Nos. 08-289 and 08-294 (Consolidated)

IN THE

Supreme Court of the United States

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

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.,*

Petitioners,

v.

MIRIAM FLORES, *ET AL.,*

Respondents.

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

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BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NCLB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented by these two consolidated cases are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction (No. 08-294)?

2. Whether compliance with NCLB's extensive requirements for English language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language

barriers impeding students' access to equal educational opportunities (No. 08-294)?

3. By mandating that the State of Arizona provide for a minimum amount of earmarked funding specifically allocated for English Language Learner programs statewide to comply with the "appropriate action" requirement of EEOA §1703(f), did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state legislatures to determine how to appropriately manage and fund their public education systems (No. 08-289)?

4. Should the phrase "appropriate action" as used in EEOA §1703(f) be interpreted consistently with NCLB, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not (No. 08-289)?

Questions 2 and 4 cover the same interplay between EEOA and NCLB, and Eagle Forum ELDF answers them together in Section IV. Questions 1 and 3 cover related issues of federalism in litigation of this type, and Eagle Forum ELDF answers them in Sections II and III, respectively. At the outset, Eagle Forum ELDF addresses the damage that bilingual education inflicts on its intended beneficiaries and the nation as a whole.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum ELDF")[1] is a

[1] Eagle Forum ELDF files this *amicus* brief with the written consent of all parties; the written letters of consent from all petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, counsel for

(Footnote cont'd on next page)

nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years it has defended American sovereignty and promoted adherence to the U.S. Constitution. Eagle Forum ELDF has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States, and encouraged State and local autonomy in the area of education. Eagle Forum ELDF has also long defended federalism, including the ability of state and local governments to protect their communities and maintain order. Eagle Forum ELDF's frequent participation as *amicus curiae* in appellate litigation involving immigration and English language issues, including *Alexander v. Sandoval,* 532 U.S. 275 (2001), in this Court, bears witness to its underlying interest in this Nation's immigration and education policies. For all of the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

FACTUAL BACKGROUND

Eagle Forum ELDF adopts the facts as stated by the petitioners. See Legislative Petitioners' Br. at 16-30; Superintendent's Br. at 2-30. In summary, after the district court found EEOA violations, the people

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amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

of Arizona enacted Proposition 203 to require public instruction in English, with "English Language Learner" or "ELL" students educated in separate, structured immersion classes until they achieve English proficiency. In addition, Arizona and its local schools took efforts to comply with NCLB, enacted in 2002. At the Nogales schools that provided the basis for this litigation, in conjunction with adopting English immersion for ELLs and complying with NCLB, school officials improved the teaching staff, replaced ineffective teacher aides with higher-quality teachers, reduced class sizes, improved facilities, improved textbook supplies, and ended social promotion. In response to these efforts, the Nogales schools' scores improved to the point where no ongoing EEOA violation exists.

STATUTORY BACKGROUND

Congress enacted the Equal Educational Opportunities Act of 1974 as part of the Education Amendments of 1974. PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984). Although motivated in large part by the Nixon Administration and Congress' desire to limit federal desegregation decrees that imposed busing as a remedy, 118 CONG. REC. 8931 (1972) (President Nixon's transmittal message to Congress), EEOA also addressed the denial of equal educational opportunity on account of race or national origin through "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." PUB. L. NO. 93-380, §204(f), 88 Stat. at 515 (codified at 20 U.S.C. §1703(f)). EEOA provides a

private right of action, 20 U.S.C. §1706, but limits the remedies available to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added).

Enacted alongside EEOA in the Education Amendments of 1974 was the Bilingual Education Act, PUB. L. NO. 93-380, §105(a)(1), 88 Stat. 503-12, which reauthorized prior bilingual-education legislation. As explained in Section IV.C, *infra,* subsequent reauthorizations first opened the door to English immersion in 1984 with limited funding and then expanded that funding in 1988 in response to demands from the Nation's schools. PUB. L. NO. 98-511, §201, 98 Stat. 2366, 2369-87 (1984); PUB. L. NO. 100-297, §1001, 102 Stat. 130, 274-93 (1988).

Congress enacted NCLB in 2002, as part of an effort to enforce performance goals on schools. PUB. L. NO. 107-110, 115 Stat. 1425 (2002). With respect to bilingual education, NCLB's Title III, Part A – the English Language Acquisition, Language Enhancement, and Academic Achievement Act ("ELALEAAA") – re-codified the Bilingual Education Act, as amended and renamed. PUB. L. NO. 107-110, §301, 115 Stat. at 1689-1734. With respect to English education, ELALEAAA's purposes include "to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. §6812(2). Finally, ELALEAAA's savings clauses provide *inter alia* that nothing in that

legislation either "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," or "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847.

