Nos. 08-289 & 08-294

IN THE
Supreme Court of the United States

THOMAS C. HORNE, Superintendent of Public Instruction of the State of Arizona,

Petitioner,

-and-

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, individually and as parent of MIRIAM FLORES, minor child; ROSA RZESLAWSKI, Individually and as parent of MARIO RZESLAWSKI, minor child; STATE OF ARIZONA; and MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,

Respondents.

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

BRIEF OF *AMICI CURIAE* WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IMMIGRANT AND REFUGEE RIGHTS PROJECT, DC LANGUAGE ACCESS COALITION, AND LATIN AMERICAN YOUTH CENTER, IN SUPPORT OF RESPONDENTS MIRIAM FLORES AND ROSA RZESLAWSKI

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INTEREST OF THE *AMICI CURIAE* [1]

English-Language Learner ("ELL") and English-speaking students have different educational experiences. ELL students face an additional high barrier—the hurdle of working in a new language—in their efforts to gain access to the same academic curriculum as their English-speaking peers. While this barrier is often addressed inadequately by State and local educational agencies, it is most likely to be surmounted if these agencies have the freedom to employ a range of educational methods, including bilingual instruction.

Amici appear in this Court to urge a resolution that does not prevent or discourage such instruction. *Amici* are non-profit organizations familiar with the academic obstacles facing ELL students. *Amici* have served as advocates for the civil and educational rights of children and adults struggling to overcome a lack of proficiency in the English language. *Amici* share an interest in ensuring that States continue to have all the tools necessary to provide ELL students with educational opportunities equal to their non-ELL peers.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Washington Lawyers Committee on Civil Rights and Urban Affairs – Immigrant and Refugee Rights (IRR) Project, established in 1978, seeks to enforce the rights of immigrants, many of whom cannot access the U.S. legal system on their own due to language barriers. In its long history, the IRR Project has advocated on behalf of hundreds of immigrants who were victims of discrimination in housing and employment matters or who were denied access to government services.

The **D.C. Latin American Youth Center**, founded in the late 1960s and incorporated as a nonprofit organization in 1974, serves multicultural youth, many of whom do not have English proficiency, with a comprehensive set of social services and educational, work skills, advocacy programs and residential programs.

The **D.C. Language Access Coalition** is an alliance of 25 community-based and civil rights organizations[2]

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[2] The Coalition's member organizations include: Africa Resource Center, American University Washington College of Law—International Human Rights Law Clinic, Asian American Justice Center, Asian American LEAD, Asian Pacific American Legal Resource Center, Asian Service Center, Ayuda, CARECEN, CentroNia, Columbia Heights Shaw Family Support Collaborative, District of Columbia Area Health Education Center, DC Learns, Ethiopian Community Center, La Clinica del Pueblo, Latin American Economic Development Corporation, Latin American Youth Center, Latino Federation of Greater Washington, Life Skills Center, Mary's Center for Maternal and Child Care, Multicultural Community Service, Neighbors Consejo, Newcomer Community Service Center, Vietnamese American Community Service Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and WEAVE, Inc.

that advocate for language access rights in the District of Columbia. The central purpose of the Coalition is to ensure that all persons in the District of Columbia with limited English proficiency or no English proficiency have equal access to government services, programs, and activities. The Coalition played a key role in the passage of the D.C. Language Access Act of 2004, D.C. Code §§ 2-1931-1937 (2004) and is named in the Act as a non-partisan, consultative organization that collaborates with the D.C. Office of Human Rights to monitor government agencies' compliance with the Act.

Amici believe that the Equal Educational Opportunity Act of 1974 ("EEOA") gives ELL students individual rights to equal educational opportunity and gives local educational authorities the discretion to use bilingual education to protect those rights. *Amici* are concerned that the standards for language acquisition set forth in the No Child Left Behind Act ("NCLB") will not simply be used as criteria for federal funding, but will be used to redefine the right to equal opportunity in education and to restrict the availability of bilingual education. Based on their collective experience with language barriers, *Amici* believe that such an interpretation would disadvantage both ELL students and their teachers. This amicus brief shows that Congress never intended that result.

