78-3311

No. 78-3311

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J. AND R. DOE, et al.,

Plaintiffs-Appellees

v.

JAMES PLYLER, et al.,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether illegal aliens residing in the United States are protected by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the defendants acted invidiously and without adequate justification in denying illegal alien children permanently residing in the state tuition-free public education available to all other children residing in the state.

INTEREST OF THE UNITED STATES

At the request of the district court, we filed a brief amicus curiae below in this case.

The United States, through the Department of Justice and the Department of Health, Education and Welfare, is obligated, by statute, to insure that children in the United States who do not speak English are not denied an equal educational opportunity because of their language disability. Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d et seq. (see Lau v. Nichols, 414 U.S. 563 (1974)), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1703(f), prohibit local school districts from discriminating against school children on the basis of national origin by failing to provide necessary bilingual education. The Department of Justice, both by participation as amicus curiae (Lau v. Nichols, supra), and as a party (United States v. State of Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (1971), aff'd 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1206 (1972); United States v. Texas Education Agency (Austin I.S.D.), 532 F.2d 380, 398 (5th Cir. 1976)) seeks relief which will insure that students with language disabilities receive equal educational opportunities.

Congress has authorized (20 U.S.C. 880b, et seq., 20 U.S.C. 1607(c)(1)) the Department of Health, Education and Welfare to establish several financial assistance programs which will enable local school districts to provide these

students with adequate bilingual assistance. Defendants have stated that their exclusion of illegal alien children from public school is due in part to the cost of the bilingual education which these children need. It is the interest of the United States to attempt to insure that children constitutionally entitled to an education are not denied one due, in part, to a need for bilingual assistance.

The United States also is authorized, by statute, to sue to prevent school officials from discriminating against children based on national origin, 42 U.S.C. 2000c et seq., 20 U.S.C. 1706, and to intervene in existing cases where allegations of national origin discrimination are raised. 42 U.S.C. 2000h-2. In this case a statute affects persons of one ethnic group. This aspect of the case may therefore affect additional litigative interests of the United States.

State regulation of aliens may also involve or affect matters of international relations, raising additional interests of the federal government. The Immigration and Nationality Act, 8 U.S.C. 1101 et seq., is based in part on the federal government's exclusive responsibility over international relations. In addition, the United States has entered into international treaties and agreements (Protocol of Buenos Aires, 21 U.S.T. 607 (1967); United Nations Charter, 59 Stat. 1031 (1945); Final Act of the Helsinki Conference on Security and Cooperation in Europe, 73 Dept. of State Bulletin No. 1888 (Sept. 1, 1975) at 323) which oblige it to take steps, where possible, to insure that children's opportunities for public

education in this country are made as fully available as is possible under prevailing constitutional standards.

STATEMENT

1. Procedural History

This action was filed on September 16, 1977, by four illegal alien families residing in Tyler, Texas. The adults, as guardians ad litem for their children, sought to have the action certified as one on behalf of all school age children of illegal aliens located in Tyler, Texas (Compl. 6-7). The complaint named as defendants the Superintendent and members of the Board of Trustees of the Tyler school district (id. at 4).

The complaint alleged that the Tyler school district's implementation of Section 21.031 of the Texas Education Code resulted in the exclusion from the Tyler public schools of all members of the plaintiff class, denying plaintiffs' rights under the Equal Protection Clause and thereby violating 42 U.S.C. 1983 and 42 U.S.C. 2000d. The complaint sought a declaration that 21.031 of the Texas Code, and the Tyler policies to implement it, are unconstitutional (id. at 7), and requested preliminary and permanent injunctive relief preventing further enforcement of 21.031 (id. at 8).

A hearing on the request for preliminary relief was held on September 9, 1977. The State of Texas intervened as defendant at that hearing (Sept. Tr. 63).[1/] A preliminary injunction prohibiting defendants from enforcing Section 21.031 to deny the named plaintiffs a free education was entered on September 12, 1977. On October 25, 1977, the suit was certified as a class action, the class being "all undocumented school aged children of Mexican origin residing within the Tyler Independent School District" (order of October 25, 1977).

The hearing on plaintiffs' request for permanent relief was held on December 12 and 16, 1977. On September 14, 1978, the district court held that Section 21.031, and Tyler's implementation of it, violated plaintiffs' equal protection rights, and that Federal law preempted the State's enactment of the statute. The district court, on that day, issued a permanent injunction preventing the Tyler district and the State of Texas from enforcing 21.031 to deny plaintiffs a tuition-free education.

2. Facts

a. The State and Local Laws

Until 1975, the Texas Education Code required local school districts to admit to its schools without tuition "all persons" between six and twenty years of age as long as the "person's" parent or guardian resided in the school district. The Attorney General of the State of Texas, in an

1/ Citation to the September hearing transcript will be "Sept. Tr.". Citation to the December, 1977 hearing transcript will be to "Dec. Tr.".

April 18, 1975 opinion for the State Commissioner of Education, stated that the statutory language required local districts to admit children of illegal aliens (Court's Ex. 1). On September 1, 1975, the Texas Education Code was amended to read as follows:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

Section 21.031 denies local districts any state revenue for the education of illegal alien children (Dec. Tr. 104).

Despite the passage of the new statute, the Tyler school district continued to enroll free of tuition children of illegal alien parents (Sept. Tr. 186). On July 21, 1977, however, Tyler adopted the following policy pursuant to revised Section 21.031 (Sept. Tr. 182):

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.
>
> A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

The Tyler school board set a tuition figure of $1,000 per student per year (Sept. Tr. 183-184).

b. Evidence From The Hearings

The named adult plaintiffs had all been residing in Tyler for a long period. One single parent had lived there since 1964 (Sept. Tr. 105), and the three married couples had

lived in Tyler for three, nine, and ten years, respectively (Sept. Tr. 57, 90, 122). All the school age children in these families were, at time of trial, 13 years old or less. All previously had been enrolled in Tyler schools (Sept. Tr. 54, 86, 105, 121), but, with one exception,[2/] had been excluded from public schools by Tyler's 1977 decision to implement State law 21.031. None of the plaintiffs' families could afford the tuition payment set by Tyler (Sept. Tr. 60, 95, 106, 126). The children of one family attended a local Catholic school, where no tuition was charged because the father worked there on weekends as compensation for his children's education (Sept. Tr. 94). Each family had at least one child who, by virtue of being born in the United States, was an American citizen (Sept. Tr. 53, 96, 104, 120). When of school age, each citizen child will be eligible for free public education in Tyler's schools.

