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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Miriam Flores, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CIV 92-596-TUC-RCC **DEFENDANTS STATE OF ARIZONA AND STATE BOARD OF EDUCATION'S [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to Federal Rule of Civil Procedure 52, and this Court's order, Defendants State of Arizona and Arizona State Board of Education submit their proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. To the extent that these Findings of Fact are also deemed to be conclusions of law, they are hereby incorporated into the Conclusions of Law that follow.

2. Plaintiffs are a certified class of "all minority 'at-risk' and limited English proficient children, now or hereafter enrolled in Nogales Unified School District, as well as their parents or guardians." (Dkt. # 105.)

3. This Court's original January 2000 judgment in this case found that the Defendants had violated the "appropriate action" provision contained in § 1703(f) of the Equal Educational Opportunities Act ("EEOA") because "the State's arbitrary and capricious Lau appropriation is not reasonably calculated to effectively implement the

Lau educational theory which it approved, and NUSD adopted." *Flores v. Arizona*, 172 F.Supp.2d 1225, 1239 (D. Ariz. 2000).

4. Post-judgment proceedings over the ensuing years focused on issues concerning appropriate funding for ELL instruction. This Court's 2000 judgment, and the subsequent injunctions, did not address whether the EEOA is violated by Arizona's implementation of the Task Force Model.

5. In March 2006, shortly after HB2064 became law, the Superintendent requested an evidentiary hearing on the new legislation, and Intervenors, joined by the Superintendent, moved for Rule 60(b)(5) relief from the underlying judgment, alleging that a variety of changed circumstances warranted relief from the 2000 judgment. (Dkt. # 380, 422, 433.)

6. Following two evidentiary hearings, two consolidated appeals to the Ninth Circuit, and an appeal to the U.S. Supreme Court, the case was again remanded to this Court "to determine whether, in accordance with the standards set out in this opinion, petitioners should be granted [Rule 60(b)(5)] relief from the judgment." *Horne v. Flores*, 129 S.Ct. 2579, 2607 (2009).

7. In setting forth the applicable "standard," the Supreme Court rejected the focus on funding, and instead held that Rule 60(b)(5) requires "a flexible approach," under which the critical inquiry is "whether the objective of the District Court's 2000 declaratory judgment order—i.e., satisfaction of the EEOA's 'appropriate action' standard—has been achieved" and emphasizing that "'when the objects of the decree have been attained'—namely, when EEOA compliance has been achieved—'responsibility for discharging the State's obligations [must be] returned promptly to the State and its officials.'" *Id*. at 2594-96 (citation omitted).

8. In addition, the Supreme Court separately concluded that the District Court's entry of statewide relief was improper, concluding that "[t]he record contains no factual findings or evidence that any school district other than Nogales failed (much less continues to fail) to provide equal educational opportunities to ELL students" and that

"the only violation claimed or proved was limited to a single district." *Id*. at 2606. The Supreme Court stated further that "[i]t is not even clear that the District Court had jurisdiction to issue a statewide injunction when it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief." *Id*. After concluding that the Arizona Constitution's requirement of a "general and uniform public school system" did not form a valid basis for a statewide federal injunction, the Supreme Court instructed that "the District Court should vacate the injunction insofar as it extends beyond Nogales unless the court concludes that Arizona is violating the EEOA on a statewide basis." *Id*. at 2607.

9. Upon remand, the parties filed a stipulation, advising the Court that, in light of the Supreme Court's decision, plaintiffs would file a motion to expand the class statewide, and may also file a motion to amend the Complaint. (Dkt. # 865.) Instead of filing such motions, however, plaintiffs filed a motion to schedule an evidentiary hearing, arguing that no motion to expand the class or to amend the Complaint was necessary, and seeking to inject into the proceedings new allegations of "statewide" EEOA violations. (Dkt. # 872.)

10. This Court scheduled the requested evidentiary hearing to address at least the four factors outlined in the Supreme Court's decision for Rule 60(b)(5) relief. The Court also permitted plaintiffs to present evidence regarding three newly alleged "statewide" violations, but ordered that "plaintiffs will bear the burden of proof as to the [alleged "statewide"] issues." (Dkt. # 883; see also Dkt. #888 (amending Dkt. # 883).) During the course of the ensuing 22-day hearing, plaintiffs withdrew two of the alleged "statewide" issues, leaving only their claim that implementation of the Task Force Model creates unlawful "segregative" effects in violation of the EEOA (hereafter, plaintiffs' "segregation claim").

11. Since this Court's judgment in 2000, Plaintiffs have not moved to amend their complaint.

12. Since this Court's judgment in 2000, Plaintiffs have not moved to expand their class.

13. In 2000, Arizona voters passed Proposition 203, which requires ELL instruction to be provided through Structured English Immersion. A.R.S. § 15-752.

