IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **G.I. FORUM and LULAC,** **Plaintiff-Intervenors,** **v.** **STATE OF TEXAS, et al.,** **Defendants.**	**Civil Action No. 6:71-CV-5281 WWJ**

UNITED STATES' RESPONSE TO THE DEFENDANTS' MOTION FOR RECONSIDERATION AND CONDITIONAL MOTION TO STAY

Plaintiff United States submits this brief in response to the "Defendants' Consolidated Motion for Reconsideration of Memorandum Opinion and Order Rejecting Defendants' Eleventh Amendment Immunity Defense and Retaining Jurisdiction and Conditional Motion to Stay Proceedings." Specifically, the United States addresses the underlying issue raised (again) by the Defendants' motion: whether the Eleventh Amendment bars the Plaintiff-Intervenors' claims under the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) ("EEOA"). The United States maintains that the EEOA abrogates Eleventh Amendment immunity, and that, in any event, the Court need not stay the proceedings in their entirety because the Plaintiff-Intervenors seek prospective and injunctive relief against a state official.

BACKGROUND

The dispute before the Court marks the latest chapter in a saga of litigation to remedy racial and national origin discrimination in the Texas public schools. On February 9, 2006, plaintiff-intervenors GI FORUM and LULAC (collectively "LULAC") moved for further relief to require that the Defendants "monitor, enforce and supervise programs for limited-English proficient students in Texas public schools so as to ensure that those students receive appropriate educational programs and equal educational opportunities." (Pl.-Intervs.' Mot. for Further Relief at 1.) The motion asserts claims under "the orders of this Court" and section 1703(f) of the EEOA.[1] (E.g., id. at 12, ¶ 45).

On February 23, 2006, the State of Texas and the Texas Education Agency (collectively "the Texas defendants") responded to LULAC's motion. In this response, the Texas defendants summarily asserted, inter alia, that the EEOA "fails to overcome the State's Eleventh Amendment immunity." (Defs.' Resp. to Mot. for Further Relief at 7.) In separate replies, both LULAC and the United States argued that the EEOA abrogated the states' Eleventh Amendment immunity, as the circuit courts have uniformly held. United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir. 1996); Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1035-38 (7th Cir. 1987); Los Angeles NAACP v. Los Angeles Unified Sch. Dist., 714 F.2d 946, 950 (9th Cir. 1983).

By Order entered April 14, 2006, the Court set a hearing for LULAC's motion on July

[1] Under 20 U.S.C. § 1703(f), "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . 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." "The term 'educational agency' means a local educational agency or a 'State educational agency.'" Id. § 1720(a).

24, 2006, and required the parties to complete relevant discovery by June 23, 2006. Interpreting this Order as an implicit deprivation of immunity, the Texas defendants filed an interlocutory appeal and a contemporaneous motion to stay district court proceedings pending the appeal. In a Memorandum Opinion and Order dated May 30, 2006, this Court denied the motion to stay and retained jurisdiction over the matter. The Court held that the Texas defendants' Eleventh Immunity argument, as originally articulated, was frivolous because it was not supported by any cogent legal analysis. Mem. Op. & Order at 10. The Court nonetheless "reserve[d] judgment as to a potentially more colorable immunity argument, if one is presented at the time of, or before, the July [24] hearing." Id. at 7. Subsequently, the Texas defendants withdrew their appeal to the Fifth Circuit.

On June 16, 2006, the Texas defendants moved the Court to reconsider its May 30, 2006 Memorandum Opinion and Order. In the motion, the Texas defendants contend that LULAC's motion for further relief presents only EEOA claims. They also offer a more substantive argument to support their earlier assertion that the Eleventh Amendment bars any EEOA claims against them. In view of the Court's invitation of such argument, the United States addresses the Texas defendants' revamped Eleventh Amendment challenge.

