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English Language Learners and Judicial Oversight: Progeny of *Castañeda*

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Introduction

When the 93rd Congress enacted the Equal Education Opportunity Act of 1974 (EEOA), it required states to take appropriate action to overcome language barriers that inhibited equal education participation by their resident students.[1] An examination of the EEOA legislative testimony suggests elected officials established the law to set forth provisions to secure the legal rights of English Language Learners (ELLs).[2] In 1981, the Fifth Circuit Court in *Castañeda v. Pickard* created a three-pronged, science-based test that required English language assistance programs for ELLs to: (1) be based on sound educational theory; (2) have adequate resources for program implementation; and (3) provide continuous assessment to determine if students' English language deficits are being addressed.[3]

From 1996 to 2006, while the total U.S. school population increased by slightly less than 3%, the ELL population increased more than 60%. The largest increases in ELL students occurred in the Southeast, Midwest, and mountain areas of the West. During the same time period, over 80% of ELLs cited Spanish as their first language, with the remaining 20% citing over 400 different languages as their native tongue.[4]

Given the exponential increase in the number of students enrolled in English language acquisition programs and the education spending priorities required in the aftermath of the global economic recession in 2008, an examination of the state of education provisions for ELLs is appropriate. Moreover, 30 years have passed since the federal court issued the *Castañeda* three-part test as a mechanism to assess the probative value of instructional programs earmarked for ELLs. Therefore, a review of judicial declarations since these principles were established is warranted. Accordingly, this article is divided into four sections. The first section provides an overview of case law and federal statutes which set forth provision for ELLs. This section also reviews civil challenges which asked the courts to interpret the "sound educational theory" tenet of the *Castañeda* test over the last three decades. The second section reviews the United States Supreme Court's most recent ruling *Horne v. Flores*[5] and *Rufo v. Suffolk County*,[6] a leading case which illustrates the pragmatics of Rule 60 (b) (5) of the *Federal Rules of Civil Procedure*[7] as applied in *Horne*. The third section contains a brief description of state funding for ELL programs. The final section of the article discusses implications of the high court's decision to set aside court-imposed sanctions on Arizona lawmakers, remanding the case back to its original jurisdiction; and what this decision means for the future of language acquisition programs three decades after *Castañeda*.

Equal Education Opportunity for English Language Learners

In 1923, the United States Supreme Court ruled in *Meyer v. Nebraska* that when the government attempts to restrict classroom instruction to the English language, parents have a right to influence what their children actually learn.[8] On May 17, 1954, the Court delivered its monumental ruling in *Brown v. Board of Education* which affirmed education as a fundamental right. The Court explained:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society...In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[9]

In addition to its impact on school segregation, *Brown* served as the catalyst for revolutionary change in almost every facet of American society. Ultimately, the case would serve as a useful resource for parents seeking equal educational opportunity for ELLs. Accordingly, advocates have a well-documented history of utilizing the American judicial system to secure favorable rulings which support equal educational opportunities for these children.

Hence, the Office for Civil Rights (OCR), the chief agency assigned to enforce Title VI of the Civil Rights Act of 1964 which forbids discrimination based on race, color, or national origin in programs receiving federal dollars, provided a clear mandate to all school districts.[10] On May 25, 1970, J. Stanley Pottinger, Director of the OCR issued a memorandum directing school districts to take steps to help ELLs overcome language barriers to ensure their meaningfully participation in all educational programs.[11] The OCR's directive was bolstered in 1974 when the U.S. Supreme Court declared in *Lau v. Nichols* that meaningful learning opportunities were not established by providing students with similar learning environments; rather, school districts needed to take affirmative steps to

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ensure a meaningful learning experience for all students.[12] In 1985, William A. Smith, Acting Assistant Secretary for Civil Rights of the OCR, issued a second directive to school districts explaining the constructs it would apply to determine if local learning communities were in compliance with the federal laws. These included: (a) whether there is actually a need for the district to provide an alternative program to serve LEP students and (b) whether the program is likely to effectively meet the educational needs of its ELLs.[13] A third OCR directive was issued in 1991 which formally adopted the benchmarks established by the Fifth Circuit Court in *Castañeda v. Pickard*[14] which required language assistance programs for English Language Learners (ELLs) to meet the three-pronged test described earlier.[15]

Shortly after *Lau*, the EEOA, which requires states to take appropriate action to eliminate language barriers which impeded the equal participation of ELLs in educational programs, was enacted.[16] Subsequent legal challenges to existing programs for ELLs and court application of the *Castañeda* test placed the burden on plaintiff-parents to demonstrate the inappropriateness of language assistance programs by proving the lack of sound educational theory to support the program in question.