The father in each of the named plaintiffs' families had a full-time job (Sept. Tr. 57, 90, 122), and had federal tax and

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2/ One illegal alien child remained in Tyler schools, but his parent did not know why the child was permitted to stay (Sept. Tr. 87), and no evidence was presented explaining why that child was permitted to continue in school.

Social Security payments withheld from his wages check (Sept. Tr. 57, 90, 123). The one single parent received public assistance for her two citizen children (Sept. Tr. 109). Each employed parent filed federal income tax returns (Sept. Tr. 57, 92, 124); each owned a properly registered car (Sept. Tr. 59, 94, 125). Two of the adult plaintiffs rented their homes (Sept. Tr. 79, 117), and one owned his (Sept. Tr. 92-93).

In defense of its decision to exclude children of illegal aliens from public schools, the State of Texas showed that between the 1975-1976 and 1976-1977 school years there had been an increase of approximately 6500 Mexican alien children in Texas schools (Dec. Tr. 173). That total was 1.8% of Texas' total student enrollment of 2,839,000 students in 1976-1977 (ibid.; see also State Defs. Ex. 3). Nearly all of the 6500 Mexican aliens were immigrants legally located in Texas (Dec. Tr. 184).

Texas submitted a study (Defs. Ex. 6) commissioned by school districts located near the Mexican border to show the effect on those school districts of Mexican migration into Texas. The study asserted that those districts were becoming overcrowded (Dec. Tr. 298) as enrollments increased. The study also said that the Mexican immigrants moving in nearly always required bilingual assistance (id. at 303), and that the

children's past educational deficiencies required school officials to place many of these children in classes with much younger students (Dec. Tr. at 299, 310). The study said that the problem caused by Mexican migration into border areas was compounded because about 80% of new immigrants were poor, adding little to the local tax base which goes to support a school system (id. at 302). The study dealt only with the effects in the districts of the presence of legally admitted aliens (id. at 308), and did not discuss any particular problems caused by illegal aliens.

The State also submitted testimony of the author of the study (Dec. Tr. 303), and by an associate superintendent of the Houston school district (Dec. Tr. 288). Both stated that admitting children of illegal aliens into the schools would lower the level of education available to the other students. The quality would be lower, according to the Houston official, because the new students would take some of the teachers' attention, reducing the time the teachers could spend with the other students (Dec. Tr. 288, 290).

As stated before, the State law operated to deny local districts state funds for educating children of illegal aliens. Local school districts receive financial support from three sources: state, local, and federal funds. The amount of state funds due a local district is determined by several different formulas, all of which consider the average daily enrollment of the

local district as one factor determining the amount of money the local district will receive (Dec. Tr. 100-102). The state funds are derived from taxes on consumer purchases, motor fuel, and utilities (Dec. Tr. 126). Local revenues for schools are derived from property taxes (Dec. Tr. 272). In Tyler, 67% of the district budget comes from state revenues, 30% from local revenues, and 1-2% from federal sources (Sept. Tr. 185).

There was little evidence concerning the State policy's financial impact on local school districts. An expert on school financing testified that usually about 25% of a district's budget goes to fixed costs--the cost of school administration and maintenance (Dec. Tr. 95-96)--which are unaffected by a relatively small decline in student enrollment. Expenditures for debt retirement are also usually not affected by small losses in enrollments (ibid.). A school district's largest financial outlay is for teachers' salaries. In this area there can only be a reduction in teaching staff where there is sufficient decline in enrollment in a grade level to permit the elimination of one teacher (id. at 97, 98).

Tyler officials did not make a study to determine the incremental cost to the district of adding one more student (Sept. Tr. 196), but set the tuition charge by dividing the total school budget by the number of students in the district (Sept. Tr. 184). The expert in educational finance testified that the exclusion of one student from a school district

which calculated its tuition by Tyler's method would not actually save the district $1,000 (Dec. Tr. 99).

Tyler officials stated that they had 17 illegal alien children in their schools in 1975-1976, 24 in 1976-1977, and that they counted about 38 who enrolled in 1977-1978 after the entry of the preliminary injunction (Dec. Tr. 149). With the enrollment of the illegal alien children in 1977, the number of students needing bilingual assistance totaled over twenty in each of two grade levels, triggering the State requirement that teachers certified as bilingual be employed in the district's existing bilingual program (Dec. Tr. 152).

No party had an accurate estimate of the number of illegal alien children in Texas. The primary motivation for illegal migration into Texas was acknowledged to be employment (Dec. Tr. 24, 44, 65). Only a small minority of illegal aliens bring their families along (id. at 72). According to the testimony, the policy of the Immigration and Naturalization Service is to attempt to prevent illegal entry at the border. Once illegal aliens are inside the United States, INS' main effort is to find and deport those in the best paying jobs (id. at 211). Many persons who are now legally admitted aliens had previously been in the United States as illegal aliens (id. at 219).

3. Opinion of the District Court

The district court held that Section 21.031 violated the equal protection rights of the plaintiff class. The court held first that illegal aliens are "persons" who fall within

the protections of the Equal Protection Clause. Relying primarily on cases holding that illegal aliens are "persons" protected by the Due Process Clause, the court noted that the Equal Protection Clause also referred to "persons", thereby paralleling the coverage of the Due Process Clause (Slip op. 16-17).

The court then noted that given applicability of the Equal Protection Clause to illegal aliens, the question before the court concerned the degree of protection the clause afforded them. The court referred to two levels of equal protection review (Slip op. 18), and then reviewed the characteristics of the group classified by the statute and the policies of the Tyler district, to see if the defendants' actions were to be strictly scrutinized (Slip op. 19-26). However, after discussing several ways in which this classification is perhaps analogous to others given strict scrutiny, the court held that the State's failure to demonstrate even a rational basis for the statute made it unnecessary to decide whether strict scrutiny is appropriate in this case (Slip op. 27).

