.[137] The next day Napolitano vetoed HB 2220 and fines started to accrue, but Napolitano convinced Judge Collins to allow the fines to be allocated to a special account to support ELL students.[138] With the legislature unsure of how to proceed, Napolitano suggested that ELL funding be increased from $334 per student to $1,289 per student, but the legislature rejected this proposal.[139] The legislature and Napolitano struggled to devise a bi-partisan agreement for about a month as fines continued to accumulate, and finally both the Arizona House and Senate narrowly approved HB 2064. This bill would incrementally increase ELL per pupil funding consistent with Arizona's education funding scheme (but inconsistent with federal law due to its supplanting of state money by federal

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[133] Arizona Senate, Senate Republican Press Release, *Governor Napolitano Sabotages Arizona as She Lets ELL Bill Go to Judge Without Her Signature*, Mar. 3, 2006, http://www.azsenate.gov/3-3majoritypresser.htm [hereinafter Senate Republican Press Release].
[134] *Id.*
[135] Arizona Education Association, Mar. 18, 2006, http://www.arizonaea.org/politics.php?page=193.
[136] *Id.*; SB 1198 simply did not allocate sufficient money to comply with the order, and the money it allocated was divided among school districts based on a grant process that would unevenly distribute money for the education of ELL students. Napolitano further noted that it would be fiscally irresponsible to sign SB 1198 because its unlimited corporate tax credit could potentially bankrupt the State, which was in desperate need of that corporate money.
[137] *Id.*
[138] *Id.*
[139] Katherine Lu, *Court Ordered Fines Reach $20 Million in Arizona*, NATIONAL ACCESS NETWORK (Feb. 28, 2006), http://www.schoolfunding.info/news/litigation/2-28-06azellcoststudy.php3.

money), create a task force within the State Department of Education to research and exclusively adopt structured English immersion programs, and create an Office of English language acquisition services to monitor ELL students, teachers, and programs.[140]

Governor Napolitano allowed HB 2064 to become law without her signature on March 2, 2006, citing the need to take the matter to a federal judge. Despite allowing it to pass, she expressed her belief that it did not meet the court's orders or the State's consent decree with the plaintiffs based on its arbitrary funding level not bearing a "rational relationship to the actual cost of implementing a successful language acquisition program," its failure to ensure academic accountability by cutting ELL students off from funding after two years in the program without ensuring their academic success, its failure to determine program effectiveness by putting important educational policy decisions in the hands of unqualified political appointees, its creation of a new bureaucracy and excess paperwork, and its violation of federal supplanting laws by requiring the State to decrease its ELL funding of schools and districts by the amount of federal money they receive.[141]

It seems as if no one was satisfied by Napolitano's actions. Senate President Ken Bennett and House Speaker Jim Weiers issued a public statement expressing their disappointment with her "sabotage of Arizona" by repeated vetoes of legislature-approved bills and her public disapproval of the bill she did allow to become law.[142] Tim Hogan was also disappointed, not in her justification for signing the bill, but in her failure to veto the bill as he was urging her to do.[143] Interestingly, at this stage, the lawyer advocate would have relied on the legislative

[140] Flores v. Arizona, 516 F.3d 1140, 1152 (9th Cir. 2008) *rev'd sub nom. Horne v. Flores*, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009). Ariz. Rev. Stat. § 15-756 (2006).
[141] Janet Napolitano's statement on HB 2064, as quoted in *Flores v. Arizona*, 516 F.3d 1140, 1153 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[142] Senate Republican Press Release, *supra* note 133.
[143] Hogan interview, *supra* note 55.

process to bring about the change he wanted, while the Governor hoping for the same improvements in ELL education elected to return to the courts, which had been unable to elicit satisfactory compliance for more than a decade.