Later civil challenges to the constitutionality of ELL programs interpreted the sound educational theory aspect of the *Castañeda* three-part test and placed the burden upon plaintiffs to prove the unsoundness of the education theory which served as the foundation for a school districts' language acquisition program. In its deliberations in *U.S. v. Texas*, the Fifth Circuit Court applied the "sound educational theory" element of *Castañeda* test when reviewing the expert testimony provided by both plaintiffs and defendants.[17] The court observed that plaintiff testimony contained a substantial number of expert witnesses who concurred with the court's initial finding that bilingual education program, adopted in 1973, was pedagogically unsound while the state (defendant) provided a single expert witness whose level of expertise remained uncertain throughout the testimony given.[18] Consequently, the court concluded that, at a minimum, some of the programs designed to help students overcome language barriers were deficient; however, the court did not make clear the level or quality of evidence they applied to declare that plaintiffs had in fact demonstrated that an unsound theory was has at the core of program.[19] Moreover, the court refused to explain how defendants might successfully respond to the abundance of testimony provided by plaintiffs.

Fifteen years later in *Gomez v. Illinois State Board of Education*, the Seventh Circuit Court declared, "...courts should accord school districts the same deference that they accord administrative agencies."[20] More specifically, "...under the Administrative Procedures Act, administrative agencies are presumed to possess expertise in their field and to be acting within the scope of their authority."[21] Applying this nuanced level of scrutiny, the court attempted to balance the need to "protect the plaintiffs' interests in obtaining equal educational opportunities (through the elimination of language barriers)" and the requirement that courts not "substitute our suppositions for the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies."[22] Because the plaintiffs in *U.S. v. Texas* and *Gomez* believed each language acquisition program to be educationally sound, the soundness of the education theory behind each program was not fully addressed in either case.

In *Teresa P. v. Berkley Unified School District*,[23] the District Court for the Northern District of California embraced the *Castañeda* "sound educational theory" test and acknowledged the decision in *Gomez*. In its nuanced standard of scrutiny, however, the court openly referenced only the second part of the *Gomez* rationale when it declared that "...courts should not substitute their educational values and theories" for those best left to educational authorities and experts.[24] The court's declaration essentially presumed that the school district's language acquisition program was educationally sound. The court concluded:

> After reviewing the evidence presented in this case, this Court concludes that *the plaintiffs have not met their burden to show that the Berkeley Unified School Districts' program is not pedagogically sound* [Italics added]. In fact, the evidence shows that the educational theories, upon which the BUSDs programs are grounded, are manifestly as sound as any theory identified by plaintiffs. Although plaintiffs advocate a program that emphasizes native tongue instruction, they introduced no objective evidence demonstrating that the efficacy of this approach, whatever it may be, for teaching LEP students English, or helping them succeed in a mainstream environment, renders the alternative programs preferred by the Berkley Unified School District pedagogically unsound.[25]

The legal record is uncertain about the quality of testimony provided by the plaintiffs in this case; however, the court did declare that "...the District's special language services were based upon sound theories, were appropriately implemented, and produced positive results in teaching LEP students."[26] The court record indicated that the court relied upon witnesses for the defendant school district, qualified as education experts who provided testimony grounded in their own personal experience with the school cited in the litigation. Even more strikingly, the court did not reveal the facts it utilized to determine the qualification of the experts provided by the school district, nor did it enunciate the actual education theory upon which the school district established its language acquisition program, merely stating that the program was based on sound education theory. However, the court did assert:

> The structure and design of the District's elementary ESL program is based upon factors that include: diversity of language backgrounds; adherence to parental preferences, where possible, either for placement in regular mainstream classrooms, the ESL program, or in bilingual classrooms; and school district educational policies that foster integration and heterogeneity.[27]

The court provided no comments about the quality of the witnesses nor did it make any attempt to weight the value of opposing testimony; rather, it merely offered platitudes which reinforced the presumption of sound theory granted to school district programs.