The court said that the State's classification based on a status defined by federal immigration law must be shown to be a reasonable method of advancing the State's interests (Slip op. 30). The court held, however, that there was no rational link between the classification adopted by the State and the interests the State offered in defense (Slip op. 32). For example, the court stated that illegal aliens pay their proportional share of the

consumer taxes which provide the State its resources for education (Slip op. 32). Similarly, either through home ownership or rental they pay directly or indirectly the property taxes used by the local district for its revenue (Slip op. 33). The court found that illegal aliens support public education "on an equal basis with all other residents * * *" (Slip op. 33). The State also argued that illegal alien children were in need of bilingual and other (free meals, clothing) special services (Slip op. 34). However, the court found that legal immigrants were also in need of those same services, so the illegals are "no different for educational purposes from a large proportion of legally resident alien children" (Slip op. 35), and the selection of illegal aliens for exclusion based on educational difficulties was not supported by any rational explanation. Similarly, the court found that although the State proved that immigration caused some overcrowding of schools in border districts, most of the immigrant children were legally in the United States, and there was no factual predicate for the distinction 21.031 draws between educating legal and illegal immigrants (Slip op. 34).

The court concluded that in order to save money the State had chosen to exclude a group on whose behalf "little political uproar was likely to be raised" (Slip op. 35). Even

though the school districts bordering Mexico may be suffering financial difficulties due in large measure, the court found, to Texas' method of financing local schools (Slip op. 35), the court said it can "invalidate state efforts that fail to demonstrate a rational basis and that make scapegoats of a defenseless groups, chosen in an arbitrary, or even invidious manner" (Slip op. 36).

The court also held that the Texas statute was preempted by federal law. The court held that the Texas statute "defeats the clear implications of federal laws covering both illegal aliens and education of disadvantaged children" (Slip op. 40). The court held further that the denial of an education was basically inconsistent with the federal treatment of illegal aliens, which was to stop illegal immigration at the border and to attempt to deport illegal aliens once they are apprehended within the United States (Slip op. 39). The court also cited the federal concern with education of the disadvantaged, see 20 U.S.C. 241(a), and with providing bilingual services to those in need, 20 U.S.C. 1703, as well as the United States' commitment to education of children expressed in the Treaty of Buenos Aires, 21 U.S.T. 607. Viewing this federal concern with education, and the INS' attempt to deal with illegal migrants in as humane a method as possible, the court held that the state law runs counter to the scheme of federal law dealing with these children.

SUMMARY OF ARGUMENT

Despite their status as illegal aliens, plaintiffs are protected by the Equal Protection Clause. The Clause protects all persons located, even temporarily or illegally, within the United States.

The Equal Protection Clause prevents a state from enacting legislation based on bias or prejudice against the subjects of its legislation. A state must instead attempt to apportion the benefits and burdens of legislation fairly and without the influence of irrationally based animus. However, in enacting this legislation against children of illegal entrants, the State has let its displeasure at illegal entry form the sole basis for its legislative action. That action irrationally and invidiously excludes the children of all illegal entrants from the public schools in Texas. The statute is not actually based on any demonstrable, unique harm these children cause the educational process in Texas, but is based solely on their legal status. The State's animus in fact takes one of the most legally suspect routes possible. It penalizes children, depriving them of a critically important social benefit, in order to condemn the parental actions over which the penalized children have neither control nor responsibility. The prior

history of official discrimination against Mexicans, who are admittedly the intended subjects of this legislation, adds to the proof of the State's invidious intent.

The defendants attempt to justify excluding illegal alien children from public school as a rational means to advance economic and educational goals. However, in each instance the State's justifications break down to show that beside their legal status, these children are identical to other children who are permitted free education in Texas. The lack of nexus between the goals the State relies on and the classification defeats the State's attempt to justify the classification.

ARGUMENT

I

ILLEGAL ALIENS ARE PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment states, in part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

While not denying that children unlawfully present in the United States are "persons" within the normal construction of that word, defendants argue that such persons are not

"persons" within the meaning of the Equal Protection Clause. We disagree, for several reasons. As shown in detail below, the plaintiff class fits within the plain meaning of "person" as understood now and as understood by the framers of the amendment; parallelism of construction requires that the word "person" be given the same meaning in the Equal Protection Clause as in the Due Process clause; Supreme Court cases holding documented aliens are protected by the Equal Protection Clause support a similar holding as to undocumented aliens; and the lower courts have consistently held that undocumented aliens are protected by the Equal Protection Clause.

The plain meaning of the Equal Protection Clause brings illegal aliens within its protections. That Clause states unequivocally that any "person" is entitled to equal protection. There are no modifiers of the word "person" which would exclude illegal aliens.

The debate in Congress on the legislation which eventually became the Fourteenth Amendment supports the view that the term "person" was all-inclusive and made no distinctions between individuals located in this country. Senator Jacob Howard, one of the Senators leading the passage of the legislation, said:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but

> any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. * * *
>
> * * * It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.

71 Cong. Globe 2766 (May 23, 1866) (emphasis added).

The word "person" is also used in the Due Process Clause of the Fourteenth Amendment, as well as the Due Process Clause of the Fifth Amendment. The Supreme Court has found that in these clauses the term "person" describes any individual actually located within the United States. In fact, the Court has specifically held that the word "person" includes those, like the plaintiffs, who reside in the United States in violation of immigration laws. For example, in Wong Wing v. United States, 163 U.S. 228 (1896), the Court found that the Fifth and Sixth Amendments prevented the enforcement of an immigration law under which an illegal alien could be sentenced to a term of imprisonment at hard labor after guilt was determined by any judge, justice, or commissioner of the United States, without a jury. The amendments prohibited the government from determining guilt of a capital or infamous

crime without presentment or indictment by a grand jury, and prevented abrogation of the right of trial by jury. The Court in Wong Wing (163 U.S. at 238), relying in part on its earlier decision in Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the Court applied the Equal Protection Clause to aliens within the United States, said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

In Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953), the Court referred more directly to constitutional rights accruing to persons who are located, albeit illegally, in this country. "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process

of law." And in Mathews v. Diaz, 426 U.S. 67, 77 (1976) in which the federal government's policies regarding the employment of aliens were challenged, the Court said:

> [t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. * * * Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection. * * * Wong Wing, supra.