SUMMARY OF ARGUMENT

Before addressing the questions presented by these consolidated cases, Eagle Forum ELDF respectfully submits that the urge to bestow bilingual services on language minorities disserves both the Nation and the minorities themselves (Section I). Against that background, this Court easily should find that – having satisfied EEOA with its English immersion program – Arizona is entitled to relief from the district court's injunction under Rule 60(b)(5), notwithstanding that Arizona did not implement the remedy that the district judge and Ninth Circuit might prefer (Section II). By exercising their political preferences over the law, the lower courts usurped State and local authority over education, well beyond both the expertise and the authority of the federal courts (Section III). Finally, while the petitioners are correct that NCLB compliance is *per se* EEOA compliance on English language instruction (Section IV.B), this Court should also consider that – in the absence of NCLB and other cabining federal legislation – EEOA's "appropriate action" requirement would be nonjusticiable and Arizona's compliance plans unreviewable (Section IV.A). Moreover, in addition to NCLB, prior federal statutory acceptance of English

immersion would support the appropriateness of Arizona's academic success, even if Congress had not enacted NCLB (Section IV.C).

ARGUMENT

I. BILINGUAL EDUCATION DIVIDES THE NATION AND INJURES STUDENTS

As Theodore Roosevelt famously observed:

> We must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington's Farewell address, of Lincoln's Gettysburg speech and second inaugural. We cannot tolerate any attempt to oppose or supplant the language and culture that has come down to us from the builders of this Republic.

THEODORE ROOSEVELT, "*The Children of the Crucible,*" 14 ANNALS OF AMERICA 1916-1928, 129, at 130 (1968).

When language divides, culture itself divides, and a division of political systems cannot be far behind. In many states, a mere referendum to amend the state constitution and split the government would suffice, once there is a sufficient division in language. Canada has suffered from and barely survived such division. A unified Nation the size of the United States depends on a common tongue. As Abraham Lincoln put it in his timeless speech to the Republican Illinois State Convention in 1858, "'[a] house divided against itself cannot stand.'" ROY A. BASLER, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461 (1953) (quoting *Matthew* 12:25). Although Lincoln was speaking about slavery, this eternal

principle holds true for language. The promotion of language balkanization leads to political separatism.

Federal courts do not allow language balkanization in their proceedings, not even in Spanish-speaking Puerto Rico: "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C. §864. What works for federal court proceedings also makes the most sense for other governmental functions, including public schools, particularly where (as here) it enjoys local support. It is a colossal and costly mistake for a federal court to insist on language balkanization in the public schools against the will of the people.

Winston Churchill observed, "This gift of a common tongue is a priceless inheritance." Winston Churchill, Speech at Harvard University (Sept. 5, 1943). It is a gift for immigrants to the United States as much as to native-born Americans. English will remain the common language of the United States and American public schools are only harming students by perpetuating any inabilities to understand English. Just as all federal court proceedings in Spanish-speaking Puerto Rico are conducted in English, Arizona public schools have the right to take advantage of this "gift of a common tongue" and teach in English.

A. BILINGUAL EDUCATION BALKANIZES OUR NATION

Out of many, one: ***e pluribus unum***. For over two hundred years, America has been a country of one, including one common language. Many constitutional rights are built on the premise that

the public understands one common language. The right to a public trial requires that the public understand the language spoken at the trial. The right to petition the government assumes that the government and the public speak a common language. The right to see a warrant prior to allowing a search and seizure assumes that the recipient can understand the language of the agent presenting the warrant. The right to reasoned judicial decisions assumes that the decision is written in a language that the litigants understand.

The Constitution, including the Bill of Rights, was adopted on the assumption that there would be one language that is common to both the government and to the people. The Constitution implicitly disfavors language bifurcation that could frustrate constitutional rights to a public trial, petitioning of the government, warrants for searches and seizures, reasoned judicial opinions, and many other rights.

While English requirements have a disparate adverse impact on those who refuse to learn English, they have an enormously positive impact on those who meet the requirements and thus gain access to mainstream of American academic and economic life. *Lau v. Nichols*, 414 U.S. 563, 565 (1974) ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice.").

Bilingual education, which often includes virtually no English, directly impedes the common language on which our great Nation has been built. Language division leads to political division and destructive internal conflicts. It is challenging enough to keep 300 million people "on the same

page" when they speak the same language; when they cannot even understand each other, that task becomes nearly impossible. The number of people living in the United States who cannot understand English is staggering. "Consider this: 40 million Americans will be non-English language proficient by the year 2000." 142 CONG. REC. H9741 (daily ed. Aug. 1, 1996) (statement by Rep. Goodlatte).

If 40 million non-English speakers broke off into regions of common language, then inevitably they would mandate use of their own language for legal proceedings and public business. The Puerto Rico Supreme Court, for example, denied an attempt by a litigant to use English in a local court proceeding, even though English was an official language along with Spanish. *People v. Superior Court*, 92 P.R.R. 580, 589-90 (1965) ("the means of expression of our people is Spanish, and ***that is a reality that cannot be changed by any law***") (emphasis added). There would be little reason for an enclave of foreign-speaking people not to have their own schools and governmental functions in their own language. Were this to become widespread, the United States would cease to be as "united" as it has been.