In *Valeria G. v. Wilson*, the plaintiff ELLs attempted to halt the implementation of state of California's controversial Proposition 227 which declared that language deficient student "...shall be taught English by being taught in English."[28] In effect, ELLs would obtain up to one year of language acquisition services and mainstreamed into classrooms where they would receive their instruction in English only. The plaintiffs asserted the program was not supported by sound educational theory or education experts and claimed it to be an egregious violation of §1703f of the Equal Education Opportunity

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Act of 1974 for its failure to meet the three-pronged test outlined in *Castañeda*. The legal record indicates that plaintiffs provided expert testimony to persuade the court that the immersion program under Proposition 227 was not a sound means to provide any instruction to ELLs while the defendant school district provided its own experts who testified that immersion programs were successfully used internationally.[29] The court responded to opposing testimony stating that "...it is apparent that the state of the art in the area of language remediation [is] such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students."[30] For that reason, the court decided it was inappropriate to choose between the divergent points of view concerning language acquisition. The court's inaction in *Valeria G.* signaled to future litigants in similar civil challenges that a school district's language acquisition program could only be declared out of compliance with the EEOA, via *Castañeda*, when plaintiffs could prove that no experts supported the underlying educational theory of the program in question, an extremely high standard for plaintiffs to meet.

U.S. Supreme Court and English Language Learners

The federal No Child Left Behind Act of 2001 (NCLB),[31] and, more specifically, the English Learner Acquisition Act (ELAA)[32] contain provisions which endorse parental participation and expanded education options for program delivery. However, the 30 year progeny of case law associated with the *Castañeda* three-pronged test has reduced the ability of ELL parents to influence the quality of educational opportunities afforded to their children, especially when they are not satisfied with the instructional methods, as was the issue when the U.S. Supreme Court granted certiorari to *Horne v. Flores*.[33]

In 1992, the Nogales school district, situated on the Arizona-Mexico border, served over 6,000 K12 students of whom 30% were ELLs. In that same year, students and parents sued under the EEOA, claiming the state of Arizona was not taking appropriate action to provide English language instruction for ELLs within the Nogales school district. At the heart of the parents' complaint was Nogales' bilingual education program where students not fluent in English were taught to read and speak English; yet a majority of their classes were delivered in their native language. For that reason, the school district's expenditures on teacher salaries increased significantly in order to hire personnel capable of teaching a variety of subjects in Spanish as well as teachers to teach English. In January 2000, the Federal District Court ruled the bilingual education program ineffective because Arizona's funding for English learners was arbitrary and capricious, and ordered the state to come up with a plan to adequately fund the education of ELLs in the state of Arizona. Initially, the court ordered the state to fix this funding problem in Nogales, but upon further examination and at the request of the Arizona attorney general who was concerned with state uniformity law for its school districts, the court later ordered the state to provide additional funding in every other district in the state. When the Arizona legislature refused to make the appropriation in support of ELL programs, the court levied large fines over several years in attempt to enforce the original court order. Entangled in partisan conflict, the Arizona attorney general and governor refused to defend the defiance of its legislature; therefore, the speaker of the house and president of the Arizona senate intervened and moved for relief from the court's judgment in light of newly adopted H.B. 2064[34] and Rule 60(b) (5) under the *Federal Rules of Civil Procedure*.[35]

Federal Rules of Civil Procedure

Rule 60 (b) (5) of the *Federal Rules of Civil Procedure*, which is a vital component of institutional reform litigation, allows a litigant to ask a federal court to grant relief from a decree when:

> ...the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application or simply the when judgment is no longer in the public interest* [emphasis added] or it is no longer equitable that the judgment should have prospective application or simply the when judgment is no longer in the public interest.[36]

Institutional reform litigation involves cases in which a federal court order is issued to remedy past violations of federal law. The orders generally remain in effect for an extended period time and extend deeply into matters traditionally relegated to state control. Moreover, orders issued in such cases often serve a very important purpose but may effectuate problematic circumstances.