14. Experts in the field of English language acquisition recognize Structured English Immersion as a sound educational theory. (Porter, Tr. 9/13/2010 at 26; Porter, Tr. 9/14/2010 at 9-10; Maguire, 9/22/2010 at 28-30, 241.)

15. Arizona has implemented SEI through a model developed by the Arizona English Language Learner Task Force (the "Task Force Model"). (Ex. 662.)

16. Several schools and districts support the Task Force Model. (Bean, Tr. 9/8/2010 at 132; Robles, Tr. 9/15/2010 at 53.)

17. The Task Force Model groups students by their language ability. (Ex. 662, Task Force Model, at 4-5.)

18. Ability grouping is not segregation. (McCollough, Tr. 9/7/2010 at 195, 197; Santa Cruz, Tr. 9/23/2010 at 89, 141; Santa Cruz, Tr. 9/24/2010 at 106.)

19. The ability-based grouping of ELL students under the Task Force Model is motivated by educators' experience and genuine concern for their students' best interests. (Huseby, Tr. 9/17/2010 at 116, 119; Maguire, Tr. 9/22/2010 at 79-80; Santa Cruz, Tr. 9/23/2010, at 140-141; Bean, Tr. 9/8/2010 at 79-80; McCollough, Tr. 9/7/2010 at 195:22-24).

20. Even the most vocal critic of the Task Force Model, Salvador Gabaldon, testified that ability-based grouping is common sense at the earliest levels. (Gabaldon, Tr. 1/7/2011 at 55).

21. No evidence was adduced at the hearing to suggest that implementation of the Task Force Model in Nogales (or anywhere else) was motivated by a deliberate intent to discriminate on the basis of race, color, or national origin.

22. The decision to keep ELL students together beyond the four-hour ELD block is a local policy decision made by individual schools and districts. There is nothing

in Arizona law or the Task Force documents that requires or even suggests this kind of scheduling plan. (Santa Cruz, Tr. 9/23/2010 at 90-91; Ex. 662; Affidavit of Adela Santa Cruz, Docket No. 1040 at ¶ 2.)

23. The testimony at the Hearing showed that ELL students take classes with non-ELL students outside of the Task Force Model in several school districts. (Molera, Tr. 9/7/2010 at 22-24, 35-36, 59-60; Robles, Tr. 9/15/2010 at 66; Huseby, Tr. 9/17/2010 at 160; Bean, Tr. 9/20/2010 at 7-8.)

24. Individual school districts determine the length of their instructional days and daily schedule. (Stollar, Tr. 9/1/2010 at 181; Molera, Tr. 9/7/2010 at 22, 35; Santa Cruz, Tr. 9/23/2010 at 90; Bean, Tr. 9/24/2010 at 80.)

25. Districts implement the Task Force Model and they are accountable for how the four hours are allocated, including what content is presented. (Santa Cruz, Tr. 9/23/2010 at 65; Santa Cruz, Tr. 9/21/2010 at 212.)

26. Only a few of the witnesses at the evidentiary hearing provided any testimony to suggest isolated, anecdotal instances in which ELLs purported to experience stigma because of their enrollment in SEI. (Gabaldon, Tr. 1/7/2011 at 56, 118-119, 160; Romero, Tr. 1/5/2011 at 61, 66-6868; Canto Parker, Tr. 11/23/2010 at 102.)

27. Most witnesses observed no stigma among ELL students, whatsoever. (Bean, Tr. 9/20/2010 at 10; Huseby, Tr. 9/17/2010 at 121; Robles, Tr. 9/8/2010 at 66). Other witnesses testified that, to the extent there was any stigma attached to ELLs, such stigma stemmed from their inability to speak English, not because of their enrollment in the Task Force Model. (Romero, Tr. 1/5/2011 at 127-128; Santa Cruz, Tr. 9/23/2010 at 94.)

28. Under the Task Force Model, ELL students stay in SEI classrooms only until they have achieved English language proficiency, and no longer. (Ex. 662.)

29. In order to ensure that ELL students exit the Task Force Model as soon as possible, ELL students can take AZELLA up to three times a year. (Ex. 662 at p. 3.)

30. The Task Force Model requires daily English Language Development instruction. Such instruction "emphasizes the English language itself," but does not preclude schools/teachers from using academic content as the vehicle for such instruction. (Ex. 662, Task Force Model, at 1, 3.)

31. There is no law or policy that prevents teachers from including content instruction during the time that ELLs are in the Task Force Model. (Ex. 662; Santa Cruz, Tr. 9/21/2010 at 178-79.)