The cost of the disunity wrought by language balkanization is enormous, as demonstrated by the French-English divisions in Canada. It was only by a razor-slim 1.2% margin in 1995 that French-speaking Quebec residents failed in their referendum to secede from Canada, by a vote of 50.6% to 49.4%, and the outcome was contested for another decade until the ballots were shredded without ever being recounted. *Court ruling dashed hopes for an*

impartial recount; 1995 referendum ballots are history, THE GAZETTE (MONTREAL) A1 (July 16, 2008) ("The vote came under suspicion when several ridings in heavily federalist areas reported an abnormal number of ballots rejected for improper markings. Quebec Superior Court ruled in April [2008] that the documents could be destroyed."). A threat of re-emergence of language-based secession remains to this day. University of Ottawa history professor Michael Behiels was quoted on Dec. 4, 2008, that "[t]he secessionist movement has been … just biding their time to watch to see if (Prime Minister Stephen) Harper would make a mistake. This is a very dangerous moment we're living through here." *Notes from Parliament Hill,* THE TORONTO STAR A23 (Dec. 4, 2008).

Portions of Quebec even voted to secede from Quebec had it seceded from Canada. "Several municipalities have held referendums asking their constituents whether, in case of Quebec's secession, they would want to stay within an independent Quebec or would prefer to remain within Canada through a partitionist process. They have usually obtained huge majorities in favor of the latter." Francois Crepeau, *The Law of Quebec's Secession,* 27 AMERICAN REVIEW OF CANADIAN STUDIES 27-50 (Sept. 1997). After all, "if a part of Canada (namely Quebec) can secede, then a part of Quebec can too." *Id.* Voters predictably want a government that speaks in their language, and bilingual education encourages the development of multiple governments:

> The [prior] conception [was] Canada is one country and only the Canadian people taken

> as a whole have a right to self-determination, to the exclusion of any of its alleged components: *au contraire,* if parts of the Canadian people may lay claim to self-determination, then other parts can too, including parts of the parts. (*Id.*)

Our own Nation, of course, also had a violent experience with secession nearly 150 years ago. But then there were powerful economic forces that bound the nation together, forces that are not as strong in the global economy of the 21st century. In Abraham Lincoln's annual address of 1862, he declared that the United States could not be broken up because it formed an indivisible economic unit, and that only its economic unity provided prosperity. GABOR S. BORITT, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM 234 (1994). Lincoln observed that, even if the United States did disintegrate over slavery, economic incentives "would, ere long, force reunion, however much of blood and treasure the separation might have cost." BASLER, 3 COLLECTED WORKS OF ABRAHAM LINCOLN 17-18, 88, 120-21 (1953-55). Earlier, Lincoln had stated the economic case against secession as follows:

> On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the path of laudable pursuit for all – to afford all, in unfettered start, and a fair chance, in the race for life.

BASLER, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 438 (1953-55). Those economic forces that bound the Nation together in the 1860s, when there were substantial tariffs and no "off-shoring," are not as strong today.

No one today, except perhaps a veteran of the break-up of the Soviet Union, seriously predicts a break-up of the United States any time soon. Andrew Osborn, *As if Things Weren't Bad Enough, Russian Professor Predicts End of U.S.,* WALL STREET JOURNAL, A1 (Dec. 29, 2008) (Prof. Igor Panarin, dean of the Russian Foreign Ministry's academy for future diplomats, predicts U.S. dissolution into five or six pieces based in part on mass immigration and economic decline). But even those who consider U.S. disintegration unlikely nonetheless must regret the partial dissolution of the national fabric through increasing balkanization in multilingual government advertising and political campaigns. *Springs Senator Bashes Plan for Spanish Ads,* THE DENVER POST, B-02 (Jan. 27, 2009) ("All these ads are going to do is provide one more assimilation off-ramp for new arrivals"). Although the impulse to allow bilingual government may flow from a sense of openness, allowing balkanization inevitably closes communities off from each other, denying the current immigrants the shared experiences that past immigrants attained.

Rather than follow the path to balkanization, disintegration and dissolution with bilingualism, schools would be better advised to follow the example of the federal government itself, which conditions naturalization on English proficiency: "No person …

shall hereafter be naturalized as a citizen of the United States upon his own application who cannot demonstrate … an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. §1423(a)(1).[2] What is outrageous about this case is that Arizona has tried to follow the federal government's example, and a district court forbade it.

B. BILINGUAL EDUCATION DISENFRANCHISES THE STUDENTS SUBJECTED TO IT

The U.S. Constitution is written and implemented in English, and there is no official version in any other language. Our Rule of Law is based on more than 200 years of development of an enormous body of law in one language: English. Common law in the United States is built on 500 years of jurisprudence in one language: English. The Declaration of Independence, the Federalist Papers, Presidential speeches and Congressional debates, the U.S. Code, federal and Arizona judicial decisions, are all in English. It is impossible to translate this for bilingual education without altering its meanings. As the Spanish philosopher put it, "An idea does not pass from one language to another without change." MIGUEL DE UNAMUNO, THE TRAGIC SENSE OF LIFE,

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[2] Congress exempted certain persons over fifty years of age and with certain physical, developmental, or mental disabilities from the English-language requirement. 8 U.S.C. §1423(b).

AUTHOR'S PREFACE, xxxiii (J.E. Crawford Flitch transl. 1921).

