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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

J. and R. DOE, et al., Plaintiffs, v. JAMES PLYLER, et al., Defendants.	CIVIL ACTION NO. TY-77-261-CA

POST-TRIAL BRIEF OF THE UNITED STATES

Trial in this case was held on December 12 and 16, 1977. Upon invitation of this Court, the United States orally moved at the opening of the trial to participate as amicus curiae with full rights of a party, and the Court granted this motion. At the close of the trial, the Court stated that the United States should submit a brief explaining its position. Pursuant to that request, the United States submits this Post-Trial Brief.

I. QUESTIONS PRESENTED

1. Whether §21.031, of the Texas Education Code, as amended, and the written policy of the Tyler I.S.D. implementing this statute, violate the Equal Protection Clause of the Fourteenth Amendment.

2. Whether §21.031 of the Texas Education case amended, and the written policy of the Tyler I.S.D. implementing this statute interferes with efforts to regulate immigration and naturalization in violation of the Supremacy Clause of the United States Constitution.

3. Whether §21.031 of the Texas Education Code, as amended, and the Tyler I.S.D. written policy implementing this statute are in conflict with certain treaties of the United States, and in violation of the Supremacy Clause of the United States Constitution.

II. STATEMENT

A. Procedural History

On September 6, 1977, plaintiffs, a group of Mexican aliens not legally admitted into the United States, filed a Complaint, a Motion for Preliminary Injunction, and a Brief in Support of this motion against the Tyler Independent School District[1/] challenging the constitutionality of a state statute, and the Tyler I.S.D.'s implementation of this statute, which resulted in their exclusion from the public schools of Tyler. The statute, Texas Education Code, §21.031, as amended (Vernon Supp., 1976), provides:

> (a) All children who are citizens of the United States or legally admitted aliens and who are the age of five years and under the age of twenty-one years on the first day of September of any scholastic year shall be entitled to the

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1/ At the hearing on the Motion for Preliminary Injunction, on September 9, 1977 the State of Texas moved to intervene as a party defendant. The Court granted this motion. On January 4, 1975 the plaintiffs filed a Motion to Amend Complaint to Conform to the Evidence, seeking to add the State as a party defendant. This motion was granted on January 5, 1978.

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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 twenty-one 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 twenty-one 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 was implemented in the Tyler I.S.D. by a policy adopted on July 15, 1977. That policy states:

> 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.

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> 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.

In their Complaint the plaintiffs challenged the statute and policy on several grounds. First, they alleged that the policy of excluding illegal alien children from school is implemented only against those children who are of Mexican origin and thus discriminates invidiously on the basis of national origin in violation of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Secondly, plaintiffs have alleged that in implementing this policy, the Tyler I.S.D. has failed to provide plaintiffs a legally sufficient opportunity to contest the imposition of tuition and are denying plaintiffs the procedural due process guarantees of the Fourteenth Amendment. Thirdly, plaintiffs have alleged that the imposition of tuition upon those children who are unable to document their United States citizenship or legal alien status discriminates against these children in violation of the Fourteenth Amendment. Finally, plaintiffs allege that the State statute and local policy invade the exclusive jurisdiction of the United States to regulate immigration and naturalization in violation of the Supremacy Clause.

This Court held a hearing on the Motion for Preliminary Injunction on September 9, 1977 and on September 11, 1977 entered a Order granting this Motion, and preliminarily enjoining the Tyler I.S.D. from (1) refusing to enroll minor plaintiffs in the Tyler public schools or requiring

them to pay any tuition fee; and (2) enforcing their policy which implements Section 21.031 of the Thxas Education Code. In its Findings of Fact and Conclusions of Law entered on the same date, the Court concluded that (1) illegal aliens are entitled to equal protection of the laws; (2) the discrimination in this case is based on wealth and results in the absolute denial of education for these children, and in these circumstances strict scrutiny was the appropriate standard of judicial review pursuant to the Fourteenth Amendment;[2/] and (3) under this standard, there was a substantial likelihood that the plaintiffs would prevail on the merits of this case. With regard to the allegation that the State of Texas is attempting to regulate immigration in an area which is preempted by federal law, the Court concluded that plaintiffs had not yet made a clear showing of intentional Congressional ouster of state regulation of education for illegal alien children which was required by the Supreme Court in DeCanas v. Bica, 424 U.S. 351 (1976).

Trial on the merits of this case was held on December 12 and 16, 1977 at which further evidence, in addition to that presented at the September 9, 1977 hearing, was submitted.

2/ The Court added that it "is not prepared to say that undocmented children are a suspect class which must always be treated equally with citizens and lawfully resident children, absent a compelling government interest." The Court further noted that Supreme Court decisions involving classifications of illegitimate children which stigmatized and penalized the children for a status which is beyond their control supported the Court's choice of a more exacting scrutiny of the Texas law.

