Nos. 08-289 and 08-294

In the Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT,
ARIZONA PUBLIC INSTRUCTION, PETITIONER

v.

MIRIAM FLORES, ET AL.

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

v.

MIRIAM FLORES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals used an incorrect legal standard in reviewing the district court's decision not to dissolve its remedial orders under Federal Rule of Civil Procedure 60(b)(5).

2. Whether a State's receipt of federal funding under Title III of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6801 *et seq.*, necessarily demonstrates that a State is fulfilling its obligations under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*

3. Whether the district court abused its discretion in declining to dissolve the remedial orders on the ground that compliance was no longer required due to changed factual circumstances in Nogales, Arizona.

4. Whether the district court abused its discretion in declining to dissolve the remedial orders on the ground that HB 2064 fully satisfied them.

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INTEREST OF THE UNITED STATES

This case concerns a judgment and a series of remedial orders entered under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The Attorney General is authorized to bring civil actions under that statute and to intervene in private actions brought under it. See 20 U.S.C. 1706, 1709. The case also concerns Title III of the Elementary and Secondary Education

Act of 1965, as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6801 *et seq.* The Secretary of Education is responsible for administering those provisions.

STATEMENT

1. a. The Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701 *et seq.*, prohibits a State from denying equal educational opportunity to any person "on account of his or her race, color, sex, or national origin." 20 U.S.C. 1703. The denial of equal educational opportunity includes the failure by an education agency "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. 1703(f).

Section 1703(f) of the EEOA codifies the central holding of *Lau* v. *Nichols*, 414 U.S. 563, 566-567 (1974). In *Lau*, this Court held that failing to provide English language instruction to non-English speaking students denies those students a meaningful opportunity to participate in a State's educational programs, in violation of regulations issued under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Title VI applies only to programs or activities that receive federal financial assistance, *ibid.*, but the EEOA's equal-opportunity guarantee does not depend upon receipt of federal funds.

Neither the EEOA's text nor its legislative history defines "appropriate action." 20 U.S.C. 1703(f). A seminal Fifth Circuit decision, however, established a framework for assessing whether a school district is taking necessary steps to ensure equal educational opportunity. See *Castaneda* v. *Pickard*, 648 F.2d 989, 1009 (1981). Under that framework, a court considers whether: (1) the school system is pursuing a program that is in-

formed by a sound educational theory; (2) the program is "reasonably calculated to implement effectively the educational theory adopted by the school" by providing the "practices, resources and personnel necessary to transform the theory into reality"; and (3) the program has been successful after a legitimate trial period. *Id.* at 1009-1010. The lower courts have uniformly adopted that framework to assess Section 1703(f) claims. See, *e.g.*, *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041-1042 (7th Cir. 1987); *Valeria G.* v. *Wilson*, 12 F. Supp. 2d 1007, 1017-1018 (N.D. Cal. 1998), aff'd, 307 F.3d 1036 (9th Cir. 2002); *Keyes* v. *School Dist. No. 1*, 576 F. Supp. 1503, 1510 (D. Colo. 1983).

b. The federal government has long provided grants to States for educational programs. One such program is contained in Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6801 *et seq.* That program is designed to help students with limited English proficiency become proficient in English and meet state academic achievement standards. 20 U.S.C. 6812(1).

If a State wishes to receive Title III funds, it must submit a plan to the Secretary of Education stating that it will establish standards for raising the level of English proficiency and test students to see if those standards are being met. 20 U.S.C. 6823(b). In approving a State's plan, the Secretary determines whether the plan includes the required assurances, see 20 U.S.C. 6823(c), but he does not conduct any substantive review of the State's English-language learner (ELL) programs.

After a plan is approved, the State reports its progress to the Department of Education (DOE). 20 U.S.C.

6843, 7843. It is up to the State to take remedial action if it is not meeting its own targets for improving student performance. See 20 U.S.C. 6842(b), 6849.

Title III does not provide any private right of action, and it includes an express savings clause for "any federal law guaranteeing a civil right." 20 U.S.C. 6847.

2. In Nogales, Arizona, a great majority of students do not speak English as their first language. Pet. App. 6a.[1] As a result, most students participate in ELL programs at some point in their academic careers, making those programs of "enormous importance" to students and parents in Nogales. *Id.* at 6a-7a.

In 1992, respondent Miriam Flores brought this class action, alleging that the State, its Superintendent of Education, and its Board of Education had failed to take appropriate action to overcome language barriers faced by ELL students in Nogales. J.A. 2. Flores contended that there were a number of deficiencies in Nogales's ELL programs that were caused by the State's failure to adequately oversee, administer, and fund ELL education. J.A. 2, 7-10.

In 2000, the district court entered a declaratory judgment that the state respondents were in violation of the EEOA. Pet. App. 117a-153a.[2] The court determined that, although the State had adopted a valid theory for ELL education, it had failed to put in place "programs and practices * * * reasonably calculated" to imple-

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[1] All references to the "Pet. App." are to the appendix in No. 08-294.

[2] The parties had entered into a partial consent decree prior to trial. The decree addressed issues such as testing, state monitoring of school districts, reclassification of ELL students, and compensatory education. J.A. 19-30. It did not address other elements of an ELL program, such as class size, teacher qualifications, tutoring, instructional materials, and funding.

ment that theory. *Id.* at 147a-149a (citing *Castaneda*, 648 F.2d at 1009-1010).[3] The court identified a number of deficiencies in Nogales's ELL programs, including too few teachers and classrooms, insufficient teaching materials, and an inadequate tutoring program. *Id.* at 149a-150a. The court determined that those deficiencies were due in large part to a state funding system that "b[ore] no relation to the actual funding needed to ensure that [ELL] students in [Nogales]" learn English. *Id.* at 150a.