The Constitution's vision is inseparable from its language. James Wilson, the only member of the Pennsylvania Ratifying Convention who had a seat at the Federal Convention, argued that English was linked to America' future greatness in his summation to the Pennsylvania Ratifying Convention:

> As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government, as yet we possess none – our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation in these respects should possess originality, there are not on any part of the globe finer qualities, for forming a national character, than those possessed by the children of America... [In addition to a respectable national character,] I think there is strong reason to believe, that America may take the lead in literary improvements and national importance. This is a subject, which I confess, I have spent much pleasing time in considering. ***That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.*** The

> French, indeed, have made laudable attempts toward establishing an [sic] universal language, but, beyond the boundaries of France, even the French language is not spoken by one in a thousand. Besides, the freedom of our country, the great improvements she has made and will make in the science of government, will induce the patriots and literati of every nation to read and understand our writings on that subject, and hence it is not improbable that she will take the lead in political knowledge.

James Wilson, Summation Address to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *reprinted in* THE DEBATE ON THE CONSTITUTION – FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 865-66 (Gryphon Eds. 1993) (emphasis added). Now is not the time to reverse course.

Bilingual education of students in Arizona hurts their education. English is becoming "the lingua franca of the [21st] century" for the world, as admitted by Germany's leading newspaper: "After trying for decades to persuade more Britons to learn their language, the Germans have given up the struggle. Instead, they are promoting English as the language of the 21st century, with lessons for children as young as six." Toby Helm, *English is Language of Today, Germans Admit,* LONDON TELEGRAPH (Apr. 6, 2000) (quoting the *Frankfurther Allgemeine Zeitung*, interior quotations omitted). Switzerland has German, French, and Italian for its

official languages, but it also embraced English to be taught as the second language of choice, rather than its official languages. Fiona Fleck, *Swiss Want English as Second Language,* LONDON TELEGRAPH (Oct. 29, 2000).

English has some inherent advantages for technology, which ensure its future dominance as the most popular language. English has the smallest alphabet of major languages, including its lack of accented, hybrid, and pictograph characters. This facilitates efficient typing, the method for communicating over the internet, and allows use of the most basic character sets. English also features easy interchangeability of nouns, verbs, and adjectives, without much variance in form for pronouns and verbs. That promotes easy communication through brief, cryptic messages, the style preferred by electronic media. Students are hampered by not learning English.

English also features a powerful pipe-like quality, such that one phrase can be cut and pasted to another phrase with ease. Foreign phrases or terms can be inserted at will into English sentences, and the English language has grown enormously from its flexibility in incorporating words and phrases from other languages. Computer-based cutting and pasting text works more efficiently in English than in many other languages, such as those using pictorial characters. This is largely happenstance, but nevertheless gives English an advantage in the internet medium. Accordingly, English has exploded in worldwide popularity since the advent of the internet, and about 80% of the

internet uses English. English is now the second most widely spoken language in the world, with only Chinese dialects spoken by more people. English is overwhelmingly the second language of choice for non-English-speaking people. See Barbara Wallraff, *What Global Language?* 286 ATLANTIC MONTHLY No. 5, at 52 (Nov. 2000) (noting, *inter alia*, that "English is the working language of the Asian trade group ASEAN" and is also "the official language of the European Central Bank").

The entire world has been moving towards mandatory English. The New York City Bar Association recommended mandatory English for air travel, for example, citing this example:

> In 1993, Chinese pilots flying a U.S.-made MD-80 were attempting to land in northwest China. The pilots were baffled by an audio alarm from the plane's ground proximity warning system. A cockpit recorder picked up the pilot's last words: "What does 'pull up' mean?" What is needed, both in the U.S. and worldwide, is a mandatory spoken English test for pilots and controllers.

Aeronautics Committee of New York City's Bar Association Seeks to Raise the Bar on Safety, 12 AIR SAFETY WEEK, at 33 (Aug. 17, 1998). Although the lack of shared language has caused other airliner crashes,[3] the larger point is that this balkanization

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[3] The well-publicized crash of ValuJet Flight 592 in the Florida Everglades in 1996, killing all 110 on

(Footnote cont'd on next page)

inflicts similar disconnects countless times every day, across the range of human interactions, with incalculable – but avoidable – negative impacts.

C. COURTS LACK AUTHORITY TO REQUIRE EDUCATION IN LANGUAGES OTHER THAN ENGLISH

A federal court can no more require States to depart from English in official documents than it could draft an official Constitution or Declaration of

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board, was caused by mistakenly loading oxygen canisters as cargo. The investigation revealed that the canisters labeled as "repairable" had been misunderstood as "empty," and at one point the National Transportation Safety Board suggested that the use of non-English speaking mechanics may have been a problem. William Langewiesche, *The Lessons of ValuJet 592,* 281 ATLANTIC MONTHLY No. 3, 81 (Mar. 1998). With respect to the worst air disaster of all-time – the crash of a KLM 747-200 into a Pan Am 747-100 in Tenerife, Canary Islands in 1977 – the official report found that "inadequate language" was a cause. The KLM pilot used the phrase "we are now at take-off" when he meant to state that he was now taking off, and thereby proceeded to crash into another airplane on the runway and kill 583 persons on both planes. Report of the Secretary of Civil Aviation, Spain (Oct. 1978), *reprinted in* AIRCRAFT ACCIDENT DIGEST (ICAO Circular 153-AN/56, 22-68).