GOVERNING LEGAL STANDARDS

As interpreted by the Supreme Court, the Eleventh Amendment "does not provide for federal jurisdiction over suits against nonconsenting States." Nev. Dep't of Human Resources, v. Hibbs, 538 U.S. 721, 726 (2003) (citations omitted). Congress, however, "can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. This

enforcement power, as the [Supreme Court has] often acknowledged, is a 'broad power indeed.'" Tennessee v. Lane, 541 U.S. 509, 518 (2004) (citations and quotations omitted).[2] Accordingly, Congress "may do more than simply proscribe conduct that [the Court has] held unconstitutional." Hibbs, 538 U.S. at 727. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

To determine whether a federal statute abrogates Eleventh Amendment immunity, a court "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate its immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." Lane, 541 U.S. at 517 (quotation omitted). To answer the latter inquiry, the Supreme Court applies a three-step analysis. First, the Court identifies "the constitutional right or rights that Congress sought to enforce" when it enacted the statute. Id. at 522. Second, the Court examines whether there was a history and pattern of unconstitutional action against the class(es) protected by the statute. Id. at 528. Third, the Court determines whether "Congress' chosen remedy . . . is congruent and proportional to the targeted violation."

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[2] Section 1 of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Under § 5 of the Amendment, "Congress shall have power to enforce" the substantive guarantees contained in § 1 by enacting "appropriate legislation."

Hibbs, 538 U.S. at 737 (quotation omitted); see also Lane, 541 U.S. at 530.

Here, the parties do not dispute the threshold question of whether Congress unequivocally intended to abrogate Eleventh Amendment immunity by the EEOA. (Defs.' Mot. for Recons. at 14); see also Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981) (noting that it is "indisputable" that "in enacting the EEOA Congress acted pursuant to the powers given it in § 5 of the fourteenth amendment."). Thus, to resolve the issue of abrogation, the Court need only apply the three-step analysis to determine "whether Congress acted pursuant to a valid grant of constitutional authority." Lane, 541 U.S. at 517 (quotation omitted).

ARGUMENT

I. The EEOA Abrogates States' Eleventh Amendment Immunity Because It Constitutes a Measured Legislative Response to a Long History of Unconstitutional National Origin Discrimination

A. The Equal Educational Opportunities Act

The core constitutional concern motivating Congress' enactment of the EEOA is that "all children in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." 20 U.S.C. § 1701(a)(1). Accordingly, Congress designed the EEOA to "abolish" the practice of segregating public school students by race, color, sex, or national origin and to provide "appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. §§ 1702(a)(2) & (b), 1701(b). To accomplish this goal, the EEOA prohibits the following: intentional segregation "on the basis of race, color, or national origin among or within schools," id. § 1703(a); the failure to remove the vestiges of a preexistent dual school system, id. § 1703(b); student assignments that increase segregation, id. § 1703(c); discrimination in faculty and staff employment, id. § 1703(d); transfers of students that

purposely increase segregation, id. § 1703(e); and the failure "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," id. § 1703(f).

B. The Constitutional Right at Issue

Before considering the historical predicate for the EEOA, this Court must first "identify the constitutional right or rights that Congress sought to enforce when it enacted" the statute. Lane, 541 U.S. at 522. In pertinent part, the EEOA aims to protect public school students from national origin discrimination, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.[3] This discrimination has taken many forms, including the segregation of national origin minorities and the exclusion of limited English proficient students from effective participation in instructional programs. See 20 U.S.C. §§ 1703(a) & (f) (prohibiting such practices). National origin classifications are "inherently suspect" and demand strict scrutiny. Apache Bend Apartments, Ltd. v. United States, 964 F.2d 1556, 1562 (5th Cir. 1992). Accordingly, "[s]uch a classification 'will almost never be based on legitimate governmental reasons,' and to survive judicial review, 'must further a compelling governmental interest which cannot be served by alternative means less burdensome to the suspect class.'" Id. at 1562-63 (quotation omitted).

[3] Congress expressly authorized private suits against states for violation of the EEOA. 20 U.S.C. § 1703 ("No State shall deny equal educational opportunity to an individual . . ."); id. § 1720(a) (defining "educational agency" for purposes of § 1703 as a local or state educational agency); id. § 1706 (establishing cause of action for EEOA violation).

C. History of Unconstitutional Discrimination Against National Origin Minority Students

The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999). At the time of the EEOA's passage in 1974, Congress was well aware of the history of national origin discrimination in public schools, particularly the denial of equal educational opportunities to limited English proficient students.

