

P U B L I C I N T E R E S T

The New Reality After High Court's *Horne* Decision

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The recent U.S. Supreme Court term ended in a flood of cases on topics that captured the public imagination: searching teenage girls; race discrimination in firefighter examinations and DNA testing.

A case, lost amid the clamor, addressed a more prosaic subject — Federal Rule of Civil Procedure 60(b)(5) — but carries with it the seeds for far-reaching and harmful consequences for advocates and their public interest lawyers, like those who work at the Public Interest Law Center of Philadelphia, who sue to enforce federal law against state officials.

That case, *Horne v. Flores*, takes aim at the derogatorily termed “institutional litigation”: cases that require, as their remedies, structural changes that may require many years to achieve. As a result of *Horne*, state officials can more readily attack the substance of a court-ordered remedy after losing at trial. State officials can do so without having to appeal the court order and without having to comply with that order. The question now will be whether the state official currently complies with the federal law, albeit through a path not ordered by the district court.

Horne was a class action brought on behalf of non-English speaking students and their parents, seeking to enforce the Equal Educational Opportunities Act of 1974. That federal law requires states and local districts to take “appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”

In January 2000, after trial, the district court held that Arizona’s English language funding was inadequate and arbitrary in that it bore no rational relationship to the actual needs of students. To remedy the violation, the district court ordered the state of Arizona appropriately to fund educational services for English language learners, or ELLs. The state officials did not appeal the order. Over

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the next six years, the district court issued multiple orders requiring the state to fund its English language program by given deadlines and ultimately began imposing fines as those deadlines were missed.

In 2006, the state Legislature passed HB 2064, a bill designed to implement a permanent funding solution in the area of ELL. The district court found that this law did not satisfy its existing orders and injunctions. Rather than modifying HB 2064 to bring it into compliance, the legislators filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(5), which permits relief when prospective application of an order is "no longer equitable."

By 2006, at the time of the argument on the motion, English language learners in the Arizona school district continued to languish. In the eighth grade, only 28 percent of the students passed the state competency exam in math, while 70 percent of the non-ELL students passed. For eighth grade reading, 31 percent of the ELL students passed, while 73 percent of the non-ELL students passed; and in writing the figures were 49 to 94 percent. The state per child expenditures for ELL instruction had grown to only \$439.

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Despite these continued failures, the legislators argued that changed circumstances made the continued enforcement of the court decrees inequitable and justified the requested relief. These included the state's switch to a new method of teaching, reforms within the school district against which the lawsuit was initially filed and an overall increase in education funds. The district court heard testimony about these claims "in detail and at length" (except for an argument about the passage of No Child Left Behind which, according to the dissent, was never raised below and "has sprung full-grown from the Court's own brow, like Athena from the brow of Zeus.") The district court denied the legislators' motion, and the court of appeals affirmed.

The Supreme Court reversed and remanded with instructions for the district court to reconsider, using the framework in *Rufo v.*

Inmates of Suffolk County Jail. Though the lower courts had relied on *Rufo* in their denials of the motion, the Supreme Court found that they had applied the test too rigidly and narrowly by focusing on whether the bill satisfied the existing decrees. It clarified that the crucial question for Rule 60(b)(5) is not whether the changes bring the state into compliance with the court order but whether the changes brought the state into compliance with the underlying federal law. After all, the court reasoned, compliance with the underlying law is the goal of the decree.

The Supreme Court based its analysis upon what it characterized as principles of federalism: For a federal court to interfere in an area typically under state control is only justified if a federal law is being violated. Dismissing the fact that a state official was a defendant in the original lawsuit and did not appeal the district court order, the court expressed its concern about a political dynamic in lawsuits seeking institutional reform in which executive branch officials do not vigorously defend them because the resulting court orders provide political cover for policies which the public may not favor.

The practical effect of *Horne* for those of us who labor to enforce federal laws may be more exhaustive and more frequent returns to the district court and the risk that the court will be compelled to modify its order, even if

the defendants have not complied with it. As Justice Stephen Breyer predicted in a dissent joined by Justices John Paul Stevens, David Souter and Ruth Bader Ginsburg, the case "will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof imposed once again upon the plaintiffs."

A second, more subtle effect is the manner in which the majority opinion undercuts the power of district courts to issue orders they find necessary to remedy proven violations of federal law. As the dissent explains, the majority "second guesses finding after finding of the District Court." The majority opinion also made clear that it did not agree with the district court's original legal conclusion that the state violated federal law "when it early and often suggests that Arizona may well comply despite lack of a rational funding plan (and without discussing how the changes it mentions could show compliance.)" Let us hope that such second-guessing will turn out to be unique to the facts of *Horne* and will not lead to a state where district courts become even less willing to enforce federal laws, mindful that there is now another avenue for some later court to overturn an order with which it simply disagrees.