

In the

ORIGINAL

Supreme Court of the United States

JAMES PLYER, SUPERINTENDENT
OF THE TYLER INDEPENDENT
SCHOOL DISTRICT AND ITS BOARD
OF TRUSTEES ET AL.,

Appellants,

v.

J. AND R. DOE, ETC., ET AL.; and

TEXAS ET AL.,

Appellants,

v.

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
ET AL

NO. 80-1538

NO. 80-1934

Washington, D. C.

December 1, 1981

Pages 1 thru 72

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REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES PLYER, SUPERINTENDENT :

4 OF THE TYLER INDEPENDENT :

5 SCHOOL DISTRICT AND ITS BOARD :

6 OF TRUSTEES ET AL., :

7 Appellants, :

8 v. : No. 80-1538

9 J. AND R. DOE, ETC. ET AL.; and :

10 :

11 TEXAS ET AL., :

12 Appellants, :

13 v. : No. 80-1934

14 CERTAIN NAMED AND UNNAMED :

15 UNDOCUMENTED ALIEN CHILDREN :

16 ET AL. :

17 - - - - -:

18 Washington, D. C.

19 Tuesday, December 1, 1981

20 The above-entitled matters came on for oral
21 argument before the Supreme Court of the United States at
22 10:10 o'clock a.m.

23

24

25

1 APPEARANCES:

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7 PETER A. SCHEY, ESQ., Los Angeles, California;
8 on behalf of the Appellees.

9 PETER D. ROOS, ESQ., San Francisco, California;
10 on behalf of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 80-1538, Plyer, Superintendent of School District, against Doe and the consolidated cases. Counsel, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD L. ARNETT, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ARNETT: Mr. Chief Justice, and may it please the Court, the questions before this Court today may and indeed based on the last year's experience will dramatically affect the future of the state of Texas and some of its school districts.

Texas sits geographically right on top of the hub of Mexico's population, in contrast to California, where the bordering state of Mexico has a population -- had a population of one million in 1970. The four Mexican states bordering Texas had populations of six milion. It is approximately one-third as far to Brownsville from Mexico City as it is to San Diego. When one considers the problem of familial migration into this country, it seems reasonably clear that Texas is indeed the state which will be most dramatically impacted by this type of illegal migration.

When one considers the fact that Mexico's population is doubling approximately every 20 years, and that approximately four and a half million children of

1 school age are out of school in Mexico right now because of
2 lack of adequate facilities, it doesn't take a great deal of
3 imagination to understand the Texas legislature's concerns
4 for the future.

5 With the federal government doing very little to
6 control the problem other than to deny its largess to
7 illegal aliens, and I use that term because it does describe
8 the people that Texas seeks to exclude from its schools,
9 persons who are illegally present in the country, but as I
10 say, with the federal government doing very little, nothing
11 at all realistically, to help the impacted school districts
12 in providing a basic program of education to their
13 residents, be them legal or illegal presently, the Texas
14 legislature enacted Section 21031 of the Texas Education
15 Code in 1975 to curtail the drain of the state's educational
16 resources and those of its districts, which drain only
17 promised to increase in the future.

18 Now, Section 21031 basically codifies two distinct
19 provisions. One denies state funding on the basis of the
20 attendance of pupils who are not lawfully admitted into the
21 state. The other exempts from the requirement for
22 tuition-free admission that is imposed upon the districts
23 those children who are not lawfully admitted into the United
24 States.

25 Those two provisions conceivably could differ in

1 result in this case. The latter, not requiring school
2 districts to admit them, in essence leaves it at the
3 discretion of local districts to review their circumstances.

4 Now, we have raised the issue, and it has been
5 invited certainly by the decisions of this Court, the
6 consistent language of the decisions of this Court,
7 concerning whether illegal aliens are in fact protected by
8 the equal protection clause of the Fourteenth Amendment.

9 Our concerns rest more with the manner of the
10 application of the equal protection clause than they do the
11 application alone. Texas has no interest in legislating in
12 an irrational manner. However, Texas is very interested in
13 having their legitimate interests recognized by this Court,
14 and in the event that they are, we see no problems with
15 that. It largely -- the application of the equal protection
16 clause largely presents a policy issue.

17 We don't really have too much to add to what we
18 have put in our brief on that point, and with the limited
19 time we have here today, we would like to address the manner
20 of any application, as well as the underlying state
21 interests at issue here.

22 QUESTION: Let me ask one question, counsel. If
23 the equal protection clause is not protective of
24 undocumented aliens, could the state of Texas impose harsher
25 criminal penalties upon them?

1 MR. ARNETT: Well, you may have Eighth Amendment
2 problems, it would seem to me, Your Honor. Certainly were
3 the equal protection clause not applicable, and I might add
4 that we have restricted our argument in that respect to
5 governmental services; it seems to us that that is the one
6 area which may do the most -- may cause the most judicial
7 interference with political decisions in this area.

8 QUESTION: There can't be any question, can there,
9 that an alien, documented or undocumented, brought before a
10 criminal court is entitled to the same due process as any
11 other person in the United States?

12 MR. ARNETT: No, Your Honor, it is not, and it may
13 well be that the due process clause in that respect may be
14 read to answer the problem that Justice Blackmun posed as
15 well as that which is also posed by the Fifth Circuit.

16 But in addressing the application of the equal
17 protection clause, the first thing I think we need to look
18 at is the nature of the class at issue. One of the
19 intimations and accusations in this case that I would like
20 to dispel immediately is that this statute embodies any
21 racial animus.

22 This whole case originated in 1975, when a
23 district on the border, Eagle Pass, which has a 95-percent
24 Mexican American population, decided to enact a policy
25 precluding illegal aliens from admission into their

1 schools. The Attorney General of Texas was asked for his
2 opinion as to the legality of that. The response was that
3 under our statutes existing at that time, all residents of
4 any classification, of any status had a right to go to
5 school.

6 Within a month, a Brownsville legislature --
7 legislator, and Brownsville has a 90-percent Mexican
8 American student population, offered an amendment to a
9 pending bill which resulted in Section 21031. Brownsville
10 and the Valley districts are the only districts to have
11 filed amicus briefs in this case. They have representatives
12 here today. They have also suffered a 700-percent increase
13 in the last year in illegal alien enrollment.

14 The purpose of this statute is to protect the
15 Mexican American population's education in Texas. It is not
16 to discriminate against them.

