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COURT AGREES TO REVIEW INJUNCTION REQUIRING STATE TO INCREASE FUNDING TO TEACH ENGLISH TO ILLEGAL ALIENS

(Horne v. Flores, Nos. 08-289 & 08-294)

The U.S. Supreme Court this week agreed to review a federal court injunction that requires the Arizona legislature to adopt massive new spending programs to teach English in the public schools to foreign-born students. The decision to hear the case was a victory for the Washington Legal Foundation (WLF), which filed a brief urging that review be granted. WLF charged that the injunction is an extraordinary power grab by the federal courts and deprives citizens of Arizona of their democratic right to establish education policy within the State.

WLF's brief in *Horne v. Flores* argued that Arizona has fully complied with all federal mandates regarding English language instruction, as established by the No Child Left Behind ("NCLB") law adopted in 2002. WLF argued that the federal courts are not authorized to impose their own separate set of mandates on the State. WLF filed its brief with the *pro bono* assistance of Gene C. Schaerr, Michael J. Friedman, and Ari E. Waldman of the law firm of Winston & Strawn, as well as Professors Ross Sandler and David Schoenbrod of New York Law School.

"Principles of federalism in almost all instances bar federal courts from dictating to States how to operate their normal functions, such as running the public schools," said WLF Chief Counsel Richard Samp. "Reasonable people can disagree about whether the Supreme Court went too far in requiring States to provide free public education to illegal aliens. But there can be absolutely no justification for federal courts stepping in to require States to engage in massive new spending to allow those illegal aliens to be taught English in programs that suit the federal courts' fancy," Samp said.

The case arose in connection with a political dispute between the Democratic Governor and the Republican-controlled legislature regarding how to structure and fund English language instruction programs in Arizona. On three occasions in 2005, the legislature adopted bills to implement its limited English proficient (LEP) education program, only to be met with vetoes from the Governor, who sought significantly higher funding levels. She allowed a fourth bill to become law, but then announced that she would support efforts to persuade the courts to order increased funding.

A 1992 lawsuit had invoked a 1974 civil rights statute to challenge the adequacy of LEP programs in the City of Nogales, Arizona. The 1974 statute provided only a vague mandate to

schools around the country: they were required “to take appropriate action to overcome language barriers that impede equal participation” in the educational process. A federal district court nonetheless in 2000 issued an injunction requiring Arizona to revise its LEP programs to do more “to overcome language barriers.”

The Governor took her case back to the district judge in 2005. The judge agreed with the Governor that the 2005 Arizona law violated federal law and his prior injunction because, in his view, it did not provide enough funding for LEP education. He made that ruling despite uncontested evidence that Arizona fully complied with the congressional mandates for LEP education imposed by the 2002 NCLB statute. The U.S. Court of Appeals for the Ninth Circuit affirmed, finding that a State’s compliance with NCLB did not deprive federal courts of the authority to craft additional remedies.

WLF’s brief asked the Supreme Court to review the Ninth Circuit’s ruling. WLF argued that the NCLB statute makes clear that Congress did not intend to permit federal courts to usurp control over public education for the purpose of mandating increased funding for LEP programs. Rather, WLF argued, Congress intended to require States that accept federal educational funds to meet a series of benchmarks designed to ensure that children for whom English is not the native language are being taught English as quickly as possible. Because it is uncontested that Arizona has met those benchmarks, there can be no basis for federal courts to tell Arizona to spend additional money on LEP programs, WLF argued.

The Supreme Court agreed to hear the case despite pleas from the State of Arizona that it not do so. (Those seeking review were Arizona’s legislative leadership and its Superintendent of Public Instruction.) The Governor of Arizona is stepping down to become the Secretary of Homeland Security in the new Obama Administration. Accordingly, it will be interesting to see whether the new Governor decides that Arizona will switch sides in the litigation and ask the Supreme Court to overturn the federal court order.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of individuals. WLF also regularly litigates in support of efforts to ensure that government programs are administered by the elected branches of government, not by the federal courts.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.