Independence translated into a different language. Our Nation was formed based on a one-language legal system, and States have full authority to adhere completely to that language in their official documents and in their public schools.

In contrast with other countries, the United States is governed by a written Rule of Law – defined and applied in English. Constitutional terms such as "due process of law," "high crimes and misdemeanors," and "common law" lack precise equivalents in other languages. Other constitutional law terms such as "freedom of speech," "cruel and unusual punishment," and "involuntary servitude" likewise lack identical counterparts in other languages. *See* Gregory Rabassa, No Two Snowflakes are Alike: Translation as Metaphor, at 1, *reprinted in* JOHN BIGUENET AND RAINER SCHULTE, THE CRAFT OF TRANSLATION 1 (1989) ("We should certainly not expect that a word in one language will find its equal in another"). Translation of the Constitution, or the enormous body of Supreme Court decisions construing it, into another language would create endless uncertainties and opportunities for alteration inherent in the translation process. *See, e.g.*, GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 428 (3d ed. 1998) (noting the impossibility of perfect translation). Even a familiar phrase like "the American dream" encounters thorny problems of translation to other languages used in the Americas, where "America" does not mean the "United States."

As observed by Professor Edward Sapir of the University of Chicago and later of Yale University,

"No two languages are ever sufficiently similar to be considered as representing the same social reality." *Id.* at 91 (quoting D. MANDELBAUM (ed.), SELECTED WRITINGS IN LANGUAGE, CULTURE AND PERSONALITY BY EDWARD SAPIR (1949)). Nor could Courts require States to depart from English in their laws and regulations. Courts lack this authority to require States to depart from English. "Government of the people, by the people, and for the people" ensures that the people have the power to require that public school education be in a common language.

Translating key terms of the Constitution would modify them without complying with the amendment process. Moreover, translating the 200-plus years of judicial interpretations into a different language would change their meaning. Imagine the Supreme Court being required to review lower court opinions written in a different language. That would introduce substantial translation complexities – and interference with the judicial process. Courts could not circumvent the amendment process by promulgating the Constitution in a different language.

II. COURTS MUST ALTER INSTITUTIONAL-REFORM INJUNCTIONS UNSUPPORTED BY CURRENT FACTS AND LAW

This Court's precedents are clear on institutional-reform litigation judgments and decrees no longer supported by the current law or facts. Principles of federalism require federal courts to grant relief under FED. R. CIV. P. 60(b)(5) when the facts or law have changed sufficiently from those that purportedly justified entry of the judgment or

decree. *See, e.g., Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 385 (1992); *Frew v. Hawkins,* 540 U.S. 431, 441-42 (2004). A finding that a school violated federal law *in the past* cannot condemn a school system to "judicial tutelage ***for the indefinite future***." *Board of Educ. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249 (1991) (emphasis added). Instead, when the school system has complied with the relevant law under the judgment or decree "for a reasonable period of time," the "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." *Dowell,* 498 U.S. at 248 (interior quotations omitted). This is basic, and the Ninth Circuit ignored it.

Indeed, *Dowell* involves a school district previously held to have violated the Fourteenth Amendment with intentional discrimination. As explained in more detail in Section III, *infra,* this Court's flexible standard, sensitive to federalism concerns in institutional-reform litigation, is even more appropriate for violations of EEOA's vague "appropriate action" standard, which does not involve intentional discrimination under the Fourteenth Amendment. This Court should reverse the Ninth Circuit under the institutional-reform precedents and Rule 60(b)(5).

III. THE LOWER COURTS USURPED THE STATE AND LOCAL GOVERNMENTS' ROLES OF DETERMINING HOW TO MANAGE AND FUND PUBLIC EDUCATION

Lacking the institutional expertise to serve as chancellors of education, the lower courts owe great deference to State and local government on the preeminently local preserve of education. Notwithstanding these factors, the lower courts not only commandeered English-language instruction in Arizona's schools but also – by claiming funding that Arizona would devote to other pressing educational needs – essentially commandeered Arizona's public education system.

While this is particularly egregious conduct in the annals of federal-court supervision of State and local schools, it becomes all the more egregious in consideration of EEOA's broad discretion for State and local governments to select an "appropriate action." As explained in Section IV, *infra,* a district court's only available remedy for a school that fails to provide "appropriate action" under EEOA is to order the school to take appropriate action. In other words, ***inaction*** is actionable. The choice from among the range of appropriate actions, however, rests solely in the school's discretion, not in a court's discretion.

Both federalism and separation of powers argues for extricating the courts from Arizona's schools, now that the underlying ELL deficiencies are cured. ***First,*** "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 410 (1977). ***Second,*** even more than the federal government generally, federal judges

simply lack the institutional expertise needed to run school systems:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise.

Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (citing Mishkin, *Federal Courts as State Reformers,* 35 WASH. & LEE L. REV. 949 (1978)). For the lower courts to have involved themselves to this extent in Arizona's school systems is genuinely remarkable.

Moreover, the lower courts' "throw money at the problem" solution not only would waste money but also would detract from other educational priorities. Indeed, as the Superintendent argues, the evidence is uncontroverted that (1) increasing funding without structural reforms would not have led to different outcomes; (2) Nogales' problems did not result from a lack of funding; and (3) the Nogales ELL program does not need more money. Superintendents' Br. at 23. Involving federal courts in this political process tarnishes the federal judiciary.

As President Nixon stated to Congress in his message forwarding the EEOA legislation, this Nation's history with federal decrees on school systems finds those decrees "sometimes sound, sometimes bizarre, but certainly uneven." 118 CONG.

REC. 8931 (1972). His intent and that of EEOA was that courts would get out of the business of running school systems by imposing only the remedy essential to correct the particular violation. *Id.;* 20 U.S.C. §1712. By going well beyond the remedy "***essential*** to correct particular denials of equal educational opportunity," 20 U.S.C. §1712 (emphasis added), the lower courts exceeded their authority under EEOA.

IV. COURTS MUST READ EEOA'S "APPROPRIATE ACTION" CONSISTENTLY WITH OTHER FEDERAL LEGISLATION

Eagle Forum ELDF agrees with the petitioners that Arizona's compliance with NCLB places it well outside a court's prerogative to find Arizona's actions ***inappropriate*** under EEOA. In addition to its agreement with petitioners, however, Eagle Forum ELDF adds two important points. ***First,*** if no federal statute cabins the determination of what constitutes "appropriate action," EEOA raises a non-justiciable political question placed entirely within the hands of the implementing educational and legislative authorities. ***Second,*** even before NCLB, federal statutes contemporaneous with EEOA provided governing principles that demonstrate Arizona's compliance with EEOA.

Even if this Court did not have an ***obligation*** to look to NCLB and other federal law to flesh out EEOA's appropriate action, the availability of such standards avoids what otherwise would be nonjusticiable for want of "any law to apply." *Chrysler Corp. v. Brown,* 441 U.S. 281, 317-18 (1979). Thus, either because it can or because it must, this

Court should look to NCLB and other federal law to define and confine EEOA's otherwise amorphous requirements.

A. WITHOUT GOVERNING PRINCIPLES, EEOA'S APPROPRIATE ACTION IS NON-JUSTICIABLE

Assuming *arguendo* that no federal legislation cabins the definition of "appropriate action" under EEOA, that aspect of EEOA would not be justiciable, either because it presents a political question or it is an issue committed to the discretion of educational and legislative officials. The political-question doctrine arises out of the same Article III limitations on federal courts' powers as standing, mootness, and ripeness, *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352-53 (2006), and so would require dismissal of this litigation:

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and ***then of the court from which the record comes***. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998) (emphasis added, citations and interior quotations omitted). So "if the record discloses that the lower court was without

jurisdiction," appellate courts such as this Court "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.,* 523 U.S. at 95. As explained below, and again assuming *arguendo* that no federal legislation cabins a court's determining what constitutes "appropriate" action, EEOA §1703(f) is non-justiciable.

Some legal questions are "entrusted to one of the political branches or involve no judicially enforceable rights." *Vieth v. Jubelirer,* 541 U.S. 267, 277 (2004) (plurality opinion of Scalia, J.). As Justice Kennedy explained in his concurring opinion, "courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive" because "[e]xcessiveness is not easily determined." *Vieth,* 541 U.S. at 316 (Kennedy, J., concurring). Like excessiveness, appropriateness is not easily determined from among the accepted means of educating students. As the only unelected branch of government, courts are the *least* fit to answer such questions. *Luther v. Borden,* 48 U.S. 1, 52-53 (1849) ("making judges supreme arbiters in political controversies … [would] dethrone [the people] and lose one of their … invaluable birthrights"). In the absence of federal law to apply to determine whether a school's chosen action is "appropriate action," this Court should dismiss this action as a non-justiciable political question.

In addition to being non-justiciable as a political question, the selection of an "appropriate action" also is committed to the discretion of educators and legislators because there is no law for a reviewing

court to apply when choosing among appropriate actions. Although this variety of nonreviewability frequently arises under the federal Administrative Procedure Act ("APA"), *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971), EEOA presents the same problem: "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830 (1985). Indeed, these cases predate the APA, *Gray v. Powell,* 314 U.S. 402, 412 (1941), and form a "common law" of "nonreviewability." Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749, 750-51 (1948). Review is particularly outside judicial expertise when, as here, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms." *Panama Canal Co. v. Grace Line, Inc.,* 356 U.S. 309, 318 (1958). For the foregoing reasons, while Eagle Forum ELDF does not doubt that a court could review a school's ***failure to act,*** EEOA does not provide the law to apply for a court to find whether one action is more appropriate than another.