SUMMARY OF THE ARGUMENT

ELLs in American public schools often lag behind their English-speaking peers in meaningful access to the same academic curriculum. If left unremediated, this gap in learning can condemn ELL students to a life of limited opportunities and poverty. One well-recognized means of addressing this issue is bilingual education, where ELL students receive some percentage of their overall educational instruction in their native language. Through this approach, ELL students are often able to close the gap and meet the same rigorous academic standards as their English-speaking peers.

Congress had precisely this language gap, and the benefits of bilingual education, in mind when it enacted Section 1703(f) of the EEOA ("Section 1703(f)") in 1974, vesting in "individuals" the right to "equal educational opportunity," and likewise vesting in the States flexibility in achieving this goal through "appropriate action." 20 U.S.C. § 1703(f) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by . . . (f) 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."). Moreover, lest there be any doubt as to the nature of this right, Congress concomitantly included within the EEOA a private right of action for individuals seeking to remedy violations of the right to equal educational opportunity. 20 U.S.C. § 1706 (2006). Ample case law—particularly *Castañeda* and its progeny—has recognized both the individual right guaranteed in Section 1703(f), and the flexibility of the States in taking

appropriate action to remedy violations of the same, including the adoption of long-term bilingual education programs.

Subsequently, in 2002, almost 30 years after Section 1703(f)'s enactment and almost 20 years after the Fifth Circuit's landmark decision in *Castañeda*, Congress passed Title III of NCLB ("Title III"). 20 U.S.C. §§ 6801-7013 (2006). Title III requires participating States to set and meet annual performance objectives for English acquisition by ELL students. It is designed to create a system of accountability for receipt of federal funds, is voluntary in nature, and contains no private right of action. Most significantly, its overwhelming emphasis on achieving short-term progress on English acquisition has the effect of requiring States to focus their Title III dollars on English acquisition strategies, and not on bilingual education strategies, which often aim for English-language acquisition in the long term while providing native-language instruction in subjects like science and mathematics.

Despite the substantially different purposes of these laws, Petitioners advance the position that States' compliance with Title III necessarily satisfies the mandate to ensure ELL students' right to equal educational opportunity under Section 1703(f). Taking Petitioners' view, Title III would effectively eviscerate Section 1703(f)'s flexible approach toward "appropriate action." It would hinder the States' ability to adopt bilingual education as a long-term strategy toward providing equal educational opportunity to ELL students. If Title III—with its standards effectively discouraging bilingual education—were considered the

new standard of "appropriate action" under Section 1703(f), it would materially alter the right Congress created in 1974. It would also significantly curtail the ability of the States to choose from a wide range of remedial programs to remove language barriers. Absent a clear congressional statement, this Court should not allow a subsequent funding law to modify the right to equal educational opportunity set forth in Section 1703(f) and the delicate federalism balance struck by Congress therein.

ARGUMENT

I. States Must Have the Option of Bilingual Education to Address the Challenges of ELLs

A. The Language Gap Creates Unequal Access to Other Subjects

Teaching English to ELL students is not enough. They must at the same time master other subjects. Yet their difficulties with English create unequal access to educational opportunity, or a "language gap," that manifests itself in significant academic underperformance of ELL students when compared to their English-speaking peers. According to nationwide historical data from the National Assessment of Educational Progress (NAEP),[3] ELL students lag far behind their English-speaking peers in mathematics, science, and other non-language subject areas.

[3] NAEP is a nationwide educational assessment conducted by the U.S. Department of Education National Center for Education Statistics. *See* http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009).

Moreover, the achievement gap has persisted for over a decade. For example, in 2007, ELL fourth graders lagged 25 points behind non-ELLs on mathematics achievements tests, virtually unchanged from a 24-point gap in 1996. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009).[4] The gap widens to 37 points for eighth graders, a modest improvement over a 46-point gap in 1996. *Id.*[5] To put these figures in perspective, 44% of ELL fourth graders were considered "below basic" in mathematics in 2007, as compared with 15% of non-ELL students. *Id.*

The disparities are no less grave in other subjects. In 2005, fourth-grade ELL students trailed their non-ELL counterparts by 32 points in science; 72% of fourth-grade ELLs were "below basic" in science, as compared to 29% of non-ELLs. *Id.*[6] The science gap grows to 44 points for eighth graders and 41 points for twelfth graders, with a staggering 86% and 88% of ELLs,

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[4] Information is retrieved from the NAEP by accessing the NAEP website and selecting certain criteria from which results will be generated. *See* http://nces.ed.gov/nationsreportcard/nde/criteria.asp (last visited Mar. 19, 2009). For example, the NAEP website generated the comparison of fourth grade ELL and non-ELL math students based upon the selection of the following criteria from a series of drop-down boxes: (1) Grade 4; (2) mathematics; (3) national results; (4) student is an English language learner; (5) years 1996, 2000, 2003, 2005, and 2007.