17 When one looks at the class, and indeed, when one
18 looks at the entire area of equal protection as applied to
19 illegal aliens, the first thing we see is the DeCanas case.
20 Now, admittedly, equal protection was not directly before
21 the Court, but I think several commentators have noticed
22 that the language of the court in talking about the state's
23 interest as well as the rights of illegal aliens in that
24 context are very easily transferrable into equal protection
25 terms, and indeed, when one compares DeCanas with Truax

1 versus Raich, it reaches entirely the opposite result.
2 Truax didn't even involve the total denial of employment.
3 DeCanas seemingly allows that.

4 At the same time that Truax was decided, the
5 doctrine at that time was that the governments, the state
6 governments could protect their resources from legal
7 aliens. That has been obviously substantially altered by
8 the decisions of this Court, but the dichotomy between
9 employment in Truax and the government resources in Truax
10 would seem to make our case much stronger here than that of
11 California in DeCanas.

12 In determining what class we are looking at, it is
13 interesting to note that the trial court in Texas versus
14 Certain Named and Unnamed Undocumented Alien Children
15 defined the class to be all children who are or will be
16 excluded from Texas schools. He thus included in that class
17 numerous, in fact, who knows how many -- we feel that it may
18 be a disastrous number in the future -- children that lived
19 -- were currently and are currently living in Mexico.

20 The effect of the lower court's decision is that
21 all they have to do is cross the border, and this is not a
22 border like going through customs, when you come into the
23 United States on an airplane. This is a border that is very
24 easily walked across, and all you have to do is walk in and
25 you will have your rights.

1 QUESTION: Mr. Arnett --

2 QUESTION: You mean walk across the Rio Grande?

3 MR. ARNETT: Yes, Your Honor. There are areas

4 where the river is shallow enough that indeed people walk

5 across the river.

6 QUESTION: There are small places.

7 MR. ARNETT: Well, sir, if you stood there and

8 watched, I understand that you can see quite a flow.

9 Indeed, the border is largely unregulated.

10 QUESTION: But the river is there. The river is

11 the boundary.

12 MR. ARNETT: Yes, sir.

13 QUESTION: And you have to cross the river.

14 MR. ARNETT: No question.

15 QUESTION: General Arnett, if you are dealing with

16 commuters, people who reside outside the district and come

17 across just to go to school, couldn't you handle that

18 problem by just saying you must be a resident of the

19 district in order to attend the school?

20 MR. ARNETT: We do have that qualification.

21 QUESTION: Well, then, you don't need it to deal

22 with the problem of people who live in Mexico and come back

23 and forth, do you?

24 MR. ARNETT: That's right. The problem would be

25 people moving into the United States.

1 QUESTION: So you are really not trying to
2 persuade us that it is a problem dealing with people who
3 commute every day?

4 MR. ARNETT: No, Your Honor, although the problems
5 in enforcing that -- that provision of the code, which is
6 21031(d), are profound for the border districts, and
7 certainly it aids in the enforcement of that regulation as
8 well, these other sections that are at issue here, but we do
9 have a statutory prohibition that technically covers that.

10 Our problems stem from the fact that all parties
11 agree that about 90 percent of the illegal aliens in this
12 country don't bring their families, but with Mexico so close
13 to Texas, and with Mexico's situation as we see it
14 deteriorating, we are very much afraid that cases like this
15 involving the right particularly to education, which is --
16 we agree wholeheartedly that education is extremely
17 important, important to our residents as well, and we feel
18 like that the trend may well be reversed in Texas, that in
19 fact many more may bring their children in. I think --

20 QUESTION: Mr. Arnett, I would like to ask you,
21 please, whether Texas interprets the statute as applying to
22 exclude only students not capable of establishing domicile
23 under Texas law.

24 MR. ARNETT: That question somewhat is analogous
25 to the question in Toll versus Moreno, and I think that one

1 could take the Texas legislature's decision in this regard
2 as being a judgment that one legally not present in the
3 state is not entitled to establish a domicile.

4 QUESTION: Is that Texas's interpretation of its
5 statute?

6 MR. ARNETT: I don't believe that we have had that
7 interpretation addressed by our courts, so for purposes of
8 argument here, I am not really in a position to give the
9 Court an authoritative construction of Texas law, because it
10 hasn't been made by our courts.

11 QUESTION: Assuming that the equal protection
12 clause applies to these students, would you tell me how you
13 would then analyze it, assuming a rational basis test were
14 applied? What is the permissible state objective?

15 MR. ARNETT: Well, there really is one overriding
16 state objective, and that is the preservation of the
17 educational resources of the state as well as those of the
18 districts. Certainly there are -- the problem is localized
19 within Texas. Brownsville has an extremely much more
20 difficult problem than El Paso does, due to the differing
21 nature of the border city in Mexico. As I say, Brownsville
22 has had a 700-percent increase in one year.

23 QUESTION: Do the undocumented aliens in Texas pay
24 taxes, the property taxes, for example, that are used to
25 support the schools?

1 MR. ARNETT: Well, there are various references in
2 the record to that in our briefs. Certainly they are
3 subject -- the property they live in is subject to
4 taxation. Now, whether they in fact add to the taxable
5 resources of the school district, we don't think they do.

6 QUESTION: Does Texas have an income tax, a state
7 income tax?

8 MR. ARNETT: No, Your Honor.

9 QUESTION: You are relying on property taxes and
10 the ad valorem taxes?

11 MR. ARNETT: Sales taxes, but our sales tax
12 exempts necessities, so as I note in our brief, it really
13 involves a great deal of questions upon which there is very
14 little evidence in terms of trying to determine whether
15 there is a -- what the correlation is between taxes and
16 benefits.

17 Concerning our interests, the one interest that
18 Texas asserts here which we have predictably met with
19 opposition on as to whether that is permissible is that as a
20 subsidiary to protecting our resources, we would like to
21 reduce the incentive for illegal immigration, particularly
22 of families and of school aged children.

23 It has been said that we don't have a permissible
24 interest in that regard. It seems to me that the Court's
25 language in Meyer versus Roe, that the state has legitimate

1 demographic concerns about the rate of its population
2 growth, and that such concerns are basic to the future of
3 the state, dispels with that. It also seems to me that the
4 Court's opinion in Sosna versus Iowa, which talked about the
5 interests of Iowa and not having an invasion for a divorce
6 mill type of effect supports that.

7 Hines versus Davidowitz, citing Thomas Jefferson,
8 to the effect that the states, whatever concerns the states
9 alone was left to them; what concerns the nation as a whole
10 was left to the nation. In our case, this problem concerns
11 Texas far disproportionately to any other state in the
12 country. We have two Senators in this nation. We have not
13 been able to get much done about it.

14 QUESTION: General Arnett, this may be sort of a
15 stupid question, but I have some trouble understanding the
16 facts. If you know who all the illegal alien children in
17 the schools are, does the state take any steps to identify
18 their parents and suggest to the federal authorities that
19 they should be removed from the state?

