10-1980

# Certain Named and Unnamed Non-Citizen Children and their Parents v. Texas

Lewis F. Powell Jr.

File

ipb 8/26/80

My edited copy as read to Sally on 8/28

DRAFT

TO: Mr. Justice Powell

FROM: Peter Byrne

DATE: August 25, 1980

RE: A-179, Certain Named and Unnamed Undocumented Alien Children v. Texas, et al.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying pending appeal an injunction entered by the United States District Court for the Southern District of Texas. The district court held that § 21.031 of the Texas Education Code, which prohibits the use of a state fund to educate alien children who are not "legally admittted" to the United States, violates the equal protection clause of the Fourteenth Amendment. The court enjoined state education officials from denying free public education to any child otherwise eligible due to the child's immigration status. The district court denied the State of

Texas's motion to stay its injunction, because the court found that a stay "would substantially harm the plaintiffs and would not be in the public interest." The court of appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their parents. Precise calculation of the number of children in Texas encompassed by this description is impossible; the State estimates that there are 120,000 such children, but the district court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not beeen legally admitted to the United States through established channels of immigration. None, however, ~~are~~ is presently the subject of deportation proceedings, and many, the district court found, are not deportable under federal immigration laws. The district court concluded that "the great majority of the undocumented children ... are or will become permanent residents of this country."

This case came before the district court as a result of a consolidation, by the Judicial Panel on Multidistrict Litiation, of lawsuits filed in all federal judicial district in Texas against the State and state education officials challenging the validity of § 21.031, ~~the only~~ No other state has a similar statute, ~~of its kind in the country~~. The court found that ~~the statute~~ § 21.031

effectively denied an education to the plaintiff children; although they could attend school upon payment of tuition, ~~these fees are~~ such payment is beyond the means of their families. ~~The court~~ held that the equal protection clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on ~~analogical~~ analogous rulings of this Court, see, e.g., Matthews v. Diaz, 426 U.S. 67, 77 (1976)(due process clause applies to aliens unlawfully residing in the United States), and precedents in lower courts, see Balanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975)(dictum). In addition, the court found guidance in the language of the equal protection clause, which extends protection to persons within a state's jurisdiction, and ruled that a state law which purports to act on any person residing within the state is subject to scrutiny under the clause.

The district court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish San Antonio School Board v. Rodriguez, 411 U.S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necesssary for the exercise of other fundamental rights such as voting and free expresssion. Id. at 29-39. The ~~district~~ court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the

question reserved in Rodriguez of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the states, an involvement condemned in Rodriguez. Applying strict scrutiny, the court held the statute violative of the equal protection clause because it was not justified by a compelling state intrerest. While not explicitly so holding, the court also implied that it would hold the statute unconstitutional even if it applied rational basis scrutiny or merely required that the law be substantially related to an important state interest.

II.

"The power of a Circuit Justice to dissolve a stay is well settled." New York v. Kleppe, 429 U.S. 1307, 1310 (1976)(Marshall, J., in chambers). See Meredith v. Fair, 83 S.Ct. 10, 9 L.Ed.2d 43 (1962)(Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> [T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibiltiy of reversal of the lower court's decision; and there must be a likelihood that

irreparable harm will result if that decision is not stayed.

Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974)(Powell, J., in chambers). When an application to vacate a stay is considered, this formulation must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the district court's decision.

~~Prudence~~ Respect for the judgment of the Court of appeals dictates that the power to dissolve its stay, entered prior to adjudication of the merits, ~~by the court of appeals~~ be exercised with restraint ~~rarely~~. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." O'Rourke v. Levine, 80 S.Ct. 623, 624, 4 L.Ed.2d 615, 616 (1960)(Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when ~~the~~ a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order ~~by a Circuit Justice must~~ invade the normal responsibility of that court to provide for the orderly disposition of cases on its docket, ~~and must be based, to a greater degree than usual, on speculation about whether the controversy ever will~~ be ~~resolved fully on its merits in this Court~~. Unless there is a reasonable probability ~~that~~ that the case will eventually come before ~~the~~ this Court for plenary consideration, a Circuit Justice's interference with an interim order of ~~the~~ a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants ~~must~~, therefore, bear an

Rider A - page 6

The District Court's holding that the equal protection clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem, as aliens enter our country in increasing numbers. In more immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the equal protection clause to unlawful aliens appears likely to remain.

