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Arizona School Finance: A Primer on Strategy and Enforcement

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Arizona School Finance: A Primer on Strategy and Enforcement

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I. INTRODUCTION

In 1991, the Arizona Center for Law in the Public Interest, a non-profit public interest law firm, filed a lawsuit alleging that Arizona's school finance system violated the state constitution. Although the attorneys working on the case were experienced and attempted to anticipate problems, it turns out that we had little idea of what lay in store for us. Thirteen years and four appellate decisions later, we are still litigating school finance issues that we thought would have been resolved long ago. Nevertheless, the benefits for Arizona's public schools

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that were produced by this litigation have been enormous and even exceeded our original expectations.

II. BACKGROUND

A. The Arizona Center for Law in the Public Interest

The Arizona Center for Law in the Public Interest ("Center") was established in 1974 as a nonprofit public interest law firm. It is a small organization with two to four lawyers, depending on the success of its fundraising efforts at any given time. The Center litigates issues of statewide importance, including environmental issues, civil rights, campaign finance, and government accountability.¹ In 1991, the Center decided to include education finance among its litigation projects.

B. School District Participation

At about the same time that the Center became interested in education finance issues, a number of school districts in low-property-wealth areas of Arizona approached the Center about their inability to build new schools or renovate existing facilities. At that time, Arizona's maintenance and operation system for school funding was roughly equalized. However, capital financing was left entirely to the ability and inclination of school districts and their voters to assess property taxes to support the issuance of general obligation bonds.

The capital finance system had produced enormous disparities among school districts with regard to their school facilities, which depended on the size of their property tax base and the inclination of their voters to approve tax increases. Schools in districts with low tax bases were older, smaller, and, in some cases, unsafe for students. Some schools lacked libraries, science labs, computer rooms, art programs, gymnasiums, and auditoriums. But in higher wealth districts, there were schools with indoor swimming pools, a domed stadium, television studios, and extensive computer systems.²

The school districts that approached the Center about litigating the constitutionality of the system were largely rural school districts

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1. See *e.g.*, *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), *aff'g Kadish v. Arizona State Land Dep't*, 747 P.2d 1183 (Ariz. 1987) (holding that the State must obtain full market value for minerals taken from federally granted school trust lands); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983) (holding that women have the right to receive the same pension benefits as men upon retirement); *May v. McNally*, 55 P.3d 768 (Ariz. 2002); *Ariz. Ctr. for Law v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1992) (holding that the public trust doctrine bars the State from relinquishing sovereign claims to river beds in wholesale fashion, and the State has a special duty to protect these areas for recreation, fishing and boating).
 2. *Roosevelt v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994).

with small tax bases. With small tax bases, large tax increases were necessary to support the districts' capital expenditures. As a result, tax rates in low-wealth school districts were many times higher than tax rates in higher wealth school districts. But high tax rates on a small tax base still didn't generate sufficient funds to build and renovate schools that were suitable for students.

C. Litigation Strategy

1. *Dealing with Adverse Precedent*

In 1973, in *Shofstall v. Arizona*,³ the Arizona Supreme Court rejected a school finance challenge based upon the Arizona constitutional requirement that the legislature "shall provide for the establishment and maintenance of a general and uniform public school system."⁴ In a unanimous decision, the court determined that the school finance system was general and uniform, because the laws circumscribing that system applied equally to all school districts. Oddly enough, the court determined that education was a fundamental right under the Arizona Constitution, but it failed to apply strict scrutiny to its analysis of the school finance system.⁵

By 1991, the entire composition of the Arizona Supreme Court had changed. Unlike the previous challenge in 1973, which generally focused on maintenance and operations funding, we determined that a more targeted challenge, limited to the capital finance system, was appropriate for a variety of reasons. First, it would be far easier to demonstrate that the capital finance system produced disparities among school districts with regard to their school buildings, facilities and equipment. Second, it did not make sense to assert a broad-based challenge to the school finance system, because it had been roughly equalized after the *Shofstall* decision and such a challenge would require an enormous investment of resources that the Center lacked. In the face of the adverse decision from 1973, we determined that a limited challenge requiring fewer resources, but one that would clearly demonstrate the stark differences in school facilities was the optimal strategy.