20 MR. ARNETT: Your Honor, the testimony in this
21 trial was that the federal authorities get vastly more
22 references, vastly more complaints of illegal aliens than
23 they are able to handle, and the purpose of --

24 QUESTION: It seems to me that if you can identify
25 10,000 or 11,000 children who are going to school every day,

1 and you know they are residents, it seems to me a
2 particularly easy enforcement problem if you were desirous
3 of getting them excluded, if you know who they are, and I
4 presume you must, if you are going to throw them out of
5 class.

6 MR. ARNETT: Well, what you do -- what we did do
7 is require documentation for admission.

8 QUESTION: I see.

9 MR. ARNETT: And we used those persons that came
10 in after the court's order when we talk about the 10,000
11 figure, and incidentally, those 10,000 may well not have
12 been here at the time of the court's order. One month is
13 plenty of time for a lot of people to cross the border.

14 As far as whether we could reasonably expect INS
15 to deport them, we think not. The evidence in this record
16 is that INS gets complaints from citizens all the time that
17 they don't follow, including addresses.

18 QUESTION: But this is not citizens. This is a
19 state government.

20 MR. ARNETT: Your Honor --

21 QUESTION: Isn't that your question? This is the
22 state government.

23 QUESTION: Yes, it is kind of a puzzling set of
24 facts.

25 QUESTION: You mean INS just paid no attention to

1 a state complaint?

2 MR. ARNETT: Your Honor, INS apparently doesn't
3 pay much -- INS is so underfunded, it is not INS's problem.

4 QUESTION: Well, does that mean that you assume --
5 the other side argues this, and I didn't know what your
6 position was -- that these children will remain in the
7 school district because it is just too much of an
8 administrative burden to get them deported, so they are
9 going to be part of the community anyway, and you would
10 rather have them uneducated than educated?

11 MR. ARNETT: No, Your Honor, that is not what we
12 feel. We feel like it is clear that this statute being on
13 the books prevents a substantial number of these children
14 from coming in. Houston has increased 60 percent in one
15 year; as I have noted before, Brownsville 700 percent;
16 another district it is 100 percent. It is clear that
17 children are coming in to take advantage of the education.
18 That is the problem. The problem is not the kids that are
19 here. The problem is the future.

20 QUESTION: I thought you said 90 percent of the
21 illegal immigration are individuals who do not have children.

22 MR. ARNETT: No, they don't bring their families,
23 Your Honor. It is not that they don't have them. They have
24 them in Mexico.

25 QUESTION: I see.

1 MR. ARNETT: About half of them are married.

2 QUESTION: May I ask this question? I understand
3 you to say the problem was not the children who are already
4 there. I thought I read somewhere in the briefs that so
5 many of these come and go. I think I read somewhere that it
6 was estimated that 90 percent of the illegals are not there
7 permanently. They just come and go. What about that?

8 MR. ARNETT: That poses problems, Your Honor.
9 There is no question about it. There are problems. Don't
10 get me wrong. There are problems resulting from the
11 children enrolled a month after the order, and Mr. Hardy
12 will address some of those problems in the perspective of
13 the school district.

14 But the real serious problem from the state's
15 point of view is the ease with which people can cross the
16 border and the incentive that this causes for further
17 migration, and as we say, if the standard of review was that
18 we had to prove that this offered an incentive, we can prove
19 it now. After a year, we can show the increase.

20 And the problem is one in looking toward the
21 future. We have to plan for a long ways in the future as a
22 state, and it is not the 10,000 that are here that are -- it
23 was not the 182 that enrolled in Brownsville one month after
24 the decision. It is the 1,300, 1,500 that are there now
25 that are causing serious problems. That is my point.

1 QUESTION: Mr. Arnett, returning to the questions
2 with respect to whether the school district should assist
3 the federal government in the deportation of these people,
4 do I -- I have the impression that your friends on the other
5 side take the position that this is purely a federal matter,
6 and the states and local districts have no jurisdiction, no
7 responsibility for identifying deportable aliens.

8 MR. ARNETT: Well, in fact, Your Honor, if you
9 accept the arguments of the other side, that we are
10 infringing upon a fundamental right, or this is a suspect
11 class, or that the state has no interest whatsoever in this
12 matter, then how could a statute or a rule which required us
13 to have the districts ask for documentation and turn them
14 over to the INS be constitutional? That statute would
15 promote exactly the same interests that this statute
16 promotes. It would be a lot less effective.

17 CHIEF JUSTICE BURGER: Mr. Hardy?

18 ORAL ARGUMENT OF JOHN C. HARDY, ESQ.,
19 ON BEHALF OF THE APPELLANTS

20 MR. HARDY: Mr. Chief Justice.

21 QUESTION: Mr. Hardy, before you commence, what is
22 the process for documentation? The briefs are full of
23 reference to undocumented aliens. How does one become
24 documented? And who does it?

25 MR. HARDY: Locally, within the Tyler Independent

1 School District, where this case originated, in the Doe v.
2 Tyler case, we had a local policy that was enacted by the
3 school board to hopefully follow up to the state statute.
4 The state statute requiring -- I am going to argue,
5 hopefully, in a minute, on the residency-non-residency
6 status, but the local policy was that if anyone that wanted
7 to attend the Tyler Independent School District or the local
8 school district on a tuition-free basis, all they had to
9 show was legal residence within our district, then that
10 could be done even if they could show any entitlement or
11 that they were seeking entitlement to be admitted to this
12 country legally, a letter to the Immigration and
13 Naturalization Service that they were applying, any
14 document, not that they had actually received that status,
15 but they were at least attempting to receive that legal
16 status.

17 In our case, I think it is important to note that
18 every one of these students and their parents, they came
19 across the border illegally. They were illegal from the
20 first time they walked across the river. They did not
21 overstay a green card or a work permit.

22 QUESTION: If you say they are illegal, how could
23 Texas determine that they are legal? You say they are
24 illegal when they come across, they stay there for six
25 months or whatever, and you document them as being legal

1 residents?

2 MR. HARDY: Yes, if they have either authorization
3 papers from the Immigration and Naturalization Service --

4 QUESTION: They have to have something from the
5 immigration authorities before you document them?

6 MR. HARDY: No, sir, they could have a birth
7 certificate.

8 QUESTION: From in the United States.

9 MR. HARDY: From the United States. Surely.

10 QUESTION: So if they are still without evidence
11 from the federal government or a birth certificate, they
12 remain illegal and not eligible for the schools?