For example, one of the leading cases pertaining to Rule 60(b)5 is *Rufo v. Inmates of Suffolk County* in which the inmates of a Boston jail sued state correction officials and local politicians for violation of their constitutional right to be free from cruel and unusual punishment, a manifestation of the sleeping conditions within the correctional facility.[37] The First District Court of Appeals ruled in favor of the inmates, and both parties entered into a consent decree which authorized the construction of a new correctional facility which would provide single sleeping areas for inmates whose cases had not gone to trial. Consistent with the court's judgment, the facility's construction was planned but the project was delayed for several months. In the interim, the number of inmates to be housed grew exponentially and prompted respondents to request an amendment to the original decree permitting double bunking of inmates, effectively expanding the capacity of the correctional facility. The district court denied the motion, and the Circuit Court of Appeals confirmed; however, the U.S. Supreme Court granted certiorari to review the lower court proceedings.

The primary issue before the high court in *Rufo* was the application of the appropriate standard for resolving a disputed request to modify a judgment accepted by officials representing the public interest. Respondents asserted that such judgment should be modified if there is a change in circumstances since the enactment of the judgment which is adversely impacting the functionality of public institutions. For example, Massachusetts state law requires the Suffolk Sherriff and state Commissioner of Correction to agree on intrafacility inmate transfers. However, the single cell provision within the decree obligated both to approve transfers counter to their professional judgment. As a result, Suffolk County inmates were transferred from the newer facility into extremely overcrowded state correctional facilities at a shared cost of one million dollars annually. Secondly, there are instances when the local sheriff may not have a significant number of inmates eligible for transfer to state correctional facilities primarily because Massachusetts law requires transfers only for pretrial detainees who have served a previous sentence for felony convictions. If the number of convicted felons within the jail is minimal and the facility is at capacity, the sheriff must then

submit a list of inmates being held on bail to a superior court judge. The judge will then select inmates from the list and release them on their own recognizance so that they may be transferred to a halfway house; a less secure facility. The net result is a perversion of the Massachusetts bail statutes primarily because it releases inmates on recognizance who would otherwise be forced to post bail to secure their own release, assuring favorable probability for their court appearance at the designated time. As a result, the Suffolk County sheriff requested permission to institute double-bunking in order to minimize the adverse impact on the local public institutions while honoring all other provisions of the initial decree. In its rejection of the sheriff's request, the district court invoked a modified version of the "grievous wrong" standard which states that a court should only modify a consent decree upon a clear showing of a grievous wrong evoked by new and unforeseen conditions.

In its reversal of the lower courts, the U.S. Supreme Court eliminated the application of the grievous wrong standard in modifying consent decrees related to institutional reform litigation. More specifically, the high court in *Rufo* ruled that the "grievous wrong" language of *United States v. Swift* was "...not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees."[39] Institutional reforms litigation like *Rufo* Rule 60(b)5 provides respondents with a means to ask a federal court to reconsider an order to determine if it has become archaic or inappropriate due to changed circumstances, such as a change in governing law.[40]

Changed Circumstance in Arizona

Horne hardly stands as an exemplar of institutional reform litigation. Begun in 1992, the case did not proceed to trial and verdict, respectively, until 1999 and 2000.[41] Also, even though the original defendants did not appeal the U.S. District Court's 2000 ruling and order to improve funding, the state of Arizona failed to take any compliance action in the ensuing five years. It was only at the point at which the court began imposing fines, ultimately exceeding $20 million, that the state legislature finally acted, passing House Bill 2064 in 2006.[42] Even then, the state was far from unified in its support for this proposed solution. The governor, who had vetoed similar measures previously, refused to sign the bill, and both the state attorney general and state board of education also declined to support relief from the 2000 court order based on this legislation. In the end, the legislature itself was forced to intervene to seek relief under Rule 60(b)(5). Additionally, the legislature sought relief from the decision of the court to apply its original order statewide, which it had done at the state attorney general's request.[43]