augmented burden of showing both that the failure to vacate the stay will probably cause them irreparable harm and that the Court will eventually either grant certioari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the court of appeals, that there is a reasonable probability ~~that~~ that the Court will ~~eventually~~ grant certiorari or note probable jurisdiction. The district court's holding that the equal protection clause applies to unlawful aliens raises a ~~significant doctrinal difficulty~~ difficult question of constitutional significance. It also involves ~~one of the most~~ a pressing ~~social~~ national problem, confronting ~~the nation today~~ as aliens enter our country in increasing numbers. In more immediate terms, the case presents a ~~significant~~ challenge to the administration of Texas public schools of ~~great~~ impotance to the State's residents. The decision of the court of appeals may satisfactorily resolve the immediate question; ~~it is doubtful that it can settle~~ But the overarching question of the application of the equal protection clause to unlawful aliens, ~~which question is of concern to people throughout the country.~~ appears likely to remain,

It is more difficult to say ~~that~~ whether there is a significant ~~possibility~~ probability that a majority of ~~the~~ their Court eventually will agree with the district court's decision. ~~The opinion of~~ the court of appeals will bear heavily on our deliberations. Furthermore, the district court ~~deliberately~~ has expanded the boundaries of constitutional concern. Reasonable minds may differ over the correctness of the court's ruling that unlawful

Thus, while not finding direct support in our precedents, the court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five members of the Court may agree with the holding of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that ~~the Court~~ we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

aliens are protected by an equal protection clause that guarantees children a right to a minimal level of free public education.

Matthews v. Diaz, supra, upheld the power of the federal government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the due process clause. The Court's resolution of the case rested, however, on Congress's necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis ... involves significantly different considerations because it concerns the relationship between aliens and the states rather than between aliens and the Federal Government." 426 U.S. at 84-85. The district court relied explicitly on this distinction in holding that the equal protection clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in San Antonio School Board v. Rodriguez, supra, to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, ~~in each of its significant rulings of law, the court,~~ while not finding ~~real~~ direct support in our precedents, ~~was convinced that its holdings are supported by established could find a place within the existing framework of constitutional analysis.~~

Although the question is close, ~~I conclude that there is a significant possibility~~ it is not unreasonable to believe that five members of the Court ~~will~~ may

This is not to suggest that I have reached any decision on

agree with the ~~decision~~ holding of the district court. ~~This formulation of my prediction of what the Court may decide at some point~~ in the future does not indicate ~~my own views of~~ the merits of this case nor ~~does it indicate~~ that I think it more probable than not that the Court will agree with the district court. Rather, it recognizes that the ~~district~~ court's decision is reasoned, that it presents ~~does not conflict with controlling authority~~ novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to ~~some emebers of the~~ their Court. Further, it may be possible to accept the district court's decision without fully embracing the full sweep of ~~the court's~~ its analysis.

III.

Applicants also ~~Plaintiffs~~ have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The district court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are these children consigned to ignorance and illiteracy, ~~but~~ they also are denied the ~~vitiating and socializing influences~~ benefits of association in the classroom with American students ~~of diverse American backgrounds~~. Instead, it is said that most of the children remain ~~in the stupor of idleness~~ idle,

or premature physical toil, which can so often lead to emotional and behavioral problems. These observations are supported by the district court's findings about the condition of the children in question.

The State argues that the stay works minimal harm on plaintiffs because they have been out of school for five years and absence for the additional year needed to authoritatively settle this controversy will not add further irreparable harm. This argument must be rejected. First, if the stay is not vacated, each child will have wasted a year of his or her life that could have been spent profitably in school. Second, enforced idleness doubtless will lead some of these children into difficulties with legal authorities that will adversely shape their futures. Finally, expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally San Antonio School Board v. Rodriguez, supra, 411 U.S. at 6-17. The State does not allege that it will be compelled to furnish additional funds for the upcoming school year, but submits that its total expenditure will be "diluted" by $70 per

Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with American students. Instead, it is said that most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by ~~the District Court's~~ findings about the condition of the children in question.

The State argues that the stay works minimal harm on ~~plaintiffs~~ applicants because they have been out of school for five years and absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face.

pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is ~~troubling~~ not de minimus. ~~Nonetheless, the burden of this decrease~~ must be borne primarily by the independent school districts, which must manage the burdens of educating additional students.

The core of the State's argument is that the stay was necessary to avoid irreparable harm ~~of~~ to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education; this strain, and that may exposes the districts to a possible cut-off of federal funds, ~~to violation of a federal judicial decree which may be entered in~~ depending upon the outcome of another pending case, and to suits charging violations of state laws governing classroom size in bilingual classrooms. These effects could amount to substantial harm if the probability of their occuraance were substantial. The papers submitted by the State, however, show them to be no more than hypothetical. No federal fund termination has been threatened, no relevent federal decrees pertaining to bilingual education have been issued, let alone violated, and no suits have been instituted or threatened alleging violations of state law.