[5] The mathematics test results are based on a 500-point scale.

[6] The science test results are based on a 300-point scale.

respectively, considered "below basic" in those groups. *Id.* The numbers for civics are similar, reflecting 2006 achievement gaps of 38, 46, and 42 points across the fourth, eighth, and twelfth grades. *Id.*[7] Eighty-two percent of twelfth-grade ELL students, a large portion of whom reached voting age in 2006, were considered "below basic" in civics that year. *Id.*

B. Bilingual Education Can Help ELL Students Overcome the Language Gap

Despite these daunting figures, one proven means of reducing the language gap is to make some use of the ELL students' native language during the course of their educational instruction. Numerous studies demonstrate that bilingual education could be an effective alternative in helping ELL students overcome educational obstacles posed by their lack of English proficiency, and that it may in fact be superior to other methods.

For example, in a meta-analytical study examining the results of several studies comparing bilingual education to English-only programs, the National Literacy Panel on Language-Minority Children and Youth concluded that there was no indication that bilingual education impedes academic achievement, and that any observed differences between bilingual and immersion programs favor bilingual instruction. *See* National Literacy Panel on Language-Minority Children and Youth, Developing Literacy in Second Language Learners 397-98 (Diane August & Timothy

[7] The civics test results are based on a 300-point scale.

Shanahan eds., 2006). Another study, reviewing several meta-analytical studies, concluded that bilingual education students consistently outperformed immersion students. *See* Stephen Krashen & Grace McField, *What Works? Reviewing the Latest Evidence on Bilingual Education*, Language Learner, Nov./Dec. 2005, at 7-8. Yet another recent study concluded that bilingual programs raise students' achievement levels, and that parents refusing to enroll their ELL children in such programs should be cautioned that their children's achievement will likely be much lower as a result. *See* Wayne Thomas & Virginia Collier, A National Study of School Effectiveness for Language Minority Students' Long Term Academic Achievement 333 (2002); *see also* H.D. Adamson, Language Minority Students in American Schools: An Education In English 231-32 (2005) (citing research showing that well-run bilingual programs are effective, but that not all bilingual programs are well-run); Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 Rev. of Educ. Res. 247, 273 (2005) (reviewing 17 studies of various language programs, 12 of which found positive effects of bilingual education and none of which found results favoring English immersion).

Moreover, there is also evidence that bilingual education is particularly effective if it is implemented as a long-term strategy. For example, researchers Thomas and Collier conclude that "bilingually schooled students outperform comparable monolingually schooled students in academic achievement in all subjects, after 4-7 years of dual language schooling." *See* Thomas & Collier, *supra*, at 334. When bilingually educated ELL

children initially exit into the English mainstream, English-only children outperform them in English, but the bilingually educated students typically close this gap by the middle-school years and surpass their English-only peers during high school. *Id.*; *see also* J. David Ramirez et al., *Executive Summary of the Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language-Minority Children*, 16 BILINGUAL RES. J. 1-2 (1992) (eight-year study concluding that students who received long-term native language instruction with increasing amounts of English tend to approach grade level norms faster than students who received short-term native language instruction or had been immersed in English with little or no native language support).

In light of this evidence and their collective experience with language barriers, *Amici* believe that bilingual education should remain an option for state and local school systems seeking to meet the challenge of teaching ELL students. As shown more fully below, Congress has provided both a right to equal educational opportunity for these students and sufficient flexibility for their school systems to employ bilingual education to satisfy that right.

II. Congress Intended Section 1703(f) to Confer a Right of "Equal Educational Opportunity" to Non-English-Speaking Students, and to Leave Significant Flexibility to Local Educational Agencies in Implementing That Right, Including Bilingual Education Where Appropriate

Congress intended to build two concepts into Section 1703(f): (1) the creation of an individual right to equal educational opportunity for ELL students; and (2) the preservation of significant flexibility at the State and local level to craft the "appropriate action" to ensure that right. The history and context of this statute confirm these points.