By March 2006 when Arizona's "Attorney General [Terry Goddard] moved on behalf of Arizona for the court to consider whether HB 2064 satisfied its order, he was arguing *against* Arizona's own law."[144] In order to sustain the original defendant's position that state action satisfied the court's order of EEOA compliance, the State Superintendent Tom Horne, with Speaker of the Arizona House of Representatives and the President of the Arizona Senate as intervenors, took over the case.[145] Despite their motion to purge contempt or for relief from judgment based on their assessment of HB 2064 as bringing Arizona into compliance, the District Court ruled that it did not.[146]

In response to an appeal by the State intervenors, on September 3, 2006 the Ninth Circuit temporarily vindicated Horne's, Pearce's, and other conservatives' view of school funding and local control of education programs. It vacated Judge Collins' 2005 contempt order and the obligation to pay fines, and remanded the case back to the District Court to hold an evidentiary hearing.[147] Given the many changes in education programs and funding since the original 2000 court order, including the recent adoption of HB 2064, the Ninth Circuit determined that the District Court needed to make additional findings of fact in order to determine whether the court order had been satisfied without the mandated cost study, or whether it required modification in

[144] Flores v. Arizona, 516 F.3d 1140, 1153 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009). (emphasis in original).
[145] Flores v. Arizona, 516 F.3d 1140, 1154 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009). Flores v. Arizona, No. CV-92-596 at 3 ("Flores IX").
[146] Flores v. Arizona, 516 F.3d 1140, 1153 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[147] Flores v. Rzeslawski, 204 F. App'x. 580, 582 (9th Cir. 2006).

order to ensure an appropriate remedy.[148] Accordingly, the District Court held an eight-day evidentiary hearing in January 2007, with both parties presenting live testimony.[149] The only issue tried was "whether funding and programmatic changes that . . . occurred since the January 2000 Order in this case warrant a modification of that judgment or otherwise bear on the appropriate remedy."[150]

Judge Collins conceded that Arizona and NUSD vastly improved the education of ELL students between 2000 and 2007, but highlighted deficiencies that ultimately kept NUSD and the State from satisfying the original Court Order.[151] Judge Collins' findings of facts focused on State and federal ELL funding and the results of ELL instruction and post-ELL instruction in Arizona schools.[152] Based on these findings, he concluded that the court order was not satisfied because "compliance would require a funding system that rationally relate[d] funding available to the actual costs of all elements of ELL instruction," which the defendants failed to show.[153] Judge Collins decided that HB 2064 did not comply with the order, because it impermissibly relied on federal funds to supplant state funds.[154] Without the receipt of the federal funding, the system would not provide rationally related funding.[155] Thus, it did not comply with the

[148] *Id.*; Flores v. Arizona, 516 F.3d 1140, 1154 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[149] Flores v. Arizona, 480 F. Supp. 2d 1157, 1159 (D. Ariz. 2007) *aff'd*, 516 F.3d 1140 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[150] *Id.* at 1159-60.
[151] *Id.* at 1160.
[152] *Id.* at 1161-64.
[153] *Id.* at 1165. An important procedural note is that Intervenor Defendants sought relief from the consent decree under Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A, and the court held: Rule 60(b)(5) relief is only available under limited circumstances where the moving party can establish (1) a significant change in the facts or the law warrants revision of the decree, (2) changes in the defendants' activities are so significant as to warrant an end of court supervision, (3) changed conditions make compliance with the consent decree more onerous, unworkable, or detrimental to the public interest, and (4) the moving party's proposed modification of the court's decree is suitably tailored to resolve the problems created by the changed factual or legal conditions. The Moving Parties failed to satisfy any of these prerequisites to Rule 60(b)(5) relief. (166-67).
[154] *Id.*
[155] *Id.*

EEOA.[156] It is unclear whether, if it had become law and were otherwise challenged, another judge would have interpreted the supplanting provision of the federal law in the same way that Judge Collins did. Judge Collins permitted the State until the end of the current legislative session to finally comply with the original order.[157]