The real danger to the school districts in the vacation of the stay would be to the quality of education they can offer to their students in the coming year. The admission of numbers of illiterate, solely Spanish-speaking children may ~~must~~ tax the resources ~~and ingenuity of any~~ of a school district. ~~Nonetheless,~~

These contentions seem speculative. Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year.

this burden would fall unequally on the different Texas school districts, depending on the number of children locally to be assimilated and the resources available. The affadavits submitted to the court of appeals, ~~and subsequently to me~~, document the possibility of severe stress only in the Houston Independent School District. Affadavits submitted by the applicants indicate that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilities to provide ~~quality~~ the customary education to all their pupils.

Under these circumstances, I conclude that ~~not all Texas school districts face irreparable harm.~~ The balance of harms weighs heavily on the side of the children in those school districts where ~~serious strain on~~ the ability of the local schools to provide education ~~does~~ will not be threatened. The stay instituted by the court of appeals, which applies to all school districts within Texas, is vacated. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the district court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the ~~immediate~~ operation of the injunction would severely hamper the provision of education to all its students during the coming year, the granting of a stay would be justified.

8/29/80

CHAMBERS DRAFT

# SUPREME COURT OF THE UNITED STATES

No. A–179

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|---|---|
| Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants, *v.* State of Texas et al. | On Application to Vacate Stay. |

[September —, 1980]

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying pending appeal an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code, which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment.[1] The Court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas's motion to stay its injunction, because the Court found that a stay "would substantially harm the plaintiffs and would not be in the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their

[1] Another Federal District Court in Texas had previously held that § 21.031 violates the Equal Protection Clause as applied to the Tyler Independent School District. *Doe* v. *Plyler*, 458 F. Supp. 569 (ED Tex. 1978), *appeal pending*, No. 78–3311 (CA5).

parents.[2] Precise calculation of the number of children in Texas encompassed by this description is impossible. The State estimates that there are 120,000 such children, but the District Court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not been legally admitted to the United States through established channels of immigration. None, however, is presently the subject of deportation proceedings, and many, the District Court found, are not deportable under federal immigration laws. The District Court concluded that "the great majority of the undocumented children . . . are or will become permanent residents of this country."

This case came before the District Court as a result of a consolidation, by the Judicial Panel on Multidistrict Litigation, of lawsuits filed in all federal judicial district in Texas against the State and state education officials challenging the validity of § 21.031. No other State has a similar statute. The Court found that § 21.031 effectively denied an education to the plaintiff children. Although they could attend school upon payment of tuition, the Court further found that such payment is beyond the means of their families. It held that the Equal Protection Clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on analogous rulings of this Court, see, *e. g., Matthews* v. *Diaz,* 426 U. S. 67, 77 (1976) (Due Process Clause applies to aliens unlawfully residing in the United States), and precedents in lower courts, *see Balanos* v. *Kiley,* 509 F. 2d 1023, 1025 (CA2 1975) (dictum), In addition, the Court found guidance in the language of the Equal Protection Clause, which extends protection to *persons* within a State's jurisdiction, and ruled that a state law which purports to act on any person residing within the State is subject to scrutiny under the clause.

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[2] The United States intervened on the side of plaintiffs below and has filed here a statement in support of the application to vacate the stay.

The District Court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish *San Antonio School Board* v. *Rodriguez,* 411 U. S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necessary for the exercise of other fundamental rights such as voting and free expression. *Id.,* at 29–39. The Court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the question reserved in *Rodriguez* of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the States, an involvement condemned in *Rodriguez.* Applying strict scrutiny, the court held the statute violative of the Equal Protection Clause because it was not justified by a compelling state interest. While not explicitly so holding, the Court also implied that it would hold the statute unconstitutional even if it applied rational basis scrutiny or merely required that the law be substantially related to an important state interest.

## II

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe,* 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) ( Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant for certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's

> decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."

*Times-Picayune Publishing Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers). When an application to vacate a stay is considered, this formulation must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision.

Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to ajudication of the merits, be exercised with restraint. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine,* 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that Court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augumented burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful alien residing in our country has risen dramatically. In more

immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Matthews* v. *Diaz, supra,* upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress's necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the states rather than between aliens and the Federal Government." 426 U. S., at 84–85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio School Board* v. *Rodriguez, supra,* to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the Court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the holding of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be

possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

## III

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for 5 years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio School Board* v. *Rodriguez, supra,* 411 U. S., at 6–17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school

year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimus*. The core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative. Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year.