A. The History and Context of Section 1703(f) Demonstrate Congress' Intent to Create a Statutory Right to Remedy Language-Based Educational Inequity

At the outset, the text of Section 1703(f) supports the Ninth Circuit's view that "[t]he EEOA's concern . . . lie fundamentally with the current rights of individual students." *Flores* v. *Arizona*, 516 F.3d 1140, 1173 (9th Cir. 2008). This is a point that Respondent argues persuasively (*see* Respondent Br. at 22-27) and needs no elaboration here. In addition to the text, however, *Amici* submit that the legislative history and context of this provision's enactment confirm its role in creating an individual right, as distinct from the systemwide assessments at issue in Title III of the NCLB.

The process that led to the enactment of Section 1703(f) occurred in two steps. Initially, President Nixon

proposed a nearly identically-worded provision as part of the Equal Educational Opportunities Act of 1972. The language was not enacted at that time. However, four months after this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974), which suggested some ambivalence as to whether ELL students have a right to a meaningful opportunity to participate in educational programs, Congress enacted the proposed language without debate. Both steps help illuminate the meaning of the statute. *See*, *e.g.*, *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 376-78 (1980) (interpreting statute in light of legislative history of previously considered but ultimately unenacted version of bill containing similar language); *Graham* v. *Richardson*, 403 U.S. 365, 381-82 (1971) (looking to the legislative history of an identical statute for any clear indication of congressional intent when the legislative history of the statute being discussed was unavailable).

In introducing the Equal Educational Opportunities Act of 1972, President Nixon sought to improve America's public education system by creating for each student a right to equal educational opportunity, regardless of race, color or ethnic origin. On March 16, 1972, the President addressed the country to discuss his commitment to the creation of a right of equal educational opportunity, explaining that the bill "would further establish *an educational bill of rights* for Mexican-Americans, Puerto Ricans, Indians, and others who start their education under language handicaps, to make certain that they, too, will have equal opportunity." Address to the Nation on Equal Educational Opportunities, 1972 Pub. Papers 426 (March 16, 1972) (emphasis added).

The following day, President Nixon made a special address to Congress to outline the purpose of the proposed Act, and spoke in similar rights-based terms:

> As we look to the future, it is clear that the efforts to provide equal educational opportunity must now focus much more specifically on education: on assuring that the opportunity is not only equal, but adequate, and that in those remaining cases in which desegregation has not yet been completed it be achieved with a greater sensitivity to educational needs.

118 Cong. Rec. 8928 (1972). President Nixon further explained that the proposed legislation would "[r]equire that no State or locality could deny equal educational opportunity to any person on account of race, color, or national origin." *Id.* at 8929.

Even more compelling, the Secretary of Health, Education and Welfare, Elliot Richardson, confirmed before the House Committee on Education and Welfare that the provision, if enacted, would create an individual right—including a right to bilingual education:

> It would be a legal right to receive bilingual education as set forth in the beginning of section 201 [now § 1703] . . . . This would be the first time that Congress ever affirmatively declared that there is a right to receive bilingual education. It would mean, therefore, that in the future any refusal to provide it would be a violation of the law.

Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the H. Comm. on Education and Labor, 92d Cong. 140-41 (1972) (testimony of Sec. Richardson).

Thus, in approving the initial legislation, the House Committee confirmed the rights-creating intent of the EEOA:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental authorities with a clear definition of their responsibilities to their students and employees and to provide the students and employees with the means to achieve *enforcement of their rights*.

H.R. REP. NO. 92-1335, at 3 (1972) (emphasis added). This statement, along with the statements by President Nixon and Secretary Richardson, strongly suggests an intent to create an individual right, both in the initially considered version of the EEOA in 1972 and in the identical version finally enacted two years later.

The timing of its enactment—on the heels of the Supreme Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974)—also suggests that Section 1703 was intended to address individual rights. In *Lau*, the Court addressed whether the City of San Francisco's failure to provide a group of Chinese students supplemental instruction in English violated Title VI of the Civil Rights Act of 1964 (and certain HEW regulations promulgated thereunder). The Court found that the City's failure to address the language deficiency of these students violated federal law. *Id.* at 567-69. However,

four justices concurred only in the judgment, finding only a violation of the HEW regulations governing the instruction of non- and limited-English students. *See id.* at 570 (White, J., concurring). This left unclear whether ELL students had a federal right to a "meaningful opportunity to participate" in the educational program under Title VI absent the HEW regulations.