The grounds for the sought-for relief were varied. The respondents argued that between 2000 and 2006 there had been several substantive changes in ELL education in Arizona due to developments at the local, state, and national levels. Locally, a new superintendent had revamped instruction in all areas, including ELL, by promoting greater efficiency and thus allowing for improvements such as reduced class sizes and increased teacher support. At the state level, it was argued that the state had abandoned bilingual education, the system that had been declared to be inadequately funded, with "Structured English Immersion (SEI)." This change was then ratified into law as part of H.B. 2064.[44] This change also followed a significant change in the formulas for funding ELL education in Arizona. Yet another key change was passage of the No Child Left Behind Act of 2001 (NCLB). NCLB provided significant increases in Title III funding for ELL programs, which Arizona then used to meet the court-mandated increases in state funding. Additionally, NCLB strengthened the EEOA's preference for greater state control over all aspects of the educational program, including ELL programs. NCLB also stated a belief of the Congress and the President that improved educational outcomes could be based on improved educational methods as opposed to additional funding. Finally, it was argued that the Nogales school district, at the heart of the original litigation, had experienced a significant increase in funding over the intervening years. Although the incremental funding at issue in the original court order had not increased at the rate envisioned in the order, the respondents argued that this overall increase in funding for the school district, coupled with local reforms, had created a sufficiently funded and educationally sound ELL program.

Both the district court and the ninth circuit rejected the legislature's motion for relief. In interpreting Rule 60(b)(5), they relied on the previous doctrines in *Rufo* and *Swift* to determine when a court order may be modified or dismissed by "changed circumstances." In noting that the state had not significantly increased incremental funding for ELL instruction, but had merely used federal funds under NCLB to supplant state funding, these courts concluded that there had been no substantial change in state funding of ELL as prescribed in the original order. These courts also placed great reliance on the fact that the original order had been uncontested by the state and that neither the legislature nor the current state superintendent were among the named parties in the original case, thus raising issues of their standing to challenge the 2000 order.

On appeal, the U.S. Supreme Court reversed these rulings and directed the lower courts to reconsider the state's request for relief under Rule 60(b)(5).[45] Although the Court did not directly order any relief from the 2000 order, it did find that both the district and circuit courts had failed to appropriately address the respondents' contention of changed circumstances. It argued that, especially in the context of institutional reform at the state level, concerns regarding federalism and the intrusion of federal courts into state functions argued for a more flexible application of the changed circumstances of Rule 60(b)(5). The Court was especially critical of the lower courts' focus on the state's incremental funding of ELL education in Nogales to the exclusion of other factors and considerations that might indicate changed circumstances. It noted that the respondents had provided persuasive evidence that the ELL situation in Nogales, and the rest of the state, was substantially different from that in 2000. Justice Alito, writing for the majority, asserted that each of the changes cited by the respondents could be taken as substantially changed circumstances in their own right as well as collectively. The Court found that the changes in local school policies, coupled with the adoption of SEI, meant that the ELL program in the Nogales school district in 2009 was significantly different from that in 1992 or 2000. It also found that NCLB/ELAA had constituted a change in law that inherently placed a greater emphasis on state control of ELL programs and a reduced emphasis on funding in educational improvement. The Court considered the substantial increase in funding available for ELL programs in Nogales, regardless of source, to be a significant change in circumstance. In making its ruling, the Court found that the lower courts had taken a far too narrow view of changed circumstances, focusing more on the state's limited response to the district court's 2000

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decree order than the circumstances that had led to the decree in the first place.[46]

With regard to the other matters raised in *Horne*, the Court accepted the intervention of the state superintendent of public instruction as sufficient to establish standing for the challenge to the court order.[47] In this, the Court may have established an important precedent, if one somewhat peripheral to this analysis, regarding the growing trend of specific executive officers at the state level refusing to affirmatively defend legislative enactments with which they personally and politically disagree. Additionally, the Court ruled that the failure of the state to appeal the initial district court order in 2000 had no effect on the respondent's ability to invoke the rules of civil procedure to seek relief from that order. The Court found the trial court had erred when it, with the acquiescence of the state attorney general, extended its order to every school district in the state despite a lack of any evidence showing similar violation elsewhere and the fact the all of the plaintiffs were residents solely of Nogales.