13 MR. HARDY: That's correct.

14 QUESTION: Well, if a parent has a green work
15 card, does that satisfy it?

16 MR. HARDY: No, sir. It does not. But my point --

17 QUESTION: What is the evidence from INS that
18 satisfies your rule?

19 MR. HARDY: If the people that have come across
20 are residing here on a work permit, a permit that would
21 allow --

22 QUESTION: A work permit issued by whom?

23 MR. HARDY: INS.

24 QUESTION: Right. That is one.

25 MR. HARDY: Yes.

1 QUESTION: What are the others?

2 MR. HARDY: Any legal status, any documentation.

3 We have I think it's an I-20 that it's called that the

4 federal government has for a student permit to --

5 QUESTION: Is that also issued by INS?

6 MR. HARDY: Yes.

7 QUESTION: What is the green card?

8 MR. HARDY: A green card is a work permit. An

9 orange card --

10 QUESTION: Who issues that?

11 MR. HARDY: INS.

12 QUESTION: Isn't that sufficient?

13 QUESTION: A green card is a commuter permit,

14 isn't it?

15 MR. HARDY: A green card is a commuter. An orange

16 card is a work permit.

17 QUESTION: A green card is not sufficient? Is

18 that right? If all you have is a green card, that is only a

19 commuter card.

20 MR. HARDY: No, sir, that is not sufficient. That

21 is basically a three-day pass that you are coming across

22 into the country for a shopping trip or something of that

23 nature.

24 QUESTION: How about a work permit? How about a

25 work permit?

1 MR. HARDY: If they have a work permit and they
2 are residing in this country, that would allow them to
3 attend the schools.

4 QUESTION: Who are they? You mean the parents?

5 MR. HARDY: The parents' children. If the
6 parents --

7 QUESTION: They may bring their children with
8 them, if they have a work permit?

9 MR. HARDY: We allow them and would allow them
10 with a work permit to have their children in the school free
11 of charge. I would like --

12 QUESTION: Mr. Hardy, under Texas law, is it
13 possible for an undocumented alien to become a legal
14 domiciliary of Texas?

15 MR. HARDY: An illegal alien become a legal
16 domiciliary? I --

17 QUESTION: To become a domiciliary?

18 MR. HARDY: I believe it is not. And I will
19 turn --

20 QUESTION: Are there any Texas cases dealing with
21 that question, do you know?

22 MR. HARDY: Justice O'Connor, if there are, I
23 haven't found them, and I know of none.

24 QUESTION: Well, certainly you can't become a
25 legal resident of the United States without some evidence

1 from the federal authorities.

2 MR. HARDY: I agree.

3 QUESTION: Isn't that right?

4 MR. HARDY: That's correct.

5 QUESTION: And so you are telling me that without
6 some documentation it doesn't make any difference how long
7 an undocumented child is present in Texas. You do not
8 recognize them as entitled to go to school or have the
9 privileges of domiciliaries or residents.

10 MR. HARDY: That's correct, because if they do not
11 have legal resident status or domiciliary status legally, it
12 is our argument and our position that they cannot attain the
13 resident status requiring them to attend -- or allowing them
14 to attend school free of charge. I think that the key issue
15 in this point is the classification in the statute. It is
16 not alienage or citizenship; it is between a legal resident
17 and a non-legal resident, or a residency statute and a
18 non-residency statute.

19 The statute provides that non-resident citizens
20 and non-resident aliens are both required to pay tuition.
21 The state classification was based upon a judgment that the
22 state and the school district would provide a free education
23 for those who are legal residents, and I submit to the Court
24 that legal residents is more than mere presence within the
25 boundaries. The Court has continuously held, and I think

1 that it is an appropriate holding, that in higher education
2 branches, that a non-resident of the state can be charged a
3 different tuition than a resident of the state, and we are
4 talking about a resident within the country or a
5 non-resident on legal status, and I think that that is a
6 distinction that has to be to carry it out there.

7 QUESTION: What do you make out of the United
8 States position in this case. The United States suggests
9 that its immigration policy does not pre-empt some efforts
10 of Texas to do what it is doing. At least it suggests that
11 this provision that is at issue here is not invalid because
12 of federal pre-emption. Do you understand that that is what
13 their position is?

14 MR. HARDY: Yes, that if we were to try -- Texas
15 does not have the right or authority -- I think that we are
16 pre-empted from making something along the lines of what is
17 the legal -- how they can come into the country.

18 QUESTION: Do you make out of that that the United
19 States is also suggesting that you could treat these illegal
20 residents or these people who -- you could treat them as
21 legal residents?

22 MR. HARDY: I don't think that we can treat them
23 as legal residents.

24 QUESTION: The United States says that you can do
25 -- at least you can do some things without worrying about

1 the federal law.

2 MR. HARDY: I disagree with that analogy. I
3 don't --

4 QUESTION: Isn't it true that before the statute
5 was passed you received federal funds based in part on the
6 enrollment which included illegal, undocumented children?

7 MR. HARDY: Federal funds, locally our funds are
8 broken down 2 percent federal funds, 40 --

9 QUESTION: Well, whatever the percentage, you did
10 get some federal money which was more because of the larger
11 enrollment attributable to these people, didn't you?

12 MR. HARDY: Yes.

13 QUESTION: So it is pretty hard to say that the
14 federal government has some rule against them being there
15 when it actually paid you money because they were there.

16 MR. HARDY: Well, I would think that you would
17 have to go back and look at the fact that the federal
18 government has a rule that it is against federal law to --

19 QUESTION: For the family to be there. Correct.

20 MR. HARDY: Or for them just to walk -- to come
21 into the country without some documentation. Otherwise, the
22 entire Immigration and Naturalization Service laws and the
23 laws that have been upheld by this Court would have no merit.

24 QUESTION: Does Texas permit illegal aliens to own
25 real property?

1 MR. HARDY: Yes. I would question the word
2 "permit".

3 QUESTION: Well, do you recognize their titles
4 when they come across and manage to remain undiscovered, or
5 even if they are discovered, if nothing is done about them?
6 Suppose you say --

7 MR. HARDY: Well, in our case --

8 QUESTION: Suppose you say to INS, here are a
9 dozen illegal aliens, why don't you deport them and have
10 them take their children with them? And they say, sorry, we
11 are too busy. And those dozen people buy property. And I
12 suppose there are a good many illegal aliens who aren't
13 destitute.

14 MR. HARDY: That's correct. There are some in
15 this case that own, you know, own property.

16 QUESTION: Yes, they own a good deal of real
17 estate. You don't prevent them from doing that.

18 MR. HARDY: Absolutely not.

19 QUESTION: Although it is your law that -- with
20 respect to property, I suppose.

21 QUESTION: Do you give them driver's licenses?

22 MR. HARDY: Some of them have driver's licenses.

23 QUESTION: Can they lawfully obtain a driver's
24 license from Texas?

25 QUESTION: In Texas.

1 MR. HARDY: I do not know the answer to that.

2 QUESTION: And they certainly can buy cars,

3 though, can't they?