32. Arizona's Office of English Language Acquisition Services ("OELAS"), was established, along with the ELL Task Force, by HB2064. A.R.S. § 15-756.07. OELAS is charged with, among other things, developing guidelines designed to ensure compliance with federal and state laws regarding ELLs, training teachers and administrators, publishing ELL guidelines, and providing technical assistance to school districts and charter schools in implementing structured English immersion programs. *Id.*

33. OELAS expected that ELL teachers would use academic content in science, math and social studies to drive the language instruction. (Stollar, Tr. 9/1/2010 at 31, 54-55, 58, 124-24; Santa Cruz, Tr. 9/23/2010 at 97-98 and Tr. 9/21/2010 at 180, 213.)

34. The ELD standards denote where ELL teachers can integrate academic content into the Task Force Model (Ex. 711, 730-32; Santa Cruz, Tr. 9/21/2010 at 102, 115-16, 118-19, 201.)

35. OELAS expressly encourages use of academic content as the vehicle for ELL instruction and provides training on how to infuse academic content into English Language Development instruction under the Task Force Model. (Ex. 662; Stollar, Tr. 9/1/2010 at 31, 54-55, 58, 124-24; Santa Cruz, Tr. 9/23/2010 at 97-98 and 9/21/2010 at 178-180, 213.)

36. Several schools and districts have ELL classrooms which expressly integrate the academic content standards into their ELL instruction, using the academic content as the vehicle to drive English language instruction. (Bean, Tr. 9/8/2010 at 82-

83, 96 and Tr. 9/20/2010 at 135-36; Robles, Tr. 9/15/2010 at 73-74; Stults, Tr. 9/16/2010 at 76-77, 117-18; Molera, Tr. 9/7/2010 at 29-30; Ex. 727-732, 736, 862, 876.)

37. In Nogales' Desert Shadows Middle School, the SEI reading classes use social studies content and literature like Shakespeare and Edgar Allen Poe. (Molera, Tr. 9/7/2010 at 26-29, 99.)

38. Nogales' Desert Shadows Middle School "is integrating as much social studies content as possible into the four hour model." (Molera, Tr. 9/7/2010 at 155-56.)

39. ELL teachers at Nogales High School embed content into their instruction during the Task Force Model. (Parra, Tr. 1/6/2011 at 154-55.)

40. ELL students at Paradise Valley's Palomino Intermediate School perform science experiments and learn science vocabulary during the Task Force Model. (Ex. 862; Robles, Tr. 9/15/2010 at 75-77.) Palomino also uses math and social studies as the vehicle for English language instruction. (Robles, Tr. 9/15/2010 at 77; Stults, Tr. 9/16/2010 at 77, 80-81.)

41. In Humbolt Unified School District, students learn age-appropriate academic content, like electro-magnetism, during the Task Force Model. (Bean, Tr. 9/8/10 at 84-85.)

42. Test results indicate that ELLs are not suffering any long-term academic deficits from their short-term enrollment in the ELL program. The data show that, upon exiting the Task Force Model, FEPs (i.e., "fluent English proficient" students) are passing AIMS, Arizona's primary method of measuring student achievement, at rates that meet or exceed their non-FEP peers in grades 3 to 7 for FY2007, FY2008 and FY2009. (Ex. 755-758.)

43. The only grades where all FEPs do not consistently outperform their statewide peers is in the 8th and 10th grades. (Ex. 755-758.) The data show that all FEPs in 8th and 10th grades score between one percentage point higher than their statewide peers (in 8th grade reading) and four percentage points lower than their statewide peers (in

8th grade writing and 10th grade reading). *Id*. Plaintiffs offered no evidence that these differences are statistically significant.

44. No statewide AIMS data for ELLs for 2009/2010 was introduced into evidence at the Hearing.

45. The traditional indicators of student achievement—high school graduation rates, grade promotion—provide further evidence that students participating in Nogales' ELL program are not incurring any "irreparable academic deficits" by virtue of their participation in Nogales' ELL program. (Ex. 775-778.)

46. Education in kindergarten through 8th grade is focused on skill development, not content. (Santa Cruz, Tr. 9/23/2010 at 101.)

47. Desert Shadows Middle School in Nogales has after school tutoring and summer school for ELLs that is essentially mandatory. (Molera, Tr. 9/7/2010 at 32, 47-50, 60-61, 123, 140).

48. Nogales High School has a summer program for incoming freshman who are ELLs. (Molera, Tr. 9/7/2010 at 125)

49. ELL students at Nogales High School have access to after-school tutoring as well as summer school and on-line courses to obtain additional academic credit. (Parra, Tr. 1/6/2011 at 39, 55, 177)

50. In 2010, including one student who finished up one course during summer school, all seniors at Nogales High School graduated. (Romero, Tr. 1/5/2011 at 65-66; Ex. 543.)