To comply with the EEOA, the court explained, the State must first "establish minimum standards" for ELL programs, and then adequately fund those programs. Pet. App. 148a-150a. Although the lawsuit arose out of conditions in Nogales, Flores sought—and the court ordered—relief against the State and its officials for defects in its statewide ELL program. *Id.* at 118a, 149a-151a; see Second Amended Complaint 2, 5-7 (Dist. Ct. Dkt. 83). The court observed that the State already was planning to conduct a cost study to develop and fund a new statewide ELL program. Pet. App. 125a, 150a. Accordingly, rather than impose its own standards and funding requirements, the court decided to await the results of that process. *Id.* at 150a-151a. The State did not appeal the declaratory judgment. *Id.* at 15a.

3. Ten months later, the State had failed to complete the promised cost study. J.A. 35. The court therefore ordered the State to prepare the cost study, J.A. 39, while making clear that it was up to "state authorities, whose powers are plenary, to decide how to provide

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[3] At that time, the State relied on bilingual and English as a second language educational theories. Pet. App. 124a. In November 2000, the State shifted to an English immersion theory. *Id.* at 16a.

[ELL] students with a meaningful Lau program." J.A. 38-39.

By June 2001, a cost study had been completed, but the legislature declined to adopt and fund any programs based on it. J.A. 42. The district court ordered the State to rationally fund the ELL program of the State's choice by January 2002. J.A. 44.

4. In December 2001, the state legislature enacted HB 2010, which increased per-student ELL funding and provided for a more comprehensive cost study. Pet. App. 17a-18a. The district court noted that the State "has never set specific standards for its programs, nor identified the requisite elements, features, or components for such programs and, therefore, has never assessed [the] actual costs" for such programs. J.A. 49. The court nevertheless approved HB 2010 as an "interim measure pending further study and review." J.A. 54; see J.A. 389.

By 2005, the more comprehensive cost study had not been completed. J.A. 389. The district court allowed the State three more months to comply with its judgment. J.A. 390, 392. The State did not do so, and the court held the State in contempt. Pet. App. 172a-174a.

5. In March 2006, the legislature enacted HB 2064. Pet. App. 20a-21a; see *id.* at 268a-334a. HB 2064 created a task force to develop models for school districts to use for ELL programs and provided that the programs would be funded through a per-student allocation and two supplemental statewide funds. *Id.* at 24a-25a. But HB 2064 limited most funding to two years per student and required school districts that wished to seek supplemental funds to subtract from their requests money received from various federal grant programs. *Id.* at 22a-24a.

6. The Speaker of the Arizona House of Representatives and the President of the Senate (petitioners in this Court) intervened in this case. J.A. 55-85. With the Superintendent (also a petitioner in this Court), they moved to purge contempt and dissolve the remedial orders under Federal Rule of Civil Procedure 60(b)(5). See Mot. to Purge Contempt and Dissolve Injunctions 1-2 (Dist. Ct. Dkt. 422) (Rule 60(b)(5) Mot.); Superintendent's Joinder Mot. 1 (Dist. Ct. Dkt. 433).

The district court denied petitioners' motion, holding that HB 2064 did not fulfill the State's EEOA obligations. Pet. App. 175a-187a. Petitioners appealed, and the court of appeals vacated the contempt order and the denial of Rule 60(b)(5) relief and directed the district court to hold an evidentiary hearing. *Id.* at 188a-190a.

After an eight-day hearing, the district court again denied the motion to dissolve the remedial orders. Pet. App. 96a-116a. It explained that evidence of certain educational improvements in Nogales did not justify vacating its orders, because those "fleeting" improvements were "largely" a result of the school district's own efforts and did not discharge the State's obligation to develop and fund a plan for ELL education. *Id.* at 100a-101a, 104a, 111a.

The court also held that HB 2064 does not constitute appropriate action under the EEOA because it "cut[s] off all funding for the incremental cost of ELL classroom instruction" after two years, regardless of whether a student actually learns English, Pet. App. 114a-115a, and "subtracts a proportionate share of the federal funds received by a district or school from the amount that th[e] district or school will receive" for ELL programs in violation of federal law, *id.* at 113a-114a.

7. The court of appeals affirmed. Pet. App. 1a-91a. It noted that petitioners sought "complete relief from [the] judgment"—not a "limited modification," *id.* at 81a—and held that the district court did not abuse its discretion in declining to grant that relief, *id.* at 48a-90a.

The court of appeals determined that an overall increase in state general education spending and management improvements in Nogales did not excuse the State from its obligation to develop and fund an appropriate statewide ELL program. Pet. App. 61a-72a. The court noted that such a program was still needed for Nogales, which continued to face "significant resource constraints" that resulted in "persistent achievement gaps." *Id.* at 36a, 66a.

The court of appeals rejected petitioners' argument that "state compliance with NCLB necessarily satisfies the EEOA." Pet. App. 75a. It explained that the EEOA is "an equality-based civil rights statute" designed to ensure that States provide meaningful ELL programs to all students, while NCLB is a voluntary funding scheme "for overall, gradual school improvement" and expressly provides that it shall not "'be construed in a manner inconsistent with any Federal law guaranteeing a civil right.'" *Id.* at 72a-75a (quoting 20 U.S.C. 6847).

Finally, the court of appeals concluded that HB 2064 does not satisfy the State's obligations, because its two-year funding cut-off is "irrational," Pet. App. 83a-85a, and its offset requirements violate federal law, *id.* at 83a-86a. The court observed, however, that if the State developed the models contemplated in HB 2064, "rationally fund[ed] the new models for the ELL programs," and cured the two key deficiencies in HB 2064, such action would comply with the judgment. *Id.* at 90a.