2. Facts

a. Background of the State Statute and Local Policy

Prior to the amendment to Section 21.031 by the Texas State Legislature, which became effective on September 1, 1975, this section of the law did not limit tuition-free public education and the accompanying benefits of state school funds to children "who are citizens of the United States or legally admitted aliens." Rather, all children who were residents of a local school district were to be admitted to the public schools, tuition-free.[3/]

Under the pre-1975 statute there is little evidence of the number of illegal alien students who attended public schools in Texas. In the Houston school district, several illegal aliens were being excluded from school prior to the 1975 amendments (Tr., 12/9, pp. 250-51, 292). When this was challenged, the Texas Attorney General issued an opinion which held that under §21.031 alien children within the state are entitled to attend public school in the district of their residence regardless of whether they may be legally or illegally within the United States. (Ct. Ex. 1; Op. Atty. Gen. 1975, No. H-586) Shortly after this opinion, the legislature passed the amendments in §21.031 which clearly limited those children required to be admitted into public schools, tuition-free to citizens and legal aliens.[4/]

3/ Disputes did arise concerning whether or not children were residents of a local school district. See e.g. Brownsville I.S.D. v. Gamboa (Civ. App. 1973) 498 S.W. 448 ref. n.r.e.

4/ Houston I.S.D. immediately adopted a policy similar to that of the Tyler I.S.D., which became effective at the beginning of the 1975-76 school year.

In Tyler, the school district continued to admit illegal aliens in their school system in 1975-76 (17 children) and 1976-77 (24 children), but did not report them as eligible students to the state; the cost of educating these children came out of local funds. (Tr., 12/9, pp. 148-49) In July, 1977 the Tyler I.S.D. adopted the policy implementing the state law because the numbers began to increase and because they wanted "to prevent Tyler from being a haven for families moving into the district to get an education." (Tr., 9/9, p. 186) Pursuant to this Court's preliminary injunction, the Tyler I.S.D. is enrolling 38 illegal alien children this school year. (Tr. 12/9, p. 149)

b. The Illegal Alien Population in Texas

Basic to the issue of Mexican immigration into the United States is the nature of the border between the two nations. Unlike immigrants from Europe and the rest of the world, the Mexican has no great psychological or physical obstacles in the path of his migration. Culturally and economically, the northern states of the Republic of Mexico are in many respects similar to the southwest region of this country. (Preliminary Report, Domestic Council Committee on Illegal Aliens, p. 67)[5/]

5/ This document was submitted to the Court and the parties on or about January 5, 1978. Henceforth, it will be referred to as U.S. Ex. 1 in this Brief.

There has been a cyclical pattern in which workers, primarily Mexican, have been imported and exported from this country. Due to the violence of the Mexican civil war and labor shortages in this country with the advent of World War I, there was a large-scale immigration of Mexican nationals to this country in the period from 1910-1924. (Tr. 12/9, pp. 17-18; U.S. Ex. 1, p. 68)[6/] This dispersion continued until the 1930's when approximately 200,000 undocumented Mexicans which was close to 1/6 of the Mexican population, were sent back to Mexico, causing a good deal of antagonism. This was followed by the Bracero Program, instituted during World War II to meet labor shortages at that time, which was an arrangement with Mexico for temporary importation of workers. Illegal Mexican migration increased during the years of this program. Texas farmers, because of Mexico's refusal to extend the Bracero Program into this area for a time, probably hired more illegal Mexican aliens than any other state. As a result, the Border Patrol launched Operation Wetback in 1953-54, and nearly one million apprehensions of clandestine Mexicans were made in one year. (U.S. Ex. 1, p. 70)

The forces which created and sustained the "Bracero" Program continue to persist. There continues to be an economic demand induced by some employers in the United States for Mexican workers. That demand is being met by legal commuters and illegal aliens. Prospects of

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6/ Mr. Gilbert Cardenas an expert for the plaintiffs, concludes that the prevalent attitude at this time was that Mexican workers were desirable as laborers but not settlers, because of racial and ethnic prejudice. A temporary contract worker program was institutionalized at this time to meet the needs of U.S. employment, but to discourage settlement (Tr. 12/9, p. 18)

available employment are the major attraction drawing illegal workers into the United States. This migration is also enhanced by cultural affinity existing for many generations between Mexican-Americans and Mexicans. (U.S. Ex. 1, pp. 71-72)[7/]

Data concerning the numbers and characteristics of illegal aliens in this country and in Texas are severely handicapped by the enormous methodological problems inherent in any attempt to count and describe a clandestine population. (U.S. Ex. 1, pp. 127, 221-23)[8/] As one expert for the plaintiffs stated, ". . . there is no indisputable estimate available on (the number of illegal aliens) . . . ." (Tr. 12/9, p. 55) The INS, basing its estimates of the illegal alien population primarily on its apprehension rates, first made an estimate of two million illegal aliens in the United States in 1971. In the period of 1971-75 when apprehension rates increased, the INS estimates increased to as high as twelve million. This figure was reduced to six million after 1975 (Tr. 12/9, pp. 57-58) but recently the INS adopted a policy of no longer

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7/ Cardenas concludes that there has been strong interests in the United States, both of employers and the federal and state governments, in utilizing Mexican workers, but that there has not been a corresponding interest in providing Mexican workers the same opportunities immigrant workers had from Europe to remain and settle in this country legally. This latter attitude was to a large extent permeated by discrimination toward Mexican aliens (Tr. 12/9, pr. 19, 21-22; See also U.S. Ex. 1, pp. 52-55, 63)