A rule that limits judicial review of EEOA compliance to ensuring the selection of a presumptively appropriate form of English language education is consistent with the Court's precedents on actionable inaction. *See, e.g., City of Canton, Ohio v. Harris,* 489 U.S. 378, 388 (1989) ("inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact"); *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004) (inaction litigable under 5 U.S.C. §706(1) "only where a plaintiff asserts that an agency failed to take a ***discrete*** agency action that it is ***required to take***") (emphasis in original); *Gomez v. Illinois State Board of Education,* 811 F.2d 1030, 1143 (7th Cir. 1987) ("[a]lthough the meaning of 'appropriate action' may not be immediately apparent without reference to the facts of the individual case, it must mean something more than 'no action'"). This Court should apply the same reasoning and limit EEOA "appropriate action" litigation to ensuring that schools have adopted ***an*** appropriate action, from among the wide array of actions available to schools.

Eagle Forum's ELDF's proposed rule is consistent with §1712's limiting remedies to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added). The remedy essential to correct denial of an "appropriate action" is to require the school to take ***an*** appropriate action: courts do not have a say in ***which*** appropriate action. Finally, the rule is at least congruent with the *Pickard* three-part test, *Castaneda v. Pickard,* 648 F.2d 989, 1009-10 (5th Cir. 1981), although Eagle Forum ELDF respectfully submits that a court's analysis of the second and third tests must be extremely deferential.

As explained above – assuming *arguendo* that federal legislation does not cabin courts' discretion in evaluating the appropriateness of State and local action – EEOA §1703(f) would not be justiciable. As explained in the next two sections however, both

before and after NCLB, federal law ***has*** cabined the otherwise vague term "appropriate," and Arizona's actions unquestionably fall within that term.

B. NCLB PROVIDES GOVERNING PRINCIPLES

The Speaker of the House, President of the Senate, and Superintendent argue persuasively that, in enacting NCLB's Title III in 2002, Congress necessarily made Nogales' (and Arizona's) NCLB-compliant actions "appropriate" for EEOA purposes. *See* Legislative Petitioners' Br. at 51-57; Superintendent's Br. at 51-61; *cf. Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81 (1969) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). Eagle Forum ELDF wholeheartedly supports their arguments and need not repeat them.

Based on their arguments at the petition stage, Arizona Opp'n, at 16; Flores Opp'n, at 27, the respondents presumably will counter by citing two NCLB savings clauses (20 U.S.C. §§6845, 6847) for the proposition that NCLB expressly did not undo either EEOA itself or any decrees under EEOA. Specifically, §6845 provides that nothing in ELALEAAA "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," and §6847 provides that nothing in ELALEAAA "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847. These savings clauses do not save the respondents for two independent reasons.

First, these savings clauses simply do not address the thrust of the argument that the Speaker of the House, President of the Senate, and Superintendent make. No-one argues that NCLB either ***requires*** the elimination of EEOA-compliant programs or ***amends*** EEOA by implication in a manner inconsistent with the pre-NCLB EEOA. Instead, the petitioners and Eagle Forum ELDF argue that NCLB provides an authoritative – indeed, controlling – statutory context for the scope of EEOA's "appropriate action" with respect to English instruction. To hold otherwise, this Court must find that, in NCLB, Congress enacted an inappropriate action. Eagle Forum ELDF respectfully submits that it falls well outside the courts' institutional expertise to make that finding.

Second, as explained in the next section, pre-NCLB federal legislation ***already*** elevated Arizona's English immersion program as "appropriate" under EEOA. While Eagle Forum ELDF agrees with petitioners that the NCLB savings clauses do not negate NCLB's ability to define or cabin "appropriateness" under EEOA, the savings clauses certainly do not render ***inappropriate*** that which ***already was appropriate,*** prior to NCLB's enactment. *See Morton v. Mancari,* 417 U.S. 535, 549-51 (1974) (repeals by implication are disfavored); *accord* 20 U.S.C. §§6845(2) (NCLB does not deprive Nogales of right to rely on actions deemed appropriate, prior to NCLB's enactment). For the reasons explained in the next section, therefore, Arizona's English immersion "actions" certainly are "appropriate" under EEOA.

C. PRE-NCLB LAWS PROVIDED GOVERNING PRINCIPLES

Federal statutory actions contemporaneous with EEOA's enactment and prior to NCLB's enactment also provide governing principles on which federal courts must base their determination of what actions are "appropriate actions." As such, the question is not whether plaintiffs lost on this issue in the 1990s, before the consent decree, versus in the 2000s, with NCLB's enactment after the consent decree. Plaintiffs lost this issue in the 1980s, if not in the 1970s.[4]

By enacting both EEOA and the Bilingual Education Act in the Education Amendments of 1974, Congress plainly set up a situation where the general provisions of §1703(f)'s requirement of "appropriate action" would be cabined by what the Bilingual Education Act required, prohibited, and allowed. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113, 122 (1849); *Offshore Logistics, Inc. v.*

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[4] As indicated in the prior section, because federal law ***already*** cabined "appropriate action" to include English immersion, this Court must reject respondents' argument that, as enacted in 2002, 20 U.S.C. §6847 somehow prevents petitioners' relying on NCLB's remedial scheme to provide governing principles on "appropriate action" under EEOA.