2. *Parties and Resources*

At the very beginning, perhaps a half-dozen school districts had approached the Center about litigating capital finance issues. We made an effort to recruit additional school districts for both financial and political reasons. Arizona has approximately 228 school districts, ranging from less than fifty students in the smallest district to 70,000

3. 515 P.2d 590 (Ariz. 1973).

4. ARIZ. CONST. art. XI, § 1.

5. See *Shofstall*, 515 P.2d 590.

students in the largest.⁶ We wanted to be able to represent to the court that the litigation was supported by a substantial number of school districts. Additionally, even though we hoped that the litigation would be relatively inexpensive, we wanted to insure that we had sufficient financial resources to pay for what might turn out to be substantial costs. The more school districts we could recruit to support the litigation, the less of a financial burden it would be for each school district.

By the time we filed the lawsuit in 1991, we had enlisted the support of over forty school districts, each of which executed intergovernmental agreements to support the litigation. Additionally, the school districts agreed to assess themselves on a per-student basis to generate the funds that we anticipated would be necessary to finance the litigation.

III. THE LITIGATION

A. The Trial Court

From among the forty or so school districts supporting the litigation, we identified four districts to serve as plaintiffs in the case. The complaint filed on behalf of those districts generally alleged that the school finance system was unconstitutional because it was not “general and uniform” and because it denied equal protection of the laws. Other lawyers represented a class of parents in the affected school districts.

We spent the next year assembling evidence to support a motion for summary judgment. We collected affidavits from the superintendents of the plaintiff school districts detailing the condition of their buildings, facilities, and equipment. We also retained a consultant to inspect higher property-wealth school districts and provide an extensive affidavit about conditions in those districts. We worked with experts to submit a lengthy affidavit about minimum facility standards that should be maintained in school districts to support an adequate learning environment. Finally, we took depositions of state education officials regarding the conditions in low-property-wealth school districts and the manner in which the school finance system was responsible for producing those conditions.

By the time we were done, we had approximately 2,000 pages of exhibits to support the motion for summary judgment that we filed. The effort was so comprehensive that the State did not attempt to rebut any of our factual assertions. Instead, the State alleged that it

6. DEP'T OF EDUC., STATE OF ARIZ., ARIZONA DEPARTMENT OF EDUCATION ANNUAL FINANCIAL REPORT FOR FISCAL YEAR 2002–2003: EXPENDITURES BY FUND FOR DISTRICTS, at www.ade.az.gov/annualreport/annualreport2003/PerPupilExpenditures/ExpendituresByFundDistrict.aspx (last visited Feb. 8, 2005).

lacked the resources to determine whether they were true and filed a motion to dismiss the case based on the *Shofstall* decision of twenty years earlier.

The trial court judge, feeling constrained by the decision in *Shofstall*, ruled that the school finance system was constitutional.⁷ However, in so doing, the judge did us a great favor by additionally finding that there were “gross disparities” in school buildings and facilities among school districts and that the disparities were caused by the Arizona school finance system. Judgment was entered for the State and we appealed.

B. The Arizona Supreme Court

We requested that the supreme court accept the case directly from the trial court, avoiding the need to have the case heard in the intermediate appellate court. The Arizona Supreme Court heard argument in November 1993, and issued its decision in July 1994.⁸

The decision was close, with a razor-thin margin voting to hold that the school capital financing system was unconstitutional. Two justices subscribed to an opinion that held that the system was not “general and uniform” based on what appeared at the time to be equity grounds.⁹ The third justice issued a concurring opinion that agreed with much of the plurality opinion but interpreted the “general and uniform” provision as imposing a minimum adequacy requirement.¹⁰ The two remaining justices dissented on the grounds that education issues were nonjusticiable under the Arizona Constitution.¹¹

Our strategy had worked perfectly. We had secured a supreme court victory, overcoming adverse precedent, with relatively modest amounts of time and money invested. We had avoided an expensive and time-consuming trial, submitted an overwhelmingly favorable factual record, and persuaded a slim majority of the Arizona Supreme Court to declare the school finance system unconstitutional.

Our luck was about to change.