8/ The Domestic Council Report did not make any estimates of the numbers of illegal aliens in the United States, apparently because of this problem. (Tr. 12/9, p. 59)

making estimates (Tr. 12/9, pp. 197, 212)[9/] Outside consultants' estimates ranged from one of 8.3 million made in 1975 and one of 3.9 million (between the ages of 18-44) in April, 1973. (Tr. p. 12/9, pp. 58,61) One of plaintiff's experts made a rough estimate of four million illegal aliens in the United States, and 675,000 in Texas. (Tr. 12/9, pp. 74-77)

Because of the lack of in-depth data concerning illegal aliens generalizations about characteristics of this group are difficult. From the information available, however, the following characteristics emerge: the vast majority of undocumented aliens in the United States come from Mexico, are young adults (mostly male and single), badly educated, speak little English, primarily farm workers from rural areas, economically motivated, employed at or near the bottom of the U.S. labor market, and inclined to send a major portion of earnings to dependents in his or her homeland outside the United States. The typical Mexican worker comes for short periods of time, up to six months at a time.[10/] It has frequently been alleged that illegal aliens produce a substantial drain on public services such as welfare, food stamps hospital care, public education and others. However, several of the studies which base their conclusions on hard data contradict this assertion. For example, a study done in San Diego County, California indicates

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9/ Prior to this change in policy of the District Director of INS for the Houston district (which covers 30 counties in southeast Texas) estimated that there were 450,000 to 500,000 ilegal aliens in his district, and close to one million in the State of Texas. (Tr. 12/9, p. 199)

10/ See generally, U.S. Ex. pp. 132-149; See also, Tr. 12/9 pp. 22-26; 63-70.

that of 9,132 welfare cases, only ten were known to be illegal aliens. The same study reports that in Los Angeles, of 1400 cases only 56 were found to be illegal aliens. In San Diego indications were also found that the problem of illegal aliens participating in public education, hospital services and food stamps were minimal. (U.S. Ex. 1, pp. 149-50)[11/]

D. The Illegal Alien Population in Tyler

In Tyler the Spanish-surnamed population is relatively small, some 379 out of a total enrollment of approximately 16,000, or about 2.4% (Tr. 9/9, p. 195; 12/9, p. 150) The number of illegal aliens attending the Tyler schools has remained relatively small, both before and after the implementation of the Tyler policy in 1977.[12/] The plaintiffs who testified at the preliminary injunction hearing were all illegal aliens of Mexican heritage. They had been living in Tyler a relatively long period of time-one family settled in 1964, another 1968, another 1969 and a fourth in 1974.[13/] Most of the children had attended the Tyler public schools until implementation of the 1977 policy. None of the plaintiffs could afford the $1000 tuition.[14/] Three of the four plaintiffs indicated that

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11/ In a study done by one of the plaintiffs' experts, the findings of low use of social services were similar. Only 27% of their sample had used hospitals or clinics, 2.9% collected unemployment insurance, 3.7% had children in U.S. Schools, 1.4% had enrolled in job training programs, 1.3% used food stamps and 0.5% had secured welfare. (Tr. 12/9, pp. 72-73) This same study indicated that 3/4 of the sample had social security and federal income taxes withheld, and 31% actually filed income tax returns. Several of those who is not have the taxes withheld were being paid substandard wage. (Tr. 12/9, pp. 70-71)

12/ As noted, supra, only 38 illegal aliens presently attend Tyler schools.

13/ There was no explanation why some of the children who were born after the date of settlement were not U.S. citizens. But there was likewise no indication that plaintiffs brought their families initially, or that they did not periodically return to Mexico.

14/ However, Tyler officials indicated that two illegal aliens did pay tuition to enroll their children in school prior to the entry of the preliminary injunction (Tr. 9/9, pp. 187-188)

they had federal and social security taxes withheld from their paychecks; one family owned its home, while the others rented. None of the plaintiffs had any reasonable expectation of becoming legal aliens or citizens because they did not qualify under present law. (See generally, Tr. 9/9, pp. 52-134)

d. Reasons for the State and Local Policy

During the early 1970's there was a growing realization, particularly amongst superintendents of local Texas school districts located on or near the Mexican border, of the intensified migration of Mexican citizens to the United States and the resulting increase in school enrollment in these districts. (Def. Ex. 6, pp. 2-3) Yet, there was not at that time, nor has there been since, any data provided on the impact of illegal alien students on these districts.

As indicated supra, the passage of the amendment to §21.031 in 1975 was apparently triggered by the State Attorney General's Opinion requiring admission of all resident alien students, whether legal or illegal. The record in this case does not indicate whether or not local districts on the border, and elsewhere,[15/] had a policy of excluding illegal aliens from their schools. The increasing concern of state officials with the increased migration of Mexicans and its impact on schools prompted a Resolution by the State Board of Education in July, 1975 which requested an in-depth study of the problem by the Texas Education Agency. (Def. Ex. 6, pp. 4-5) As a result the Region I Education Service Center

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15/ As indicated earlier, Houston I.S.D. did have a policy of excluding some of these students in 1974-75 prior to the Attorney General's opinion. Tyler I.S.D. accepted such students until this year.

conducted such a study of 61 school districts in thirteen counties located on the border of Mexico.