Four months following *Lau*, Congress passed the EEOA, including Section 1703(f). Congress was aware of the *Lau* decision and referred to it in the legislative history of the Bilingual Education Act, which was passed simultaneously with the EEOA in 1974.[8] Congress thus acted to clarify the uncertainty left by *Lau*, a conclusion drawn by lower courts in addressing the meaning of Section 1703(f). *See*, *e.g.*, *Castañeda* v. *Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981); *Cintron* v. *Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 61 (E.D.N.Y. 1978) ("Apparently spurred by the Court's pronouncement in *Lau*, the Congress explicated the obligation of the state to provide an effective bilingual educational program in the enactment of [Section 1703(f)]."). Thus, the EEOA sought to establish firmly in statutory law the individual right to equal educational opportunity partially embraced in *Lau*.

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[8] *See* 120 Cong. Rec. 15,430 (1974) (describing the holding of *Lau* and resolving "to assist in the provision of *equal educational opportunity*") (emphasis added).

B. The Flexible "Appropriate Action" Standard in Section 1703(f) Confers on State and Local Educational Agencies the Discretion to Effectuate This Right Through Bilingual Education Where Appropriate

At the same time that Section 1703(f) creates an individual right to equal educational opportunity for ELL students, it creates a balance between the right created and the discretion of States and localities to choose how best to effect that right for its ELL students.

The clearest indicator of Congress' intent to leave the implementation of Section 1703(f) to States and localities (subject to judicial review) is its choice of broad language in the statute itself. In employing the phrase "appropriate action," Congress clearly envisioned that States and localities could consider a wide range of alternatives in their efforts to effect the right to equal educational opportunity. Congress thus struck a delicate balance of protecting individuals' rights while preserving some degree of discretion in an area traditionally governed by States and localities. [9]

The Fifth Circuit aptly described this balance in *Castañeda*, the definitive case to date on the construction of Section 1703(f). In *Castañeda*, the court,

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[9] One of our Constitution's primary authors—James Madison—warned that the federal government should tread lightly in dealing with education, a traditional responsibility of the States. *See* Annals of Cong. 388, 389 (1849) (federal funding and control of schools "would subvert the very foundations . . . of the limited Government established by the people of America").

in construing "appropriate action," concluded that Congress utilized intentionally broad language to permit States and localities significant flexibility in choosing the approach toward ensuring the rights of students under the EEOA:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.

Castañeda, 648 F.2d at 1009. At the same time, however, it also recognized that the discretion conferred by Section 1703(f) was not boundless, and that State and local programming would be subject to some degree of judicial scrutiny:

> [B]y including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress must also have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Id. In other words, Section 1703(f), as *Castañeda* instructs, struck a balance by granting a judicially enforceable right

on the one hand and, on the other, deferring to State and local entities on the implementation of that right.

This balance is aptly captured in the three-pronged test established in *Castañeda* to determine whether a State or locality has taken "appropriate action" to provide equal educational opportunity to its ELL students. Under that test, whether a State has taken appropriate action is determined by an examination of three broad factors: (1) "the soundness of the educational theory or principles upon which the challenged program is based"; (2) "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school"; and (3) whether the program "produce[s] results indicating that the language barriers confronting students are actually being overcome." *Id*. at 1010. The flexibility of this test achieves Congress' objective of leaving significant discretion to States and localities as to what "appropriate action" to take under Section 1703(f).

Moreover, Congress clearly contemplated that the discretion left to States under Section 1703(f) was broad enough to permit the use of bilingual education as one of any number of "appropriate action[s]" to ensure the rights of English-deficient students. As the Fifth Circuit recognized in *Castañeda*, Section 1703(f) was enacted at the same time as the Bilingual Educational Act of 1974, Pub. L. No. 93-380, 88 Stat. 503, 512 (1974), which established a program of federal financial assistance to encourage local educational authorities to develop and implement bilingual education programs. *Castañeda*, 648 F.2d at 1008-09. Moreover, while Congress did not

intend Section 1703(f) "to *require* local educational authorities to adopt any particular type of language remediation program," *id.* at 1008 (emphasis added), it clearly did not intend to *preclude* use of some form of bilingual education as a means of ensuring the right, *id.* at 1008-09. Thus, when Congress, through its flexible "appropriate action" standard, sought to contain the expansion of federal power inherent in a judicially enforceable right to equal educational opportunity for ELL students, it did so with a clear recognition that providing some version of bilingual education could, under "appropriate" circumstances, constitute "appropriate action."[10]