There is no indication in the Fourteenth Amendment that the use of the word "person" in the Equal Protection Clause was intended to be different from its use earlier in the same sentence in the Due Process Clause (see comments of Senator Howard, supra at pp. 18-19). Accordingly, cases holding that illegal aliens are protected by the Due Process Clause of the Fifth and Fourteenth Amendments strongly support including them within the protections of the Equal Protection Clause. "It is a settled principle of statutory construction that when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place." United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978). See also Meyer v. United States, 175 F.2d 45, 47 (2d Cir. 1949).

In cases presenting claims of legal aliens, the Court has specifically held that aliens are protected by the provisions of the Equal Protection Clause. Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634, 641 (1973). As stated in Graham, "an alien as well as a citizen

is a "person" for equal protection purposes." 403 U.S. at 375. The Court in Sugarman relied in part on Wong Wing, supra, when it said "It is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause." 413 U.S. at 641. Nothing in the wording of the Equal Protection Clause suggests that the definition of "person" turns on an individual's immigration status. 3/

Lower courts have acknowledged that illegal aliens are protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In Bolanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975), the court said "we can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within

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3/ The Equal Protection Clause does say that no state shall deny equal protection "to any person within its jurisdiction." That phrase indicates that only a person present within a state may challenge the practices of that state. "The equal protection clause* * *is confined to persons within the jurisdiction of the enacting State." Township of River Vale v. Town of Orangetown, 403 F.2d 684, 687 (2d Cir. 1968). See also Glicker v. Michigan Liquor Control Comm., 160 F.2d 96, 99 (6th Cir. 1947). The equality is to be determined solely by treatment of persons within the State, not as compared to actions of other States. As the Court said in Gaines v. Canada, 305 U.S. 337, 350 (1938):

> [T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, -- each responsible for its own laws establishing the rights and duties of persons within its borders.

the United States * * *, and even to those aliens whose presence here is illegal." See also Holley v. Lavine, 529 F.2d 1294 (2d Cir. 1976), cert. denied, 426 U.S. 954 (1976), and Williams v. Williams, 328 F. Supp. 1380 (D. V.I. 1971). And see also United States v. Barbera, 514 F.2d 295 (2d Cir. 1975), where the court applied the Fourth Amendment to the detention and search of an admittedly illegal alien.

Neither Tyler nor the State points to any language in the Equal Protection Clause or in any applicable case law restricting the plain meaning of the term "person". Texas cites Leng May Ma v. Barber, 357 U.S. 185 (1958), and Zartarian v. Billings, 204 U.S. 170 (1907), to argue that plaintiffs' illegal entry means that they were never "within the United States," and "not * * * person[s] within a state's jurisdiction," and therefore not entitled to constitutional protections (State Br. 18).

However, neither case cited by Texas has any constitutional significance. Each case presents only instances where the Court interpreted the phrase "within the United States" as used in the Immigration and Nationality Act.[4/] In Leng May Ma, the Court

4/ Under that act, persons who unsuccessfully seek initial entry are "excluded" (see 8 U.S.C. 1221-1230), while persons illegally here, and apprehended within the country, are "deported" (see 8 U.S.C. 1251-1260). Different procedural provisions apply to each type of proceeding, and the distinction turns on whether or not at the time of decision the individual is "within the United States." "Our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its

specifically stated "the question [before the Court] * * * is wholly one of statutory construction," 357 U.S. at 187. See also Zartarian v. Billings, supra, 204 U.S. at 175. We suggest these cases are of no real significance to the constitutional question presented by this case. However, to the extent they may be deemed to be even marginally significant, the Court's statement (see n. 4, supra) that any entry "irrespective of its legality" brings one within the additional procedures required for deportation supports the argument that even illegal aliens are protected by legal provisions applicable to persons actually residing within the United States.

The defendants rely heavily on DeCanas v. Bica, 424 U.S. 351 (1976), to argue that illegal aliens have no equal protection rights, or, alternatively, that state regulation of illegal aliens does not violate the Equal Protection Clause. (State Br. 17-19, Tyler Br. 32). However, DeCanas is not an

4/ (continued)
legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" Leng May Ma, supra, 357 U.S. at 187.

In Leng May Ma, supra the alien had been detained upon initial entry. She had been allowed to enter the United States only on "parole" status, a status where an alien who is detained is admitted only provisionally, in order to avoid "needless confinement * * * while administrative proceedings are conducted." 357 U.S. at 190. However, the Court held that Congress specifically intended that one on "parole status" was in the same legal position under the Act as one seeking initial entry and that provisions for exclusion, rather than for deportation, applied. 357 U.S. at 188.

equal protection case, but instead involves only the question whether a state statute regulating the employment of illegal aliens is preempted by federal law. The lower court decision (40 C.A.3d 976, 115 Cal. Rptr. 444 (Ct. App. Cal. 1974)) reviewed by the Supreme Court invalidated the statute on preemption grounds. It never applied the Equal Protection Clause to the statute and that issue was not before the Supreme Court. 5/

II

SECTION 21.031 AND ITS IMPLEMENTATION BY TYLER OFFICIALS INVIDIOUSLY DISCRIMINATE AGAINST THE PLAINTIFF CLASS

A. Introduction

Invidious classifications are those by which a state subjects one group to disparate or detrimental treatment based not on rational, neutral considerations, but based instead on bias, prejudice or antipathy toward the classified

5/ To the extent that DeCanas addressed the issue of preemption, however, it is relevant to this case. We addressed the issue of preemption in our brief to the district court (pp. 28-32) and reiterate these views by reference here.

In its discussion of preemption, the district court relies on a possible conflict between the State statute and federal law providing educational benefits to the poor or to persons in need of bilingual education (Slip op. 39, 40). We suggest that the real conflict is that federal officials, in relying on State operation of these programs, depend on the State to act in a constitutional manner when determining a student's eligibility for school and, therefore, for participation in federally funded programs. It is the constitutional violation, therefore, which creates the conflict between the State law and the operation of federal financial aid to education.

group. As stated in the Supreme Court's recent decision in New York City Transit Authority v. Beazer, 47 U.S.L.W. 4291, 4297 n. 40 (U.S. Mar. 21, 1979), invidious classifications are "drawn 'with an evil eye and an unequal hand' or motivated by 'a feeling of antipathy' against a specific group of residents."