IV. ENFORCEMENT OF THE SUPREME COURT DECISION

While we were not naïve, we did not fully appreciate the problems we would encounter in enforcing the supreme court’s decision. For one thing, the supreme court had merely directed that a declaratory judgment be issued in favor of the plaintiffs, but it declined to issue any

7. Order, *Roosevelt* (Maricopa County, Ariz. Super. Ct. Sept. 18, 1992) (No. CV91-13087).

8. *Roosevelt v. Bishop*, 877 P.2d 806 (Ariz. 1994).

9. *Id.* at 814–15.

10. *Id.* at 822 (Feldman, C.J., specially concurring).

11. *Id.* at 827 (Moeller, V.C.J., dissenting, joined by Corcoran, J.).

injunctive relief, based on the presumption that state legislators would surely enact responsive legislation in a timely manner. The supreme court required action within a reasonable period of time, but it failed to give a specific deadline.

The next four years were exceedingly difficult for both us and the school districts. We bounced back and forth between the legislature and the courts in an effort to get legislation enacted that complied with the supreme court's decision. Our clearly identified goal of supporting any school finance plan that complied with the constitutional mandate served us well through those difficult periods. However, we were also at odds with individuals and groups who would ordinarily be considered allies of public education. Perhaps most significantly, we learned that party affiliation often does not mean much in the context of school finance and that what is more important is the specific situation of school districts located within a legislator's district. We had heard the maxim that all politics is local, but we never fully understood it until we went through the legislative experience.

A. Initial Legislative Response

We knew we were in for a difficult time when on the day that the supreme court decision was announced, the President of the Arizona State Senate (a lawyer) said that the supreme court could decide whatever it wants, but making the legislature comply with the decision was another matter altogether. He understood that Arizona has a strong separation of powers doctrine that is expressly stated in Arizona's Constitution.¹² He also understood that the legislature had been dismissed early on as a defendant in the case based on that doctrine, and that, as a nonparty, the legislature could not be the direct subject of any compliance actions by the plaintiffs.¹³

We began to appreciate the problem as well and decided to retain the services of experienced lobbyists to make our case for us at the legislature. We specifically chose lobbyists who were members of the same political party as the majority of legislators and the Governor. It was our hope that in so doing we would enjoy greater access to legislators than we would otherwise. What we did not realize was that access to legislators is not very helpful when they have already made up their minds.

The supreme court's decision was issued in July, after the conclusion of the 1994 legislative session.¹⁴ We developed a proposal to address the court's decision that would have equalized capital

12. ARIZ. CONST. art. III.

13. Order, *Roosevelt* (Maricopa County, Ariz. Super. Ct. Dec. 10, 1991) (No. CV91-13087).

14. *Roosevelt*, 877 P.2d 806 (filed July 21, 1994).

expenditures on the same basis that maintenance and operation expenses had already been equalized in Arizona, and submitted the proposal to the legislature for its consideration after it reconvened in January 1995.¹⁵

At the same time, other individuals, groups and legislators were busy preparing their own proposals for consideration. Committees were formed and summits were held, but by the end of 1995 nothing had happened. It was now a year-and-a-half since the court had issued its decision, and we decided we could not let another legislative session go by without legislative action addressing its decision.

In late 1995, we filed a motion with the trial court detailing the legislature's inaction and requesting that the trial court establish a deadline for compliance.¹⁶ We also requested that the trial court enjoin the operation of the school finance system if the legislature failed to meet the established deadline. That was one of the more difficult decisions we had to make, because it meant that school districts themselves were asking that the public schools be closed if the legislature failed to comply. We knew that there would be questions about how educators could support such action, but in the face of legislative delay and inaction, we really had no choice.

The trial court denied our motion in January 1996, because we had not offered proof concerning what constituted a reasonable time for legislative action.¹⁷ Following that ruling, the legislature finally took some action in March 1996. Legislation was passed that appropriated \$30 million to address critical capital deficiencies and established a board to mete out the money based on applications for funding submitted by school districts, with priority given to health and safety needs.¹⁸ After passing the legislation, the legislature and Governor declared that they had complied with the supreme court decision and that the problems with the school capital finance system had been addressed.