This study (Def. Ex. 6) and statistics kept recently by the Texas Education Agency[16/] indicate that the number of Mexican alien students in Texas schools, particularly along the border, is increasing. Both these surveys were conducted after passage of the 1975 law, and were admittedly indicative only of legal resident aliens in the schools. (Tr. 12/9 p. 184, 308) The T.E.A. study cited the overcrowding caused by this migration, burdens of educating additional low income, non or limited English-speaking students and the financial strain that this was causing local districts. (See generally, Def. Ex. 6, Tr. 12/9, pp. 302-307)

The above research is admittedly inconclusive as to what impact the inclusion and exclusion of illegal alien children in Texas schools would have on the state educational system. Defendants presume that the inclusion of such students would add to the educational burdens of school districts, particularly along the border and in major metropolitan areas where they cluster, but have no data to indicate the extent of the burden. They further presume that the added burden of educating these children would detract from the education of legal resident aliens and all other students in that district.

The two cities where there is some evidence as to the number of illegal aliens do not present a clear

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16/ T.E.A. statistics indicate that in 1975-76 there were 44,799 Mexican alien students in schools and a total of 2,218,000 total students in the state. In 1976-77 there were 51,239 Mexican alien students. (Tr. 12/9, pp. 170-73)

indication of the effect of their exclusion on the educational program. In Houston, an estimate was made in 1976 that there were anywhere between 4120 and 5626 children of school age who were illegal aliens. (Tr. 12/9, p. 200) Yet, whether this estimate is correct or indicative of the number of students who would be added to the school district's enrollment is not clear. It seems apparent that the Houston school district was required to enroll illegal alien students in the 1974-75 school year after the State Attorney General's opinion in that year requiring enrollment of illegal alien children. Yet, the Director of Pupil Services in the Houston I.S.D. testified that they did not reduce their staff between 1974-75 and 1975-76 when they excluded illegal alien children from their schools pursuant to the new state law.

In Tyler, which is neither near the border nor a major metropolitan center, the number of illegal alien children is admittedly small. The policy appears to have been adopted to discourage it from being a "haven" for illegal aliens, although there is no evidence that its previous policy of admitting such students was causing any influx of illegal aliens. Indeed, the Tyler I.S.D. experienced only a modest increase in the number of illegal alien students from 1975-76 to 1977-78.

The Tyler I.S.D.'s decision to set tutition for illegal alien students at $1,000 was arrived at by dividing the total operating budget by the average daily attendance. Yet, their chief financial officer conceded that the exclusion of illegal alien students would not reduce the

operating cost of the district this much. (Tr. 12/9, pp. 142-44) Indeed, as one plaintiffs' experts testified, a school district experiencing a moderate loss of students does not necessarily reduce its operating costs, and the financial advantage to such a school district is minimal; on the contrary, such a decrease in enrollment can cause financial problems for such a district.[17/]

ARGUMENT

I. INTRODUCTION

The problem of the large, and apparently growing number of illegal aliens presently residing in the United States is an extremely difficult one. The history of past efforts to deport these immigrants apparently led the Domestic Council Committee on Illegal Aliens to conclude that "massive deportation is both inhumane and impractical" (U.S. Ex. 1, p. 243) Recently, in August, 1977 the White House proposed a set of actions designed to markedly reduce the flow of undocumented aliens into this country and to regulate the presence of the millions of undocumented aliens already here. To reduce the flow of such aliens the following actions were proposed:

1. Make unlawful the hiring of undocumented aliens, with enforcement by the Justice Department against those employers who engage in a "pattern or practice" of such hiring.

2. Increase significantly the enforcement of certain federal laws which already prohibit the hiring of illegal aliens.

17/ See Tr. 12/9, pp. 93-102. Such a moderate decline would not affect fixed costs such as administrative and maintenance costs, and debt services; and any reduction in instructional costs probably would not be realized until there was a substantial loss of students. Thus, a school district experiencing only a moderate decline in the number of students would lose some revenue from the state, based on its decline in enrollment, but would not commensurately reduce costs, and could face a financial squeeze.

3. Substantially increase resources available to control the southern border and other entry points, in order to prevent illegal immigration.

4. Promote continued cooperation with the governments which are major sources of undocumented aliens, in an effort to improve their economies and their controls over alien smuggling rings.

In order to deal with the illegal aliens already in this country, the President proposed to adjust the status of undocumented aliens already in the country as follows: (1) those who have resided in the United States continuously from before January 1, 1970 to the present and who apply with the Immigration and Naturalization Service can have their status readjusted to permanent resident alien status; (2) a new immigration category of temporary resident alien is to be created for undocumented aliens who have entered after January 1, 1970 and prior to January 1, 1977 and have resided in the United States continuously; (3) make no status change and enforce the immigration law against those undocumented aliens entering the United States after January 1, 1977.[18/] In support of this proposal the President stated:

> I have concluded that an adjustment of status is necessary to avoid having a permanent "underclass" of millions of persons who have not been and cannot practicably be deported, and who continue living here in perpetual fear of immigration authorities, the local police employers and neighbors. Their entire existence would continue to be predicated on staying outside the reach of government authorities and the law's protections. (U.S. Ex. 2, p. 5)

18/ See document sent to Court on January 5, 1978 entitled "The White House" and dated August 4, 1977. This is referred to as U.S. Ex. 2.

While passage of such legislation would partially moot this litigation the constitutional issues posed by this case remain and would remain to a lesser extent even with passage.[19] We turn now to those issues.

II. PLAINTIFFS ARE ENTITLED TO THE PROTECTION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

At the outset the Court is faced with the issue of whether the Fourteenth Amendment's equal protection clause extends to illegal aliens. Section one of the Fourteenth Amendment provides as follows:

> No state shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States; 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 laws.