SUMMARY OF ARGUMENT

In 2000, the district court determined that Arizona was in violation of the EEOA because it failed to adopt and fund a program reasonably calculated to guarantee equal educational opportunity to students with limited English proficiency. The court allowed the State the discretion to define and fund its own ELL program. The State had not done so by 2007. The district court did not abuse its discretion in declining to dissolve its remedial orders under those circumstances.

A. The district court's remedial orders required the State to design and fund an ELL program that is reasonably calculated to help non-native speakers attain proficiency in English. The court did not impose its own policy views or require the State to adopt any particular standards or programs or allocate any specified amount of funding; it deferred to the State to chart its own path to EEOA compliance.

The district court's orders followed directly from the EEOA violation—*i.e.*, that the State had failed to put in place the programs, practices, and resources necessary to implement a recognized theory of ELL education. Although the State agreed that the EEOA required it to adopt and appropriately fund a statewide ELL program, it had not done so at the time of petitioner's motion to dissolve the orders.

B. Rule 60(b)(5) authorizes a district court to modify an injunction when the judgment has been satisfied or when compliance is no longer equitable based on significant changes of fact or law. Although courts considering modification are to apply a flexible approach, whether an injunction should be modified is entrusted to the sound discretion of the district court, and it is the moving party's burden to establish that modification is warranted.

The court of appeals applied those standards in reviewing the district court's ruling.

C. The district court did not abuse its discretion in declining to dissolve the remedial orders in this case.

First, a State's receipt of federal funding under Title III of the NCLB does not itself demonstrate that it is taking appropriate action under the EEOA. Title III is a voluntary funding program, not a civil rights statute. Title III does not set any substantive requirements for ELL programs, and the Secretary does not evaluate the content of States' ELL programs or determine whether they result in equal educational opportunity. Moreover, Title III contains a savings clause that expressly preserves civil rights remedies, such as those under the EEOA.

Second, the educational improvements and funding increases in Nogales that petitioners identified did not require dissolution of the orders. Here, the district court determined that the EEOA requires the State to develop and fund an appropriate statewide system of ELL education, and the State cannot abdicate that responsibility. Programs and funding are still needed in Nogales, where educational improvements have been "fleeting at best" because the State has not provided "clear rules and requirements" for school districts to follow. Pet. App. 100a.

Third, HB 2064 does not comply with the district court's judgment, although it does put in place a statewide scheme that ultimately could lead to compliance if certain changes are made. HB 2064 provides that the State will develop models for ELL education and fund those models. But HB 2064 cuts off ELL funding after two years and requires school districts to use federal funds in a manner that violates federal law. If those de-

ficiencies are corrected, however, and the new ELL models are reasonably funded, the State will be taking appropriate action under the EEOA. Because petitioners sought to dissolve the remedial orders in their entirety before those steps were taken, the district court correctly denied their motion.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO DISSOLVE THE REMEDIAL ORDERS

A. The District Court's Orders Required The State To Adopt And Fund An ELL Program To Meet Its Obligations Under The EEOA

Determining whether the district court should have dissolved its remedial orders first requires understanding the nature of those orders.

1. The district court determined in 2000 that the State was in violation of the EEOA because of systemic deficiencies in ELL education in Nogales caused by a lack of state oversight and funding. Pet. App. 137a-141a, 149a-150a. Although the State had adopted valid educational theories for its ELL instruction, *id.* at 124a, 148a, it had "failed to follow through with [the] practices, resources and personnel necessary to transform theory into reality," *id.* at 151a. Aside from basic educational funds for students generally, the State provided school districts only $150 per ELL student. *Id.* at 125a. That amount, the court found, was not "reasonably calculated to effectively implement" any particular ELL program, and the State "ha[d] not designed any programs, nor implemented any practices, nor committed any resources" to ELL education other than that appropriation, *id.* at 150a. The State did not appeal that crucial determination.

Rather than impose a remedy, the district court permitted the State to design and fund its own program. Pet. App. 153a. But although the State repeatedly assured the court that it would take the necessary steps to adopt and rationally fund an ELL program, see, *e.g.*, Defs.' Trial Mem. 5-6 (Dist. Ct. Dkt. 189); Defs.' Resp. to Pls.' Mot. for Post-J. Relief 1, 6 (Dist. Ct. Dkt. 207) (Defs.' Resp.), it did not do so.

The first step in that process was to complete a cost study. Pet. App. 148a-150a, 156a. The State said such a study was forthcoming at the time of trial, *id.* at 125a, and again later in 2000, J.A. 39. Mindful of the State's interest in managing its own educational system, the district court waited for years for the State to produce the comprehensive study provided for in 2001 in HB 2010. Only after the study was completed, and the State declined to implement any of its options, did the court find the State in contempt. Pet. App. 169a-170a. Even then, the court continued to adhere to the view that the State should be permitted to develop its own program. J.A. 90.

2. Throughout the course of this litigation, the district court's remedial orders have remained the same: The State must develop and appropriately fund a program for ELL education. See, *e.g.*, Pet. App. 100a (State "must establish clear rules and requirements that can be fulfilled and followed" by school districts); *id.* at 147a (State must choose "programs and practices" to implement a recognized ELL educational theory); J.A. 49 (State must "set specific standards for its programs," "identif[y] the requisite elements, features, [and] components for such programs," and "assess[] [the programs'] actual costs").