The admission of numbers of illiterate, solely Spanish-speaking children may tax the resources of a school district. The affidavits submitted to the Court of Appeals document the possibility of severe stress only in the Houston Independent School District.[3] Affidavits submitted by the applicants indicate that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilites to provide a customary education to all their pupils.

Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. The stay instituted by the Court of Appeals, which applies to all school districts within Texas, is vacated. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the district court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely hamper the provision

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[3] The State argues that serious difficulties can be expected in the Dallas and Brownsville school districts as well.

of education to all its students during the coming year, the granting of a stay would be justified.[4]

[4] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 2, 1980

A-179 Certain Named and Unmamed Non-Citizen Children
v. Texas

MEMORANDUM TO THE CONFERENCE:

I enclose a draft of a proposed Chambers Opinion by me as Circuit Justice and the most pertinent papers in the case. This is the Texas case that has received considerable public attention. It involves the validity of the Texas statute that prohibits the use of state funds to educate alien childen who are not "legally admitted" to the United States. Suits were filed in all federal districts in Texas, and these were consolidated for trial in the Southern District of Texas.

The District Judge there held that the statute violates the Equal Protection Clause, and enjoined the enforcement of the statute. The Court denied the State's motion to stay its injunction, but the Court of Appeals granted a stay at the State's request.

For the reasons stated in my draft opinion, I am inclined to vacate the stay and allow the injunction to remain in effect pending appeal to the Court of Appeals. The constitutional question is a close one, and normally I would not interfere with the action of the Court of Appeals. In this case, however, it seems to me that the balance of irreparable injury is overwhelmingly on the side of children who already have been denied public education for several years.

Before releasing an opinion, however, I would like to have the views of Justices who may be available this week. I would prefer to refer this to the Conference. But the Chief Justice and others may not return until next week.

In sum, I would like your views as to whether: (1) we should hold this until a quorum is present for a Conference, or (2) I should act as Circuit Justice and enter the order indicated by my draft opinion.

L.F.P., Jr.

lfp/ss

September 2, 1980

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L.F.P., Jr.

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: SEP 2 1980

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. A-179

Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants,
*v.*
State of Texas et al.

On Application to Vacate Stay.

[September —, 1980]

MR. JUSTICE POWELL, Circuit Justice.

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## II

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe,* 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) ( Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

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It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Matthews* v. *Diaz, supra,* upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress's necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the states rather than between aliens and the Federal Government." 426 U. S., at 84–85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio School Board* v. *Rodriguez, supra,* to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the Court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be

possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

## III

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for 5 years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio School Board* v. *Rodriguez, supra*, 411 U. S., at 6–17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school

year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimus*. But the core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative.

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Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely ham-

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: SEP 2 1980

Recirculated:

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. A-179

Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants,
*v.*
State of Texas et al.

On Application to Vacate Stay.

[September , 1980]

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying pending appeal an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code, which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment.[1] The Court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas's motion to stay its injunction, because the Court found that a stay "would substantially harm the plaintiffs and would not be in the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

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per the provision of education to all its students during the coming year the granting of a stay would be justified.[1]

[1] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 2, 1980

RE: No. A-179 Certain Named and Unnamed Non-Citizen Children v. Texas

Dear Lewis:

I do not think it is necessary to hold this application until a quorum is present for a Conference. I agree with your position as stated in your draft opinion, and think that you should enter the order as Circuit Justice.

Sincerely,

Bill

MMcC

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

September 2, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. A-179 - Certain Named and Unnamed Non-Citizen Children v. Texas

I discussed this case with Mr. Justice Blackmun today by telephone. He has asked me to advise you that he is content to have Mr. Justice Powell act as Circuit Justice in this matter.

John P. Dean
Law Clerk
to Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

September 2, 1980

A-179 Certain Named and Unnamed Non-Citizen Children v. Texas

MEMORANDUM TO THE CONFERENCE:

Mr. Justice Stewart has advised me by telephone that while he would ordinarily be very reluctant to interfere with a stay pending appeal granted by a court of appeals, he believes that Mr. Justice Powell should act as Circuit Justice and enter the order as indicated in his draft opinion.

Elliot Gerson
Law Clerk to
Mr. Justice Stewart

Peter - let's talk about tomorrow
A.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 3, 1980

Re: A-179 - Certain Named and Unnamed Non-Citizen Children v. Texas

Dear Lewis:

I am satisfied to leave the matter with you to act as Circuit Justice. I agree with your order.