State Provisions for English Language Learners

Additional costs for educational programs are generally related to legitimate differences based on district characteristics, type of program in which a student is enrolled, or characteristics of student populations such as those with disabilities, students with English as a second language (ELLs), and the poor. For nearly 40 years, most state school funding programs have recognized the need for

Table
States with Funding for English Language Learner Programs: 1999 and 2009

State	State Funding for ELL Programs	
	1999	2009
Alabama		x
Alaska	x	x
Arizona	x	x
Arkansas	x	x
California	x	x
Colorado	x	
Connecticut	x	x
Delaware	x	
Florida	x	x
Georgia	x	
Hawaii		x
Idaho	x	x
Illinois	x	x
Indiana	x	x
Iowa	x	x
Kansas	x	x
Kentucky		
Louisiana		x
Maine	x	x
Maryland	x	x
Massachusetts	x	x
Michigan	x	x
Minnesota	x	x
Mississippi		
Missouri	x	x
Montana		
Nebraska	x	x
Nevada	x	
New Hampshire	x	x
New Jersey	x	x
New Mexico	x	x
New York	x	x
North Carolina	x	x
North Dakota	x	x
Ohio		
Oklahoma	x	x
Oregon	x	x
Pennsylvania		
Rhode Island	x	x
South Carolina		
South Dakota		
Tennessee		x
Texas	x	x
Utah	x	x
Vermont	x	x
Virginia	x	
Washington	x	x
West Virginia		
Wisconsin	x	x
Wyoming	x	x
Total	37	37

Sources: Andrew McKnight and Beth Antunez, *State Survey of Legislative Requirements for Educating Limited English Proficient Students* (Washington, DC: The George Washington University, National Clearinghouse for Bilingual Education, 1999), http://www.ncela.gwu.edu/files/rcd/BE020932/State_Survey_of_Legislative_Re.pdf.; and Deborah A. Verstegen and Teresa S. Jordan, "State Public Education Finance Systems and Funding Mechanisms for Special Populations," a paper presented at the Annual Conference of the American Education Finance Association, March 2010, Richmond, VA.

additional resources to meet minimum education goals for these children.[48] Typically, state funding for these programs takes one of three forms: (1) categorical aid; (2) weighting of the general aid formula; or (3) inclusion of ELL funding in the general aid formula. Some states use more than one approach. The table compares states that provided funding ELL programs in 1999 with those that did so in 2009, the latter representing the latest data available. Although the same number of states (37) provided funding for ELL programs in both years, these do not necessarily represent the same states. For example, three states—Alabama, Hawaii, Louisiana—which did not provide funding for ELLs in 1999 now do so. On the other hand, Nevada and Virginia, followed the opposite trend, and now offer no funding for ELL programs. Finally, eight states had no funding for ELL programs in either year. These include: Kentucky, Mississippi, Montana, Ohio, Pennsylvania, South Carolina, South Dakota, and West Virginia. Also, it is important to remember that while almost three-fourths of states provide funding for ELL programs, we do not know if the levels of funding are sufficient or equitably distributed.

Conclusion and Policy Implications

Given the recent calls for national immigration policy reforms, the defeat of the Development, Relief and Education for Alien Minors Act (DREAM) Act by the 111th U.S. Congress,[49] the extended downturn in the American economy, and the focus of current ELL research on financial burdens assumed by state lawmakers, the U.S. Supreme Court's recent ruling in *Horne v. Flores* may have significant implications for subsequent enforcement of ELL statutory provisions. The primary question before the high court was whether the funding remedy originally ordered by the district court should stand or whether Arizona school officials should be granted relief from the original order if they had demonstrated significant, changed circumstances in the Nogales school district. In a 6-3 decision, the U.S. Supreme Court reversed the decision of the Ninth Circuit Court. Writing for the majority, Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas remanded the case back to the district court for the appropriate application of Rule 60 (b) (5) for compliance within the guidelines of the EEOA. A byproduct of the legal proceeding was an issue of whether or not federal court orders, established specifically for the Nogales school district, could be extended to all Arizona school districts at the request of state's attorney general. The Court declared that if the issue were to be raised on remand, then the district court would have to determine if there was a basis in federal statutes or in the evidence of the case to support such an extension. In addition, the Court declared that state officials should not simply ignore court rulings in an attempt to use the federal courts as a conduit for enacting state policy changes in lieu of the legislature and the will of state voters. Joined by Justices Ginsburg, Souter, and Stevens, Justice Breyer's dissent was of the view that the majority utilized new standards to rule in cases pertaining to so-called institutional reform litigation, effectuating a more difficult environment for the courts to secure enforcement of federal laws which set forth education provisions for English Language Learners.