The district court's remedial orders were appropriate means of enforcing its judgment. "[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto* v. *Finney*, 437 U.S. 678, 690-691 (1978). The court's requirement that the State develop and fund the ELL program of its choice is consistent with both the text and purpose of the EEOA, which requires that the State "take appropriate action to overcome language barriers that impede equal participation by students in its educational programs." 20 U.S.C. 1703(f). Once the court found a systemic failure to educate ELL students in Nogales that was caused by inadequacies in the statewide program, the court appropriately ordered the State to put a plan in place to ensure that ELL students receive the services needed to participate meaningfully in the educational system. That remedy was "essential," 20 U.S.C. 1712, because the EEOA violation arose from the State's failure to put in place the "practices, resources and personnel necessary" to implement a recognized theory of ELL education. *Castaneda*, 648 F.2d at 1010.[4]

The court found that a remedy against the State was necessary because the suit challenged the State's failure to develop ELL programs and funding for all school districts, including Nogales. The State did not challenge the original finding of a violation at the state level or the subsequent remedial orders entered against the State, apparently because it believed that developing and funding an ELL program only for Nogales would run afoul

[4] Petitioners' reliance (08-289 Br. 56, 59) on the remedial standards in 20 U.S.C. 1713 and the notice provision in 20 U.S.C. 1758 is misplaced; the former applies only to busing remedies, and the latter is limited to desegregation remedies.

of the Arizona Constitution's guarantee of "a general and uniform public school system." State Resp. C.A. Br. 60 (quoting Ariz. Const. Art. XI § 1(a)).

The district court's orders are faithful to the remedial principles set forth by this Court. They are directly "related to" the violation of federal law, *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977), because they are designed to ameliorate the deficiencies in Nogales caused by the State's failure to provide standards for class sizes, teacher training, instructional materials, and other key elements of an ELL program. The orders are also "remedial in nature," *ibid.*, because they ensure that ELL students will be afforded equal educational opportunity that they have been denied. See Pet. App. 156a ("Thousands of children * * * have now been impacted by the State's continued inadequate funding of ELL programs.").

The district court was respectful of "the interests of state and local authorities in managing their own affairs." *Milliken*, 433 U.S. at 281. The court recognized that "[t]he scope of federal injunctive relief against a state government must always be narrowly tailored to enforce federal constitutional and statutory law only." J.A. 390. It therefore allowed the State to "choose *any* legitimate * * * instructional method" so long as it "provide[d] sufficient funding to implement that method." Pet. App. 110a (emphasis added); see J.A. 39, 89-90. Indeed, petitioners have acknowledged that the district court "left it up to the Legislature to craft a program that is not arbitrary and capricious." Rule 60(b)(5) Mot. 8.

The funding aspect of the district court's remedial orders is consistent with this Court's decisions. The court did not order the State to spend any particular

amount of money on ELL education; it required only that ELL funding "shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona's schools." J.A. 44; see, *e.g.*, Pet. App. 110a, 150a, 180a. The requirement that the State provide an amount "adequate to fund" the ELL program of its choosing appropriately "protect[ed] the function of [local government] institutions" and permissibly "place[d] the responsibility for solutions to the problems * * * upon those who have themselves created the problems." *Missouri* v. *Jenkins*, 495 U.S. 33, 51-52 (1990).

3. At the time of petitioners' Rule 60(b)(5) motion, then, the district court had determined that the State was in violation of the EEOA and had reasonably exercised its equitable authority to require the State to develop and fund an ELL program of its choice. The State never appealed the original judgment or the ensuing remedial orders, Pet. App. 15a-18a, 20a, instead assuring the court that compliance was forthcoming. Some progress has been made toward compliance: the State enacted HB 2064, which charged a task force with developing instructional models to be utilized by school districts for ELL education and put in place a scheme for funding those programs. J.A. 89-90. But the State had not yet adopted and funded the models. See Pet. App. 61a, 68a. It was against that backdrop that petitioners sought to vacate the remedial orders in their entirety.

B. The Court Of Appeals Applied The Correct Standards Under Rule 60(b)(5)

1. Federal Rule of Civil Procedure 60(b)(5) authorizes modification of an institutional injunction when the party seeking modification demonstrates "a significant

change either in factual conditions or in law." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); see *Agostini* v. *Felton*, 521 U.S. 203, 215 (1997). Modification may be warranted when changed factual conditions "make compliance * * * substantially more onerous" or "prove[] [the decree] to be unworkable"; compliance "would be detrimental to the public interest"; or the court's remedial order has "become impermissible under federal law." *Rufo*, 502 U.S. at 384, 388. Rule 60(b)(5) is not, however, a mechanism to relitigate the original judgment. *Id.* at 391-392; see, *e.g.*, *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961).

In assessing requests for modification of an institutional injunction, courts should utilize a "flexible approach." *Rufo*, 502 U.S. at 381; see *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004). But "it does not follow that a modification will be warranted in all circumstances." *Rufo*, 502 U.S. at 383; see *Frew*, 540 U.S. at 442. That determination is entrusted to the district court's discretion, *Agostini*, 521 U.S. at 238, and the party seeking modification bears the burden of establishing that it is warranted, *Rufo*, 502 U.S. at 383. Complete dissolution of an injunction ordinarily is warranted only when the moving party demonstrates that there has been "full and satisfactory compliance with the decree," *Freeman* v. *Pitts*, 503 U.S. 467, 491 (1992), that has been sustained "for a reasonable period of time," *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991).

2. The court of appeals applied the foregoing principles in declining to vacate its remedial orders. Citing *Rufo* and *Agostini*, it recognized that the moving party has the burden to demonstrate "a significant change either in factual conditions or in law." Pet. App. 49a. It also recognized that the Rule 60(b)(5) standard is "flexi-

ble," Pet. App. 49a, and that the district court has discretion in deciding whether to modify its own decree, *id.* at 49a-50a.

The court of appeals correctly observed that it should not "retry the case" or "reexamine unappealed legal determinations," Pet. App. 49a, especially where, as here, the State never challenged the underlying judgment or any of the remedial orders, *id.* at 61a-62a. And the court properly accounted for this Court's federalism-based concerns, stating that it would scrutinize the district court's Rule 60(b)(5) decision "closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." *Id.* at 52a (internal quotation marks omitted).

