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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DOE, ET AL	X	
	X	
V.	X	CIVIL ACTION NO. TY-77-261-CA
	X	
PLYER, ET AL	X	

POST TRIAL BRIEF OF STATE

This case presents the question whether a state may constitutionally distinguish between legal and illegal residents in providing governmental services. It appears clear that legal aliens or any subclass thereof constitute a suspect classification. Nyquist v. Mauclet, 432 U.S. 1 (1977); Graham v. Richardson, 403 U.S. 365 (1971). However, the U.S. Supreme Court has yet to state that illegal aliens are protected at all by the equal protection clause and its ruling in DeCanas v. Bica, 424 U.S. 351 (1976), clearly indicates that illegal aliens are not a suspect class. Any doubts to the contrary are resolved by the Court's unanimous statement that illegal aliens "have no federal right to employment within the country." Id. at 355. This statement gives rise to a strong argument that, contrary to earlier statements by lower courts, illegal aliens have no equal protection rights. Considering the fundamental nature of the right to employment, see Smith v. Texas, 233 U.S. 630 (1914), the conclusion is inescapable that normal equal protection analysis is not applicable to illegal aliens.

The argument that DeCanas v. Bica is not applicable because the statute applied to employers rather than aliens is wholly without merit. The California statute drew a clear classification based upon legal residency. The propriety of such a classification was central to the Court's decision, ergo the statement concerning the illegal aliens' right to employment. If the classification had been unconstitutional the statute would likewise have been invalid and would not have supported a cause of action. Eisenstadt

v. Baird, 405 U.S. 438 (1972); See Barrows v. Jackson, 346 U.S. 249 (1953).

Accordingly, DeCanas v. Bica controls this case. Texas' decision to provide a free education only to lawful residents rather than to "persons not entitled to lawful residence in the United States, let alone [to go to school here], is certainly within the mainstream of . . . police power regulation." DeCanas v. Bica, supra at 356. Indeed,it makes little sense to require states to educate a class of persons which they may then prohibit the employment of.

Similarly, the theory advanced on the basis of Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), is not applicable to the case at bar. These "status" cases involve lawful residents; there is no authority for the proposition that illegal residence is an impermissable classification. While one may have sympathy with the plight of illegal alien children, they are not the only children who are subject to laws involving criteria over which they allegedly have no control. The basic requirement of residency for a tuition free education prevents many children from attending the school of their choice. Age classifications are even more clearly based upon circumstances beyond a child's control. In the context of deportation, citizen children suffer from the illegal nature of their parents' presence. Encisco-Cardozo v. I.N.S., 504 F.2d 1252 (2nd Cir. 1974); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972). Texas has merely distinguished upon the basis of the child's illegal presence. In any event the "status" argument can only be applicable to younger children. Several of the children involved here are old enough to choose for themselves whether to continue their illegal presence or return to their native country for educational and other purposes.

The record in this case presents a forceful basis for the legislative choice at issue. [1] The evidence indicates that illegal

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[1] It is clear that section 21.031 was enacted as a result of Attorney General Opinion No. 586. However, contrary to the United States' assertion, few illegal aliens were admitted in the one month between the issuance of the opinion and the end of the school year. Furthermore, as the author of that opinion, this writer deems himself to be in a good position to label as ill-considered any claim that the opinion is contrary to the State's position herein. The opinion was based upon statutory construction and merely reports the state of the law some three years ago with respect to any constitutional questions.

alien children as a class are difficult to educate and that their free admission to schools would, from a sociological viewpoint, accomplish little and sacrifice much. The illegal alien child is frequently overage (T.R. 262, 297) and can not be adequately educated at present. (T.R. 208). Illegal aliens are below legal aliens in educational abilities. (T.R. 237-39). Since they generally live in the same areas as legal aliens and Spanish-speaking citizens (T.R. 241-42), they tend to populate inpact areas where schools are already overcrowded. (T.R. 298, 302). Their need for bilingual education together with the lack of bilingual teachers would create a situation where the legal resident or citizen Spanish-speaking child must bear the real cost, a poor quality education. (P.I.R. 144; T.R. 260, 259, 276, 286, 288-90, 293-94). The border areas in particular suffer from the unpleasant choice between poor education and highly burdensome taxation. (T.R. 203, 306). These are also the poorest districts in the state. (T.R. 304).

The evidence shows that free admission of illegal aliens would tend to perpetuate the disadvantaged position of legal Spanish-speaking residents. This loss would not be offset by a significant gain. If the State were to succeed in adequately educating an illegal alien, he would then either be unable to secure employment commensurate with his abilities, DeCanas v. Bica, supra, or would run afoul of the federal government's selective enforcement of immigration laws. (T.R. 205,216,224). The latter result illustrates the basic distinction drawn by the statute; illegal residents may be deported at any time. The State has a strong interest in education of its lawful residents, particularly those who are presently disadvantaged. It need not jeopardize its efforts in this regard by dedicating its limited resources to the education of children who are difficult to educate adequately and who in all likelihood would not return the benefits gained to state or national society.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Arnett, Assistant Attorney General of Texas hereby certify that a true and correct copy of the foregoing instrument has been deposited in the U.S. Mail, Certified, Return Receipt Requested, addressed to Mr. Larry Daves, P.O. Box 1115, Tyler, Texas 75701, Mr. Peter Roos, MALDEF, 28 Geary Street, 6th Floor, San Francisco, California 94108, Mr. John C. Hardy, 200 Peoples National Bank South, Tyler, Texas 75702 and Mr. Joseph D. Rich, Department of Justice, Washington, D.C. 20530 on this the 20th day of July, 1978.

Richard Arnett

RICHARD ARNETT