51. Humboldt Unified School District provides its ELL students with before and after school tutoring as well as summer school to assist them in maintaining grade level academic content. (Bean, Tr. 9/8/2010 at 163.)

52. Humbolt Unified School District tailors its summer school classes to offer the credits that its high school ELL students need to graduate. (Bean, Tr. 9/8/2010 at 164-65.)

53. Students in Amphitheater Unified School District also receive compensatory instruction after school, three nights a week, with an emphasis on reading and math. (Huseby, Tr. 9/17/2010 at 91-92.) Current and former ELL students are also encouraged to, and do, participate in after-school and summer school programs offered each summer. (Huseby, Tr. 9/17/2010 at 92-93.) Summer school is offered to ELL students free of charge through a grant. (Huseby, Tr. 9/17/2010 at 94.)

54. Although high school ELL students generally receive elective credits for three of the four hours of ELD instruction, their credit distribution does not preclude them from graduating in four years. (Ex. 666; Santa Cruz, Tr. 9/23/2010 at 122-23; Bean, Tr. 9/8/2010 at 164-65); Huseby, Tr. 9/17/2010 at 115.)

55. The hurdle of academic content acquisition is faced by several categories of students, not just ELLs. For example, students who change schools often or students who move to Arizona from a state with a different curriculum progression face the same content acquisition and high school graduation hurdles as ELL students. (Santa Cruz, Tr. 9/23/2010 at 106); Robles, Tr. 9/15/2010 at 81, 83-84; Stults, Tr. 9/16/2010 at 50-51.)

56. Nogales has implemented the Task Force Model "to the fullest extent possible." (McCollough, Tr. 9/7/2010 at 181.)

57. The Arizona Department of Education ("ADE") has monitored Nogales over the last several years to ensure the adequacy of its programming and resources for its ELL students. (Stollar, Tr. 9/2/2010 at 35.)

58. ADE has provided Round 2 training to Nogales' ELL teachers. (Santa Cruz, Tr. 9/23/2010 at 226.) And ADE has offered to provide additional training to Nogales teachers. (Ex. 788.)

59. In February 2010, pursuant to the request of an elementary school principal, ADE trainers went to Nogales to provide a condensed ELL training to a number of Nogales teachers. (Stollar, Tr. 9/2/2010 at 46-47; Ex. 797.)

60. The data from the Arizona English Language Learner Assessment ("AZELLA") test show that Nogales' reclassification rate was 39% in 2009. (Ex. 771, 772).

61. Nogales' reclassification rate has been "very high" and this has played a "significant part" in explaining Nogales' "decline in the number of ELLs." (Stollar, Tr. 9/2/2010 at 18; McCollough, Tr. 9/7/2010 at 187.)

62. Nogales High School's reclassification rate was 22% in 2009. (Ex. 772) The statewide high school reclassification rate was between 17% and 19%. (Stollar, Tr. 9/2/2010 at 8)

63. Nogales' ELL students have a 77% graduation rate, which exceeds the statewide graduation rate for all students, 75%, and the statewide graduation rate for ELL students, 43%. (Ex. 781).

64. Nogales High School had "pretty much 100 percent" of the Class of 2010 graduate. (Parra, Tr. 1/6/2011 at 130.)

65. Nogales High School has only a 1% drop-out rate for all of its students, including ELLs. (Parra Tr. 1/6/2011 at 63-64.)

66. In 2009, Nogales' FEP students outperformed all students throughout the state on AIMS in every subject and all grades except 10th grade reading where Nogales' FEP students scores two percentage points below the mainstream students statewide. (Ex. 775.) Plaintiffs offered no evidence that these differences are statistically significant.

67. NCLB also requires schools to show that they are making Annual Yearly Progress ("AYP"); the data show that Nogales' ELLs have, for the most part, been making AYP between 2006 and 2009. In 2009, the only school in Nogales that did not make AYP was Nogales High School. (Ex. 782; Stollar, Tr. 9/2/2010 at 25-26.)

68. The vast majority of schools in Nogales met the NCLB requirement of Annual Measurable Achievement Objectives ("AMAO") between 2006 to 2009. (Ex. 782; Stollar, Tr. 9/2/2010 at 24-25. In 2009, the only school in Nogales that did not make meet AMAO was Pierson Alternative High School. *Id*.

69. Nogales' reclassified ELL students' performance on AIMs is "pretty remarkable." (Stollar, Tr. 9/1/2010 at 110, 113.)

70. Nogales' students are "doing an excellent job compared to the state averages . . . in the various [AIMS] subtests and at the various grade levels." (Stollar, Tr. 9/2/2010 at 16.)

