

The Many Faces of Compliance: The Supreme Court's Decision in *Horne v. Flores*

By William E. Thro, J.D., M.A.



At first blush, the Supreme Court's recent decision in *Horne v. Flores* (2009) appears to be about the proper standard for determining when to modify a previous judgment, a topic that would interest only civil procedure geeks. Yet, on closer examination, *Horne* is about giving local and state officials discretion to solve education problems and, ultimately, about solving education issues without spending more money.

Horne is one of those cases that seems to last forever. The case began in 1992 when a group of English-language learners (ELLs) and their parents sued education officials in Arizona, alleging that the Nogales School District violated the Equal Educational Opportunities Act. The plaintiffs contended that the state official failed to take appropriate action to overcome language barriers that impeded the children from equal participation in various instructional programs.

In January 2000, after almost eight years of litigation, a federal trial court concluded that Arizona violated federal law because the amount of funding the state allocated for the special needs of ELL students was arbitrary and unrelated to the actual funding needed to cover the costs of ELL instruction in Nogales. Although all the plaintiffs were in the Nogales district, and even though the trial court made no findings regarding any district other than Nogales, it expanded its order in 2001 to include the entire state. The court further ordered the state to provide funding rationally related to the actual amount of funding needed by January 31, 2002.

When the state failed to comply with the trial court order by late 2005, the court held the state in contempt and directed the legislature to increase funding within 15 calendar days or face significant fines. Once the fines totaled \$20 million, the legislature passed an increase in funding.

Although the governor thought the new legislation was inadequate, she allowed the bill to become law without her signature and urged the attorney general to ask the trial court to determine whether the state was meeting its obligations. The governor, the state board of education, and the original plaintiffs all agreed that the recently passed legislation was inadequate; the state superintendent of public instruction said the new legislation was sufficient.

Legislative leaders moved to intervene to purge the contempt order or grant modification of the judgment because of changed circumstances. The trial court, however, concluded that the new legislation was insufficient to address the federal law violations. The court found that (a)

the funding increase was not rationally related to effective ELL programming, (b) the two-year limit on funding for each student was irrational, and (c) the legislature's reliance on federal funds violated federal law. The court did not address the request of legislative leaders to modify the judgment in light of changed circumstances.

On appeal, in an unpublished decision, the Ninth Circuit vacated the earlier order and fines while remanding for an evidentiary hearing on the legislative leader's request to modify the original judgment.

On remand, the federal trial court denied the request to modify the judgment. The court maintained that the new legislation did not establish a funding system rationally related to providing the actual costs of ELL instruction. When the legislature failed to pass new legislation, the court again found the state in contempt and the legislative leaders appealed.

Although the Ninth Circuit noted that the state had made significant improvements in ELL instruction since 2000, it affirmed the trial court's denial of relief. The court agreed that unless it could be shown that there were no additional costs associated with ELL instruction or that Arizona had substantially altered its funding model, there would be no modification. The superintendent of public instruction and the legislative leaders asked the Supreme Court to review the decision.

Supreme Court Proceedings

In an opinion written by Justice Alito and joined by Chief Justice Roberts as well as Justices Scalia, Kennedy, and Thomas, the Supreme Court reversed.

The Court began by examining whether any of the parties that sought further review actually had standing to do so. Since the governor and the state board of education agreed with the original plaintiffs that the state was not doing enough, and given that these officials had the ultimate responsibility for complying with the law, there was a serious standing issue.

Nevertheless, the Court quickly resolved this question. Insofar as the state superintendent was a named defendant and subject to the injunction, the Court pointed out that he had standing. Moreover, the Court observed that the new governor of Arizona ordered the attorney general to switch sides. Since the superintendent had standing, the Supreme Court thought it unnecessary to determine whether the legislative leaders had standing.

The Supreme Court began its analysis on the merits by acknowledging that suits aimed at bringing about fundamental change in policy, often called "institutional reform litigation," raise special concerns that are not present in ordinary suits. First, the Court explained that injunctions remain in place for years and the passage of time requires reexaminations of decisions.

Second, when a federal judge is overseeing areas that traditionally are left to the states or when the federal

courts are dictating state and local budgetary priorities, the Court indicated that new constitutional issues are raised.

The Court asserted that when new officials take power, they find themselves bound by different policy choices and their own discretion limited.

Third, because state officials often want to further their own policy views, the Court wrote that they consent to or only nominally oppose injunctions that go well beyond what federal law requires. The Court asserted that when new officials take power, they find themselves bound by different policy choices and their own discretion is limited. Because of this concern, the Supreme Court reasoned that the question of modification turns on whether the state has corrected the federal law violation rather than on whether the state has complied with the court order.

The Court demonstrated that there are many ways to achieve compliance with federal law. According to the Court, the fact that some officials consented to pursue one method does not mean that their successors cannot pursue another. As long as federal compliance is achieved, the Court was satisfied that modification of the judgment and dissolution of the injunction were appropriate. Indeed, the justices pointed out that federal courts have an obligation to return control to state and local officials as soon as the federal law violation has been corrected.