Thus, the structure, legislative history, and judicial context to Section 1703(f) all demonstrate that Congress intended (1) to create for ELL students an individual right to "equal educational opportunity," and (2) to preserve for the States significant discretion in how to effectuate that right under a broad "appropriate action" standard. Given this expressed intent, any subsequent attempt to alter the right created or the balance struck by Congress must be done clearly and unambiguously. Title III evidences no such intent, in either respect.

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[10] Secretary Richardson's testimony before the House Committee in 1972 similarly confirms that States could use bilingual education as a means to provide equal educational opportunity to ELL students. *See Equal Educational Opportunities Act: Hearings on H.R. 13915 Before the H. Comm. on Education and Labor*, 92d Cong. 140-41 (1972) (testimony of Sec. Richardson).

III. Title III Was Never Intended to Alter Either the Right Created or the Federalism Balance Struck by Section 1703(f)

Petitioners and certain *Amici* argue, in essence, that Title III of NCLB renders Section 1703(f), as construed by *Castañeda*, a dead letter. *See*, *e.g.*, Pet'r Horne Br. 1; Pet'rs Arizona House Spkr. and Senate Pres. Br. 51-55. In support, they argue that satisfaction of the requirements set forth in Title III necessarily constitutes "appropriate action" sufficient to ensure ELL students' right to equal educational opportunity. *See id*. But Title III does not evidence a clear and unequivocal intent by Congress either to alter the right created by Section 1703(f) or to disrupt the federalism balance created by it. In the absence of a clear direction by Congress to change the earlier statute, its well-established interpretation continues to govern.

A. Title III Cannot Alter the Statutory Right Created by Section 1703(f) Absent Clear Congressional Intent

"Repeals by implication are not favored . . . . In the absence of some affirmative showing of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 549-50 (1974) (citations and internal quotation marks omitted). In Title III, we find no evidence of intent to affect the statutory right to equal educational opportunity as defined by Section 1703(f). First, there is no explicit rights-affecting language directed at the statutory right to equal educational opportunity set

forth in Section 1703(f). Quite the opposite—in enacting NCLB, Congress also enacted 20 U.S.C. § 6847, which states: "Nothing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. A clearer statement of Congress' intent to preserve the scope of Section 1703(f) could hardly be crafted.

Rather than evidencing an intent by Congress to affect individual rights, Title III evidences an intent to create a system of accountability for receipt of federal funds. It is voluntary in nature (*i.e.*, States can opt out and forego federal funding), and contains no private right of action. In particular, under Title III, States with federal government-approved plans are granted funds to further this purpose. *See* 20 U.S.C. §§ 6821-6826. Ongoing eligibility for funds is based upon "annual measurable achievement objectives . . . includ[ing] . . . making adequate yearly progress for limited English proficient children." *See* 20 U.S.C. § 6842. This includes "at a minimum, annual increases in the number or percentage of children making progress in learning English," "at a minimum, annual increases in the number or percentage of children attaining English proficiency by the end of each school year," and "making adequate yearly progress" in the academic achievement of such children. 20 U.S.C. § 6842(a)(3)(A).[11]

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[11] Perhaps recognizing that Title III is, at its core, a funding statute designed to further federal educational policies on a broad scale, rather than a vehicle to bear and enforce individual civil rights, neither Title III nor NCLB contains any private right of action, an interpretation which has been borne out by

(Cont'd)

Simply put, where Section 1703(f) sounds in individual rights, Title III sounds in regulatory accountability. To read Title III as affecting in any way the right created by Section 1703(f) would do violence to the clear intent of both statutes.

B. Title III Does Not Evidence Clear Congressional Intent to Disrupt Section 1703(f)'s Balance of Federalism Considerations

By the same token, Title III does not evidence the kind of clear intent necessary to change the balance struck by the "appropriate action" requirement of Section 1703(f). In striking this balance, Congress contemplated that a State would be permitted to use bilingual education as a form of "appropriate action" to provide equal educational opportunities to its ELL students. Petitioners' reading of Title III as supplanting *Castañeda's* three-part test for "appropriate action" under Section 1703(f) would reduce that discretion and, as a practical matter, limit the use of bilingual education. Title III does not show the clear intent needed to limit state discretion in complying with the earlier statute.

