

# ***Flores v. Arizona: The Federal Legal Rights of English Language Learners and the Scope of State Authority over Educational and Fiscal Policy***

by

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On August 29 and September 2, 2008, respectively, the Arizona State Superintendent of Public Instruction and the Arizona Legislature both filed petitions for *certiorari* in the United States Supreme Court asking the Court to review the Ninth Circuit's recent decision in *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008). In *Flores*, a unanimous panel of the Ninth Circuit concluded that, after more than fifteen years of litigation, the State of Arizona still has not complied with a judgment requiring the state to provide funding for English language learner (ELL) students that is reasonably calculated to effectively implement Arizona's educational theory for ELL students. The petitioners challenge the decision below on three grounds arguing that (1) the court of appeals did not adequately account for changed circumstances; (2) the testing and accountability provisions of the No Child Left Behind Act (NCLB) should define the scope of "appropriate action" under the Equal Educational Opportunities Act (EEOA); and (3) the lower federal courts have unconstitutionally usurped local control over public education through their rulings against Arizona. In the event that the Supreme Court grants *certiorari* on any of these questions, it would have important implications for the development of American education law. Even if the Court denies review, *Flores* merits attention because it reflects educational, fiscal, political, and legal conflicts likely to be faced more and more in other states around the nation.

The *Flores* case was filed in 1992 on behalf of a class of ELL students and parents in Nogales, Arizona, a small city along the state's Mexican border. The plaintiffs' primary allegation was that Arizona had failed to provide financial and other resources necessary for public schools to adequately implement state-mandated ELL programs. In 2000, after a bench trial, the district court held that Arizona was in violation of the EEOA, finding that Arizona failed to provide adequate resources to implement ELL programs throughout the state. The district court found that the financial support was so inadequate that it bore "no relation to the actual funding needed to ensure that [ELL] students . . . [were] achieving mastery of [the state's] specified 'essential skills.'" *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000) (internal citations omitted). After the district court issued this ruling, the parties entered into a consent decree that addressed the plaintiffs' other allegations. The 2000 judgment was not appealed, but Arizona failed to comply both with the judgment's original mandates and with later orders. The district court, in an attempt to enforce its original order and the subsequent consent decree, held Arizona in civil contempt. The state again failed to act, and accrued more than \$20 million in civil fines.

In the spring of 2006, Arizona passed a funding bill, which Arizona Governor Janet Napolitano allowed to become law without signature, despite concerns about whether it would bring the state into full compliance with the existing court orders. (H.B. 2064, codified at Ariz. Rev. Stat. § 15-241 *et seq.* "H.B. 2064"). The governor asked the state attorney general to move for expedited review of this issue. Because of the governor's reservations, the state superintendent of public instruction argued that H.B. 2064 complied with the court's orders while the attorney general argued that the law did not fully comply. The speaker of the Arizona state house of representatives and the president of the Arizona senate separately intervened to argue that the district court should purge the contempt order or, in the alternative, order relief from judgment under Fed. R. Civ. P. 60(b)(5).

The District Court issued an order denying relief from judgment and twice held that H.B. 2064 did not comply with its prior orders. According to the district court, compliance still required "a funding system that rationally relate[d] funding available to the actual costs of all elements of ELL instruction." *Flores v. Arizona*, 480 F. Supp. 2d 1157, 1165 (D. Ariz. 2007).

On appeal, the Ninth Circuit focused much of its analysis on the parties' Fed. R. Civ. P. 60(b)(5) argument that the underlying facts had been so altered over time that the changes rendered prospective enforcement inequitable. According to the Ninth Circuit, to prevail on such a claim, the parties needed to show either that the basic factual premises of the district court's original findings and subsequent orders had been swept away, or that there had been some change in the legal landscape that made the original ruling improper. 516 F.3d at 1168-69. The Ninth Circuit found that, although time had passed, the fundamentals of the Arizona school funding system had not changed in ways that undermined the district court's original conclusion that Arizona's inadequate ELL funding constituted a violation of the EEOA. 516 F.3d at 1171.

In addition, although the NCLB had been enacted since the district court's original liability determination, the Ninth Circuit rejected the state's argument that the NCLB had radically altered the legal landscape for ELL funding. The court of appeals flatly rebuffed the suggestion that the NCLB had defined the scope of "appropriate action" under the EEOA. The court further stated that the NCLB's overall, gradual school-improvement requirements could not substitute for the equality-based civil rights guaranteed by the EEOA.

With respect to the argument that H.B. 2064 was in compliance with the declaratory judgment, the Ninth Circuit found that the district court had not abused its discretion in deciding that there "remains ... a fundamental mismatch between the ELL costs [Nogales] requires and the funds provided for that specific purpose," and that Arizona was still in violation of the EEOA. 516 F.3d. at 1160. The court of appeals found, first, that H.B. 2064's two-year funding cut-off alone rendered the law inadequate as a funding scheme rationally grounded in the costs of providing ELL programs. Second, because H.B. 2064 violates the no-supplant requirements of federal law, it does not provide adequate funding for Arizona school districts.

Whether or not the Supreme Court grants *certiorari* in *Flores*, this case is significant for a number of reasons. First, it involves the intersection between the educational and political controversy about how to effectively teach English and the legal right of non-native speakers to access to the general curriculum. How quickly can schools realistically be expected to teach enough English to provide meaningful access to the general curriculum and what does such instruction cost? Second, it exemplifies a type of conflict between fiscal concerns and educational rights that is likely to recur with increasing frequency in these troubled economic times, not only for ELL students, but also for special education students and general education students. How in a time of financial crisis do states and school districts meet the mandates of statutes like the EEOA and the NCLB? *Flores* provides a window into these and other important educational and legal questions.

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