71. Nogales' financial position has improved in the last two years. (McCollough, Tr. 9/7/10 at 161).

72. Nogales' budget includes funds from a budget override ballot measure that passed in 2010. (McCollough, Tr. 9/7/2010 at 162.)

73. Nogales has all the financial resources that it needs. (McCollough, Tr. 9/7/2010 at 204-05.)

74. Nogales' school facilities are in "very good" shape. (McCollough, Tr. 9/7/2010 at 168).

75. Nogales classrooms have "everything that they need from a . . . material standpoint." (McCollough, Tr. 9/7/2010 at 178; Molera, Tr. 9/7/2010 at 42-43.)

76. Nogales has adequate textbooks and other materials to effectively implement the SEI program. (Stollar, Tr. 9/2/2010 at 55; McCollough, Tr. 9/7/2010 at 179; Molera, Tr. 9/7/2010 at 18; Parra, Tr. 1/6/2011 at 148.)

77. Classrooms in Nogales have a "healthy" student-to-teacher ratio. (McCollough, Tr. 9/7/2010 at 169).

78. Nogales' ELL teachers are highly qualified in compliance with state and federal standards. (Molera, Tr. 9/7/2010 at 11-13; Canto Parker, Tr. 11/23/2010 at 43; Romero, Tr. 1/5/2011 at 106; Parra, Tr. 1/6/2011 at 146-47.)

79. Nogales employs reading coaches and other instructional specialists at every school, who focus on improving ELL instruction. (Stollar, Tr. 9/2/2010 at 36; Romero, Tr. 1/5/2011 at 164.)

80. The faculty in Nogales is not only "very experienced" but also "very stable and mature." (McCollough, Tr. 9/7/2010 at 172.)

81. Nogales High School has highly qualified teachers, sufficient classrooms, and small class sizes. (Parra, Tr. 1/6/2011 at 147-48.)

82. Nogales has sufficient classrooms and facilities for its ELL students and sufficiently small ELL class sizes to provide effective instruction to ELL students. (McCollough, Tr. 9/7/2010 at 152-53, 168-69; Canto Parker, Tr. 11/23/2010 at 80-81; Romero, Tr. 1/5/2011 at 180-81.)

83. Nogales' teachers and administrators are providing their ELL students "with a real quality program." (Stollar, Tr. 9/2/2010 at 12-13.)

84. Nogales provides its ELL students with effective programs so that they can overcome language barriers and participate equally in mainstream classes. (McCollough, Tr. 9/7/2010 at 206; Molera, Tr. 9/7/2010 at 55; Romero, Tr. 1/5/2011 at 219; Stollar, Tr. 9/1/2010 at 97; Santa Cruz, Tr. 9/23/2010 at 9 and Tr. 9/24/2010 at 115.)

85. Nogales will continue to do a good job of reclassifying ELL students so that they can move into mainstream classrooms with their fluent peers. (Canto Parker, Tr. 11/24/2010 at 96-97.)

86. Nogales High School was classified as a "performing plus" school under NCLB for 2009/2010. (Parra, Tr. 1/6/2011 at 148-49.)

87. In 2000, Nogales had only $3,675 available per pupil. In 2010, Nogales had $5,306 available per student, a 44% increase in funds available per pupil from 2000. (Ex. 805, Valdivia, Tr. 9/14/2010 at 176-178.)

CONCLUSIONS OF LAW

1. To the extent that these Conclusions of Law contain findings of fact, they are hereby incorporated into the Findings of Fact above.

2. Pursuant to the Supreme Court's analysis in *Horne v. Flores*, 129 S.Ct. 2579, 2606-07 (2009), the statewide expansion of the Court's January 2000 judgment ("statewide injunction") was improper at its inception.

3. The validity of the statewide injunction is not dependant on any "changed circumstances" analysis under Rule 60(b)(5).

4. Rule 60(b)(5) is a vehicle for defendants to seek relief, based on changed circumstances, from judgments that were properly entered at their inception. Rule 60(b)(5) is not a vehicle for plaintiffs to prevent courts from vacating orders that were legally defective when entered.

5. Plaintiffs' new "statewide" claim seeks to "defend" what Plaintiffs have never before proven they are entitled to: affirmative relief on a statewide basis. Plaintiffs cannot "preserve" the improper statewide injunction by alleging new statewide EEOA violations under the guise of a "defense" to Rule 60(b)(5) relief.

6. The Supreme Court's directive that "the District Court should vacate the injunction insofar as it extends beyond Nogales *unless the court concludes that Arizona is violating the EEOA on a statewide basis*," 129 S.Ct. at 2607 (emphasis added), did not excuse Plaintiffs from their obligation to comply with the procedural and substantive safeguards that are necessary prerequisites to proper pursuit of any claims for affirmative statewide relief.