The Supreme Court has never explicitly ruled on this issue,[20] but the plain meaning of the language of the Equal Protection Clause and the implication of several cases involving application of Fourteenth Amendment to legal aliens leads to the conclusion that plaintiffs are entitled to the coverage of the equal protection clause. It has long been settled through a line of Supreme Court cases that aliens lawfully in this country are entitled to the protections of both the due process and equal protection clauses of the

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19/ Each of representative plaintiffs could adjust his or her status in a manner outlined above; but, some undocumented aliens would remain in the class which was defined by Court as "all undocumented school-aged children of Mexican origin residing within the Tyler Independent School District." See Order of October 25, 1977.

20/ As plaintiffs point out in their brief, the paucity of cases involving the rights of illegal aliens is most likely explained by their fear of apprehension, and the resultant efforts of staying out of reach of government authorities.

amendment Yick Wo. v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973). It is likewise well-established that in deportation proceedings involving illegal aliens, proceedings must conform to traditional standards of fairness encompassed in the due process clause. The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903); Wong Yong Sung v. McGrath, 339 U.S. 33, 49-50 (1950); Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953); Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953). More recently, the Supreme Court in Mathews v. Diaz 426 U.S. 67 (1976) indicated in dicta, that illegal aliens are entitled to protection of the due process clause:

> There 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. Wong Yong Sung v. McGrath, 339 U.S. 33, 48-51; Wong Wing v. United States 163 U.S. 228, 238; see Russian Fleet v. United States, 282 U.S. 481, 489. Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection. Wong Yong Sung, supra; Wong Wing, supra. 426 U.S. at 77.

The language of the Fourteenth Amendment equal protection clause extends to "any person within its jurisdiction"; it is only logical that if "any person", including an illegal alien, is entitled to protection from deprivation of life, liberty or property without due process of law, that coverage of the equal protection clause also extends to the illegal alien. This has already been recognized by some lower courts. In Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975) Judge Friendly stated:

> . . . We can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the United States, and even to aliens whose presence here is illegal. (citations omitted)

See also, Holley v. Lavine 529 F.2d 1254, 1296 (2nd Cir. 1975) cert. den. 426 U.S. 954 (1976) We would also note in the case presently before the Texas state courts raising the same issue, the Court of Civil Appeals in dicta reached the same conclusion. Hernandez v. Houston I.S.D., No. 12,650 (Tex. Cir. App. Nov. 18, 1977) (Slip Opinion, at p. 3).[21/]

III. THE STATE INTEREST SERVED BY §21.031 AND THE TYLER IMPLEMENTING POLICY SHOULD BE SUBJECT TO A MORE SEARCHING INQUIRY THAN THE RATIONAL BASIS TEST NORMALLY APPLIED TO SOCIAL AND ECONOMIC LEGISLATION.

The Supreme Court has ruled that classifications by a State that are based on alienage are "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. supra, 403 U.S. at 372; Examining Board v. Flores de Otero, 426 U.S. 572, 601-602 (1976); In Re Griffiths, supra, 413 U.S. at 721; Sugarman v. Dougall, supra, 413 U.S. at 642. As the Court stated in Graham:

> Aliens as a class are a prime example of a 'discrete and insular' minority (see United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938)) for whom such judicial solicitude is appropriate. 403 U.S. at 372.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973), the Supreme Court set forth the following standard for the "traditional indicia of suspectness":

21/ The Texas Attorney General's 1975 opinion reached the same conclusion. (Ct. Ex. 1)

> . . . the class is . . . 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 majoritorian political process.

Section 21.031 of the Texas Education Code does not distinguish between citizens and the entire heterogeneous group of aliens in the state; rather, it discriminates only between citizens and legally admitted aliens on the onehand, and all other aliens on the other. Yet, the Supreme Court in Nyquist v. Maucelet, 45 U.S.L.W. (1977), has rejected an argument that because a statute only distinguished within the entire class of aliens,[22/] it did not warrant more rigid judicial scrutiny:

> 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. (citations omitted) 45 U.S.L.W. at 4657.

In this context, we believe the Court should subject §21.031, and the Tyler I.S.D.'s implementing policy, to a standard of judicial review similar to that applied in other alienage cases, even though it discriminates only against a certain segment of the alien population in the state. If anything, the class of illegal aliens meets the "traditional indicia of suspectness" enunciated Rodriguez

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22/ The statute in question in Nyquist was a state assistance program for higher education which was available only to citizens and aliens who have applied for citizenship, or if the aliens are not qualified for citizenship, have filed a statement of intent to apply as soon as they are eligible. Plaintiffs were lawful resident aliens who did not wish to apply for U.S. citizenship and thus did not qualify for such assistance.

to a greater extent than the larger classification of all aliens. As noted in the record, this group has been subjected continuously to unequal treatment. Because of their economic status and their fear of government authority and institutions, the class of illegal aliens presently residing in the United States has been described as a "serf class" by one of the defendants' experts (Tr. 12/9, p. 246), and a "permanent 'underclass' "by the President in his submission of proposals to deal with illegal aliens. (U.S. Ex. 2); in such circumstances, the class has less political power than even legal aliens.[23/]