3. Petitioners are mistaken in contending that the court of appeals applied an incorrect standard in reviewing the district court's Rule 60(b)(5) decision. The court did not resurrect the "grievous wrong" standard from *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). The court made no mention of *Swift*, instead appropriately relying on *Rufo* and *Agostini*. Further, the court's inquiry as to whether "the basic factual premises" of the orders "had been swept away" or there had been "some *change* in the legal landscape" (Pet. App. 63a) simply restated this Court's teaching that the moving party must show some change in the facts or the law, not simply that "it is no longer convenient to live with [the judgment's] terms." *Rufo*, 502 U.S. at 383. And the court's careful review of current conditions in Nogales (Pet. App. 63a-72a) makes clear that it was fully willing to grant relief if it was warranted.

Contrary to petitioners' suggestion (08-294 Pet. Br. 38-41), the court of appeals did not refuse to modify its orders simply because the State had neither appealed the original judgment nor supported the Rule 60(b)(5) motion. Instead, the court noted those facts in explaining that Rule 60(b)(5) relief is directed at changed circumstances, not arguments that were raised or could have been raised at the time of judgment. Pet. App. 51a-52a, 60a-62a. And the court made clear that it would defer to the view of state officials on the burdens of complying with the judgment if they "work[ed] out * * * a consistent position and approach." *Id.* at 55a.

There is, therefore, no basis to conclude that the court erected an "insurmountable hurdle" (08-289 Pet. Br. 37) to Rule 60(b)(5) relief. To the contrary, the court specifically contemplated that relief could be appropriate if the models contemplated in HB 2064 were implemented and appropriately funded. Pet. App. 90a.

C. The Court Of Appeals' Application Of The Rule 60(b)(5) Standards Was Correct

The court of appeals did not err in upholding the district court's denial of relief under Rule 60(b)(5), particularly given the arguments petitioners made and the nature of relief they requested. Petitioners contended: (1) that Title III of NCLB "preempts" the EEOA and makes the district court's orders "obsolete," Rule 60(b)(5) Mot. 2, 16; (2) that the State was not required to comply with the orders due to improvements in Nogales, *id.* at 3; and (3) that HB 2064 complied with the judgment, *id.* at 1. Petitioners asked that the remedial orders be "dissolve[d]" or deemed satisfied in their entirety on those grounds. *Id.* at 2. None of petitioners' arguments required that result.

1. Receipt of funds under Title III of NCLB does not itself demonstrate "appropriate action" under the EEOA

A State's receipt of federal funding under Title III of NCLB does not in itself demonstrate that the State is taking appropriate action to overcome language barriers under the EEOA. Nothing in Title III indicates an intent to displace entirely the EEOA, and there is no warrant for this Court to assume Congress had such an intent.

a. The EEOA and NCLB are fundamentally different, although complementary, statutory schemes. The EEOA is "an equality-based civil rights statute," Pet. App. 72a, that requires *all* States to "take appropriate action to overcome language barriers that impede equal participation by [their] students," 20 U.S.C. 1703(f). The EEOA focuses on ensuring that States provide "equal educational opportunity" to ELL students, 20 U.S.C. 1703, through programs and resources that are reasonably calculated to help them become proficient in English. Accordingly, EEOA litigation typically focuses on the adequacy of a State's programs, including factors such as class size, teacher training, time spent in classrooms, instructional materials, tutoring, and state oversight and funding. See, *e.g.*, *United States* v. *Texas*, 680 F.2d 356, 371 (5th Cir. 1982); *Keyes*, 576 F. Supp. at 1511-1519. The EEOA is enforced by individuals through a private right of action and by the Attorney General. 20 U.S.C. 1706, 1709.

NCLB, on the other hand, is a voluntary funding program that focuses on the overall academic improvement of disadvantaged students. Pet. App. 73a; see 20 U.S.C. 6301. Title III of NCLB authorizes federal grant funds to help States "ensure that children who are limited

English proficient * * * attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. 6812(1).

No State is required to participate in Title III. 20 U.S.C. 6826(a). To receive funds, a State must submit a plan to the Secretary stating that it "will establish standards and objectives for raising the level of English proficiency," require school districts to measure students' progress using annual measurable achievement objectives (AMAOs), and hold school districts accountable if they do not meet the established standards. 20 U.S.C. 6823(b); see 20 U.S.C. 6823(f).

A State that receives Title III funding is required to follow through with processes described in its plan and report its progress to the Secretary. 20 U.S.C. 6843. But the Secretary does not decide whether the State's ELL programs are adequate. Instead, the *State* evaluates each school district's progress and requires the district to take remedial action if its students are not meeting the AMAOs established by the State. See 20 U.S.C. 6842(b) (remedial actions include requiring school district to develop improvement plan, modify curriculum, or replace educational personnel). DOE assists the State by monitoring the State's goals and progress and providing technical assistance upon request. 20 U.S.C. 6823(f).

The EEOA and Title III, then, function in distinct ways: the EEOA affords each student an actionable individual right to equal educational opportunity, while Title III establishes a voluntary funding arrangement under which the Secretary works with States to reach their own academic achievement goals.

b. Several features of Title III make clear that it is not a substitute for States' obligations under the EEOA.

First, participation in Title III is voluntary. Unlike the EEOA, which requires States to take action to provide students with equal educational opportunity, 20 U.S.C. 1703, NCLB does not require States to do anything, 20 U.S.C. 6821. Only if a State chooses to apply for funding under NCLB does the State incur the obligations to develop and submit a plan, set standards for student performance, monitor school districts' progress, take appropriate remedial action, and report its progress to DOE. See 20 U.S.C. 6821, 6823, 6825, 6842.