The Equal Protection Clause generally "was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation." McPherson v. Blacker, 146 U.S. 1, 39 (1892). Thus, in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court reviewed a federal statute in which Congress, intending "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," 413 U.S. at 534, denied food stamps to any person in a household where unrelated individuals lived. 7 U.S.C. 2012(e). The Court held that the legislators' admitted intent to pass the legislation as a way to harm this group invalidated the legislation. "[I]f the constitutional concept of 'equal protection of the laws' means anything, it must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (emphasis in original). 413 U.S. at 534. See also O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

However, it is the unusual case where legislative antipathy is either obvious or admitted. When animus is not so apparent, the determination whether a classification is based on prohibited prejudicial intent requires examination of circumstantial evidence. Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). The Supreme Court's experience with cases presenting instances of invidious intent has led it to "infer antipathy", Vance v. Bradley, 47 U.S.L.W. 4176, 4177 (U.S. Feb. 22, 1979), in some classifications, and therefore give governmental action raising that inference particularly "attentive judgment." Beazer, supra, 47 U.S.L.W. at 4298, n. 40.

There are two types of legislative classifications which, the Supreme Court has found, give rise to a rebuttable inference of invidious motivation. First, such an inference arises where the state, determining one's eligibility for benefits or inclusion in regulatory legislation, relies on a personal characteristic so unrelated to a person's ability and responsibility that the use of such a classification raises serious questions about the state's true motives. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (sexual classification); Lalli v. Lalli, 47 U.S.L.W. 4061 (U.S. Dec. 11, 1978) and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (classification by illegitimacy). Second, the inference may arise when the state uses a classification singling out for disparate treatment a

group which is particularly politically vulnerable to unfair treatment by the majority, see San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973); Graham v. Richardson, 403 U.S. 365, 373 (1971); and United States v. Carolene Products Co., 304 U.S. 144, 153 n. 4 (1938). Both of these inquiries raise a strong inference that Section 21.031 is a result of invidious motivations of the State of Texas.

B. Section 21.031 Penalizes Children For A Personal Status For Which They Are Not Responsible, Which They Cannot Change, And Which Is Irrelevant To Their Ability To Benefit From An Education

A presumption of invidious motivation is raised when a state chooses to apportion benefits, or subject people to certain legislation, based on a characteristic which is normally irrevelant to individual ability or responsibility. In Frontiero v. Richardson, 411 U.S. 677, 686 (1973), Mr. Justice Brennan, writing for a plurality, stated that one reason a sexual classification deserved close examination was because sex was an "immutable characteristic determined solely by the accident of birth * * *, [which] frequently bears no relation to ability to perform or contribute to society." The use of such a criterion -- one irrelevant to individual ability or responsibility -- should raise serious questions about legislative

motivation. Similarly, the Court has found legislative distinctions between legitimate and illegitimate children suffer from the same fault -- the characteristic is unrelated to an individual's abilities, and is not the responsibility of the individual who suffers from its use as a classifier. See Weber v. Aetna Casulty & Surety Co., supra. When the state chooses to classify persons in this way, the Court will examine the action carefully to determine whether the state is using the classifying factor as a legitimate method of determining benefits, or whether the state, through the classification, is denying persons benefits due solely to animosity toward the group characterized by the classifying factor.

No one argues -- nor is there support for the argument -- that the children here are themselves responsible for their status as illegal aliens.[6/] All presumably were brought into the United States as young children with their parents. Their status as illegal aliens, therefore, results directly from their parents' illegal entries.

As to the children, of course, their status as illegal aliens is a status they can do nothing about. They are, as small children, under the control of their parents, and are

6/ Under neither the law of Texas, where the age of majority is eighteen, V.T.C.S. 5923b, nor under federal immigration law, under which aliens in the United States must register on their own after age fourteen, 8 U.S.C. 1302, are the children responsible for their citizenship status.

powerless to affect their immigration status during the period when educational benefits are denied them. Similarly, no one argues that these children could not benefit substantially from an education. Their ability to learn is equal to other children with similar backgrounds who do have documentation, or are citizens.

This statute affects these children in a manner almost identical to the effect on children of statutes denying benefits based on illegitimacy. The Court has, on several occasions, held that statutes which deny benefits to, or disparately classify, children based on their status as illegitimate should be carefully reviewed. Illegitimacy, the Court has held, is "a characteristic determined by causes not within the control of the illegitimate individual", and one which "bears no relation to the individual's ability to participate and contribute to society," Mathews v. Lucas, 427 U.S. 495, 505 (1976). Accordingly, classifications based on illegitimacy, like those based on sex, have been described by the Court as "based on * * * immutable human attributes," Parham v. Hughes, No. 78-3, 47 U.S.L.W. 4457 (U.S. April 24, 1979), the use of which "undermines" the "presumption of statutory validity" normally due non-invidiously based legislation (id. at 4458).[7/] In Weber v. Aetna Casulty & Surety Co., supra,

7/ Of course, the state may demonstrate that its use of the child's status as the basis for the classification is "substantially related to important state interests," see Lalli v. Lalli, supra, and where the statute operates not to deprive the child of a benefit, but instead to withhold a benefit from the parent, see Parham v. Hughes, supra, the use of the classifications could be upheld. However, when the classification absolutely deprives the child of "substantial benefits accorded children generally," Gomez v. Perez, 409 U.S. 535 (1973) (per curiam), see also Jimenez v. Weinberger, 417 U.S. 628, 635 (1974), the Court will find the classification creates an invidious discrimination. Gomez, supra.

406 U.S. at 175, the Court noted the inherent unfairness and illogic of penalizing children for actions of their parents which the state chooses to condemn.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as unjust--way of deterring the parent.

This Court, relying in part on cases dealing with rights of illegitimates, has held that state laws which deny children educational benefits due to parental misconduct violate the children's rights to due process. St. Ann v. Palisi, 495 F.2d 423 (1974).

Both illegitimacy and illegal entry may arouse local condemnation. However, when that condemnation affects those without responsibility for the status condemned, the action must be carefully reviewed to determine whether the legislature is choosing the status as a legitimate means of regulation, or is merely venting its disapproval in an arbitrary and harmful manner. The circumstances here imply the latter.