Other factors in this case add to the reasons that the Texas legislative scheme should be subject to a searching inquiry. While in Rodriguez, supra, 411 U.S. at 35 the Court held that education is not among the rights afforded explicit or implicit protection by our Federal Constitution, it did note that if the legislation would result in a clearly definable class of poor people who were unable to pay a tuition assessed, resulting in their absolute denial of education, then a "far more compelling set of circumstances for judicial assistance" would exist. 411 U.S. at 25, n. 60; see also 411 U.S. at 37. This is precisely the situation in this case - a class of poor,

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23/ The Court has applied a more relaxed standard of scrutiny in cases where the Congress of the United States makes distinctions between aliens and citizens and within the class of aliens. Mathews v. Diaz, 426 U.S. 67. But, the Court explained at length in Diaz and re-emphasized in Nyquist "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the states." 45 U.S.L.W. at 4657, n. 8.

undocumented alien children who are unable to pay the tuition set by the Tyler I.S.D. is absolutely excluded from receiving a public education.[24/] Moreover, the Supreme Court, in justifying a relaxed standard of inquiry of the Texas system of school financing in Rodriguez, stated:

> Every step leading to the establishment of the system Texas utilizes today . . . was implemented in an effort to extend public education and to improve its quality . . . . The thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the states efforts and to the rights reserved to the states under the Constitution. 411 U.S. at 39.

Here, the amendment to §21.031 was passed after the State Attorney General's opinion which interpreted state law to mean that illegal aliens were entitled to tuition free education, and resulted in a limitation, and, in almost all instances, absolute denial of education to this class of students. Nothing in Rodriguez detracts from recognition of the Supreme Court that "education is perhaps the most important function of state and local governments "Brown v. Board of Education, 347 U.S. 483, 493 (1954); see cases cited in Rodriguez, 411 at 30. Unlike the situation in Rodriguez, where all students were provided an "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" (See 411, U.S. at 37), the absolute denial of education

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24/ In Tyler all the representative plaintiffs were unable to pay the $1,000 tuition. Two of approximately 40 illegal alien children in the district were able to pay the tuition. Generally, throughout the state it is clear that illegal aliens are a distinctly poor class.

in this case has a much more devastating impact on the enjoyment of these rights. Indeed, the absolute denial of education compounds the reasons that illegal aliens are presently evolving into a permanent "underclass" alluded to earlier. In such circumstances, we believe a higher standard of judicial scrutiny is appropriate.

Finally, as this Court noted in its September 12, 1977 opinion, the Supreme Court has recognized in its cases dealing with illegitimate children, that a fundamental concept of our system is freedom from punishment in the absence of personal responsibility. As stated in Weber v. Aetna Casualty & Surety Co. 406 U.S. 164, 175 (1972):

> . . . visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disability 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 an unjust-way of deterring the parent.

The same reasoning applies to a certain extent to children who are illegal aliens; they have little or no control over their status and yet are penalized because of this status. We agree that this circumstance lends further support for requiring a more searching inquiry of the governmental interest behind the classification in §21.031.

IV. THE GOVERNMENTAL INTERESTS SOUGHT TO BE FURTHERED BY §21.031 DO NOT JUSTIFY THE DISTINCTION DRAWN BY THE STATUTE.

Though the latitude given state economic and social regulation is necessarily broad, see Dandridge v. Williams, 397 U.S. 471 (1970), when state statutory classifications approach sensitive and fundamental personal rights or create a suspect class, a Court must exercise a stricter scrutiny of the statute. In our view, the standard of

inquiry most appropriate to this case was stated in Examining Board v. Flores de Otero, 426 U.S. 572, 605:

> We do not suggest, however, that a State, Territory or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens. In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.

See also, Nyquist v. Maucelet, supra 45 U.S.L.W. at 4657.[25/]

While not clearly articulated by defendants, it would appear that the primary purpose of the challenged legislation is to allow local school districts to target their resources for the benefit of citizen and legally admitted alien students; that is, they assert that the influx of illegal alien children and the cost of educating these students has lowered the quality of education for all other students in the school district, and exclusion of the illegal alien children from the local programs will lead to a more adequate education for citizen and legally admitted alien students. While the improvement of the quality of education for children in the state is a legitimate interest, the record in this case does not reflect that the singling out of illegal alien children and effectively excluding them from school is necessary for achieving this interest. In Tyler the school district would appear to have little additional monies available to educate the students remaining after the exclusion of approximately 38 illegal alien children in the

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25/ This standard of review appears most similar to that enunciated in recent Supreme Court cases which have examined statutory classifications based on sex. See e.g. Craig v. Boren, 429 U.S. 190, 197-99 (1977); Reed v. Reed 404 U.S. 71 (1971). While some commentators have analyzed this standard as one which establishes an intermediate standard of review between the traditional two-tiered equal protection inquiry, we believe the important point is that in the circumstances of this case, it is the most appropriate standard of inquiry.

district. While they estimated that it costs $1,000 to educate each student in the district, they conceded that an insubstantial loss of students would not produce any savings in the district (Tr. 12/9, p. 144), and thus would not free up any significant resources for the education of the remaining teachers. Moreover, as one of plaintiffs' experts noted, school districts experiencing a declining enrollment often are faced with financial problems rather than increased revenues. They experience a loss in state aid because of a lower A.D.A., but the costs of operating the schools may not be commensurately reduced primarily because fixed costs are not reduced; instructional costs cannot be reduced unless there is a substantial decline in enrollment.