Tallentire, 477 U.S. 207, 220-21 (1986) (same); *cf. Morton v. Mancari,* 417 U.S. 535, 550-51 (1974) ("specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). Under these precedents, common sense, and the respect that courts owe to Congress, this Court should read EEOA in conjunction with the Bilingual Education Act, as amended.

Courts read statutes as a whole not only because they owe that respect to the co-equal branch that wrote the statute but also to avoid "untenable" or "unreasonable" interpretations. *American Tobacco Co. v. Patterson,* 456 U.S. 63, 71 (1982) ("[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). Indeed, *American Tobacco* involved this Court's rejection of a federal agency's interpretation of a statute that "would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision." *Id.* That is exactly the untenable situation here: a district judge has interpreted EEOA to prohibit a form of English instruction expressly allowed by Congress.

Specifically, in 1984, Congress expressly amended the Bilingual Education Act to "declare[] it to be the policy of the United States, in order to establish equal educational opportunity for all children and to promote educational excellence … to encourage the establishment of special alternative instructional programs for students of limited English proficiency in school districts where the establishment of bilingual education programs is not

practicable or for other appropriate reasons." PUB. L. NO. 98-511, §201(a) , 98 Stat. 2366, 2370-71 (1984); *accord* PUB. L. NO. 100-297, §7002(a), 102 Stat. 130, 275 (1988) (same); S. REP. NO. 100-222, at 77, *reprinted in* 1988 U.S.C.C.A.N. 101, 178 (1984 Bilingual Education Act amendments authorized federal funding for "special alternative instructional programs" such as "English as a Second Language" and "structured immersion"); H.R. REP. NO. 98-748, 7, *reprinted in* 1984 U.S.C.C.A.N. 4036, 4042 ("new category of special alternative instructional programs for LEP children is established as an alternative to transitional or development programs [that] might include approaches such as English-as-a-Second Language (ESL) or structured immersion"). The "special alternative instructional" or "SAI" program – including immersion – remained part of the Bilingual Education Act from 1984 through NCLB's enactment. *See* PUB. L. NO. 103-382, §7112, 108 Stat 3518, 3719-20 (1994) (1994 amendments). As such, respondents and the lower courts cannot evade immersion through NCLB's savings clauses.

In introducing the Bilingual Education Act amendments ultimately enacted in 1988, Representative Jeffords expressed the sentiment behind SAI programs:

> It is not the role of the Federal Government to dictate the method of instruction to be used at the local level, but rather to establish policy which supports the attainment of English language proficiency by the target population.

132 CONG. REC. H1709 (daily ed. Apr. 9, 1986) (Statement of Rep. Jeffords). In doing so, Congress not only expressly amended the Bilingual Education Act, but also impliedly amended the scope of "action" deemed "appropriate" under EEOA. *See, e.g., Erlenbaugh v. U.S.,* 409 U.S. 239, 243 (1972) (statutes "in *pari materia* – that is, [statutes that] pertain to the same subject – … under settled principles of statutory construction, should … be construed as if they were one law"); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 143 (2000) ("subsequent acts can shape or focus th[e] meanings" of prior statutes); *U.S. v. Estate of Romani,* 523 U.S. 517, 530-31 (1998). The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *U.S. v. Fausto,* 484 U.S. 439, 453 (1988). Under that classic judicial task, this Court must find that Congress has deemed English immersion as an "appropriate action" *per se.*

English immersion is undeniably an educational method that works, that Congress has authorized, and that preserves our national identity. While it is not the Congress' role to dictate State methods of instruction, it even more strongly is not the role of a federal judge to do so. Because the Bilingual Education Act consistently allowed English immersion as a means of instruction from 1984 through the enactment of NCLB in 2002 (and since), Eagle Forum ELDF respectfully submits that the plaintiffs and the district court have it precisely

backwards. The question is not whether NCLB's savings clause in §6845(2) protects their injunction under EEOA. *See* 20 U.S.C. §6845(2) ("[n]othing in this part shall be construed … to require a State or a local educational agency to … eliminate any particular type of instructional program for limited English proficient children"). The question is whether §6845(2) prohibits anyone's denying that English immersion is an "appropriate action" under federal law.

The answer is that §6845(2) plainly prohibits courts from denying schools the right to use English immersion. *Id.; see also* 20 U.S.C. §1712 ("court … shall seek or impose only such remedies as are ***essential*** to correct particular denials of equal educational opportunity" under EEOA) (emphasis added). Because English immersion is *per se* an appropriate action, a court simply lacks discretion under EEOA to require anything else from a school that provides English immersion. Under the circumstances, this case is not an instance of merely ***disfavoring*** repeals by implication, *Morton,* 417 U.S. at 549-50, but one where the Court "should be particularly hostile to [repeals by implication because] the allegedly repealing statute ***specifically rules them out***." *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 746 (1989) (emphasis added). Following 25 years of congressional policy, this Court must accept immersion as an "appropriate action."

CONCLUSION

For the foregoing reasons and those argued by the petitioners, this Court should reverse the Ninth

Circuit's decision and remand with instructions to vacate the district court's injunction.

Respectfully submitted,

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