4 MR. HARDY: Yes.

5 QUESTION: Could Texas deny them fire protection?

6 MR. HARDY: Deny them fire protection?

7 QUESTION: Yes, sir. F-i-r-e.

8 MR. HARDY: Okay. If their home is on fire, their

9 home is going to be protected with the local fire services

10 just --

11 QUESTION: Could Texas pass a law and say they

12 cannot be protected?

13 MR. HARDY: I don't believe so.

14 QUESTION: Why not? If they could do this, why

15 couldn't they do that?

16 MR. HARDY: Because -- I am going to take the

17 position that that is an entitlement of the -- Justice

18 Marshal, let me think a second. You -- that is -- I don't

19 know. That is a tough question.

20 QUESTION: Somebody's house is more important than

21 his child.

22 QUESTION: Aren't they here at their peril?

23 MR. HARDY: I am sorry?

24 QUESTION: Aren't they here at their peril? They

25 take all the risks, no protection from the government, if

1 they want to come here illegally?

2 MR. HARDY: No. I think that they are afforded
3 all the due process procedures and the other problems that
4 are attributable to that. We are not talking about denying
5 them all rights. I am talking and attempting to talk about
6 the resident and non-resident --

7 QUESTION: You are talking about denying them all
8 rights that every other similarly situated person has, such
9 as fire protection, police protection, garbage collection,
10 things like that. You could take all those things away, it
11 seems to me, under the state's argument.

12 MR. HARDY: I don't believe so. That is not our
13 position.

14 QUESTION: Let me suggest this. If a Virginian
15 went to Texas to spend a year, but had no intention of
16 becoming a domiciliary of Texas, would you allow him or her
17 to attend a Texas public school for free?

18 MR. HARDY: You are placing a one-year requirement
19 on me?

20 QUESTION: No, let's say six months. Let's say
21 six months.

22 MR. HARDY: I know the court's rule on a one-year
23 requirement.

24 QUESTION: Let's say six months. To make it
25 realistic, let's say six months, for one term. Would you

1 allow the Virginian to go to the University of Texas
2 tuition-free?

3 MR. HARDY: I think we would have to look to the
4 merits of that individual case, on the basis of, did they
5 actually set up a legal residence here. They have a right
6 to set up a legal residence here.

7 QUESTION: You don't have a one-year rule such as
8 Virginia does, for example?

9 MR. HARDY: No.

10 QUESTION: Would you hazard a guess as to whether
11 if one came to Virginia from Texas, and his house was on
12 fire three days after he arrived, that Virginia would have
13 any obligation to put the fire out?

14 MR. HARDY: The difference here is that Texas has
15 oil wells for its university and Virginia doesn't.

16 (General laughter.)

17 QUESTION: Doesn't Texas have a non-resident
18 tuition?

19 MR. HARDY: Yes.

20 QUESTION: What is a non-resident?

21 MR. HARDY: It is the same --

22 QUESTION: Somebody who -- if somebody can acquire
23 a residence in a day, whenever they come to the university,
24 they become a resident immediately, don't they?

25 MR. HARDY: That's possible.

1 QUESTION: Is it possible or not?

2 QUESTION: If there is a non-resident tuition, it
3 means that it is not enough just to be there. You are going
4 to have to pay tuition as a non-resident.

5 MR. HARDY: Yes, Your Honor.

6 If I might save the rest of my time for rebuttal.

7 QUESTION: Mr. Hardy, before you sit down, please,
8 how do you compare the children of the undocumented or
9 illegal alien with the illegitimate children that the Court
10 considered in Lalli? The children themselves have a status
11 over which they have no control, the children of these
12 illegal aliens. Does the Texas statute then punish these
13 children for something over which they have absolutely no
14 control?

15 MR. HARDY: At a certain age, I would have to
16 argue that, yes, that the children -- I am realistic enough
17 to know that they don't have either the know-how or the
18 knowledge to go through the process at INS. But I believe
19 that one of the key issues is that the federal government
20 has the law that provides that these people are illegal.
21 They have violated those laws. They cannot attain a
22 resident status. They cannot become a legal resident or a
23 local domiciliary of this country or the state of Texas, and
24 getting away from the equal protection argument and going to
25 the resident, non-resident status and the difference on the

1 basis of tuition charging on that basis I think is
2 appropriate.

3 QUESTION: Well, if the Court were to find that
4 equal protection clause applies to these children, then how
5 do we deal with the question of these children with relation
6 to children such as illegitimate children? Do we have to
7 apply then a heightened -- standard if equal protection
8 applies?

9 MR. HARDY: With all due respect, may I ask that
10 the state address that question in our rebuttal? Thank you.

11 QUESTION: Could I ask you a question before you
12 sit down? It is unfair to you, I suppose, but it
13 demonstrates the interest of the Court.

14 QUESTION: We don't charge the question time to
15 your time, counsel, so you can proceed on that theory.

16 MR. HARDY: Thank you.

17 QUESTION: I think that we tend to confuse the
18 situation when we ask about university tuition charges.
19 Suppose we have Mr. Justice Powell's Virginian going down to
20 the University of Texas as a visiting professor, but he has
21 three elementary school children. He is going to be there
22 for six months. Do you let them into your public schools?

23 MR. HARDY: Absolutely.

24 QUESTION: Do you charge them for it?

25 MR. HARDY: No.

1 QUESTION: Why not?

2 MR. HARDY: The father and family has a legal
3 right, a legal residence, and a legal domicile within our
4 borders.

5 QUESTION: Well, he doesn't intend to stay there.

6 MR. HARDY: But I don't think that that is the
7 test on the domicile of someone that has the right to be
8 within the borders.

9 QUESTION: You are not making the distinction
10 between the American citizen from Virginia and the Mexican
11 American -- or the Mexican citizen.

12 MR. HARDY: To me the analogy is such that a
13 Virginian or someone from Washington, D. C., coming to the
14 state of Texas has that right. They are legal residents of
15 this country, and they can be domiciled under the
16 Constitution wherever they want to be. They have a status
17 that cannot be gained by the people coming across the border
18 from Mexico without some --

19 QUESTION: So if he were a visiting professor from
20 the University of Mexico in Mexico City, you would have no
21 problem?

22 MR. HARDY: No, because I believe that the
23 professor would have the proper authority and the proper
24 identification to be here legally. He would be here either
25 on a work permit, a temporary resident status, or some other

1 indication that would allow him to be here in the country.
2 Under some color or title or interest in law, he would be
3 coming here as an invitee.