It is well-settled that congressional attempts to repeal or modify federalism protections must be clear and unambiguous. *See Will* v. *Mich. Dep't of State Police*,

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(Cont'd)

ample case law. *See*, *e.g.*, *Fresh Start Acad.* v. *Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN* v. *NYC Dep't of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003); *Stokes exrel. K.F.* v. *U.S. Dep't of Educ.*, 05-11764-RWZ, 2006 WL 1892242 (D. Mass. July 10, 2006); *Coachella Valley Unified Sch. Dist.* v. *California*, C 05-02657 WHA, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

491 U.S. 58, 65 (1989); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (concluding that a congressional intent "to alter the usual constitutional balance between the States and the Federal Government" must be "unmistakably clear in the language of the statute") (internal quotations omitted) (citations omitted). Thus, where statutes have posed threats to a pre-existing balance of federal and state authority, this Court has required that Congress manifest a clear intent to alter it. *See*, *e.g.*, *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) (addressing whether the ADA applies to state prisons); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (addressing whether the Bankruptcy Code displaced state laws relating to title in real estate); *Gregory*, 501 U.S. at 456, 461 (addressing whether the ADEA applies to state law establishing mandatory retirement age for Missouri judges).

This principle applies with particular force where Congress legislates in the area of public education, an area traditionally within the province of State regulation. *See*, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 580-81 (1995) (stating that education is considered to be an area of traditional State regulation); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Epperson* v. *Arkansas*, 393 U.S. 97, 104, (1968); *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483,

493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). Thus, where an interpretation of a statute would effect an "alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools," this Court will not adopt such an interpretation "unless that is the manifest purpose of the legislation." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 432 (2002).

Title III does not display a manifest intent to redefine the contours of "appropriate action" under Section 1703(f). To begin with, there is no mention whatsoever of Section 1703(f) in Title III, or elsewhere in NCLB. Moreover, one of the stated purposes of Title III is "to provide State educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching limited English proficient children, that the agencies believe to be the most effective for teaching children." 20 U.S.C. § 6812(9). Thus, one purpose of Title III—to promote flexibility in States' teaching ELL students—is entirely consonant with the purpose and federalist spirit of Section 1703(f)'s flexible "appropriate action" standard.

True, in enacting Title III, Congress imposed a number of conditions that create practical limitations on States' use of bilingual education as a condition of receiving Title III funding. For example, Title III mandates that States set "annual measurement achievement objectives" for ELL students that include annual increases in the number or percentage of ELL students making progress in learning English, 20 U.S.C.

§ 6842(a)(1), and annual increases in the percentage of ELL students becoming proficient in English, *id.* at § 6842 (a)(3)(A)(i).[12]

Such limitations are entirely appropriate under this Court's Spending Clause jurisprudence. *See*, *e.g*, *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). However, extending Title III to redefine what constitutes "appropriate action" under Section 1703(f) would effect a radical shift in the balance struck in that statute, and would do so without congressional authorization.

At best, Title III imposes English acquisition requirements as a condition of federal funding, not as a means of complying with § 1703(f). *See* 20 U.S.C. §§ 6821-6826, 6842. Compliance with Title III, therefore, means only that a State has to meet the precondition to receive federal funding, not that it has automatically remediated language barriers as required by Section 1703(f). While compliance with Title III may have some value in determining whether "appropriate action" has been rendered sufficient to remedy a violation of Section 1703(f), *see*, *e.g.*, *Flores*, 516 F.3d at 1175 n.46, compliance with Title III alone is not *per se* "appropriate action" under Section 1703(f). To hold differently would be to undermine the federalism concerns underlying that statute.

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[12] These objectives are subject to the approval of the Secretary of Education. 20 U.S.C. § 6823(c). Title III also imposes sanctions upon States and localities for failure to meet these English acquisition standards, such as mandated modifications of educational programming, replacement of school personnel, and outright denial of federal funds. 20 U.S.C. § 6842(b)(4).

CONCLUSION

For the reasons explained above, the Court should affirm the judgment and order below.

Respectfully submitted,

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