7. The Supreme Court expressly questioned whether the District Court "had jurisdiction to issue a statewide injunction" and noted that "it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief." *Horne*, 129 S. Ct. at 2606. Proper standing is constitutionally required—and thus jurisdictional. Accordingly, neither this Court nor the Supreme Court can excuse plaintiffs from meeting this fundamental prerequisite. *Blum v. Yaretsky*, 457 U.S. 991, 999 (1992).

8. The foregoing statements in *Horne* are inconsistent with any suggestion that the Supreme Court intended, implicitly, to excuse plaintiffs from complying with the procedural and substantive prerequisites necessary to bringing statewide claims within the jurisdiction of the District Court.

9. Permitting plaintiffs to pursue statewide relief through procedural shortcuts would also necessarily deprive defendants of their right to contest plaintiffs' satisfaction of the necessary prerequisites to such relief in a full and fair manner. *Memphis Light,*

Gas & Water Division v. Craft, 436 U.S 1, 14, (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'")

10. Seeking and obtaining a statewide extension of the judgment, as an initial matter, constitutes a request for affirmative relief that must be pled and proved.

11. If Plaintiffs want to obtain affirmative relief beyond the confines of their Complaint and the limited class that has been certified in this action, they must, at a minimum, (1) establish the constitutionally required standing to pursue such "statewide" claims, (2) move to expand the class and satisfy their burden under the "rigorous analysis" required by Rule 23, and (3) move to amend their complaint under the standards of Rule 15.

12. Plaintiffs have not done so, and any attempt to do so would be futile. Standing is a fundamental prerequisite to the Court's jurisdiction under the "case or controversy" requirements of Article III of the Constitution, applies equally as well in class action contexts as in individual suits. *Blum v. Yaretsky*, 457 U.S. 991, 999 (1992) ; *Lewis v. Casey*, 518 U.S. 343, 357 (1996); see also *Alee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring in the result in part and dissenting in part) ("[A] named plaintiff . . . cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.").

13. Constitutional standing is not "dispensed in gross," but must be correlated to the particular harm alleged in the Complaint. *Lewis*, 518 U.S. at 358, n.6 (1996) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] posses by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.") (quoting *Blum*, 457 U.S. at 999).

14. Plaintiffs have not established that any particular class member—much less the named plaintiffs—has suffered all of the hypothetical harms alleged in plaintiffs' purported statewide claim. The record is devoid of evidence that any named plaintiff—or any actual ELL student for that matter—has failed to graduate on time as a result of

his/her participation in an ELL program implemented under the Task Force Model. Nor is there any evidence in the record that any named plaintiff (or any actual ELL student) has incurred "irreparable academic deficits" during their participation in an ELL program implemented under the Task Force Model that resulted in any unremedied "indirect impediment to the student's equal participation." *Castaneda v. Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981).

15. Plaintiffs have not demonstrated that they have standing to represent a statewide class.

16. By rule, class certification decisions must be made "at an early practicable time after a person sues." Fed. R. Civ. P. 23(c)(1)(A). Nearly twenty years after the Complaint was filed is not "an early practicable time." Likewise, Rule 23(c)(1)(C) states that any alteration or amendment to the certification order must occur "before final judgment." Here, the final judgment was issued eleven years ago. Plaintiffs may not expand the their class at this late date.

17. Even if plaintiffs could overcome the hurdles of Rule 23(c)(1), plaintiffs would still have the burden of proving that each of the requirements of Rule 23(a) and 23(b)(2), as well as all other prerequisites of class certification, have been satisfied. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977); 7A C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc. Civ. § 1759 (3d ed. 2005).

18. It is unlikely that plaintiffs would be able to meet Rule 23 prerequisites of "typicality" and "adequacy of representation," Fed. R. Civ. P. 23(a)(3)-(4), because the evidence shows that the plaintiffs' positions on the alleged statewide issues are "antagonistic to" and "in conflict with" the positions of many in the putative class who are strong advocates of the Task Force Model. (Bean, Tr. 9/8/2010 at 132; Robles, Tr. 9/15/2010 at 53.); *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (overruled on unrelated grounds) (adequate representation depends inter alia on absence of antagonism between class representative and class members); *Edgington v. R.G. Dickinson & Co.*, 139 F.R.D. 183, 189 (D. Kan. 1991) (important aspect of typicality is whether

representative's interest are antagonistic or adverse to those in the class); *Pratt v. Chicago Housing Auth.*, 155 F.R.D. 177 (N.D. Ill. 1994) (decertifying civil rights action for declaratory and injunctive relief based on inadequacy of representation, where there was vigorous dissent among the class members regarding the propriety of the challenged warrantless search procedure); *id*. at 179 (noting that the adequacy requirement "becomes especially important when certification pursuant to rule 23(b)(2) is sought because absent class members may not opt out of the class.").