At first impression, there can be little dispute that the U.S. Supreme Court decision in *Horne* remedied certain serious oversights by the district and circuit courts. Critical among these was the obvious oversight in the lower courts focusing their changed circumstance analysis under Rule 60(b)(5) solely on the state's direct response, or lack thereof, to the district court order without regard to the larger question of the current status of ELL education in Nogales and the rest of the state. Likewise, there is no logic in the petitioners' argument that a party, especially a state, to an institutional reform order cannot claim relief from that order based on new and changed circumstances simply because they failed to appeal the initial order when it was imposed. Finally, it would appear that other than the convenience of the state attorney general and other officials, the district court had no basis on which to extend its order to the entire state.

That said, the application of Rule 60(b)(5) to the ELL court order in *Horne* raises several troubling issues. Through delays of litigation and deliberate avoidance of the eventual court order, the Arizona legislature evaded its obligation to address ELL deficiencies in the Nogales school district and the rest of the state for over 13 years. When finally confronted with court fines for failure to enforce the order, the legislature passed a new law that carried no significant guarantees of improved ELL education, and then, by stringing together a series of apparently fortunate externally changed circumstances, has now been allowed to seek to vacate the original order altogether under the rubric of the *Federal Rules of Civil Procedure*. To be certain, the respondents have made considerable arguments that the condition of ELL education in the Nogales school district today may be significantly better than it was in 1992. Nonetheless, it cannot be disputed that the legislature has essentially used the *Federal Rules of Civil Procedure* to argue that evolutionary changes over time, as opposed to the specific changes cited in *Rufo*, caused largely without significant state action, along with the passage of a single piece of legislation that did not directly address the issues in the original litigation, constituted changed circumstances sufficient to allow it to challenge a court order it never even attempted to comply with.

As such, *Horne v. Flores* may have established a troubling precedent found nowhere in the actual ruling. While using Rule 60(b)(5) to evade federal court orders may require more than simple delay and obfuscation, this ruling does suggest that states facing court-ordered institutional reform may be able to apply an increasingly flexible standard of changed circumstances to challenge such orders, even when the states themselves make no affirmative efforts to remedy the deficiencies identified in these orders. In a worst case scenario, state legislatures could continue to claim that an endless succession of new statutes and school leaders would constitute changed circumstances sufficient to defeat, or at the very least indefinitely delay, court-ordered remedies for state failures to adequately implement federal programs or uphold the constitutionally protected rights of school children.

The ruling in *Horne* has numerous and mixed policy implications for securing equal educational opportunity for ELLs. In permitting an exemption from funding remedies handed down by federal courts in the wake of changed circumstance, the decision inherently re-emphasized the need for policymakers and educators to apply educationally sound instructional strategies to appropriately serve students who do not speak English. Conversely, the Arizona legislature's failure to respond to or appeal the federal court rulings, with little or no consequences, may establish a precedent that clearly contravenes the foundation of the rule of law within the American

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judicial system. On the other hand, one may view the Arizona legislature's contempt for the federal court as a reaffirmation of our nation's federalist framework whereby the reserved powers principles established under the 10th Amendment of the U.S. Constitution were applied as intended by its authors. Nevertheless, the mere mention of states' rights juxtaposed to the enforcement of federal statutes designed to secure equal opportunity for suspect classes of Americans evokes images of national guardsmen, political discord, protest, and social unrest against the backdrop of the impotence of "with all deliberate speed." Moreover, recent court applications of the *Castañeda* standards, approving any instructional practice for ELLs grounded in a single educational theory, creates a significant legal burden for parents who disagree with the education provided to their children.[50] Consequently, *Horne* has raised questions about the future of federal courts and their ability to provide relief for dissenting parents, especially when state lawmakers are in violation of federal law pertaining to English Language Learners.

Endnotes

[1] 20 U.S.C. § 1701 et seq.