We disagreed. A single appropriation that would only address critical needs failed to change the system that had produced "gross disparities" among school capital facilities across the state. We went back to the trial court and alleged that the new legislation failed to comply with the supreme court decision. At the same time, we requested that the trial court establish a deadline and enjoin operation

15. Plaintiffs' Motion for Further Relief at 6 exh.D, *Roosevelt* (Maricopa County, Ariz. Super. Ct. Dec. 14, 1995) (No. CV91-13087).

16. Plaintiffs' Motion for Further Relief, *Roosevelt* (Maricopa County, Ariz. Super. Ct. Dec. 14, 1995) (No. CV91-13087).

17. Order *Roosevelt* (Maricopa County, Ariz. Super. Ct. Jan. 30, 1996) (No. CV91-13087).

18. H.B. 2009, 42d Leg., 5th Spec. Sess., 1996 Ariz. Sess. Laws ch. 8.

of the school finance system if compliance was not achieved by the time set by the court.

In November 1996, the trial court agreed and gave the legislature one budget cycle to comply or face a shutdown of the public schools on June 30, 1998.¹⁹ The Governor, who had previously intervened, appealed that ruling to the state supreme court, which, in January 1997, affirmed the trial court without elaboration.²⁰

B. The Legislature Gets More Sophisticated

Understanding that it at least had to make the pretense of changing the school finance system, the legislature enacted new legislation in 1997, which was dubbed "Assistance to Build Classrooms" ("ABC").²¹ This legislation slightly increased the amount of funding that had been appropriated in the previous legislation and used it to establish a revenue stream to school districts to support the issuance of revenue bonds. The legislation purported to reduce the disparity in the capital funding capacity of school districts to a ratio of four-to-one. Under the ABC legislation, low-wealth school districts would still have to issue debt to build or renovate schools, but the State would provide some assistance. Even so, the tax effort required in low-wealth school districts to build or renovate schools would still be substantially greater than in higher property-wealth school districts.

Higher wealth school districts supported the ABC legislation, but the districts we were representing objected to it on numerous grounds, including that it preserved large disparities in the school finance system and contained no standards by which to determine the adequacy of school buildings and facilities. Once again we returned to the trial court, which ruled in our favor, and once again the Governor appealed.

On appeal to the supreme court, a number of state legislators filed an amicus brief requesting the court to be more specific about what the legislature needed to do to satisfy the constitutional mandate. Apparently the legislature had never heard the admonition that you should be careful what you ask for.

The supreme court upheld the trial court's decision and acceded to the legislators' request to be more specific about the requirements for a "general and uniform" public school system.²² The court held that the State must establish minimum adequacy standards for school buildings, facilities and equipment; bring all existing facilities up to those standards; and then keep them there.²³

19. Order, *Roosevelt* (Maricopa County, Ariz. Super. Ct. Nov. 19, 1996) (No. CV91-13087).

20. Order, *Roosevelt* (Ariz. Jan. 15, 1997) (No. CV96-0614-SA).

21. H.B. 2119, 43d Leg., 1st Reg. Sess., 1997 Ariz. Sess. Laws ch. 4.

22. *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997).

23. *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998).

Although it may not have been exactly what the legislature wanted to hear, the legislature soon enacted a new school finance system that complied with the court's prescription—at least for those school districts that wanted to participate in it.

C. The Opt-Out System

During the legislative session in early 1998, the legislature took another shot at complying with the supreme court's decisions.²⁴ Legislation was proposed that would establish minimum building and facility standards and provide funding to renovate and replace school buildings that failed to meet the standards.²⁵ Additionally, a formula would be used to determine appropriations for the construction of new schools and the maintenance of existing facilities.²⁶

It sounded great, but there was a catch. The legislature was still listening to high-wealth school districts and school associations that feared that the new legislation would impair "local control." As a result, the legislature decided to include a provision that school districts that did not want to participate in the new system could continue to rely on their tax base to finance school construction and renovation.²⁷ School districts that chose to participate in the new system, on the other hand, would be prohibited from issuing debt to exceed the minimum adequacy standards.

As a consequence of the opt-out provision, two separate and unequal school finance systems would be created by the legislation. Low-wealth school districts would have to participate in the new system, because they would have no other means by which to construct and renovate their schools. However, higher wealth school districts would be able to opt out of the proposed system and continue to build schools that exceeded the minimum state standards.