Sincerely,

TM
T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 4, 1980

A-179 Certain Named and Unnamed Noncitizen Children
v. Texas

MEMORANDUM TO THE CONFERENCE

On the basis of the views expressed by Bill Brennan, Potter, Thurgood and Harry, I am today entering an order vacating the stay of the Court of Appeals in the above case.

This will have the effect of reinstating the injunction issued by the District Court subject to the qualifications stated in my Chambers opinion.

The Justices not yet heard from are, I am told, at various points in their travels.

There is some urgency, as the public schools in Texas already have opened.

L.F.P.

L.F.P., Jr.

SS

# SUPREME COURT OF THE UNITED STATES

No. A–179

Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants,
*v.*
State of Texas et al.

On Application to Vacate Stay.

[September 4, 1980]

MR. JUSTICE POWELL, Circuit Justice.

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II

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe,* 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) ( Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

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Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to ajudication of the merits, be exercised with restraint. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine,* 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augumented burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful alien residing in our country has risen dramatically. In more

immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Matthews* v. *Diaz, supra,* upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress's necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the states rather than between aliens and the Federal Government." 426 U. S., at 84–85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio School Board* v. *Rodriguez, supra,* to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the Court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the Court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be

possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

## III

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for 5 years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio School Board* v. *Rodriguez, supra,* 411 U. S., at 6–17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school

year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimus*. But the core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative.

Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year. The admission of numbers of illiterate, solely Spanish-speaking children may tax the resources of a school district. The affidavits submitted to the Court of Appeals document the possibility of severe stress only in the Houston Independent School District.[3] Affidavits submitted by the applicants indicate, however, that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilites to provide a customary education to all their pupils.

Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely ham-

[3] The State argues here that serious difficulties can be expected in the Dallas and Brownsville school districts as well.

per the provision of education to all its students during the coming year, the granting of a stay would be justified.[1]

[1] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

# SUPREME COURT OF THE UNITED STATES

No. A–179

| | |
|---|---|
| Certain Named and Unnamed Non-Citizen Children and Their Parents, Applicants, *v.* State of Texas et al. | On Application to Vacate Stay. |

[September 4, 1980]

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying pending appeal an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code, which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment.[1] The Court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas's motion to stay its injunction, because the Court found that a stay "would substantially harm the plaintiffs and would not be in the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their

[1] Another Federal District Court in Texas had previously held that § 21.031 violates the Equal Protection Clause as applied to the Tyler Independent School District. *Doe* v. *Plyler*, 458 F. Supp. 569 (ED Tex. 1978), *appeal pending*, No. 78–3311 (CA5).

parents.[2] Precise calculation of the number of children in Texas encompassed by this description is impossible. The State estimates that there are 120,000 such children, but the District Court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not been legally admitted to the United States through established channels of immigration. None, however, is presently the subject of deportation proceedings, and many, the District Court found, are not deportable under federal immigration laws. The District Court concluded that "the great majority of the undocumented children . . . are or will become permanent residents of this country."

This case came before the District Court as a result of a consolidation, by the Judicial Panel on Multidistrict Litigation, of lawsuits filed in all federal judicial district in Texas against the State and state education officials challenging the validity of § 21.031. No other State has a similar statute. The Court found that § 21.031 effectively denied an education to the plaintiff children. Although they could attend school upon payment of tuition, the Court further found that such payment is beyond the means of their families. It held that the Equal Protection Clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on analogous rulings of this Court, see, *e. g.*, *Matthews* v. *Diaz*, 426 U. S. 67, 77 (1976) (Due Process Clause applies to aliens unlawfully residing in the United States), and precedents in lower courts, *see Balanos* v. *Kiley*, 509 F. 2d 1023, 1025 (CA2 1975) (dictum). In addition, the Court found guidance in the language of the Equal Protection Clause, which extends protection to *persons* within a State's jurisdiction, and ruled that a state law which purports to act on any person residing within the State is subject to scrutiny under the clause.

[2] The United States intervened on the side of plaintiffs below and has filed here a statement in support of the application to vacate the stay.

The District Court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish *San Antonio School Board* v. *Rodriguez,* 411 U. S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necessary for the exercise of other fundamental rights such as voting and free expression. *Id.,* at 29–39. The Court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the question reserved in *Rodriguez* of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the States, an involvement condemned in *Rodriguez.* Applying strict scrutiny, the court held the statute violative of the Equal Protection Clause because it was not justified by a compelling state interest. While not explicitly so holding, the Court also implied that it would hold the statute unconstitutional even if it applied rational basis scrutiny or merely required that the law be substantially related to an important state interest.