4 QUESTION: Does your argument come down to the
5 proposition of whether the person is legally or illegally in
6 the state? Is it not that simple?

7 MR. HARDY: I think that it is that simple, but
8 for some reason I haven't been able to boil it down that
9 simple, that the resident and the non-resident status, I
10 believe, is the key issue before the Court.

11 QUESTION: Well, the states under a long line of
12 decisions are prohibited under all but the most narrow
13 circumstances from prohibiting migration from one state to
14 another within the United States, so that Texas can't fence
15 off its borders to Louisianans or -- whether they be aliens
16 or citizens or anything else.

17 You are saying, aren't you, that the difference is
18 that this is a foreign country.

19 MR. HARDY: Absolutely. I think that being a --
20 we are talking about a federal law. Being a U. S. citizen
21 grants certain rights regarding your movement within this
22 country of any of the 50 states.

23 QUESTION: Mr. Hardy, one last question so far as
24 I am concerned.

25 MR. HARDY: Yes, sir.

1 QUESTION: Could Texas pass a law denying
2 admission to the schools of children of convicts?
3 QUESTION: How about escaped convicts?
4 MR. HARDY: I am sure they could pass a law. I
5 don't know --
6 QUESTION: Would it be constitutional?
7 MR. HARDY: No, it would not. I don't see a
8 rational basis. You are talking about all kinds of
9 constitutional problems.
10 QUESTION: We are dealing with children. I mean
11 here is a child that is the son of a murderer, but he can go
12 to school, but the child that is the son of an unfortunate
13 alien cannot?
14 MR. HARDY: Basically --
15 QUESTION: Who even pays his taxes. The aliens,
16 you know, they pay taxes, too.
17 MR. HARDY: I don't want to move too far -- I can
18 answer that question, but one thing that would concern me, I
19 realize it is only a federal misdemeanor crime --
20 QUESTION: Isn't your point the alien point only?
21 Isn't that it?
22 MR. HARDY: I think that, yes, sir, that is one of
23 the main points.
24 QUESTION: Very well.
25 MR. HARDY: Thank you.

1 CHIEF JUSTICE BURGER: Mr. Schey?

2 ORAL ARGUMENT OF PETER A. SCHEY, ESQ.,

3 ON BEHALF OF THE APPELLEES

4 MR. SCHEY: Mr. Chief Justice, and may it please
5 the Court, I would like to follow up on some of the issues
6 that the Court has already raised, and perhaps also clarify
7 some factual questions.

8 Firstly, the state of Texas seems to argue that it
9 is in a highly unique situation, and they downplay the
10 importance of this problem to states like California, et
11 cetera. This Court should note that it is a matter of
12 public record -- Immigration and Naturalization Service
13 keeps statistics on these kinds of matters -- that in fact
14 the state of California has a much larger non-citizen
15 community than does the state of Texas.

16 QUESTION: I have great problems with who has got
17 accurate figures as to aliens. I mean, do aliens register?
18 No.

19 MR. SCHEY: This is a difficult --

20 QUESTION: Are they known? No. What is this, a
21 guess?

22 MR. SCHEY: It is a difficult figure to measure.
23 However, according to, Number One, apprehension statistics,
24 which are gathered by the Immigration Service, and Number
25 Two, numerous, in excess of hundreds of demographic studies

1 which have been conducted both by the Department of Labor,
2 the Department of Justice, the Department of State, they are
3 able to ascertain where the majority of people are moving
4 to, where the majority of people are living, where the
5 majority of people are paying taxes, et cetera.

6 QUESTION: Well, don't most Texas school
7 districts, when you come for your kindergarten or first
8 grade or whatever it is, ask you to fill out a simple form
9 asking where you were born and what country you are a
10 citizen of?

11 MR. SCHEY: Yes, they do, and contrary to the
12 position taken by counsel for Texas, the District Court
13 specifically noted that those kinds of questions, the
14 District Court opinion at Page 574, that those kinds of
15 questions to produce proof of legal citizenship in this
16 country are directly targeted against Spanish surnamed
17 students in the schools.

18 QUESTION: Well, you are not arguing in the
19 District Court now. This is the Supreme Court.

20 MR. SCHEY: I understand that, Your Honor, but
21 just as a finding of fact and in terms of what the proof
22 was, I merely raise it for that reason. I think it is
23 important to note that not only did the state of Texas seek
24 federal funding for both bilingual and migrant education
25 prior to 1975, when they enacted this statute, but they have

1 continued to do it since 1975.

2 In fact, the unequivocal testimony and conceded in
3 their reply brief is that to this day they send out
4 so-called migrant recruiters, who go out into the Mexican
5 communities, not just by counting these people for purposes
6 of the census count, but they actually send out what they
7 call migrant recruiters into the Mexican communities, where
8 they knock on doors, they go to the -- they knock on
9 residential homes, and they recruit undocumented children,
10 which means they fill out little pieces of paper which they
11 then send to the federal government, and pursuing this way,
12 they not only gain a windfall by taxing the parents of these
13 children and then not educating the children, but they gain
14 a further windfall by submitting these pieces of paper to
15 the federal government and by getting \$250 million per year.
16 One quarter of the total national allocation for migrant and
17 bilingual education goes to the state of Texas.

18 QUESTION: Is that true of the Tyler School
19 District?

20 MR. SCHEY: That is true of all the school
21 districts.

22 QUESTION: That isn't a border --

23 MR. SCHEY: That is true of all the school
24 districts in the state of Texas.

25 QUESTION: Are you suggesting they get these slips

1 filled out and use them to get federal funds but do not
2 admit those children?

3 MR. SCHEY: Precisely. That is the finding of the
4 District Court. There are three or four witnesses who
5 testified to that, including the people themselves who are
6 going out --

7 QUESTION: And that is true in the school district
8 or districts involved here?

9 MR. SCHEY: That is correct. Including -- people
10 testified in our trial who went out and were knocking on
11 these doors to fill out these applications. Some little
12 church set up a little school where they had maybe 50
13 undocumented children in one big room, and these recruiters
14 would come around and fill out little pieces of paper.

15 QUESTION: What do you mean by recruiters?

16 MR. SCHEY: That is just what they call them.
17 They call them migrant recruiters. They are employees of
18 the state --

19 QUESTION: Recruiters for what?

20 MR. SCHEY: Excuse me?

21 QUESTION: Recruiters for what?

22 MR. SCHEY: They are simply recruiting these
23 little pieces of paper, is what they are really doing. That
24 is the title given to them by the state of Texas. They go
25 out and they complete little forms which measure the total

1 number of migrant children and the total number of children
2 needing bilingual education in the state. They submit this
3 to the federal government, and the state of Texas alone ends
4 up with one-quarter of the national federal moneys.