Even if a State accepts Title III funding, it is not required to serve all students, because each school district's participation in Title III is voluntary. In Arizona, for example, nearly 5000 ELL students were not served by Title III programs during the 2007-2008 school year. *Consolidated State Performance Report for State Formula Grant Programs Under the Elementary and Secondary Education Act As Amended By the No Child Left Behind Act of 2001, School Year 2007-2008: Arizona* 48-50 (2008) (*CSPR*). The State's Title III standards and objectives apply only to those students served under Title III. See 20 U.S.C. 6826, 6842.

Second, Title III "compliance" means adherence to the statute's process-oriented requirements. Title III does not impose specific curricula or "delineate[] what programs states must implement." 08-289 Pet. Br. 56. To the contrary, the Secretary is expressly prohibited from "mandat[ing], direct[ing], review[ing], or control-[ling] * * * content [and] curriculum." 20 U.S.C. 7906(b); see 20 U.S.C. 1232a, 3403(b), 6849. Accordingly, the Secretary's approval of a State's plan does not reflect a judgment about the adequacy of the State's

ELL programs; instead, it shows that the plan "meets the [statutory] requirements." 20 U.S.C. 6823(c). Indeed, a State's plan simply does not provide sufficient detail about its ELL program to make a determination as to its adequacy for purposes of the EEOA. See, *e.g.*, State of Arizona, *Consolidated State Application* 61-63 (2002) (ELL portion of state plan).

Nor does a State's continued receipt of Title III funding establish that the State is offering equal educational opportunity. A State may continue to receive Title III funding even if particular school districts are not meeting the State's AMAOs, so long as it continues to work cooperatively with DOE and to "substantially" comply with its statutory obligations. 20 U.S.C. 1234c. Arizona's Title III participation is illustrative: During the 2007-2008 school year, 147 of the 217 school districts in Arizona failed to meet the AMAOs the State had set for ELL students; 127 school districts had not made AMAOs for two consecutive years, and 34 school districts had not made AMAOs for four consecutive years. See *CSPR* 55; see also Pet. App. 39a. Those facts, however, do not provide a basis for ending Title III funding.

Third, Title III places the responsibility for designing and assessing ELL programs on the State. The State set its own performance standards, determines how to measure student progress, reviews testing results, and requires school districts to make changes if they fail to meet state standards. 20 U.S.C. 6823, 6842; see 20 U.S.C. 6311(b)(2) and (3). To conclude that a State has taken appropriate action under the EEOA to afford equal opportunity to ELL students merely by deciding that it is meeting its own standards would be anomalous, especially because it would tie the *federal*

right under the EEOA to varying *state* performance standards.

Fourth, the EEOA and Title III have very different enforcement schemes. The EEOA is enforced through private lawsuits brought by individuals or the Attorney General. 20 U.S.C. 1706. The Title III provisions at issue are administered by the Secretary, and they contain no mechanism—administrative or judicial—for individuals to seek relief. See, *e.g.*, *Newark Parents Ass'n* v. *Newark Pub. Sch.*, 547 F.3d 199, 208-214 (3d Cir. 2008) (collecting cases).[5]

Finally, Title III does not mention the EEOA, much less declare that compliance with its requirements satisfies a State's obligations "to take appropriate action to overcome language barriers." 20 U.S.C. 1703(f). To the contrary, Title III provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. 6847; see 20 U.S.C. 7914(a). The EEOA is just such a law, for it guarantees equal educational opportunity without regard to race, color, sex, or national origin. 20 U.S.C. 1703. Title III's savings clause—which petitioners do not even mention—makes clear that Title III does not supersede the EEOA.

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[5] Petitioners are mistaken in contending (08-289 Pet. Br. 56 n.23) that individual students may seek relief from the Secretary "when their ELL programs are inadequate." 20 U.S.C. 7844(a)(3)(C) requires *States*—not the federal government—to adopt procedures for the receipt and resolution of complaints alleging "violations of law in the administration of the programs." Although there are regulations authorizing the Secretary to review a State's resolution of a complaint, 34 C.F.R. 299.10-299.11, they do not apply to the Title III provisions at issue here, 34 C.F.R. 299.10(b).

c. In petitioners' view, receipt of federal funding under Title III is a complete defense to liability under the EEOA. See, *e.g.*, 08-294 Pet. Br. 57 (no EEOA remedy "where a State's NCLB plan is approved by the Department of Education"). This amounts to an argument for repeal by implication, which could be found only if the two statutes are irreconcilable. Pet. App. 77a (citing *Morton* v. *Mancari*, 417 U.S. 535, 549-550 (1974)). The EEOA and Title III are not irreconcilable, as confirmed by the savings clause in Title III. And the district court's remedial orders permit the State to choose its own program for EEOA compliance, just as Title III allows the State to set its own standards and targets for student performance, see 20 U.S.C. 6823(b)(2).

Even though Title III participation is not a complete defense under the EEOA, whether a State is reaching its own goals under Title III may be relevant in an EEOA suit. For example, data collected by the State as part of its assessment of student progress may be useful in judging whether a State's ELL program results in equal educational opportunity under the third step of the *Castaneda* inquiry. See 648 F.2d at 1009-1010; see also Pet. App. 80a-81a & n.46. But petitioners did not make that type of argument below. Instead, they insisted that mere participation in Title III justifies dissolution of the remedial orders. The district court appropriately rejected that proposition.

2. Asserted changed circumstances in Nogales did not compel dissolution of the orders

Petitioners contend (08-289 Pet. Br. 43-45; 08-294 Pet. Br. 45) that injunctive relief is no longer warranted because ELL programs in Nogales have improved and overall state educational funding has increased. The

district court disagreed, and that determination was not an abuse of discretion.

a. Petitioners' claims of educational improvements in Nogales did not justify dissolving the remedial orders. The EEOA places obligations on both state and local educational agencies. 20 U.S.C. 1703(f), 1720(a). Even if local personnel are responsible for the day-to-day implementation of the State's ELL programs, the State may not abdicate its oversight and funding obligations to them, at least where, as here, state law assigns such responsibilities to the State. See, *e.g.*, *Gomez*, 811 F.2d at 1043; *Idaho Migrant Council* v. *Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981).