The scope of the harm Texas' action causes these children further suggests the presence of invidious motivation. The denial of a child's opportunity for an education will undeniably have a devastating impact on his or her later life. As the Court said in Brown v. Board of Education, 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally in his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

See also San Antonio School District v. Rodriguez, supra, 411 U.S. at 30.

The testimony in the record reflects this view. Dr. Jose Cardenas, an educational expert, succinctly stated that "the exclusion of a child from education locks the child into a life of poverty" (Dec. Tr. 128).

The Supreme Court has held that where a state, when advancing even a legitimate interest, does so by imposing a punishment far in excess of the benefits accruing to the state, the asserted bases should be carefully examined for the possibility that invidious motives are the true bases for the state's action. For example, in Eisenstadt v. Baird, 405 U.S. 438 (1972), the

Court was reviewing a State law which, on penalty of five years imprisonment, prohibited the distribution of contraceptives to unmarried persons. The State in Eisenstadt argued that one aim of the legislation was to discourage premarital sex. However, the Court held it unreasonable to ascribe to the State an intent to "prescribe pregnancy as punishment for fornication, which is a misdemeanor," and the Court also held it unreasonable to assume that the State would pass a statute with a five year criminal penalty in order to deter commission of a mere misdeameanor. The Court rejected the State's proffered bases for the legislation, and held that as a pure prohibition on contraception, the distinction between married and unmarried users was "invidious." 405 U.S. at 454.

Here the State defends its statute on economic grounds. Assuming arguendo those grounds are valid (but see pp. 40-46, infra), the ramifications to a child of the denial of an education so far outweigh any speculative monetary saving to the State or local districts to suggest that only invidious motivation could justify the penalty Texas exacts from these children. Accordingly, the balance of equities further demonstrates the invidious intent[8/] behind the State's action.

8/ The State's willingness totally to sacrifice the education, and therefore the futures, of these children could also be traced to a belief that the education of these children is of minimal importance. Such a justification would support the inference that this legislation, detrimentally affecting a "discrete and insular" minority, and one totally without political influence, is invidiously motivated.

C. The Texas Statute Is Aimed At A Politically Vulnerable Group

Another sign that invidious motivation may have been exercised appears where the classification defines a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian poltiical process." San Antonio School District v. Rodriguez, supra, 411 U.S. at 28. The political vulnerability of these groups is often intensified by their possessing certain characteristics which may arouse the prejudices of the majority. Statutes clasifying racial minorities are, of course, the prime example of this type of presumptively invalid legislation. McLaughlin v. Florida, 379 U.S. 184, 191-192 (1965). Other groups against whom prejudicial legislation has been enacted may also be identified by certain characteristics (e.g., alienage, Graham v. Richardson, 403 U.S. 365, 372 (1971)), or beliefs (e.g., Jehovah's Witnesses, Niemotko v. Maryland, 340 U.S. 268, 272 (1951)), which may tend to incite prejudicial reactions by the political majority.

A legislature's use of such classifications must be carefully reviewed because, as the Court stated in New York City Transit Authority v. Beazer, supra, 47 U.S.L.W. at 4297, classifications which "circumscribe a class of persons by some unpopular trait or affiliation" may "create or reflect [a] special likelihood of bias on the part of the ruling majority." The fact that the group classified here -- illegal aliens in Texas--is in several respects this type of group lends further support to the inference that Section 21.031 is invidiously motivated.

Illegal aliens are members of a "discrete and insular" group (see United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)), uniquely liable to harmful and invidiously motivated treatment by the political majority. They are totally without political power. Because of their illegal status, they are understandably reticent to risk the personal exposure which necessarily occurs when one chooses to challenge state action one feels to be unfair. The fact that they are here in violation of law suggests that, as a group, they possess an "unpopular trait" likely to encourage the exercise of prejudicial action. Accordingly, when state legislation is aimed at the plaintiff class, careful review is necessary to determine whether invidious motivation has been exercised.

We are not suggesting that all classifications of, or action taken against, illegal aliens are presumptively invidious. The crime committed by illegal entry is one against federal authority. However, the classifier here is not the federal government, but a state government. The federal government, as part of its authority over this country's national and international affairs, "enjoys rights to distinguish among aliens not shared by the States," Nyquist v. Mauclet, 432 U.S. 1, 7 n. 8 (1977). The federal government's responsibility over the international affairs of this country gives it broad authority to deal with questions relating to alienage and illegal entry. However, since states have no parallel authority, when using a federal classification relating to immigration status a state may not rely on the federal interests behind the classification, but must demonstrate an independent state interest to support its use of the federal classification. See Oyama v. California, 332 U.S. 633, 664 (1948) (Murphy, J. concurring).

Conversely, insofar as the classified group may share a similarity to groups against whom invidious legislation historically has been enacted, the same presumptions of invidiousness apply, and are not rebutted because the class is in possible violation of federal immigration laws. Cf. Mathews v. Diaz, 426 U.S. 67, 85 (1976).[9/] Accordingly, illegal aliens are the type of group which is particularly susceptible to the enactment of invidiously motivated state legislation, and Texas' enactment of 21.031 raises the inference of invidious motivation.

9/ As stated in Mathews v. Diaz, supra:

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normal legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

Normally concerns of state government have little to do with the alienage or legal status of residents, see, e.g., Graham v. Richardson, supra, and state authority to classify based on citizenship status is confined within "narrow limits", see Sugarman v. Dougall, 413 U.S. 634, 642 (1973). Accordingly, the normal deference given state legislation over subject matter which is the usual subject of state legislation does not so firmly apply when state legislation is based on a resident's citizenship status, cf. Sugarman, supra, 413 U.S. at 647, or when no special attribute of citizenship is the basis of the legislation. Cf. Foley v. Connelie, 435 U.S. 291, 295-296 (1978).

Other attributes of the group classified by 21.031 buttress this inference. State action which classifies persons based on alienage, see Graham v. Richardson, 403 U.S. 365 (1971), or on national or ethnic origin, see Hernandez v. Texas, 347 U.S. 475 (1954), has been held to be inherently suspect. These holdings are based on the theory that groups characterized by alienage generally, or by ethnic origin, are political minorities, often subjected to arbitrary and prejudicial treatment by the majority. See Graham, supra, 403 U.S. at 372; Hernandez, supra, 347 U.S. at 478-480. The statute at issue here has elements of both these classifications, lending further support to the possibility that Texas has implemented invidious motivations.