Just months before passing the EEOA, Congress heard testimony from the acting director of the Office of Civil Rights ("OCR") for the Department of Health, Education, and Welfare ("HEW"), Martin Gerry, who described OCR's efforts to vindicate the rights of national origin minority students. Bilingual Education Act: Hearings on H.R. 1085, H.R. 2490, and H.R. 11464 Before the Gen. Subcomm. on Educ. of the Comm. on Educ. and Labor, 93rd Cong. 20 (1974) (hereinafter "Bilingual Education Act Hearings"). This testimony revealed that OCR initiated a nationwide review of "civil rights and educational literature" to "address[] the question of discrimination against national origin minority group children." Id. at 21. According to Mr. Gerry,

> [t]he review was in part prompted by complaints from community groups that the Office had failed to investigate and identify discriminatory aspects of school district operations which often resulted in the segregation of national origin minority children within schools and denial to them of equal educational opportunity. Evidence of systematic lower achievement of minority group children and the existence of large numbers of segregated ability-grouping and special education classes were accumulated.
>
> This review, together with discussions with the Commissioner of Education and members of his staff, led to the conclusion that national origin minority children were, as a group, in many school districts beings excluded from full and effective participation in, and the full benefits offered by, the educational programs operated by such districts.

Id.

As Mr. Gerry noted, innumerable national origin minority students have been unlawfully segregated within schools into separate ability groups and special education classes. Moreover, contemporaneous court decisions informed Congress that national origin discrimination extended to complete school segregation in several states. See Lane 541 U.S. at 524-25 (treating cases as part of the record of unconstitutional disability discrimination that Congress considered). For example, in Arizona, California, Colorado, New Mexico, and Texas, tens of thousands of Mexican American students were segregated into separate or racially identifiable schools.[4] Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 197 (1973) (stating the conclusion of the U.S. Commission on Civil Rights that Hispanic students in Arizona, California, Colorado, New Mexico, and Texas "suffer from the same educational inequities as Negroes and American Indians"); United States v. Tex. Educ. Agency, 467 F.2d 848, 879-82 (5th Cir. 1972) (summarizing the findings of two reports by the U.S. Commission on Civil Rights regarding the education of Mexican Americans); Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F. Supp. 599, 612 (S.D. Tex. 1970) ("It is obvious to the court from the evidence that the Mexican-Americans have been historically discriminated against as a class in the Southeast and in Texas, and in the Corpus Christi District"), aff'd, 467 F.2d 142 (5th Cir. 1972); see also generally Jorge C. Rangel & Carlos Alcala, Comment, Project Report: De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. L. Rev. 307 (1972).[5]

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[4] Discrimination against Hispanic students was not limited to these states. See, e.g., United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1526-28 (S.D.N.Y. 1985) (describing segregative actions against minorities, which included Hispanic and black students).

[5] Court findings of discrimination against Mexican Americans in Texas were not limited to the field of education. See, e.g., Graves v. Barnes, 343 F. Supp. 704, 728 (W.D. Tex. 1972) ("[T]he Mexican-American population of Texas, which amounts to about 20%, has historically

This unconstitutional segregation has been historically attributable to, and justified by, the language deficiencies of the national origin minorities. In Texas, for example, school officials frequently rationalized the school and classroom segregation of Mexican Americans because of the students' lack of English fluency. Hernandez v. Texas, 347 U.S. 475, 479 n.10 (1954); Morales v. Shannon, 516 F.2d 411, 413 (5th Cir. 1975); United States v. Tex. Educ. Agency, 467 F.2d 848, 868-69 (5th Cir. 1972); Indep. Sch. Dist. v. Salvatierra, 33 S.W.2d 790, 791-92 (Tex. Civ. App. 1930). Consequently, such segregation perpetuated the English language deficiencies of Mexican Americans and other national origin minorities by limiting their exposure to English-speaking students. E.g., Gonzales v. Sheely, 96 F. Supp. 1004, 1007 (D. Ariz. 1951); Mendez v. Westminster Sch. Dist. of Orange County, 64 F. Supp. 544, 549 (S.D. Cal. 1946). This tragic cycle powerfully illustrates the nexus between national origin discrimination and the failure to take action to overcome limited English proficient students' language barriers.

As this Court has observed, "[i]n the field of public education, discrimination against Mexican-Americans in Texas has been particularly acute." United States v. Texas, 506 F. Supp. 405, 411 (E.D. Tex. 1981). Much of this disparate treatment correlated with the limited English-speaking ability of Mexican-American students. In advocating the Bilingual Education Reform Act, Senator Kennedy noted that "Mexican-American youngsters are not only shunted out of college bound courses, but all too frequently are placed in classes for the mentally retarded–not because of any intelligence deficiency, but because of an English language deficiency." 93 Cong.