Arizona instead appealed to the Ninth Circuit, arguing that HB 2064 demonstrated actual compliance with the Declaratory Judgment, but that "conditions [had] so changed as to make the Declaratory Judgment's emphasis on developing cost-linked ELL funding structure irrelevant and so render[ed] it inequitable to require the state to do so."[158] The Ninth Circuit first methodically traced the case's entire background, including the basis of the class' complaint on EEOA grounds, the 2000 Declaratory Judgment and Arizona school funding, post-judgment relief and Arizona's ELL Programs, the first contempt order in 2005 and HB 2064, the relief from the contempt order and remand for an evidentiary hearing on the status of ELL program funding, and finally the evidentiary hearing.[159] It then summarized the results of the evidentiary hearing focusing on Statewide changes and policy change, test results, and funding in NUSD and other school districts, before moving into its analysis.[160] In its description of Judge Collins' ruling on remand, the Ninth Circuit highlighted the holding that "improvements at NUSD do not establish that Arizona is fulfilling its duty to fund ELL programming rationally" and that "without a rational funding system for ELL incremental costs, Arizona remains out of compliance with the EEOA."[161]

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[156] *Id.*
[157] *Id.* at 1167.
[158] *Id.*
[159] Flores v. Arizona, 516 F.3d 1140, 1140-1154 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[160] *Id.* at 1154-61.
[161] *Id.* at 1161-62.

Despite Judge Collins' recognition that he was to "make findings of fact regarding whether 'changed circumstances' required modification of the original court order pursuant to Rule 60(b)(5),"[162] in his twentieth (of twenty) conclusion of law he breezily stated what Rule 60(b)(5) required and dismissed it by saying the "Moving Parties failed to satisfy any of these prerequisites."[163] The Ninth Circuit affirmed this ruling, but provided a much lengthier analysis of what relief from final judgment under 60(b)(5) required.[164]

Rule 60(b)(5) permits the court to "relieve a party . . . from a final judgment, order, or proceeding [if] the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[165] The Ninth Circuit focused on the third circumstance, because Arizona had not satisfied the prior judgment and "no pertinent earlier judgment had been reversed or vacated."[166]

As the Ninth Circuit understood it, the well-established rule was that "the party seeking relief from an injunction or consent decree [met its initial burden by showing] 'a significant change either in factual conditions or in law.' "[167] In applying this rule, the Ninth Circuit gave substantial deference to the district court, and situated its Rule 60(b)(5) review within the context of the implications of institutional injunctions against states due to federalism concerns.[168] Even though it expressed federalism concerns, it noted that they were lessened because that State had

[162] Flores v. Arizona, 480 F. Supp. 2d 1157, 1159 (D. Ariz. 2007) *aff'd*, 516 F.3d 1140 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[163] *Id.* at 1166-67.
[164] Flores v. Arizona, 516 F.3d 1140, 1162-80 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[165] Fed. R. Civ. P. 60(b)(5).
[166] Flores v. Arizona, 516 F.3d 1140, 1162 (9th Cir. 2008) *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (U.S. 2009).
[167] *Id.* at 1163-64.
[168] *Id.* at 1163.

dropped the case, and only the State superintendent Tom Horne and the House and Senate majority leaders maintained it.[169]

The Ninth Circuit dismissed the view that conditions had "so changed as to make the Declaratory Judgment's emphasis on developing a cost-linked ELL funding structure irrelevant and so render it inequitable to require the state to do so" by saying that this [was] not a typical reason for 60(b)(5) relief and that instances such as this are "likely rare."[170] In terms of changes of fact, the Ninth Circuit held that the district court did not err in finding that the State did not satisfy the requirements that they "demonstrate either that there [were] no longer incremental costs associated with ELL programs in Arizona or that Arizona's . . . educational funding model was so altered that focusing on ELL-specific incremental costs funding [had] become irrelevant and inequitable" for EEOA purposes.[171] In terms of changes in law that would justify relief despite non-compliance by the State, the Ninth Circuit held that compliance with NCLB did not necessarily satisfy the EEOA and that NCLB's monitoring protocols did not obviate the need for a statewide cost study of ELL program costs (although it may have allowed for a modification of the judgment).[172]

Finally, the Ninth Circuit confirmed that HB 2064 did not bring Arizona into compliance with the declaratory judgment.[173] Reiterating the district court's conclusions, the Ninth Circuit cited the two-year ELL funding cut-off; the insufficiency of ELL per pupil, per year spending; and its violation of federal law as adequate to conclude that Arizona did not yet deserve relief from judgment.[174]

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[169] *Id.* at 1164.
[170] *Id.* at 1167.
[171] *Id.* at 1169.
[172] *Id.* at 1172-76.
[173] *Id.* at 1179.
[174] *Id.* at 1176-79.