The statute classifies residents based partly on alienage.[10/] It is no answer to say that the State was directing the classifications at the "illegal" in "illegal alien", since, as we have shown, Texas may not rely on immigration status without showing a particular connection between that status and permissible state interests. Oyama, supra.

10/ The fact that Texas' statute only affects some, and not all, aliens does not, by itself, lessen the review given the state statute. In Graham v. Richardson, supra, and Nyquist v. Maculet, supra, state classifications which denied benefits to some resident aliens were held presumptively discriminatory. In Nyquist, supra, 432 U.S. at 9, the Court said "the important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." See also Weber v. Aetna Casualty & Surety Co., supra, 406 U.S. at 172; Mathews v. Lucas, supra, 427 U.S. at 504-505, n. 11.

In addition, although the statute appears to be ethnically neutral, the testimony shows that in fact the statute was intended to affect Mexican children. The report (State Defs. Ex. 6) on which the State relied studied Mexican immigration into Texas. The study was undertaken as a result of the concern of some local superintendents with Mexican immigration (Dec. Tr. 300-301, 318). All the studies of the Texas Education Agency concerned the number of Mexican students in Texas schools (Dec. Tr. 170-173; State Defs. Exs. 1, 2). When the State offered testimony concerning the Houston school district, the discussion concerned Mexican or Hispanic students (Dec. Tr. 255, 279, 285, 289). And when Tyler officials implemented the policy, they began "to contact Hispanic-origin people" (Sept. Tr. 188; see also Sept. Tr. 204-205).

The presumption of invidiousness inherent in thus aiming legislation at an ethnic minority is buttressed by the history of invidious discrimination against Mexican-Americans which has occurred both in Texas and throughout the Southwestern United States. This history of discrimination has been recognized by the Supreme Court, see Keyes v. School District No. 1, 413 U.S. 189, 197-198 (1973), and evidenced by several cases involving discrimination against Mexican-Americans by Texas public officials. In Hernandez v. Texas, supra,

the Court found discrimination against Mexican-Americans in jury service, and described pervasive discrimination against Mexican-Americans in Jackson County, Texas. 347 U.S. at 479. Other cases have similar evidence of discrimination against Mexicans in Texas (see White v. Regester, 412 U.S. 755 (1973), discussing discrimination against Mexicans in Texas in voting[11/]). Both lower federal courts[12/] and State courts[13/] have been presented with similar evidence of historical discrimination in Texas against Mexican residents.

11/ The Congress, in passing the Voting Rights Act Amendments of 1975, Pub. L. 94-73, took particular note of the history of discrimination against Mexican-Americans in Texas. See S. Rep. 94-245, 94th Congress, 1st Sess. (1975) at pp. 25-28; H. Rep. 94-196, 94th Congress, 1st Sess (1975), at pp. 16-22).

12/ United States v. Texas Education Agency (Austin I.S.D.), 467 F.2d 848 (5th Cir. 1972) (education); Briscoe v. Bell, 432 U.S. 404 (1977) (coverage of Texas by Voting Rights Act amendments of 1975, 89 Stat. 400); Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972), aff'd sub nom. White v. Regester, supra (extensive discussion of historical discrimination in Texas against Mexicans); Cisneros v. Corpus Christi, Independent School District, 324 F. Supp. 599, 606 (S.D. Tex. 1970), aff'd 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973), and United States v. State of Texas, 342 F. Supp. 24, 25-27 (E.D. Tex. 1971), aff'd 466 F.2d 518 (5th Cir. 1972) (discussing discrimination in Texas schools against Mexicans).

13/ See Clifton v. Puente, 218 S.W.2d 272 (Ct. Civ. App. 1948) (denying enforcement of restrictive convenant prohibiting sale of property to "persons of Mexican descent"); Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Ct. Civ. App. 1944) (upholding exclusion of Mexicans from private swimming pool); Salazar v. State, 193 S.W.2d 211 (Ct. Crim. App. 1946) (denying motion to quash indictment

D. The Defendant's Asserted Justifications For The Statute In No Way Support The Exclusion From School Of Children Of Illegal Aliens, And Further Establish The State's Invidious Motivation

The defendants assert that the statute is intended to restrict the State's limited fiscal resources for use by "lawful residents" (State Br. 23), and to improve the financial condition of local districts by requiring that they provide educational support only for those residents (id. at 20). The defendants also assert that the exclusion of children of illegal aliens will improve the education given to the students remaining in school (id. at 26). The district court properly examined the statute and its operation and found that the first purpose was no purpose at all and that the statute does not actually advance the other purposes (Slip op. 28-36).

The district court was correct in deciding to look behind the justifications the State advanced for the statute. As the Supreme Court said in Weinberger v. Wiesenfeld, 420 U.S. 636, 648, n. 16 (1975):

13/ (continued)
based on failure to call any Mexican-Americans for grand jury service); Independent School District v. Salvatierra, 33 S.W.2d 790 (Ct. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931) (rejecting claim of discriminatory placement of new school).

> This Court need not in equal protection cases accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

See also Trimble v. Gordon, supra, 430 U.S. 762, 769 (1977); Orr v. Orr, 47 U.S.L.W. 4224, 4227 n. 10 (U.S. Mar. 5, 1979).

In asserting that the legislature has determined that its funds should be used for the education of the State's "lawful residents" (State Br. 23, Tyler Br. 35), both the State and the Tyler defendants merely restate the statute. This "amounts to little more than an assertion that discrimination may be justified by a desire to discriminate."[14/] Examining Board v. Flores de Otero, 426 U.S. 572, 605 (1976).

The justification that the exclusion of children of illegal aliens will put local districts in a better financial position is also not supported by the record. Section 21.031 actually lessens the amount of state aid going to each local district. The amount of state aid going to each district is calculated by formula which uses as one factor the district's average daily attendance (ADA). See, e.g., V.T.C.A., Education Code, §16.102 (Personnel Component), §16.104 (Special Education), §16.151 (Operating Cost Allotment) §16.301 (Equalization), and Dec. Tr. 100-101. Under new

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14/ The State argues that it should not be required to educate children "subject to deportation at any time" (Br. 23-24). However, a great number of children permitted to enroll in Texas schools eventually leave the State, or even the country. For no other child does the State condition enrollment in school on some sort of expectation of continuing residence in Texas.