II

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe,* 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) ( Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's

> decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed."

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Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely ham-

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[1] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

September 4, 1980

A-179 Certain Named and Unnamed Noncitizen Children
v. Texas

MEMORANDUM TO THE CONFERENCE

On the basis of the views expressed by Bill Brennan, Potter, Thurgood and Harry, I am today entering an order vacating the stay of the Court of Appeals in the above case.

This will have the effect of reinstating the injunction issued by the District Court subject to the qualifications stated in my Chambers opinion.

The Justices not yet heard from are, I am told, at various points in their travels.

There is some urgency, as the public schools in Texas already have opened.

L.F.P., Jr.

ss

Rodney D. Hargrave
Florence C. Hargrave

3412 Colgate
Dallas 75225
361-1095

SEP 8 1980

September 5, 1980

Justice Lewis F Powell Jr.
The Supreme Court of the United States
Washington, D.C.

Dear Sir

All honors to you on your wise and just ruling on the matter of the education in Texas of children of Mexican parents, those who are in the United States illegally, although following the first obligation to themselves of survival and a better existance for their families.

That children should suffer from these conditions is, from a humanitarian view, repugnent to anyone professing a regard and care for the poor, and mostly despised.

From an economic sense, we stultify ourselves here in Texas by consigning these children to a life on the streets exposed to all of the evils that abound, where parents are obliged to be away from home to earn a meager living. The cost to society would be far greater, than the cost of educating these children and giving tham a chance to compete in the employment market.

We in the United States are blind to the absolute necessity of better relations with Mexico, and the contempt of the people who rule Mexico, is sharply in focus, witness the Mexican President's ~~reamrks~~ REMARKS on his recent visit to Cuba.

Be charitable on my spelling, I am 75 and get my thinking ahead of my 2 finger typing system.

Hang in there, Judge, and I hope and pray you deliver the message to your associates, if it comes to that.

Sincerely,

Rodney Hargrave

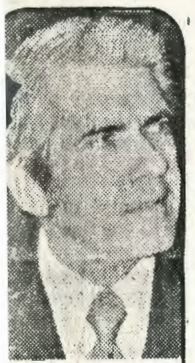
# The Houston Post

Good morning!

It's Friday, September 5, 1980

25 cents


# Free schooling for illegal aliens ordered



**HISD's reaction:**

**After a closed meeting with trustees and lawyers, Tarrant Fendley, Houston school board president, said, 'We are going to uphold the law. We'll treat illegal aliens the same as other kids."**

By JIM CRAIG
Post Washington Bureau

WASHINGTON — Supreme Court Justice Lewis F. Powell Jr. Thursday overturned an appeals court ruling that prohibits illegal alien children from attending free public schools in Texas.

His order that a stay issued by the 5th U.S. Circuit Court of Appeals be vacated has the effect of allowing the undocumented children to enter public schools without paying tuition, at least until the constitutional question can be decided by the full court.

However, in issuing the order and an eight-page opinion that accompanied it, Powell said the action Thursday is not to suggest that he has reached any decision on the merits of the broad constitutional question.

Powell also suggested that the question of whether illegal alien children in Texas have a right of access to free public education will ultimately be decided by the full court.

The 5th Circuit Court of Appeals Aug. 12 stayed a district court ruling that required Texas to allow undocumented children to attend public school free.

In a one-sentence order, a three-judge panel in New Orleans said that pending appeal the stay sought by the state of Texas had been approved.

The Texas attorney general's office had asked the appeals court to delay the implementation of a federal judge's ruling which would have allowed undocumented children to attend Texas schools without paying tuition.

The undocumented children and their parents appealed to the Supreme Court to vacate that stay. Since the application to vacate the stay was an emergency, only the justice who handles 5th Circuit cases had to issue an order and opinion. That is the reason Powell acted alone on the matter.

Powell included in his opinion a provision suggesting that school systems may prove economic hardships caused by the influx of illegal alien students and therefore justify the granting of a stay of the lower court's order that the children should receive free education.

The district court held that the Equal Protection Clause of the 14th Amendment to the Constitution applied to unlawful aliens.

In his opinion issued Thursday, Powell said that finding "raises a difficult question of constitutional significance. It also involves a pressing national problem: The number of unlawful aliens residing in our country has risen dramatically."

Powell said he recognizes that the district court's decision is "reasoned, that it presents novel and important issues. . . ."

The justice said the applicants who asked that the appeals court stay be vacated presented convincing arguments "that they will suffer irreparable harm" unless the stay is overturned.

"Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975," Powell wrote.