The legislation was hotly contested. The plaintiff school districts opposed it because it would forever consign them to second-class status. Higher wealth school districts that benefited from the property tax based system supported the legislation, because it preserved largely intact the old system that had worked for them.

The final vote was close. In casting the deciding vote in favor of the opt-out legislation, a legislative member from one of the higher wealth school districts made a tearful speech about how horrible and unfair the new legislation was, but how she felt constrained to vote for it.

This time the Governor directly petitioned the supreme court to bless the new legislation. We opposed, arguing that the new legisla-

24. S.B. 1002, 43d Leg., 3d Spec. Sess., 1998 Ariz. Sess. Laws ch. 1.

25. *Id.* ch. 1, § 44 (adding ARIZ. REV. STAT. § 15-2011).

26. *Id.* ch. 1, § 44 (adding ARIZ. REV. STAT. §§ 15-2002, -2021, -2031, -2041).

27. *Id.* ch. 1, § 7 (adding ARIZ. REV. STAT. § 15-341(A)(31)).

tion created not one but two school finance systems: one for the rich and one for the poor. Our contention was that the new legislation would ensure the existence of disparities, because low-wealth school districts that had no choice but to participate in the new system would be prohibited from ever exceeding the minimum standards, while higher wealth school districts could exceed the minimum standards at will.

In a dramatic decision entered in June 1998, the Arizona Supreme Court unanimously agreed with us and rejected the new legislation.²⁸ The court extended the trial court's previously issued injunction for another sixty days to allow the legislature to act before the school finance system was enjoined for noncompliance. Many in the legislature railed against the court for what they regarded as an unwarranted intrusion into legislative affairs. At the same time, it was an election year and the only way the Governor was going to lose the election was if the schools were shut down in August. In short order, she convened a special session of the legislature, which promptly enacted the Students FIRST (Fair and Immediate Resources for Students Today)²⁹ legislation which preserved many of the core elements from the previous legislation, but required all school districts to participate.

It is impossible to ignore the irony associated with the enactment of the Students FIRST legislation in 1998. The Arizona Legislature is conservative and generally recoils at the idea of bigger government. The last thing in the world that it would have wanted to do in 1994 was to create a massive new system in which the State was exclusively responsible for financing the repair and renovation of existing schools and the construction of new schools without any contribution whatsoever from local school districts. But that is exactly what happened.

The legislation created a new state agency, the School Facilities Board ("SFB") that is responsible for establishing minimum adequacy standards and overseeing operation of the new system.³⁰ Students FIRST also required that the State assess each and every school building to determine whether it met the minimum standards and, if not, to make the necessary repairs. That ended up costing a total of \$1.3 billion by the end of 2004.

The State is now responsible for funding new school construction up to the minimum adequacy standards as well as providing an annual distribution of building renewal funds to maintain existing facilities. If fully funded, that amounts to at least \$350 million annually.

28. *Hull*, 960 P.2d 634.

29. S.B. 1001, 43d Leg., 5th Spec. Sess., 1998 Ariz. Sess. Laws ch. 1.

30. *Id.* ch. 1, § 39 (adding ARIZ. REV. STAT. § 15-2001).

All told, the State has spent approximately \$3 billion on school buildings and facilities since 1996.

V. THE POLITICS OF EDUCATION FINANCE

The school finance debate may have gotten started in the courts, but it spread quickly and often uncontrollably to the executive and legislative branches. And, to be sure, there was a tension between those two branches and the judiciary on the issue. Whenever that kind of tension exists, the issue is certain to attract the media, and when schools are involved, the effect is compounded.

As I said at the outset, while we were experienced, our experience did not prepare us for navigating the legislative process. That is why we hired lobbyists to represent our clients at the legislature. After a couple of years, it became apparent that regardless of lobbyists' party affiliation or experience, they can only be effective when legislators have an open mind. In this case, lines were quickly drawn and minds just as quickly shut because of what many legislators viewed as an intrusion by the judiciary on what, until then, had been regarded solely as legislative turf.