5 QUESTION: Was there testimony that any of these
6 recruiters were from the Tyler School District?

7 MR. SCHEY: I am not sure if there was. We had
8 about five or six different school districts that were
9 involved in the consolidated case. I think that the
10 particular recruiter who testified in our case was from the
11 Dallas Independent School District, and we called that
12 person, but also a statewide official testified from the
13 Texas Education Agency.

14 QUESTION: Dallas is a considerable distance from
15 Tyler.

16 MR. SCHEY: I am sorry?

17 QUESTION: Dallas is a considerable distance from
18 Tyler. There must be several school districts in between.

19 MR. SCHEY: That's correct, but -- that's correct,
20 but this is a state program, and what I am saying is that a
21 statewide official testified that this was happening.

22 QUESTION: But I mean there must be several school
23 districts in between.

24 MR. SCHEY: That's correct, and it apparently is
25 happening in every school district in between, because it is

1 a statewide program. It is the Texas Education Agency that
2 is doing this.

3 I would also like to point out that the residency
4 question has raised many, many questions here. The state
5 has a residency law, as they have pointed out. That
6 residency law worked fine. That residency law worked until
7 1975. Under that residency law, people who attempted to
8 just come across the border solely for the purpose of going
9 to school, there is a special provision within their
10 residency law that prevents people from simply coming across
11 the border for the sole purpose of going to school, and a
12 federal challenge to that statute was just completed in the
13 Fifth Circuit, and that statute was upheld, so that a child
14 cannot -- the name of the case is Arredondo versus
15 Brockett, and there is a petition for cert pending. So,
16 children cannot simply willy-nilly come into the school,
17 stay there for a few days, solely for the purpose, leave
18 their parents behind, and attend school in Texas.

19 The state of Texas defines undocumented people as
20 residents for numerous purposes, trusts, wills, some
21 criminal proceedings, for the payment of property taxes, so
22 they have had no trouble -- neither has the federal
23 government, for that matter, had trouble defining people who
24 are in a questionable immigration status, not a lawful,
25 permanent status with the green card.

1 QUESTION: I am having difficulty seeing what your
2 observations have to do with this case. The issue before
3 the Court is whether a person illegally in the state of
4 Texas and in the United States is -- must be granted these
5 services. What they do in these other areas has nothing to
6 do with this case.

7 MR. SCHEY: Well, Your Honor, the problem with
8 that characterization of the issue of the case, which is the
9 way the state of Texas characterizes it --

10 QUESTION: Well, how would you characterize it?

11 MR. SCHEY: -- illegal aliens, the problem with
12 that is that that is a term, that is a term that you can
13 certainly read every day of the week on the front page of
14 the Washington Post. It is not a term that you will find on
15 any page of the Immigration and Nationality Act. In other
16 words, the problem is, and this Court addressed fully this
17 problem in DeCanas versus Bica -- let me just explain.

18 In DeCanas versus Bica, the state of California
19 didn't beat the federal government to the punch. The state
20 of California only excluded from employment those people who
21 the federal government had already determined could not work
22 in the state, and even with that this Court was not
23 satisfied, and remanded the case for a finding of potential
24 conflict with federal law.

25 But here, you have a statute that every district

1 court judge that has looked at it carefully and that has
2 examined the Immigration and Nationality Act, that the state
3 is going to incorporate a federal concept. They have to do
4 it somewhat carefully. That is the notion of pre-emption.
5 And it also ties into the rationality of the statute. Who
6 precisely are they keeping out of school?

7 Well, in this particular case they keep out of
8 school "illegal aliens". Well, that term isn't used
9 anywhere in the Immigration or Nationality Act. Under the
10 Immigration and Nationality Act, the legality of a person's
11 presence in this country is measured against deportation
12 statutes. The statute says you cannot go to school if you
13 did not enter the country legally, but there are thousands
14 upon thousands of children who did not enter the country
15 legally, yet they are entitled to remain in the United
16 States.

17 There are numerous statutes, there are numerous
18 regulations, and these are all covered in our brief, there
19 are numerous policies, there are operation instructions
20 which allow people to remain here even though they did not
21 enter "legally" as the District Court held. Upon looking at
22 this carefully, this particular statute, and its
23 implementation, has been a monument to ambiguity. They
24 really don't know who they are keeping out of school.

25 Let me give you one example. We had a witness

1 testify in our case, not a plaintiff -- and none of our
2 plaintiffs are under order of deportation; they all entered
3 illegally, but every single one of them is documentable
4 under federal immigration laws -- aside from the plaintiffs,
5 we had a witness testify. This witness entered the United
6 States at the age of four months. Her father is a United
7 States citizen born in Texas. Her mother is a lawful
8 permanent resident. She has been in the United States for
9 nine years. She has attended school in two states.

10 This also gets to your question, Justice
11 Rehnquist, about putting up a wall between other states.
12 She didn't come to Texas from Mexico. She came to Texas
13 from, I believe, Missouri, or New Jersey, where she attended
14 school for two years. This child will never be deportable
15 from this country. Maybe the New York Times would call her
16 an illegal alien, but no immigration judge would ever call
17 her an illegal alien. No court would ever authorize her
18 deportation.

19 QUESTION: You refer to her as documentable. What
20 does that mean?

21 MR. SCHEY: That means, Your Honor, that when she
22 gathers the necessary documents, when she gathers her
23 mother's birth certificate -- her mother was born in the
24 Yucatan, and she is represented by an immigration counsel,
25 and her immigration counsel testified that he had been

1 working for two years trying to get the mother's birth
2 certificate from the Yucatan. Then they had to get the
3 father's birth certificate from Texas. When they finally
4 gather all that preliminary documentation, they can go down
5 to the Immigration Service and begin the process of
6 documenting that child. We had the ex-commissioner --

7 QUESTION: Had this been done at the time of trial?

8 MR. SCHEY: They were in the -- for two years they
9 had been in the process of gathering the preliminary
10 documentation. Now, once they go down to the Immigration
11 Service, the Immigration Service doesn't do anything. They
12 have a thousand people show up every morning filing these
13 kinds of applications. They will only give you the kind of
14 letter that counsel for the state of Texas keeps talking
15 about. Well, we will let these children in once they get a
16 letter saying they are legally here. The Immigration
17 Service doesn't give out those kind of letters. What they
18 will do is, once they have processed the child's
19 documentation, they will give that child a green card, or
20 they may even decide that this particular witness is a
21 derivative citizen, and they will then give her citizenship
22 papers.