"The harm caused these children by lack of education needs little elucidation," he added. "Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds.

"Instead, most of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems," Powell said.

He said the contention by the state that the stay's harm on the children is minimal because they have been out of school for five years is an argument that is "meritless on its face."

Powell said testimony indicates that delays in entering school will tend to "exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate."

After the 5th Circuit stayed the lower court ruling, the Houston Independent School District returned to its former policy of requiring immigration papers or tuition of $162 a month before children can attend school.

Texas is the only state with a law prohibiting use of state funds to pay for education of illegal alien children.

School officials across the state are uncertain of the numbers of illegal alien

Please see Free/page 15A

**Powell's ruling:**

**In his ruling Justice Lewis Powell wrote: "Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation."**

## *HISD to begin enrolling illegal aliens*

By JORJANNA PRICE
and BILL COULTER
Post Reporters

On the heels of a ruling by a Supreme Court justice, the Houston Independent School District announced Thursday it will begin enrolling illegal aliens tuition-free Friday, while three other area school districts also named as defendants in a lawsuit said they will comply as well.

"We are going to uphold the law," Tarrant Fendley, Houston school board president, said after a closed meeting with trustees and lawyers. "We'll treat illegal aliens the same as other kids."

About 3,000 undocumented children are expected to enter HISD classes under the new ruling, according to estimates by both school officials and lawyers for illegal aliens.

Fendley said it was not known how many additional teachers will be needed, but space apparently will not be a problem since enrollment is down 2 percent this year.

An HISD survey this week showed there is room for 3,000 more students in 21 predominantly Hispanic schools.

Officials estimated 600 illegal aliens registered for classes two weeks ago before the 5th U.S. Circuit Court of Appeals stayed an order opening the way for free schooling.

While HISD was assuming an attitude of cooperation Thursday, Fendley said privately he believed Supreme Court Justice Lewis F. Powell Jr.'s order will worsen the problem of Mexicans illegally crossing the Texas border.

"I think we ought to close the damn border," Fendley said. "But

Please see HISD/page 15A

# HISD to begin enrolling illegal aliens

From page 1

Powell just opened it further."

Henry Wheeler, superintendent for the Spring Branch Independent School District, said his schools also will open to illegal aliens Friday. About 30 had registered prior to the stay, he said, adding that the parents of those children probably will be contacted Monday if the children have not appeared at school.

In the Pasadena Independent School District, which saw about 100 undocumented children enroll the first day, attorney Stanley Baskin said, "I am sure we'll do everything reasonable to enroll them. There will be 100 percent cooperation. We won't defy a court order."

Superintendent Johnny Clark of the Goose Creek Independent School District said he expects 70 illegal aliens to enroll Friday, but the Baytown district will be hard pressed to accept most of them in one school heavily damaged by fire last school year.

Clark said there is a possibility the district would appeal that hardship to U.S. District Judge Woodrow Seals, as suggested in Powell's opinion.

While area school officials were making hasty preparations for accepting new students Friday, two weeks after the start of classes, Texas Attorney General Mark White said his office will handle "with dispatch" any complaints of hardship from individual districts.

White said he thought Powell was trying to be "abundantly fair with everyone" in his decision but said he regretted the decision was made after classes had already begun in most of the 1,100 school districts in Texas.

After reading Powell's eight-page order, White declared the state is in a good position to pursue its appeal, which he felt the 5th Circuit will hear in about six months.

Raymon Bynum, deputy commissioner for program administration and finance with the Texas Education Agency, said he had not yet heard of any districts planning to seek individual stays from the court order.

He said TEA will send a letter to all districts with the agency's interpretation of Powell's order. "We'll tell them if they enroll illegal aliens, we'll pay for them," he said.

TEA estimates the open admission practice will cost the state $800 per new pupil enrolled and the local district another $800 per student, he said, adding that the greatest impact is expected in districts along the Rio Grande.

However, Peter Schey, lead attorney in the lawsuit against the state of Texas and 17 school districts, said the plaintiffs are not opposed to overburdened districts receiving individual delays from Seals. Seals is expected to hold a hearing this month on a status report from school districts.

"We have no doubt that a handful of school districts will face serious problems in enrolling the children," Schey said from California. "We were not opposed to that . . . when actual problems rather than grossly exaggerated hypothesized problems appeared from the enrollment of undocumented children."

Lawyers for the illegal aliens admitted surprise when hearing of Powell's ruling.

Local attorney Isaias Torres called it "a long shot. We thought we'll had a slim chance."

He was critical of the manner in which undocumented children were abruptly excluded from Houston schools when the adverse ruling was received from the 5th Circuit.