Once we came to the realization that our lobbyists, though talented and well-meaning, were not going to be able to achieve the results sought, we terminated their contracts. I assumed those responsibilities and soon, along with two superintendents, became a spokesperson for our client group.

By that time, the number of school districts participating in our group had swelled to over seventy. While there was value in representing close to a third of Arizona's school districts, it also led to cumbersome and sometimes difficult decisionmaking. Decisions often had to be made on the spur of the moment, because legislators and other elected officials would routinely issue plans to much fanfare. When that occurred, the media expected an instantaneous response from the plaintiffs.

The plaintiff school districts and their counsel were steadfast in their adherence to the principle that we would support any plan that complied with the constitutional mandate, regardless of who sponsored it. Sometimes that meant supporting elected officials with whom we did not otherwise agree on a variety of other school-related issues. When that happened, we were separated from traditional education groups and allies in the legislature. But we understood that any deviation from that overarching principle would spell doom for us in the legislature and the courts.

The pitched battle between the Governor and the legislature on the one hand, and the court on the other, became so accentuated that the Governor used the school finance issue as a litmus test for new judges. One judicial candidate at the time told me that the very first question

the Governor asked in the interview concerned the court's school finance opinion. Likewise, there was a seething undercurrent in the legislature that many of them would not be wasting their time on school buildings if they were not being coerced by the courts.

There was even conflict within the Executive Branch. The Governor intervened, because he did not believe the named defendant—the Superintendent of Public Instruction—was adequately representing the State's interests. The Superintendent was herself an elected official and a member of the same political party as the Governor. To her credit, she generally agreed with us regarding the legislature's unwillingness to comply with the court's decisions, leading to a very public dispute with the Governor.

We had one major advantage that the other participants in the debate lacked. We spoke with one single and assertive voice and we did not have much to lose. When any new plan was proposed at the legislature, we could support or oppose it without worrying about how our position might affect other legislative issues. Likewise, when the legislature took action that we deemed insufficient, we faced little risk when we challenged it. It was not as if we were going to end up worse off than we were prior to the legislative action.

VI. THE STATE OF SCHOOL FINANCE IN ARIZONA TODAY

When Students FIRST was enacted in 1998, the state treasury was flush with cash. That fact, combined with conservatives' traditional aversion to debt, meant that at least initially, Students FIRST was entirely paid for with cash out of the State's general fund. We knew the day would come when the economy soured, and that day came sooner than we thought it would. Over the last several years, with budget deficits instead of surpluses, the State has reduced Students FIRST funding, forcing us to return to court.³¹ Litigation over funding issues continues, and, at the same time, pressure has increased to explore other ways of funding Students FIRST. That search continues, but because the budget deficit crisis appears to have abated, alternative financing schemes are now proposed far less frequently.

In 1991, when we filed the first lawsuit, one of our motivations was to establish new precedent upon which to build a challenge to Arizona's maintenance and operation funding system. We filed that lawsuit in 2001, asserting that the funding system was unconstitutional because it failed to provide the programs and funding at-risk students need in order to achieve the State's academic standards. It is difficult to surprise me anymore, but I was surprised when the trial court judge dismissed the 2001 lawsuit, holding that the separation of pow-

31. *Roosevelt v. State*, 74 P.3d 258 (Ariz. Ct. App. 2003).

ers doctrine prevents the judiciary from becoming involved.³² The case is now on appeal, and I have an overwhelming sense of—you guessed it—*déjà vu* all over again.

VII. CONCLUSION

I suppose the lesson from all this is that school finance work is never truly done. As long as there are social and economic inequities, there will be school finance inequities. For a public interest lawyer like myself, that is not news. But for other lawyers who are new to the world of school finance, you can dispense with the idea that there is a beginning and end to these cases. You will forget the beginning; the end may never come into clear view.

That does not mean that the cases are not worth the enormous effort they take. On a personal and professional level, I have had no greater satisfaction than traveling around this state and seeing the hundreds of new and renovated schools in poor communities and knowing that our work helped build them.

32. *Order, Crane Elementary Sch. Dist. v. State of Arizona* (Maricopa County, Ariz. Super. Ct. Nov. 25, 2003) (No. CV2001-016305), *appeal pending*, No. 1 CA-CV 04-0076 (Ariz. Ct. App.).