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suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."), aff'd in pertinent part, sub nom, White v. Regester, 412 U.S. 755 (1973).

Rec. 15431 (May 20, 1974). In an earlier congressional hearing, Spanish professor Faye Bumpass stated that, "in many of our schools in Texas, a Spanish-speaking child is never allowed to speak Spanish, even on the playground. Whenever he does, he is often punished severely." Bilingual Education: Hearings on S. 428 Before the Spec. Subcomm. on Bilingual Educ. of the S. Comm. on Labor and Public Welfare, 90th Cong. 61 (1967).

Before enacting the EEOA, Congress also learned that many other national origin minorities were denied equal educational opportunities because of the systemic failure to provide English language services. In San Francisco alone in the year 1973, nearly 5,000 Chinese, Hispanic, Filipino, Japanese, and other national origin minority students needed, but did not receive, assistance to overcome their language barriers. Bilingual Education Act Hearings 53. In Maine, a substantial number of Franco-Americans were "unable to understand English when entering school, discouraged in using the language [French] in which they were fluent, [and, as a result,] often failed to become fully accomplished in either." Id. at 71 (statement of Hon. William S. Cohen). Indeed, the laws of many states, such as Texas, forbade national origin minority students from speaking their native language on school grounds, which substantially hindered those students' education and socially isolated them from their peers. Joseph Leibowicz, The Proposed English Language Amendment: Shield or Sword?, 3 Yale L. & Pol'y Rev. 519, 535-36 (1985); Texas, 506 F. Supp. at 415; Gonzales, 96 F. Supp. at 1007.

As Mr. Gerry explained to Congress, this pattern of discrimination against national origin minority students prompted HEW to issue a May 25, 1970 memorandum ("1970 HEW memo") clarifying "the responsibility of school districts to provide equal educational opportunity to national origin minority group children deficient in English language skills." See Bilingual

Education Act Hearings 21-22.[6] The 1970 HEW memo recited the following findings:

> Title VI [of the Civil Rights Act of 1964] compliance reviews conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese.

The memo further outlined specific guidelines, including the following directive: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

The widespread failure to help national origin minorities "overcome language barriers" produced predictable and appalling results. After the issuance of the 1970 HEW memo, OCR conducted a series of compliance reviews, which "showed conclusively that the educational performance of national origin minority students as compared against their prior performance was declining rapidly and, when compared to the performance profile of their Anglo peers, decidedly unequally." Bilingual Education Act Hearings 23. Moreover, drop-out rates of national origin minorities were astronomically high. See, e.g., Education Legislation, 1973: Hearings on S. 1539 Before the Subcomm. on Educ. of the S. Comm. on Labor and Public Welfare, 93rd Cong. 2593 (1973) (statement of Sen. Alan Cranston) (noting that 50% of Spanish-speaking students in California drop out by the eighth grade and the average number of

[6] The 1970 HEW memo is available at http://www.ed.gov/print/about/offices/list/ocr/docs/lau1970.html.

school years completed by Mexican Americans in the Southwest is 7.1 years). The detrimental ramifications of such trends on society are obvious.

The Texas defendants incorrectly suggest that the historical inquiry supporting abrogation must include congressional findings or legislative history identifying state failures to address language barriers in public schools. (Defs.' Mot. for Recons. at 12.) "This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." Lane, 541 U.S. at 527 n.16. As the Fifth Circuit explained, "after Lane we do not look solely at the state level for a history and pattern of unconstitutional action; we also examine discrimination by nonstate government entities." Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277 n.14 (5th Cir. 2005); see also McCarthy v. Hawkins, 381 F.3d 407, 423 n.2 (5th Cir. 2004) (Garza, J., concurring in part and dissenting in part) (observing that, in Lane, the Supreme Court "appear[ed] to have abandoned" the requirement that Congress itself must "identify a history and pattern of discrimination by states"). Moreover, because discrimination on the basis of national origin demands strict scrutiny, it is "easier for Congress to show a pattern of state constitutional violations." Hibbs, 538 U.S. at 736.

Therefore, based on the well-documented history of discrimination against national origin minority students, including segregation justified by language deficiency, Congress possessed ample factual justification to enact the EEOA.