Horne appealed the Ninth Circuit decision.

Policy in Practice

On the ground, students continued to attend school and teachers continued to teach (and even comply with the law most of the time). When HB 2064 became law, the newly-created ELL Task Force had to "develop separate models for the first year in which a pupil is classified as an [ELL] that include[d] a minimum of four hours per day of English Language Development."[175] While until then Prop 203 mandated SEI for all ELLs in Arizona, school districts varied greatly in their implementation of ELL programs.[176] The most common ELL programs included SEI, bilingual education (with a parental waiver), and programs mixing ELL students in mainstream classrooms with English proficient students.[177] But in fall 2008, schools began to segregate ELLs into SEI classrooms for the HB 2064-mandated four-hour blocks, often neglecting other core content.[178] And once in an SEI four-hour block, ELLs ended up staying in these classes for years before being reclassified as proficient in English.[179]

Even with HB 2064's new four-hour block requirement, school districts still varied in "(1) the types of programs offered to ELL students [such as after-school and summer school programs], (2) grouping criteria, and (3) the everyday academic experiences of ELL students [such as type and amount of content-based instruction]."[180] A study based on surveys of school districts in Arizona found that perceived costs and benefits of the four-hour SEI block.[181] The costs include the segregation of ELLs, resulting in missed academic content and isolation from

[175] ARS 15-756.01 (HB 2064).
[176] KARISA PEER & KARLA PÉREZ, POLICY IN PRACTICE: THE IMPLEMENTATION OF STRUCTURED ENGLISH IMMERSION IN ARIZONA 4 (2010).
[177] *Id.* at 4-5.
[178] *Id.* at 3, 5.
[179] Mary Ann Zehr, *Scholars Target Policies for Arizona's ELL Students*, EDUCATION *WEEK* (July 8, 2010), http://www.edweek.org/ew/articles/2010/07/08/36arizona.h29.html [hereinafter Zehr-*Scholars Target ELLs*].
[180] CECILIA RIOS-AGUILAR ET AL., IMPLEMENTING STRUCTURED ENGLISH IMMERSION IN ARIZONA: BENEFITS, COSTS, CHALLENGES, AND OPPORTUNITIES 4 (University of Arizona 2010).
[181] *Id.* at 12.

English proficient peers causing social and emotional harm; the efficacy of the four-hour block, given that it takes more like three or four years, not one, to develop English proficiency; the limited financial resources, which do not cover more than two years in the four-hour block or the extra support ELLs need; the lack of peer role models; the duration of the four-hour block, which limited core content area instruction; and time for graduation and college readiness, since ELLs in high school miss important content area classes (and the units required for graduation).[182] The perceived benefits include additional training for teachers, although the effectiveness of the training is questioned; more attention to ELL students' language needs, in terms of monitoring and explicit instruction; and higher reclassification rates, but with somewhat high re-enrollment in the four-hour block after some time in mainstream classrooms.[183]

Another qualitative study that included observation of the four-hour block within eighteen classrooms, interviews with teachers and district staff, and collection of background information and archival artifacts found many negative consequences resulting from the four-hour SEI block.[184] It found that the four-hour block resulted in social stigmatization recognized by ELL students, English proficient students, and teachers; overt emphasis on teaching about language form and discrete skills, which deprives students of learning to use English for meaningful communication; a lack of appropriate materials available by age and ability levels; concerns about the English proficiency test, given that students that exit the four-hour block do not achieve at grade level; and evidence that students in the four-hour block fall behind their English-proficient peers and often lack opportunity to meet graduation requirements.[185]

[182] *Id.* at 14-16.
[183] *Id.* at 12-13.
[184] PEER & PÉREZ, *supra* note 176.
[185] *Id.* at 34.