Section 21.031, the state would no longer permit local districts to include illegal alien children in computing their ADA (see 21.031(a) and Dec. Tr. 104). Accordingly, as the district court found (Slip Op. 11-12), Section 21.031 actually results in each local district receiving a lower amount of state funds than it received before the statute was amended.[15/]

An expert in school finance testified at the December hearing that a small loss of students would not cause an equally apportioned drop in costs to a local district (Dec. Tr. 94-98). The bulk of a school district's expenditures are fixed costs (e.g., debt maintenance, buildings) and teacher salaries, and a small loss of students would not lower these costs (see p. 11, supra). Only a loss of enough students in one grade level to permit the elimination of a teacher would save any salary expenditures, and other fixed costs would remain unchanged (ibid.). Accordingly, the record showed, and the district court found (Slip op. 11-12), that the exclusion of children of illegal aliens did not necessarily improve the financial condition of local districts, but in many instances could well have the opposite effect.

15/ The State argues (Reply Br. 7-8) that "there is clearly more money when there are fewer students," suggesting that 21.031 necessarily is economically advantageous to local districts. In support, it says (Br. 8), "the entire available school fund is apportioned annually" suggesting that excluding children of illegal aliens would increase the amount of state aid to each local district. This ignores Texas' Minimum Foundation Program.

(continued)

The State also defended its act as a way of preventing overcrowding and construction of new facilities in school districts bordering Mexico (State Br. 6, 25-26). However, there again must be loss of a significant number of students in one grade to make new facilities unnecessary. Since the State's study cataloguing overcrowding problems dealt only with enrollment of legal aliens, there is no record that enrolling illegal aliens would require new construction, or that their exclusion could actually permit any local district to avoid otherwise needed construction expenditures.

The State also argues that illegal alien children often need bilingual assistance, which the State contends is

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15/ (continued)

It is true that the Texas Code (V.T.C.A., Education Code §15.01(b)) says the State's "available school fund * * * should be apportioned annually." However, the total amount of aid given each district is determined not by the Available School Fund program found in §15, but by the State's Minimum Foundation Program, found at V.T.C.A. Ed. Code §16, et seq., which has replaced the outmoded "Available School Fund" as the primary source of aid to local school districts. See discussion in San Antonio School District v. Rodriquez, 411 U.S. 1, 8-12 (1973). In fact, the amount of aid given a district under the Available School Fund is subtracted from the amount for which it is eligible under the Minimum Foundation Program (V.T.C.A., Education Code §16.254; San Antonio, supra, 411 U.S. at 12 n. 31). The amount of aid each district receives under Minimum Foundation Program formula is not reapportioned yearly, so the total amount of state aid to education is not reapportioned annually, and the loss in average daily attendance does reduce the total amount of state aid a local district receives.

expensive. However, the record showed that the local districts' real problem was locating qualified bilingual teachers (Dec. Tr. 290); the State chose to solve some portion of that problem by eliminating these students. However, the record shows that the needs of illegal alien children are identical to those of legally admitted aliens, and of some Hispanic children born in the United States as well; neither of these groups are excluded from free public education by Texas (Dec. Tr. 117, 276). Accordingly, as the court found (Slip op. 35), beyond the plaintiffs' citizenship status there is no real distinction between those children denied free public education by Texas, and those granted it.[16/]

The State also argued that the statute improves the education of children left in school by allowing the teacher to devote to those students the time he or she would otherwise spend on the illegal alien. That justification could work as well as to justify the exclusion of any class or type of student, and does not establish an independent basis for exclusion of these children.

The record also shows, and the district court found (Slip. op. 32), that children of illegal aliens cannot be distinguished from other children by their families' financial contributions to

16/ In fact, citizen siblings of children excluded by the statute are entitled to a free public education.

the system of education in Texas. The revenues local school districts collect for educational programs come from property taxes (Dec. Tr. 272), which are paid by any person, legal or illegal, who owns or rents property. The state's revenues are derived mainly from consumer taxes (Pl. Ex. 6), which any resident, legal or illegal, pays as part of daily purchases. Accordingly, although illegal alien families may often be poor, and for that reason might not contribute substantially to the state and local revenues supporting Texas schools, presumably they contribute equally with citizens and legal residents who are in a similar financial condition.[17/] Accordingly, there can be no argument that illegal alien families do not contribute financially to Texas' school systems, and there is no fiscal justification for excluding the plaintiff class from a program to which they contribute in the same manner as persons eligible to participate. See Graham v. Richardson, supra, 403 U.S. at 376; Nyquist v. Mauclet, supra, 432 U.S. at 12.[18/]

17/ Tyler's implementation of the statute reflects the State's intention to exclude children of illegal aliens from the schools. The Tyler tuition charge of $1,000 was not designed to make up the loss in state aid which occurred when 21.031 was amended. The district determined neither the actual financial loss caused by the statute, nor the actual incremental cost of enrolling an illegal alien child. The $1,000 was far in excess of state aid lost by the elimination of one child from the district's ADA, suggesting that the $1,000 was set for exclusionary, rather than compensatory, reasons.

18/ The State suggests studies show that illegal aliens often support dependents in other countries, or may avoid paying taxes by claiming an excessive number of exemptions (Br. 30). However, no other children are denied an education where their parents support persons in other countries, or where a parent may be claiming too many exemptions on tax forms.

Accordingly, examination of the purported objectives of Section 21.031 demonstrates that the statute actually advances none of the aims the State contends support the statute. The statute, therefore, appears to be an effort to exclude children of illegal aliens from school solely because of their status, and not because of any demonstrable harm which would be caused by providing these children free public education.

CONCLUSION

The statute before this Court is a legislative effort to harm a vulnerable and unpopular group in an irrational, invidious manner. A state's desire to bring about such harm is not a legitimate basis for legislation, United States Department of Agriculture v. Moreno, supra, 413 U.S. at 534 and the statute is, therefore, unconstitutional. For these reasons, we urge the Court to affirm the judgment of the district court.

Respectfully submitted,

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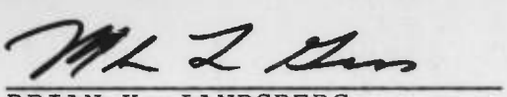

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