D. The EEOA Is Reasonably Tailored to Remedy and Prevent Unconstitutional Discrimination Against National Origin Minority Students

Finally, this Court must determine whether the remedies created by the EEOA are "congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent." Pace, 403 F.3d at 277. Under this inquiry, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." Lane, 541 U.S. at 523-24. Accordingly, "[d]ifficult and intractable problems often require powerful remedies" and may justify "reasonably prophylactic legislation." Kimel, 528 U.S. at 88; Hibbs, 538 U.S. at 737.

The EEOA is a remedial and prophylactic scheme that prohibits states from "deny[ing] educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703. Congress devised this scheme to respond to the deplorable record of national origin discrimination that was documented in the hearings and cases described above. The statute targets a range of conduct in public schools that facilitates or perpetuates the segregation of minority students or otherwise discriminates against them. Id.

Section 1703(f) is one component of this statutory scheme designed not only to address explicit and subtle forms of national origin discrimination, but also to eliminate the vestiges of prior discrimination. See id. Section 1703(f) proscribes two forms of clearly unconstitutional actions: (1) the intentional denial of language assistance to limited English proficient students because they belong to a national origin minority group, and (2) the failure to provide language assistance to limited English proficient students who previously were segregated because of their language deficiencies. See also id. § 1703(b) (requiring the removal of vestiges of a former dual school system). Such conduct not only presumptively violates the Equal Protection Clause but

also "effectively foreclose[s] . . . any meaningful education" for those students. Lau v. Nichols, 414 U.S. 563, 566 (1974).[7]

Whether or not the denial of equal educational opportunities to limited English proficient students is motivated by discriminatory intent, the gravity of the harm is profound and warrants a prophylactic response. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). In light of this harm and the difficulty of discerning whether the absence or inadequacy of language assistance reflects intentional discrimination against students of a particular national origin, Congress required states to take "appropriate action to overcome [the] language barriers" of all limited English proficient students. 20 U.S.C. § 1703(f). In doing so, Congress appropriately sought to prevent more subtle forms of discrimination, including practices that have the effect of denying equal educational opportunities. Lane, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Indeed, in exercising its § 5 power, Congress "'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" Hibbs, 538 U.S.

[7] "[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions." Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

at 737 (quoting Kimel, at 81).

In Hibbs, the Court found that the Family Medical Leave Act ("FMLA") was a congruent and proportional remedy to combat "mutually reinforcing stereotypes" about women's and men's roles that "created a self-fulfilling cycle of discrimination" because this discrimination "may be difficult to detect on a case-by-case basis." Id. The Court upheld the FMLA's requirement of unpaid leave for both sexes as a means of preventing this subtler discrimination because had Congress required only gender equality in leave benefits, states could deny leave entirely, which would negatively affect women more than men. Id. at 738. The EEOA resembles the FMLA in both respects. As Texas's example illustrates, invidious stereotypes led to the denial of equal educational opportunities to Mexican-American students, and a failure to overcome their language barriers relegates these students to a second-class status, thereby perpetuating stereotypes that renew the cycle of discrimination. See Gonzales, 96 F. Supp. at 1007. In addition, the EEOA's "appropriate action" requirement ensures that limited English proficient students receive some language assistance, while a simple nondiscrimination provision may have enabled states to deny language assistance on the grounds that all students received the same instruction. The EEOA, like the FMLA, guards against these types of discriminatory effects in a manner authorized by the Fourteenth Amendment.

The EEOA is otherwise proportionately tailored because it targets one discrete area of education and provides educational authorities with significant flexibility to satisfy their duties. See Lane, 541 U.S. at 532-33. The statute's remedy is reasonably narrow in scope; it protects limited English proficient national origin minority students by simply requiring educational agencies to "take appropriate action to overcome language barriers that impede equal

participation . . . in its instructional programs." 20 U.S.C. § 1703(f). As such, section 1703(f) pertains only to the provision of instruction to limited English proficient students (who are almost exclusively national origin minorities), not to all aspects of public education. Cf. Hibbs, 538 U.S. at 738 ("Unlike the statutes at issue in City of Boerne, Kimel, and Garrett, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted . . . and affects only one aspect of the employment relationship.").