With this four-hour SEI block model in place and an opinion from the Ninth Circuit, the Supreme Court granted certiorari.

Split Supreme Court Hands Down Blurry New Rule

When the Supreme Court took the case, Hogan said he realized that it would not enforce the declaratory judgment.[186] He could not predict, however, whether its opinion would definitely end the almost twenty year legal battle for ELL students' rights in Arizona or whether it would, as he hoped, just require that he change his arguments about what enforcement of the EEOA required. Justice Alito wrote the opinion of the court, in which his usual conservative fellow justices Scalia, Thomas, and Roberts joined, along with Justice Kennedy.[187] Justice Breyer wrote the dissenting opinion, emphasizing that the lower courts had already applied the rule the majority laid out.[188] "Friends of the court" wrote nine briefs in favor of Arizona's at-risk ELL students and seven briefs in favor of Tom Horne and the Arizona majority leaders.

By this point, significant improvements had taken place in NUSD since 1992: class sizes were smaller, teachers were higher quality, textbooks and the curriculum were more uniform, and the shortage of instructional materials had been ameliorated.[189] However, most ELL students were being educated for four hours of every six-hour school day in a SEI class, separated from native English speakers and not learning the grade level content material that their classmates were learning.[190]

Unsurprisingly, the majority's opinion echoed many of the ideas proposed in amici curiae in support of the petitioners, written mostly by groups whose missions are to advance federalism, individual liberty, and the U.S. Constitution. The minority's opinion echoed many of the ideas

[186] Hogan interview, *supra* note 55.
[187] Horne v. Flores, 129 S. Ct. 2579, 2588, 174 L. Ed. 2d 406 (2009).
[188] Horne v. Flores, 129 S. Ct. 2579, 2588, 174 L. Ed. 2d 406 (2009) (dissent).
[189] Horne v. Flores, 129 S. Ct. 2579, 2604, 174 L. Ed. 2d 406 (2009).
[190] Zehr-*Scholars Target ELLs*, *supra* note 179.

proposed in those amici curiae supporting the respondents. These briefs were written by civil rights organizations such as MALDEF, PRLDEF, NAACP, AALDEF and by others more directly involved with education policy and implementation such as various Arizona school districts, School Board Associations, and education policy scholars. The United States also filed a brief on Flores' behalf. Beyond supporting arguments made by Hogan for the respondents, some of these briefs also highlighted the importance of English acquisition to a student's success in society, the challenges school districts face to educate ELLs with insufficient funding, and the importance of bilingual education.

The Court based much of its reasoning for reversing the holdings of the Ninth Circuit and the District Court on its view of the declaratory judgment as an "institutional reform injunction and the accordingly important role that Rule 60(b)(5) thus plays."[191] While it did not explicitly define "institutional reform injunctions," it characterized them by referencing their impact and import:[192] they are long-lasting and thus warrant reexamination to take into account changed circumstances and new policy insights;[193] they frequently raise federalism concerns, especially when a federal court dictates core state or local budget responsibility;[194] and they involve unique dynamics, with public officials often acquiescing to more than federal law would require.[195] Additionally, they disrupt the democratic process by binding public officials to the policy preferences of their predecessors, rather than allowing them to act on their powers.[196] For these reasons, courts must take a flexible approach in their consideration of whether state obligations should be discharged or modified.[197] The Supreme Court faulted both the Ninth Circuit and the

[191] Horne v. Flores, 129 S. Ct. 2579, 2593, 174 L. Ed. 2d 406 (2009).
[192] *Id.* at 2593-95.
[193] *Id.* at 2593.
[194] *Id.*
[195] *Id.* at 2594.
[196] *Id.*
[197] *Id.* at 2595-95.