19. Likewise, the analysis of claims alleging unlawful segregation differs depending on whether the particular district at issue has a "past history of unlawful discrimination" or not. *Castaneda*, 648 F.2d at 996-98 (setting forth different standards for evaluating permissibility of ability grouping in districts with and without a past history of discrimination). Thus, the claims regarding Nogales (which is not subject to a desegregation order) may not be typical of claims against other school districts that do have a history of unlawful discrimination.

20. Allowing plaintiffs to proceed with their alleged "statewide" claims without requiring plaintiffs to move for certification of a statewide class threatens to prejudice defendants with respect to potential future litigation. It is axiomatic that persons not made parties to a lawsuit are not bound by the judgment rendered thereby. 18A C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. § 4449 (2d ed. 2002) ("The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound.") Accordingly, in the event defendants were to prevail against plaintiffs' "statewide" claims, the only parties bound by that judgment would be the class of students and parents in Nogales. The judgment would not be res judicata for any other students and parents in other districts throughout the state, who would remain free to sue these defendants again under the same theories and seek a different result.

21. Although Rule 15 allows for post-judgment amendments, such amendments are intended to encompass situations in which "an issue not raised in the pleadings is tried by the parties' express or implied consent." Fed. R. Civ. P. 15(b)(2). That scenario

is inapplicable here. Moreover, "post-judgment motions to amend are treated with greater skepticism than pre-judgment motions." *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997). Plaintiffs cannot effectively amend their Complaint—11 years post-judgment—without subjecting their arguments to scrutiny under the parameters of Rule 15.

22. Plaintiffs' newly asserted claims are not "statewide" in nature, but rather depend on specific implementation choices made at the district level, thus requiring a district-by-district analysis.

23. Because these implementation decisions vary from district to district, plaintiffs have not—and cannot—establish any "statewide" violation.

24. To the extent that plaintiffs' issues exist, they are local issues which, necessarily, require a local and individualized inquiry—not appropriate for statewide relief. Thus, such claims would need to proceed on a district-by-district basis. *See U.S. v. Texas,* 601 F.3d 354, 372 (5th Cir. 2010) (where individual school districts have primary responsibility for implementing language programs and have latitude to choose in implementing an ELL programs, evidence from individual districts is necessary to show statewide violation).

25. Plaintiffs bear the burden of proving that implementation of the Task Force Model in Nogales creates unlawful "segregative" effects in violation of the EEOA. (Order, Dkt. # 883.) Plaintiffs did not meet this burden.

26. Plaintiffs did not show implementation of Task Force Model violates the EEOA.

27. Plaintiffs' segregation claim does not arise under §1703(f), the "appropriate action" prong of the EEOA; rather, segregation claims arise under §1703(a), which prohibits denial of equal educational opportunities by "the *deliberate segregation* by an educational agency of students on the basis of race, color, or national origin among or within schools." (Emphasis added.)

28. Different standards apply to claims under subsection (a), than to claims under subsection (f).

29. Claims under § 1703(a) require states to refrain from taking certain actions, whereas claims under § 1703(f) require states to affirmatively take certain actions.

30. Section 1703(f) speaks of the requirement to overcome barriers that impede "equal participation," while § 1703(a) does not discuss "equal participation."

31. Claims under § 1703(a) require proof of deliberate discriminatory intent—i.e., that the segregation was motivated by an actual, invidious intent to treat similarly situated persons differently on the basis of race, color, or national origin. *Castaneda*, 648 F.2d at 1000-01, 1007; see also *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (unlawful segregation of students exists when a governmental policy deliberately separates students only on the basis of race); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 6 (1971); *Morales v. Shannon*, 516 F.2d 411, 413 (5th Cir. 1975). By contrast, claims under § 1703(f) may be established by proof of mere disparate impact, "regardless of whether such a failure is motivated by an intent to discriminate against those students." *Castaneda*, 648 at 1008.

32. No evidence was adduced at the hearing to suggest that implementation of the Task Force Model in Nogales (or anywhere else) was motivated by a deliberate, invidious intent to discriminate on the basis of race, color, or national origin. Accordingly, plaintiffs' segregation claim under § 1703(a) fails this threshold requirement.

33. Ability-based grouping is a tool that educators use, not only in ELL instruction, but across many academic subject areas. Such grouping is used to place students in classes according to their current proficiency in any given subject; it is a tool that seems unremarkable in another context like math. It is an educator's tool and, accordingly,

> it is educators, rather than courts, who are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved. Thus, as a general rule, school systems are free to employ ability grouping, even when such a policy has a segregative effect,

> so long, of course, as such a practice is genuinely motivated by educational concerns and not discriminatory motives.