In short, defendants do not appear to be claiming that they wish to save money by this litigation;[26/] rather they wish to use the money to guarantee an adequate education for citizens and legally admitted children in the state. The record in this case does not establish that the "means adopted to achieve this goal" -- the virtual exclusion of illegal alien children from the schools -- is necessary to accomplish the goal, or even that it is effective.

Defendants have likewise not clearly articulated their reasons for designating illegal alien children and excluding them from schools to achieve this goal. The record

26/ Even if savings were the primary interest of the defendants this would not be ample justification in this case. As stated in Shapiro v. Thompson, 394 U.S. 618, 633 (1969):

> (The State) may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not for example, reduce expenditures for education by barring indigent children from its schools.

indicates that a primary reason of the Tyler I.S.D. was to prevent that system from becoming a "haven" for illegal aliens.[27] But, as the Supreme Court noted in Nyquist, supra, this is not a permissible justification for discriminatory state legislation:

> Control over immigration and naturalization is entrusted exclusively to the Federal Government and a state has no power to interfere. 45 U.S.L.W. at 4658.[28]

There also appears to be an assertion by the defendants that illegal alien children are designated since they are allegedly not contributing to tax revenues of the districts. But, as the Court pointed out, in its September 12, 1977 opinion:

> All the plaintiff parents in this suit have lived in Tyler for three to thirteen years. They all rent or own homes, thereby subjecting themselves to property taxes, either indirectly or directly. Many of the plaintiff parents are employed and have shown evidence of having paid federal income and social security taxes. Several own cars, and it is undisputed that these cars are subject to personal property tax. All undoubtedly pay sales tax. (Slip opinion at p. 12)

Further, the evidence that is available on the illegal alien population in general, demonstrates that the class is not a major drain on our social services including public education and that a high percentage pay federal and social security taxes.

One further point shows the lack of legitimacy, and even rationality, of the designation made by the State in §21.031. Defendants by this legislation have excluded a substantial class of students from their schools because

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27/ Other portions of the record indicated that defendants considered the legislation important in deterring illegal immigration into the state. See Tr. 12/9, p. 304.

28/ Nyquist does not discuss the federal pre-emption issue raised in this case and discussed in Section V of this Brief. However, we believe that while a statute like this is not pre-empted by exclusive authority of the federal government in the area of immigration, it is impermissible for equal protection purposes for a state to justify a discriminatory classification on the basis of an interest that is essentially federal.

of a circumstance for which the children are not responsible, and which the children cannot rectify. Yet, the state requires these same children to attend school (Tex. Education Code, §21.032-21.033). By effectively excluding this class from a basic education, the state is thwarting one of its fundamental educational policies - to require an education of children residing in its state - and "spites its own articulated goals." Stanley v. Illinois, 405 U.S. 645, 653 (1971)

In summary, we believe defendants have failed to meet their burden of justifying the effective exclusion of illegal alien children from schools throughout the state. The state interest in providing adequate education to citizen and legally admitted alien children is legitimate; but, here where such interest is promoted by the effective exclusion of the illegal alien children and where such exclusion does not perceptibly advance that interest in Tyler, we do not believe defendants have adequately met their burden of justifying such discrimination under the appropriate standards of the Equal Protection clause.

This is not to suggest that there may not be less drastic measures available for the state to deal with problems that local schools districts face because of the influx of illegal alien children. The record does indicate that this influx in Texas is greatest in the border school districts and some of the major metropolitan districts. If legislation were tailored precisely to combat effectively the problem where it existed, such legislation might be justifiable.[29/]

29/ Legislation designed to combat the problem and which falls short of effective exclusion of resident illegal children from school might be permissible. For example, in California state statutes provide for state reimbursement to the local district for the actual cost of educating the illegal alien child, but requires local school officials to forward a list of names of such children to the I.N.S. See Calif. Code, §§6950, 6957.

V. SECTION 21.031 DOES NOT IMPERMISSIBLY INTRUDE ON THE FEDERAL GOVERNMENT'S AUTHORITY IN THE AREA OF IMMIGRATION AND NATURALIZATION.

The power to regulate immigration has long been held to be exclusively a federal power. See e.g. Passenger Cases, 7 How. 283 (1849); Henderson v. Mayor of New York, 96 U.S. 259 (1976); Chy Lung v. Freeman 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Hines v. Davidowitz, 312 U.S. 52 (1941) But, as the Supreme Court recently stated in DeCanas v. Bica, 424 U.S. 351 (1970)

> But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised. 424 U.S. at 355.

DeCanas was a suit brought by migrant farmworkers against farm labor contractors for enforcement of a California state statute which forbid employment of "an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The Court applied the test of Florida Lime and Avocado Growers v. Paul 373 U.S. 132, 142 (1963):

> (F)ederal regulation . . . should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.

The Court held:

> In this case, we cannot conclude that pre-emption is required either because 'the nature of the subject matter (regulation of employment of illegal aliens) permits no other conclusion or because 'Congress has unmistakably so ordained.' 424 U.S. at 356.