As the Fifth Circuit observed, the duty of "appropriate action" provides "state and local authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." Castaneda, 648 F.2d at 1009. Like the "reasonable modification" requirement of the Americans with Disabilities Act ("ADA") upheld in Lane, the EEOA's "appropriate action" requirement "can be satisfied in a number of ways." Lane, 541 U.S. at 532. "Appropriate action" could entail, for example, providing bilingual instruction, English as a Second Language instruction, an immersion program, or some combination thereof. See Castaneda, 648 F.2d at 1009 (recognizing that "appropriate action" could entail, but does not require, bilingual education). Thus, by imposing a reasonably limited and flexible mandate to provide language services to limited English proficient students, Congress ensured that the "appropriate action" requirement under the EEOA would be "congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent." Pace, 403 F.3d at 277.

The Texas defendants argue that the EEOA fails the congruence and proportionality test because the "right created by the statute is so vague as to be virtually boundless" and the "remedy is equally undefined." (Defs.' Mot. for Recons. at 13.) These assertions, however, are

unpersuasive. The duty created by the statute is clear: states must ensure that adequate services are provided to enable language minority students to participate meaningfully in educational programs. Castaneda, 648 F.2d at 1014-15. The EEOA's requirement is no more vague than an analogous provision of the ADA that was upheld in Lane and "required the States to take reasonable measures to remove architectural and other barriers to accessibility" at public courthouses. 541 U.S. at 531 (citing 42 U.S.C. § 12131(2) (requiring "reasonable modifications")). Moreover, the EEOA's purported vagueness benefits the Texas defendants because, as discussed above, the duty of "appropriate action" vests educational authorities with a measure of discretion in complying with the statute. See Castaneda, 648 F.2d at 1009.

That the EEOA's remedy lacks a precise definition is also inconsequential. The remedy section of the statute merely indicates that aggrieved private individuals and the Attorney General can initiate a civil cause of action against any party that violates the substantive requirements of the EEOA. 20 U.S.C. § 1706. Such statutory provisions are neither uncommon nor constitutionally suspect. See, e.g., 42 U.S.C. §§ 1983, 2000b(a). Indeed, the ADA remedial scheme upheld in Lane incorporates virtually the same language as the EEOA's remedial section. See 29 U.S.C. § 794a ("In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.") (incorporated into the ADA by 42 U.S.C. § 12333) (emphasis added).

In sum, the EEOA represents a congruent and proportional means of remedying and preventing national origin discrimination, and thus validly abrogates the states' Eleventh Amendment immunity.

II. The United States Opposes the Motion to Stay as to the Commissioner of Education

If the Court reaffirms its earlier decision on sovereign immunity and the State appeals, the United States does not oppose staying proceedings against the State. The Court, however, need not stay this dispute in its entirety because one of the named defendants, the Commissioner of Education, is a state official who cannot claim immunity from suit. In Ex Parte Young, 209 U.S. 123 (1908), the Supreme Court established an exception to the doctrine of sovereign immunity with respect to state officials. Aguilar v. Tex. Dep't of Crim. Justice, 160 F.3d 1052, 1054 (5th Cir. 1998). To satisfy this exception, "a plaintiff's suit alleging a violation of federal law must be brought against individual persons in their official capacities as agents of the state, and the relief sought must be declaratory or injunctive in nature and prospective in effect. Id. (citing Saltz v. Tenn. Dep't of Employment Sec., 976 F.2d 966, 968 (5th Cir. 1992)).

In their motion for further relief, LULAC specifically identified the Texas Commissioner of Education (currently Shirley J. Neeley) as an original defendant from whom relief is currently sought. (Mot. for Further Relief at 2, ¶ 3.) Moreover, LULAC exclusively seeks prospective injunctive relief that Commissioner Neeley can provide. (Id. at 17-19.) Therefore, LULAC's claims as to Commissioner Neeley squarely fall within the Young exception. Accordingly, staying the entire dispute would not only lack a legal justification, but also would unnecessarily delay resolution of the applicable claims.

CONCLUSION

For the foregoing reasons, the Court should maintain jurisdiction over this matter and decline staying proceedings with respect to the Texas Commissioner of Education.

Respectfully submitted,

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DATED: July 10, 2006

CERTIFICATE OF SERVICE

I, Andrew R. Cogar, attorney for the United States, certify that on this 10th day of July, 2006, I have sent to the following counsel of record true and correct copies of the **United States' Response to the Defendants' Motion for Reconsideration and Conditional Motion to Stay**, via the electronic filing system.

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