"Parents were astounded by the way they were immediately cut off from school. They could have done it in a way that was not so abrupt. There could have been some transition to it. Some parents now are hesitant to go back."

Torres indicated lawyers may still have to go to court to get the Dallas school system to admit illegal aliens.

Despite Powell's ruling, Dallas officials said they will admit no undocumented children until ordered by a local court.

Dallas has contended that since it was not individually named in Seals' July 21 order holding state law unconstitutional, then it may continue past policies.

But Torres maintained that Seals' ruling applied statewide.

Texas
Oil

September 8, 1980

Dear Mr. Hargrave:

Thank you for your most gracious note of September 5.

It was good to hear from you. The influx of millions of aliens into our country presents serious problems, but I would hope their innocent children will not be made to suffer.

Sincerely,

Mr. Rodney D. Hargrave
3412 Colgate
Dallas, Texas 75225

lfp/ss

125 Broad Street
New York, N.Y. 10004

October 22, 1980

Honorable Lewis F. Powell, Jr.,
United States Supreme Court,
Washington, D. C. 20543

Re: Certain Named and Unnamed Non-Citizen Children v. Texas

Dear Lewis:

While in Nantucket this summer, I commented to Bill Brennan who was also vacationing there that I thought the decision you made on September 4, 1980 in your capacity as Circuit Justice for the Fifth Circuit was very appropriate inasmuch as there could be no better way of assuring that there would be an increase in criminal law violations by denying the children of illegal immigrants an opportunity for an education.

I understand that the last paragraph of your in-chambers ruling states explicitly that you have not reached any decision on the merits of the case, but nevertheless I hope it will turn out eventually that undocumented alien children will be able to attend Texas public schools.

With kind regards and best wishes, I am

Sincerely yours,

Arthur H. Dean

# Illegal Aliens Get 1st Schooling in Special Classes

BROWNSVILLE, Tex., March 18 (AP) - Until two months ago, 9-year-old Julio ad never held a pencil, used scissors or it at a desk. He still has trouble writing, itting paper and speaking English.

Julio is one of 750 children of illegal liens who are enrolled in local schools r the first time this year under a Fed- al judge's order. Some, like Julio, had ver been to school, even in Mexico.

Before his family moved to this border ty six months ago, he worked on a ranch ing odd jobs. The nearest school was more than 10 miles away in Matamoros, by often impassable roads.

Julio and 26 other youngsters are in a special program for children who lack basic skills in either English or Spanish.

**Problems Encountered Early**

"These youngsters at first went into regular bilingual classrooms, but problems emerged very clearly when teachers found the children had no skills," said Cesar Cisneros, director of elementary education for the Brownsville Independent School District. "You can imagine the frustrations of teachers trying to conduct a regular class when there's one who can't hold a pencil."

Texas law prohibited free schooling for illegal aliens before a Federal judge struck down the statute as unconstitutional in July 1980.

The Brownsville district set up special classes in January at three elementary schools and it plans to start the program in two more schools when teachers are available. Most illegal aliens entering school for the first time are in regular, bilingual classrooms.

At the Cromack Elementary School, Blanca Betancourt teaches eight pupils, from age 9 to 13, in the special program. Her classroom is reminiscent of a one-room schoolhouse. A girl who normally would be in the second grade sits in front of a boy whose peers are in the seventh.

**Difficulties With Age Range**

"It's unbelievable what can happen when a child doesn't get an education," she said. "I never realized there were children with no schooling at all."

The wide age range causes difficulties; some children are sophisticated beyond their years, like one 13-year-old boy who worked as a street vendor after his parents died. He enrolled in local schools after moving in with an aunt and uncle here.

All the children are from families with incomes below the Federal poverty line. Their only experience with English comes in class, unless they follow the teacher's orders to watch American television programs.

Miss Betancourt uses English as often as possible for instruction but frequently switches to Spanish to make herself understood. However, these children with little or no schooling often lack even a basic Spanish vocabulary.

"I must teach them the Spanish word so they will know what I mean when I tell them the word in English," the teacher said.

Instructional materials include first grade-level flash cards and a lot of improvisation. The setting is similar at Egly Elementary School, not far away.

Betty Frausto has seven students, from age 10 to 13, including two who had never been to school.

One of Mrs. Frausto's students, Oscar, lived in Brownsville for three years without going to school. He had been in a Matamoros school before moving to the United States.

"I would go with a friend all the time and try to find a job," the 13-year-old said in Spanish. "But they would tell me I was too young and needed an education." Unable to enroll here because of the state law, he stayed at home.