In this case, the State repeatedly acknowledged that, regardless of what actions individual school districts are taking, it has a responsibility under the EEOA to develop and fund "an appropriate, state-wide system of English Acquisition Programs." Defs.' Resp. 1, 6; see Pet. App. 148a-150a. But the State has not yet fulfilled that responsibility. Pet. App. 110a-116a. Until the State "follow[s] through with practices [and] resources" to transform its theory of ELL instruction into reality, it has not taken appropriate action under the EEOA, and modification of the remedial orders is not warranted. *Castaneda*, 648 F.2d at 1010. The EEOA requires States to "*take* appropriate action," 20 U.S.C. 1703(f) (emphasis added), not to forgo action in the hope that conditions will improve.

Contrary to petitioners' contention (08-294 Pet. Br. 45), the fact that there had been some improvements in Nogales with regard to six specific deficiencies identified by the district court in 2000 did not mean that the State itself was fulfilling the programmatic and oversight obligations under the EEOA that have been the

subject of this case from the outset. The district court concluded that local improvements, which "have been made largely as a result of [Nogales's] efforts alone," are "fleeting at best," because the State has not provided "clear rules and requirements" for school districts to "fulfill[] and follow[]" in achieving lasting results. Pet. App. 100a. EEOA compliance does not mean merely remedying the six deficiencies that were symptomatic of the State's failure to provide for appropriate ELL education in Nogales; it means putting in place a statewide program that guarantees equal opportunity to ELL students. *Id.* at 111a.

In any event, petitioners are mistaken in suggesting that ELL education in Nogales had improved so dramatically that the flaws in the state program were no longer of any consequence to Nogales. For example, ELL students in Nogales required an average of four to five years of sheltered English immersion to become proficient in English, Pet. App. 41a, yet state law sets a target of one year for ELL students to become proficient in English, Ariz. Rev. Stat. Ann. § 15-752 (West 1991), and HB 2064 cuts off funding for most ELL education after two years, Pet. App. 22a-23a. State performance data reflected that ELL students in Nogales continued to perform markedly worse than other students, especially at the high-school level. *Id.* at 39a, 66a ("the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass"). In light of the "persistent achievement gaps" remaining in Nogales, *id.* at 66a—which petitioners' own experts described as "not acceptable," J.A. 193-195—the district court acted within its discretion in continuing to require the State to adopt and rationally fund an ELL program.

b. The district court likewise did not abuse its discretion in rejecting petitioners' assertion (08-294 Pet. Br. 46) that Nogales has ample funding for its ELL programs. Determining whether funding is adequate first requires the State to define the elements of its ELL program, such as teacher training, class size, and time spent on classroom instruction, and then provide for the funding necessary to put those standards into practice. Pet. App. 110a-111a. At the time of the Rule 60(b)(5) motion, the State was still "endeavoring to establish appropriate standards and goals for all students in Arizona." *Id.* at 100a. In the absence of those standards, it would have been premature to deem any particular amount of funding sufficient.

By all accounts, moreover, Nogales continued to face "significant resource constraints." Pet. App. 36a. The State's own ELL model has long assumed that ELL programs require their own funding, "*on top* of base level support," because of the additional burdens they place on school districts. *Id.* at 69a. Yet the State has never funded ELL programs at a rate approaching their actual cost. *Id.* at 44a. The State's per-student allocation in HB 2064, *id.* at 43a, was less than what a 1987 cost study had estimated to be adequate, *id.* at 149a, and less than one-third of the amount Nogales was actually spending on its ELL programs, *id.* at 41a-42a. Indeed, that allocation "d[id] not appear to have been set with regard to any specific program costs, known or estimated." *Id.* at 32a.

As a result, Nogales was able to fund basic ELL education only by "seeking grants, diverting state base level funding away from other purposes, and passing county-level budget overrides." Pet. App. 41a. None of those sources provides a sustainable basis for successful ELL

programs. Federal grant funds may only be used to supplement the State's ELL programs, not to fund them in the first instance. See pp. 31-32, *infra*. Budget overrides provide only a few percent of the necessary funds and are limited by the local population's willingness to assume that burden. Pet. App. 42a. And diverting base-level funding to ELL programs denies other students the amounts the State has deemed necessary to "ensure that [they] receive[] a basic education," *id.* at 122a, and creates resource disparities that may be unacceptable under the state constitution's uniformity guarantee, Ariz. Const. Art. XI, § 1(a). See Pet. App. 70a.

Even with those additional funding sources, resource constraints limited the success of Nogales's ELL program. The school district was unable to attract and retain teachers because it could not afford to "pay market rate salaries," which made it difficult to reduce class sizes. Pet. App. 66a. And it could not afford to hire qualified teachers aides, *ibid.*, even though local educational officials considered them "essential," J.A. 225.

Thus, at the time of the Rule 60(b)(5) motion, the State had not determined the cost of funding a comprehensive ELL program, and "a fundamental mismatch" remained "between the ELL costs [Nogales] require[d]" for its existing programs "and the funds provided for that specific purpose." Pet. App. 44a. It was therefore not an abuse of discretion for the district court to keep the remedial orders in place.