The Court noted that even if the regulatory scheme might have some purely speculative and indirect impact on immigration it does not thereby become constitutionally proscribed. 424 U.S. at 355. The Court would not presume that Congress, in enacting the Immigration and Naturalization Act, intended to pre-empt state authority to regulate the employment relationship covered by the California statute in a manner consistent with pertinent federal law:

> Only a demonstration that a complete ouster of state power-including state power to pre-mulgate laws not in conflict with federal laws - " 'was the clear and manifest purpose of Congress' would justify this conclusion. 424 U.S. at 357

While DeCanas held that the Immigration and Naturalization Act (INA) did contemplate some room for harmonious legislation in the field of regulating employment relationships within the state, the statute still needed to be examined to determine whether it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the INA. The case was remanded to the district court to make a determination as to "whether the statute can be enforced without impairing federal superintendence in the field." 424 U.S. at 363.

In our view the case for federal pre-emption is no stronger here than it was in DeCanas. Regulation of education, like that of employment, is an important power of state and local government. As was true with employment regulation, there is no specific indication in either the wording or legislative history of the INA that Congress intended to preclude even harmonious state education regulations of aliens in general, or the regulation of undocumented aliens' education in particular.

Plaintiffs urge the Court to distinguish this case from DeCanas primarily on the grounds that §21.031 leaves discretion with local school districts to define who a "legally admitted alien" is, a function which is exclusively the province of federal government under the INA. The Court in DeCanas remanded the case for a determination of whether the phrase "entitled to lawful residence" in the California statute has been enforced in a manner which impaired the "federal superintendence of the field." 424 U.S. at 363

As with the California statute, there is on the face of the Texas statute room for construction which could conflict with the INA. But, the record in this case shows that, as enforced, the statute has not been construed in a manner that conflicts with federal law. Rather, the Tyler I.S.D. has construed the term "legally admitted alien" to mean whomever has appropriate documentation from federal authorities indicating that he or she is legally within the United States or even a person who is in the process of obtaining such documentation. Thus, as construed in this case, the Texas state law does not unconstitutionally conflict with federal law, nor impair "federal superintendence of the field" covered by the INA.[30/]

VI. §21.031 DOES NOT IMPERMISSIBLY INTERFERE WITH THE FEDERAL GOVERNMENT'S AUTHORITY IN THE SPHERE OF INTERNATIONAL RELATIONS.

In 1970 the Protocol of Buenos Aires, a treaty amending the charter of the Organization of American States, was signed by the President. In specific reference to the issue of educational opportunities to be provided, the treaty amendments stated:

> The member states will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right of education on the following basis:

30/ Plaintiffs also attempt to distinguish DeCanas from this case on the grounds that the Texas statute somehow conflicts with those portions of the INA which regulates the registration of minor alien children. But, the short answer to this assertion is that nothing in the Texas statute affects the registration requirements of the act, much less conflicts with them.

a. Elementary education compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the state it shall be without charge.

Plaintiffs have asserted that §21.031 interferes with the federal governments' jurisdiction in the area of international relations. We disagree

It is not disputed that the Protocol is a treaty and that our federal constitution provides that treaties made under the authority of the United States are part of the supreme law of the land. A treaty, however, does not automatically supercede local laws which are inconsistent with it unless the treaty provisions are self-executing. Foster v. Neilson, 27 U.S. 253, 314 (1829). A closer look at the Charter and the Protocol indicates clearly that the cited provisions are not self-executing.

When the Senate gave its advice and consent to ratification of the Charter of the Organization of American States, it attached to its regulation the following reservation:

> That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states. U.S.T. 2484, T.I.A.S. No. 2361 (1951)

Article 47 of the Protocol, which amended the Charter, contained similar limiting language: "The member states will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education . . . ." (emphasis added)

Shortly after President Johnson sent the Protocol of Buenos Aires to the Senate for advice and consent the Committee on Foreign Relations scheduled hearings which

were held on February 6, 1968. The chief witness before the Committee was Ambassador Linowitz, who played a leading role in negotiating the agreement. Senator Fulbright asked him the following question: "Is there anything in these amendments which could be interpreted as changing the relative powers of the federal and state governments within the United States?" The response was: "No, Sir," (Hearing before Committee on Foreign Relations, U.S. Senate 90th Congress Second Session on Executive L, 90th Congress, 1st Session, Amendments to the OAS Charter, Feb. 6, 1968, p. 30). The Committee apparently accepted this position. Moreover, in recommending that the Senate advise and consent to ratification, the Committee concluded: "Although these amendments expand considerably the economic and social articles of the OAS Charter, in the judgment of the Committee they do not expand U.S. obligations in the economic and social fields." (Exec. Rept. No. 1, 90th Cong., 2d Secs., p. 6).

In short, the reservation to the OAS Charter applied equally to the Protocol amending the Charter, and the purpose of inserting the qualifying language in Article 47 was to preclude the argument that the Protocol supercedes local state laws in the administration of their school systems. In this light we do not believe that §21.031 interferes with the obligations of the United States under these treaties.

CONCLUSION

For the reasons stated in Sections II - IV above, we believe that this Court should find that §21.031 of Texas Education Code, as applied by the Tyler I.S.D. in their July, 1977 policy, violates the Equal Protection Clause of the Fourteenth Amendment, and that its enforcement should be permanently enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Post-Trial Brief of the United States upon all counsel of record by sending a copy by United States mail, postage prepaid, addressed as follows:

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