District Court for their failure to apply this appropriate legal standard and instead applying a much narrower one.[198] The majority then went on to criticize the dissent's defense of the lower courts' narrow focus on funding by counter-arguing its four principle conclusions.[199] It first discredited the dissent's conclusion that the District Court had looked at changes in ELL education beyond funding.[200] Next it dismissed as irrelevant the dissent's conclusion that funding was the basis of the District Court's finding of an EEOA violation and the accompanying declaratory judgment.[201] Then it argued against the dissent's alleged conclusion that the incremental ELL funding issue "lies at the heart of the statutory demand for equal educational opportunity."[202] Finally, it contradicted the dissent's conclusion that since the District Court did not require the legislature to appropriate a certain amount, it did not dictate state and local budget priorities or order certain funding, by equating holding the State in contempt and imposing heavy fines as restrictions on the legislature.[203]

Given the misperceptions, shared by the lower courts and the dissent, of the EEOA's "appropriate actions to overcome language barriers" requirement and the appropriate Rule 60(b)(5) standard, the Supreme Court remanded the case, requiring examination of four factual and legal changes that could impact the 60(b)(5) analysis.[204] It required that the District Court analyze state-mandated ELL program changes that resulted due to Proposition 203 and HB 2064 to determine if, in the aggregate, they amounted to changed circumstances warranting relief.[205] These changes include the shift to mandatory SEI and the creation of new agencies to help implement this model and train teachers. The majority also obligated the District Court to

[198] *Id.* at 2595-98.
[199] *Id.* at 2598.
[200] *Id.*
[201] *Id.* at 2599.
[202] *Id.* (quoting dissent at 2614).
[203] *Id.* at 2600.
[204] *Id.*
[205] *Id.* at 2600-01.

consider changes due to NCLB and its emphasis on accountability, rather than increased funding, for improving student achievement.[206] It also dictated that the District Court consider the structural and management reforms in NUSD between 2000 and 2005.[207] This emphasis hinted at the majority's impression that the quality of educational programming and services is not a result of increased funding. But even if the District Court were to continue its focus on funding to bring the state into compliance with the EEOA, the majority pointed out that Arizona increased its education funding since the declaratory judgment.[208] The majority criticized the District Court's assessment of this increased funding as insufficient and from an inappropriate source, saying that the EEOA does not require the funding to come from a particular source and does not give the federal courts authority to indict a state for diverting funding from other educational programming to its ELL programming.[209]

Having highlighted these changed circumstances that the District Court either needed to weigh differently or analyze under a different legal standard, the majority said that it was possible that NUSD was no longer violating the EEOA, in which case continued enforcement of the original order would be inequitable under Rule 60(b)(5) and relief would be warranted.[210] Finally, the majority required the District Court to vacate the injunction "insofar as it extend[ed] beyond Nogales."[211] The class consisted only of Nogales parents and students, but the injunction extended to the entire state because the former attorney general of Arizona suggested in a brief that a "Nogales only" remedy would violate Arizona's Constitution, which requires a "general

[206] *Id.* at 2602-03.
[207] *Id.* at 2604-05.
[208] *Id.* at 2605.
[209] *Id.* 2605-06.
[210] *Id.* at 2606.
[211] *Id.* at 2607.

and uniform public school system."[212] The majority reversed and remanded on these grounds, emphasizing one last time the importance of the EEOA within a local framework.[213]

Dissent

In a long response, the dissent criticized the majority on many grounds, ending with a condemnation of the opinion for limiting lower courts' abilities to regulate compliance with a federal statute that is supremely important to the unity and success of the nation.[214] Like the majority and the Ninth Circuit, it began by reviewing the extensive record of the case.[215] However, the conclusions it drew diverged from the conclusions the majority drew from the same record. Unlike the majority, it concluded that the District Court had considered all relevant changed circumstances such that its Rule 60(b)(5) analysis was not legal error.[216] It also rationalized the District Court's partial focus on funding because of the centrality of resources to the case and to Arizona's EEOA compliance.[217] It also noted that the need for extra money to provide the extra help that ELLs need is undisputed and central to *Castaneda*'s EEOA analysis.[218] To the chagrin of the majority, it next conflated the "resource issue" with the EEOA violation issue.[219] It said that failing to provide appropriate resources is one way to fail to take the required "appropriate action" to educate ELLs that the EEOA requires.[220] Finally, the dissent maintained that, despite the concern of the majority and various amici that a federal court was dictating state law and state budget priorities, the District Court had merely ordered Arizona to provide a funding system that was not "arbitrary and capricious," but that instead bore a rational