Castaneda, 648 F.2d at 996.

34. Plaintiffs have not proven that the Task Force Model is anything more than ability-based grouping of students, a technique that is permissible under the EEOA. *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1346-47 (11th Cir. 2005) (ability grouping not unconstitutional when it "is not based on the present results of past segregation or will remedy such results through better educational opportunities.") (quoting *McNeal v. Tate County Sch. Dist.*, 508 F.2d 1017, 1020 (5th Cir.1975); *Castaneda*, 648 F.2d at 994 ("ability grouping is not per se unconstitutional").

35. The evidence did not support plaintiffs' claim that the Task Force Model results in widespread stigma.

36. The EEOA does not require schools to prove that no other ELL program exists that could produce similar results with fewer hours of ELD instruction.

37. The goal of SEI and the Task Force Model is for ELL students to become proficient in English through English-only instruction so that they can meaningfully participate in mainstream classes. A.R.S. §§ 15-752, -756.01.

38. Non-binding *dicta* in *Castaneda* suggests that § 1703(f) of the EEOA requires not only appropriate action to overcome language barriers, but also an obligation to overcome academic deficits that students may incur during participation intensive language training. *Castaneda*, 648 F.2d at 1011. To the extent the EEOA does impose such a requirement, the party asserting such a violation must show that the students have incurred "irreparable academic deficits," as reflected by measurements of students' actual progress on achievement tests. *Id*. at 1014. Plaintiffs produced no such evidence at the hearing.

39. All high school students, including ELLs and FEPs, must satisfy the State's content-based graduation requirements. Ariz. Admin. Code R7-2-302 et seq. These content-based requirements act as a back-stop and ensure that all high school students,

including ELLs and FEPs, have mastered all necessary academic content prior to graduation.

40. Plaintiffs have failed to satisfy their burden of proving that Nogales' ELL students are being unlawfully deprived of academic content because of the Task Force Model.

41. That some ELL or FEP students may not graduate in four years does not mean that the EEOA has been violated. The EEOA does not require that high school students graduate in four years.

42. Students who cannot graduate in four years can remain in school – at the State's expense – until they do graduate. A.R.S. § 15-821(A) (requiring schools to accept enrollment in public school until age 21 or until graduated).

43. Based on the data and Arizona's high school graduation requirements, access to content for ELLs is a *de minimus* issue, no greater for ELLs than for several other categories of students. And to the extent that this issue should be addressed for the various groups of impacted students, it is one that should be addressed as a matter of policy not law.

44. Plaintiffs suggestion that this Court defer its ruling on the Task Force Model until there are sufficient data effectively reverses the burden of proof on plaintiffs' segregation claims.

45. If plaintiffs cannot amass sufficient evidence to support their allegations of purported unlawful segregation in Nogales, based on implementation of the Task Force Model, then, assuming Superintendent and Intervenors otherwise prevail on the issues for which they bear the burden, Rule 60(b)(5) relief must be granted.

46. Rule 60(b)(5) relief cannot be denied when the evidence establishes current EEOA compliance, with only the mere speculative possibility that future events may result in non-compliance with the EEOA. *Horne*, 129 S.Ct. at 2595 ("If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper.").

47. Under Rule 60(b)(5), relief is appropriate "if, among other things, 'applying [the judgment or order] prospectively is no longer equitable.'" *Horne*, 129 S.Ct. at 2593 (quoting Fed. R. Civ. P. 60(b)(5)). This Rule "serves a particularly important function in" long-standing cases like this one where "the passage of time frequently brings about changed circumstances — changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id*.

48. The testimony and evidence presented by the Superintendent and the Legislative Intervenors during this Hearing show that the Defendants are entitled to Rule 60(b)(5) relief from the 2000 judgment.

49. The Court's analysis of whether post-judgment relief is appropriate should review (1) Nogales' implementation of the Structured English Immersion ("SEI") methodology; (2) Congress' enactment of the No Child Left Behind Act of 2001 ("NCLB") and the concomitant structural and programming changes in ELL education, increased funding for education in general and ELL programming in particular, and the Nogales results from the NCLB-required assessment and reporting techniques; (3) structural and managerial improvements in Nogales; and, (4) overall increase in education funding available in Nogales. *Horne*, 129 S. Ct. at 2600-06.

50. The testimony and exhibits at the Hearing demonstrate that Nogales has made sufficient progress to satisfy both the original judgment and the Supreme Court's mandate for evaluating post-judgment relief in this case. Accordingly, Rule 60(b)(5) is appropriate.

LEWIS AND ROCA LLP LAWYERS

DATED this 18th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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