The Supreme Court found that the lower courts ignored this principle. First, the lower courts focused exclusively on the narrow question of the adequacy of the state's incremental funding for ELL instruction rather than fairly reviewing the broader question of whether, as a result of important changes during the intervening year, the state fulfilled its obligations under federal law by other means. Second, the Court ruled that both the Ninth Circuit and the trial court ignored the federalism. The Court added that when, as in *Horne*, state officials take opposite positions, federalism concerns are elevated.

Insofar as the lower courts applied too narrow a standard and had ignored the federalism concerns, the Supreme Court reversed the Ninth Circuit's judgment and remanded so that the trial court could apply the proper analysis. However, the Court articulated five important legal and factual developments that "may warrant the granting of relief from the judgment."

First, the Court noted that Arizona adopted a new ELL instructional methodology. Instead of stressing “bilingual education” in which students are taught core subjects in their native language, Arizona now relies on “structured English immersion” in which students are taught almost exclusively in English.

Money does not determine compliance or educational success.

Second, the Court indicated that Congress enacted the No Child Left Behind legislation, which emphasizes flexibility for local officials but demands that the schools meet certain standards, including compliance with the Equal Educational Opportunities Act. Although compliance with NCLB does not mean compliance with the Equal Educational Opportunities Act, the Court observed that compliance with NCLB does alter the educational landscape in ways that promote compliance with federal law.

Third, the Court acknowledged that there were many structural and management reforms in the Nogales School District that may have led to compliance.

Fourth, the Court recognized that the amount of funding available to Nogales had increased and may have resulted in compliance in the district.

Fifth, the Court admonished the lower courts for extending the orders on a statewide basis. Although the plaintiffs proved a violation in Nogales, one of 239 districts in Arizona, and one that serves less than 1% of the state’s students, the plaintiffs did not prove a statewide violation of federal law. Indeed, it appeared that the only basis for extending the injunction to the entire state was the belief that a limited injunction would violate the Arizona Constitution.

The Supreme Court found that a potential state constitutional violation could not justify action by a federal court. Unless there was a finding of a statewide violation of federal law, the Court directed that the statewide injunction would have to be vacated.

Justice Breyer, joined by Justices Stevens, Ginsburg, and Souter, filed a lengthy dissent. In their view, the lower courts had properly focused on the issue of funding rather than on whether compliance had been achieved through other means. Indeed, the adequacy of funding was always the central issue.

Moreover, the dissent did not regard *Horne* as institutional reform litigation, but merely as a dispute wherein a local board failed to comply with a federal statute. Further, the dissent argued that the lower court actually addressed the new considerations and that the majority was merely second-guessing factual findings rather than deferring to factual findings.

Finally, Justice Breyer and his colleagues believed that the framework ultimately adopted by the Court was unworkable.

Implications

Despite the length of the opinions, the duration of the proceedings, and the complexity of the record and some of the issues, *Horne* offers three straightforward implications for school business officials.

First, there are many ways to comply with federal law. Although school boards and their officials must comply with federal law, they do not have to agree with the methods chosen by the plaintiffs. For example, the plaintiffs in a Title IX case may wish a board to achieve compliance by adding a specific sport for women. However, board officials may decide that another method, such as cutting sports for men or adding a different sport for women, is more appropriate.

Moreover, money does not determine compliance or educational success. Changed circumstances or new legal developments may trump financial considerations. The Court ruled that the judiciary has limited discretion to dictate how compliance is achieved. Even where a court picks a particular method, such as mandating more money, a board may be able to end judicial supervision by demonstrating its compliance through other means.

Second, it is easier to modify or dissolve injunctions. The question now is whether a school board complied with federal law, not whether it has done exactly what the judiciary wanted it to do. Moreover, injunctions that result from an official’s consent or only nominal opposition are treated with skepticism. The Supreme Court recognizes that some officials use judicial orders to achieve funding or policy goals that cannot be achieved through the normal political process. These are important distinctions and result in greater discretion for local school districts.

Third, state and local control of education remains a paramount constitutional value. Although the Supreme Court has made similar pronouncements in its cases, rarely has it done so as forcefully as it did with *Horne*. Justice Alito’s opinion for the Court makes it clear that education professionals at the local and state level, not federal judges, should be deciding educational policy.

In sum, *Horne* is not just a case for those who obsess about civil procedure and the role of the federal courts. *Horne* is a decision that expands the discretion of education officials, limits the role of federal courts, and reaffirms the importance of local control.

Reference

Horne v. Flores, 2009 WL 1789470 (2009).

William E. Thro, J.D., M.A., is university counsel and assistant professor of government at Christopher Newport University, Newport News, Virginia. He served as solicitor general of Virginia from 2004 to 2008 and argued two cases before the Supreme Court of the United States. Email: wthro@cnu.edu