[212] *Id.* (quoting Ariz. Const., Art. 11, § 1(A) (some internal quotation marks omitted)).
[213] *Id.*
[214] *Id.* at 2607-31 (dissent).
[215] *Id.*
[216] *Id.* at 2613.
[217] *Id.* at 2613-14.
[218] *Id.* at 2614.
[219] *Id.*
[220] *Id.*

relationship to the cost of educating ELLs within its adopted model of instruction as required by the EEOA.[221]

Turning next to the majority's Rule 60(b)(5) and institutional reform litigation analysis, the dissent provided many reasons for its resolution that the majority got it wrong. Starting with Rule 60(b)(5) as it applies generally, not specifically to institutional reform litigation, the dissent said that the District Court did follow its standards, looking at the appropriate factors and subjecting the judgment to a flexible standard permitting modification.[222] It also highlighted a more serious problem, namely that the majority failed to apply, or applied incorrectly, basic Rule 60(b)(5) principles: that "a judge need not consider issues or factors that the parties themselves do not raise";[223] that the party seeking relief " 'bear the burden of establishing that a significant change in circumstances warrants' that relief";[224] that there is a distinction in the request to modify an order and to set it aside;[225] that the party seeking to have a decree set aside "must show both (1) that the decree's objects have been 'attained,' and (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will again occur";[226] "that a party cannot dispute the legal conclusions of the judgment from which relief is sought";[227] and that appellate courts only review district court denials of Rule 60(b)(5) motions for abuse of discretion.[228]

The dissent assumed that the majority either intentionally ignored these standards or intentionally applied them differently in cases of institutional reform litigation.[229] If it intended

[221] *Id.* at 2615.
[222] *Id.*
[223] *Id.* at 2618.
[224] *Id.* at 2615.
[225] *Id.* at 2618.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 2619.
[229] *Id.* at 2619-20.

to ignore them, it should have been explicit that going forward theses standards should be modified to reflect the way they are applied in this case.[230] This risks perpetual challenges to court orders and unending litigation.[231] In the event that the majority did not intend these modifications for *general* Rule 60(b)(5) analysis but only specifically for institutional reform litigation, the dissent rejected the modifications, not viewing this case as such because it did not involve a failure to meet basic constitutional standards.[232]

After clarifying that the District Court did consider changed circumstances and examine whether Arizona had produced a rational funding program, the dissent positioned the majority's opinion squarely on what it did not have the authority to do: substitute its own judgment for that of the lower court and require a so-called "proper examination" of what the District Court had already applied the appropriate standards to.[233] It defended the District Court against the majority's conclusion that each of four factual and legal changes had to be examined in a different way than they originally were.[234] As to the changes in instructional methodology, the dissent pointed to the eight-day evidentiary hearing the District Court held, more than two days of which were devoted not to funding, but to the contention that SEI constituted an advancement in ELL assistance.[235] In considering improvements other than funding, the District Court did acknowledge advancements and that the State was close to meeting the injunction's requirement that it develop an appropriate funding mechanism (but that the changed circumstances did not yet warrant relief).[236] As to the changes originating from NCLB, the dissent argued that the District Court did take account of the changes that the parties advanced, and did not need to take account

[230] *Id.* at 2620.
[231] *Id.*
[232] *Id.* at 2621.
[233] *Id.*
[234] *Id.* at 2621-28.
[235] *Id.* at 2622.
[236] *Id.* at 2622-23.

of changes advanced for the first time by the majority.[237] As for examining the "structural and management reforms in Nogales," the dissent criticized the majority's judgment that the District Court discounted this evidence, because it was within the District Court's authority to deem the changes "insufficient to warrant dissolution of its decree" given the mixed evidence.[238] Finally, as to the changes in increased funding available in NUSD that the majority said the District Court must properly examine, the dissent justified each of the District Court's conclusions about the actual availability of the money as reasonable and the aggregate result as not sufficient to satisfy the changed circumstance requirement of Rule 60(b)(5).[239]