[2] See, Sandra Del Valle, *Language Rights and the Law in the United States* (Clevedon, UK: Multilingual Matters, 2003), 243, 270. Del Valle noted that the EEOA was passed as a floor amendment to the Education Amendments of 1974 and had no legislative history that year; however, there is a legislative history attached to the identical bill introduced in 1972. This bill failed to receive Senate approval.

[3] *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

[4] U.S. Department of Education, *The Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program School Years 2004-06* (Washington, DC: Office of Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, 2008).

[5] *Horne v. Flores*, 129 S. Ct. 2579 (2009).

[6] *Rufo v. Inmates of the Suffolk Co. Jail*, 502 U.S. 367 (1992).

[7] U.S. House of Representatives, The Committee on the Judiciary of the House of Representatives, *Federal Rules of Civil Procedure* (Washington, DC: U.S. Government Printing Office, December 1, 2010).

[8] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[9] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

[10] 42 U.S.C. §§ 2000(d)-2000(d)(7).

[11] Memorandum from J. Stanley Pottinger, Director, Office for Civil Rights, to selected school districts with students of national origin-minority groups, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970, http://www2.ed.gov/about/offices/list/ocr/docs/nationaloriginmemo.html.

[12] *Lau v. Nichols*, 414 U.S. 56 (1974). Id. at 566.

[13] Memorandum from William A. Smith, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, United States Department of Education, to Senior OCR Staff, "Office for Civil Rights Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient," April 6, 1990, http://www2.ed.gov/about/offices/list/ocr/docs/lau1990_and_1985.html.

[14] *Lau*, *supra* note 12.

[15] Memorandum from Michael L. Williams, Assistant Secretary for Civil Rights, Office for Civil Rights, United States Department of Education, to Senior OCR Staff, "Policy Update on Schools' Obligations toward National Origin Minority Students with Limited-English Proficiency (LEP students)," September 27, 1991, http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html.

[16] 20 U.S.C. § 1701 et seq.

[17] *United States v. Texas*, 680 F.2d 356 (1982).

[18] *Id*. at 371.

[19] *Id*.

[20] *Gomez v. Ill. St. Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987).

[21] *Administrative Procedures Act*, 5 U.S.C.

[22] *Gomez*, *supra* note 20, at 1041.

[23] *Teresa P. v. Berkeley Unified School District*, 724 F. Supp. 698, 713 (N.D. Cal. 1989).

[24] *Id*.

[25] *Id*. at 713-14.

[26] *Id*. at 771.

[27] *Id*. at 712.

[28] *Valeria G. v. Wilson*, 12 F Supp. 2d. 1007 – Dist. Ct., N.D. Cal. 1998.

[29] *Id*. at 1018.

[30] *Id*. at 1018-19.

[31] P.L. 107-110; 20 U.S.C. § 6311, *et. Seq*.

[32] 20 U.S.C. § 6812(1).

[33] *Horne v. Flores*, 129 S. Ct. 2579 (2009).

[34] H.B. 2064, 2006 Leg., 47th Sess., 2nd reg. Sess. (Az., 2006).

[35] U.S. House of Representatives, *Federal Rules of Civil Procedure*, 79.

[36] Ibid.

[37] *Rufo v. Inmates of the Suffolk Co. Jail*, 502 U.S. 367 (1992).

[38] *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

[39] *Rufo, supra* note 35, at 381.

[40] *Id*., 383.

[41] *Horne, supra* note 33, 2589-90.

[42] H.B. 2064, 2006 Leg., 47th Sess., 2nd reg. Sess. (Az., 2006).

[43] *Id*. The attorney general had argued that the state constitution required a uniform application of all laws and rules affecting school funding.

[44] H.B. 2064, 2006 Leg., 47th Sess., 2nd reg. Sess. (Az., 2006).

[45] *Id*., 1307.

[46] *Id*., 2593-2608.

[47] *Id*., 2592-3.

[48] Robert Berne and Leanna Stiefel, *The Measurement of Equity in School Finance* (Baltimore, MD: Johns Hopkins University Press, 1984), 14-16.

[49] S. 729, 111th Cong. (2009).

[50] Eden Davis, "Unhappy Parents of Limited English Proficiency Students: What Can They Really Do?" *Journal of Law and Education* 35 (2006): 277-287.

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