3. HB 2064 does not fully satisfy the judgment

A primary argument petitioners made to the district court was that HB 2064 "complies in all material respects with the judgment and orders" of the district court. Rule 60(b)(5) Mot. 3. Yet petitioners make little

mention of HB 2064 before this Court. It is important to examine HB 2064, however, both because it represents the State's chosen method of meeting its EEOA obligations, and because it now governs the structure and funding of ELL programs statewide. Pet. App. 53a, 82a.

a. HB 2064 was enacted to provide "a comprehensive, efficient and cost-effective program of developing research based models of structured English immersion that comply with all state and federal laws" and of "funding the incremental costs of [those] research based models." Pet. App. 332a. It created a task force within the state Department of Education to develop models for school districts to use for ELL education. *Id.* at 282a. Those models would provide detailed standards for ELL programs based on the size and location of the school and the number of its ELL students. *Id.* at 282a-283a. Once those models were created, each school district would determine the amount of funding required to implement the model and request funds from the State. *Id.* at 284a.

State funding for ELL programming would then be available from three sources. First, each school district would receive incremental funding of $430 for each ELL student, for up to two years per student. Pet. App. 333a-334a.[6] If that funding is not adequate, then the district could seek additional funds from the statewide "structured English immersion fund"—but that fund was also limited to two years per student. *Id.* at 22a, 284a-286a. If students remain in ELL programs beyond two years, funding is available from a statewide compensatory education fund. *Id.* at 304a-306a. But that funding can only

[6] This provision would become effective only if the district court approved HB 2064 as "appropriate action" under the EEOA. Pet. App. 333a-334a.

be used for instruction outside of the normal class day, such as "individual or small group instruction, extended day classes, summer school or intersession school." *Id.* at 306a. Further, HB 2064 provides that any request for money from the two supplemental funds must be reduced by funds received under certain federal grant programs, including Title III of NCLB. *Id.* at 284a-285a, 304a-305a.

b. HB 2064 does not demonstrate full compliance with the judgment, although it does put the State on a path to compliance.

There are two key flaws in HB 2064 that the courts below found prevented it from satisfying the State's obligation to take "appropriate action" under the EEOA. First, HB 2064 cuts off funding for structured English immersion after a student has participated in that program for two years, regardless of whether the student has become proficient in English. Pet. App. 22a-23a. The lower courts reasonably concluded that that limitation was problematic in light of the uncontroverted evidence in the record that many students are unable to become proficient in English after only two years. *Id.* at 83a-85a. As the district court noted, "[o]n average, it takes ELL students in [Nogales] four to five years" to become proficient in English, and petitioners "did not present any evidence that two years is a sufficient amount of time * * * to attain English language proficiency." *Id.* at 108a-109a. The compensatory education fund does not provide an adequate backstop for students who require more than two years of ELL instruction, because that fund cannot be used for ordinary classroom instruction. *Id.* at 107a. It was not an abuse of discretion to conclude that a statewide system that arbitrarily stops funding ELL education after two years is not rea-

sonably calculated to fulfill the State's obligation to ensure that all ELL students have an equal opportunity to learn consistent with the EEOA.[7]

Second, both the structured English immersion fund and the compensatory education fund contain offset provisions that clearly violate federal law. Under HB 2064, after a school district calculates the money it needs from the two statewide funds, it must subtract from that amount money it receives from four federal grant programs—Title I, Title II-A, Title III, and Title VII of ESEA, as amended by NCLB. See Pet. App. 284a-285a. Several provisions of ESEA prohibit such use of federal funds to meet state obligations. Title I (20 U.S.C. 6321(b)), Title II-A (20 U.S.C. 6623(b)), and Title III (20 U.S.C. 6825(g)) each contain "supplement, not supplant" provisions that prohibit the use of federal grant funds to take the place of state funds that otherwise would have been available. Further, 20 U.S.C. 7902 specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Title VII under certain circumstances) in determining the amount of state funding to allocate to a school district

[7] Title I of ESEA generally requires a student to be assessed in reading or language arts using a test written in English after the student has attended school in the United States for three or more consecutive years. 20 U.S.C. 6311(b)(3)(C)(x). That process does not, however, reflect the view that all students will be proficient in English after three years. Title I permits school districts to decide, on a case-by-case basis, that some students should be tested in their native language for up to five years, *ibid.*, and it authorizes school districts to make certain accommodations when testing students with limited English proficiency, 20 U.S.C. 6311(b)(3)(C)(ix)(III).

for public education.[8] Because HB 2064's offset provisions violate federal law, that aspect of the statute's funding scheme must be eliminated before HB 2064 could constitute an appropriate solution under the EEOA.

c. Although the mere passage of HB 2064 does not fully satisfy the judgment, HB 2064 provides a path to compliance, because it provides mechanisms for the State to define its own ELL program and for school districts to implement that program. See Pet. App. 90a; J.A. 90. The first step toward compliance has already been taken, because the task force has developed the models for ELL education, which include standards for variables such as class size, student-teacher ratios, instructional materials, and tutoring. See *Structured English Immersion Models of the Arizona English Language Learners Task Force* (Apr. 10, 2008) <http://www.ade.state.az.us/ELLTaskForce/2008/SEIModels04-10-08.pdf>. Together with the programmatic changes put in place by the consent decree, see note 2, *supra*, they set out a statewide program for ELL education.

The "only steps remaining" are for "the school districts to complete the budget forms and submit them" to the legislature, and for the legislature to appropriate funds. J.A. 90. If those steps are taken, and the State cures the two key flaws in HB 2064 described above, then the district court should deem the judgment satisfied. See Pet. App. 90a. But because petitioners sought dissolution of the remedial orders before the State corrected those flaws and put the system envisioned by HB

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[8] DOE explained how the offset provisions violate federal law in detail in a letter to the Superintendent. See State Resp. Br. App. 1-4; see also Pet. App. 82a, 113a-114a.

2064 in place, the district court did not abuse its discretion in denying that relief at that time.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[*] The Solicitor General is recused in this case.