The dissent continued with various other criticisms of the majority's opinion, such as overemphasis on dicta that did not relate to the actual holding, before dismissing its discussion of limiting the injunction to NUSD, rather than applying it to the whole state, as without basis. Its final criticism of the majority's opinion is that in cases with records as lengthy as the one in the current case, certain dangers adhere that are best avoided by much deference to district courts.[240] The first danger of the Supreme Court's opinion is that it becomes a rehashing of the facts of the case and disagreement over whether the fact-based determinations were correct—a role better played by an appellate court.[241] It also risks complicating future district court decisions, since the framework dictated is incomplete and muddled by the lengthy record, so changing a legal standard is better applied to less complicated cases.[242] Finally, what is meant to be an expression of an attitude might be interpreted as a rule of law with unclear boundaries.[243]

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[237] *Id.* at 2623-34.
[238] *Id.* at 2624-25.
[239] *Id.* at 2626-28.
[240] *Id.* at 2630.
[241] *Id.*
[242] *Id.* at 2631.
[243] *Id.*

Ultimately, the dissent worried that through this opinion it would become more difficult for federal courts to enforce federal standards. It saw the value in the EEOA and other such laws, and wanted those laws to be available as a legislative means of producing positive change in this nation, which may only be possible if federal courts have the authority to enforce them.[244]

What Could Have Been Done

The majority did not consider the *Castaneda* test, which requires the State to provide "practices, resources, and personnel necessary" to implement its chosen ELL program. By doing so, it could have said that the focus should have shifted away from funding and back to a re-analysis under *Castaneda*, rather than 60(b)(5). Because the original declaratory judgment required a cost study and funding that rationally related to the cost of educating ELL students under that model, a change in the model would require different funding to implement. The dissent justified the District Court's and Ninth Circuit's main focus on funding because that was where Nogales originally failed the *Castaneda* EEOA test. It implicitly characterized the *Castaneda* test as requiring appropriate resources for ELL education generally, rather than appropriate resources to specifically implement the adopted program. No court ever held that the new SEI program was not funded in a way rationally related to the needs of ELL students. Arizona suggested that the cost study should not be done until the program was implemented, implying that the costs of one program are likely different than the costs of another, but the District Court, perhaps due to frustration, said the cost study still needed to be done immediately because the costs would be similar enough for the cost study to reflect how much ELL programs cost. However, this disregarded that under *Castaneda*, the resources required by step two depend directly on what is necessary to effectively implement the adopted program approved in step one.

[244] *Id.* at 2607-31.

The dissent came closest to this analysis when it faulted the majority for characterizing the District Court's order as one requiring increased incremental funding that would dictate state budget priorities until the State provided a particular level of funding. Instead, the dissent pointed out that the actual injunction required Arizona to "produce a plan that set forth a 'reasonable' or 'rational' relationship between the needs of [ELLs] and the resources provided to them,"[245] without dictating what the program should be. However the dissent failed to recognize that after the injunction was ordered, an injunction not necessarily requiring higher ELL spending, the plaintiffs and the District Court continually rejected as inadequate the State's efforts because although they changed the model, they did not provide appropriate resources for the model based on an appropriate cost study.

Awaiting a Decision

In January 2001, the remanded case came before the District Court for what should be the last time. The Arizona Center for Law in the Public Interest website declared:

> Mr. Hogan showed that when [ELLs] are segregated for two-thirds of every school day for more than one year, they are being denied equal access to education. The state has not shown that it can teach English to students within a year, yet it continues to ghettoize students in English language classes for four hours every day. These students are missing out on all other aspects of the curriculum, including basics such as math, science and social studies.[246]

Hopefully the judge will make a decision that enables school districts in Arizona to educate ELLs to their full potential. The plaintiffs continue to await a decision, although a different generation of students will be affected.

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[245] *Id.* at 2615-16.
[246] Arizona Center for Law in the Public Interest (2004), http://www.aclpi.org/.