23 The ex-commissioner of the Immigration and
24 Naturalization Service testified in our trial. That process
25 can take anywhere from two to seven years, given current

1 backlogs. He testified and an immigration judge testified
2 subsequent to this little child testifying that the chances
3 of this child ever being deported were simply zero.

4 So, we can say, well, who does this case involve?
5 Doesn't it simply involve legal versus illegal aliens?
6 Unfortunately, it is not that simple. Here is a little
7 child who had been for two years in a row, she had gone and
8 tried to enroll in the Texas public schools. She was not
9 allowed to enroll, even though she had an immigration
10 counselor go down to the school with her. They wouldn't let
11 her enroll. She is the child of a U. S. citizen. This
12 immigration counselor testified he had approximately 200
13 open cases just like hers in Houston alone. Children of
14 United States citizens who could not attend the public
15 schools in the state of Texas.

16 QUESTION: Your time is running. Isn't your basic
17 position that in any event, however here, even though
18 admitted illegally, these children are persons under the
19 Fourteenth Amendment, entitled to protection of the equal
20 protection clause, and that that has been denied them, and
21 that this statute doesn't satisfy whatever the standard may
22 be of state interest? Isn't that your position?

23 MR. SCHEY: That is our basic position.

24 QUESTION: Well, are you going to argue it? I
25 haven't heard a word on that.

1 MR. SCHEY: That is our basic position. Our basic
2 position is that regardless of a child's deportability or
3 non-deportability, in fact, none of these children have been
4 established to be deportable, the state has not established
5 any rational basis for excluding these children from the
6 Texas schools.

7 QUESTION: Mr. Schey, would you concede that it
8 would be possible, assuming the equal protection clause
9 applied, that it would be possible for a state to provide
10 its public school education only to domiciliaries of the
11 state.

12 MR. SCHEY: Yes, and that is precisely what
13 happened in Texas until 1975. In 1975, let us assume that a
14 child --

15 QUESTION: All right. You would concede that that
16 is possible.

17 MR. SCHEY: I think it is possible. In other
18 words --

19 QUESTION: All right. Can a child of an alien who
20 has no authority to be in the United States of any kind, and
21 the child is not born here, can that child become a
22 domiciliary?

23 MR. SCHEY: Yes, and I believe Texas law provides
24 for that. Texas --

25 QUESTION: Under Texas law.

1 MR. SCHEY: Under Texas law.

2 QUESTION: How?

3 MR. SCHEY: The Attorney General of Texas wrote a
4 memorandum, which is in evidence in our trial, to that
5 effect in 1975, and counsel has indicated it was in response
6 to that memo, partly in response to that memo, that they
7 enacted this statute. In other words, I think that is
8 essentially a matter of state law.

9 QUESTION: Could a state legitimately have laws
10 that would prevent such a person from becoming a domiciliary
11 of the state?

12 MR. SCHEY: I would, as a constitutional matter, I
13 think that that is conceivable. I think that a state law
14 which was carefully tailored to track federal immigration
15 laws and policies as opposed to this law where they conceded
16 at trial they hadn't even been in touch with the immigration
17 service for five years, to update themselves on policy, but
18 conceivably if they were to carefully track immigration
19 laws, regulations, and policies, and let me give you an
20 example that I could conceive of. A child is under a final
21 non-appealable order of deportation. The federal government
22 has made a judgment on that child or that child's parents'
23 ability to reside in this country. I could -- I am not
24 suggesting that from a -- I am not saying that that would be
25 wise legislation, but I think conceivably it would be

1 rational legislation.

2 That is what California has done. California has
3 a welfare and institutions code, 11-104, which --

4 QUESTION: You are now getting into your
5 colleague's time, counsel.

6 MR. SCHEY: Thank you very much.

7 CHIEF JUSTICE BURGER: Mr. Roos?

8 ORAL ARGUMENT OF PETER D. ROOS, ESQ.,

9 ON BEHALF OF THE APPELLEES

10 MR. ROOS: Mr. Chief Justice, Members of the
11 Court, as Mr. Schey has articulated, it is our view that the
12 nub of this case is that undocumented children are similarly
13 situated to their permanent resident and citizen
14 classmates. I would like to highlight some of those facts,
15 and then get into the legal discussion that the Chief
16 Justice asked about concerning -- and Justice Brennan,
17 because the issues are on the table.

18 With respect to the residency situation, I think
19 it is highlighted by the fact that the plaintiffs in the Doe
20 trial have been here for a number of years. Indeed, the Doe
21 family has been here since 1964. They own property in
22 Tyler. They pay taxes on that property. Their children
23 attended schools for five or six years before they were
24 excluded from those schools.

25 QUESTION: But they are not legal residents or

1 legally authorized aliens in this country?

2 MR. ROOS: They are unlawful aliens in this
3 country. They came to this country unlawfully, but they
4 have been here for 15 years. They have paid taxes. Their
5 educational needs are the same as other children. Indeed,
6 these children -- there is a lot of discussion in the briefs
7 about the unique educational needs of undocumented
8 children. Indeed, undocumented children are like other
9 children. Some, like the Doe children, have been here for
10 15 years, have no English language problems, have no
11 particular problems whatsoever. Others are new immigrants,
12 and as the testimony shows, like new immigrants, like all
13 new immigrants, they may have language needs, may have
14 various other needs, but indeed, to fence out a class of
15 undocumented children is to fence out a class of children.

16 QUESTION: What is your explanation for the
17 parents' continued stay in the country unmolested by the
18 federal government?

19 MR. ROOS: The testimony in both the Doe trials
20 and in the other trial was that indeed the Immigration and
21 Naturalization Service has very limited resources. They do
22 not go after families except in a rare instance. That is in
23 the record. The district --

24 QUESTION: Are you suggesting that there is a
25 tacit or unexpressed federal policy that these people should

1 remain in the country undisturbed?

2 MR. ROOS: I think the one --

3 QUESTION: Is there something in the record to
4 support that?

5 MR. ROOS: There certainly is something in the
6 record.

7 QUESTION: Is there any finding by the courts or
8 not?

9 MR. ROOS: The -- yes, in the In Re Alien Children
10 case there was such a finding.

11 QUESTION: In what case?

12 MR. ROOS: We have two consolidated cases that --

13 QUESTION: Just tell me the number.

14 MR. ROOS: The In Re Alien Children number is 1934.

15 QUESTION: 1934?

16 MR. ROOS: 1934, Your Honor, and that finding is
17 based upon testimony of Leon L. Castillo.

18 QUESTION: What is the finding?

19 MR. ROOS: The finding is that there is a de facto
20 amnesty policy in the United States.

21 QUESTION: So they are de facto legally resident
22 in the United States?

23 MR. ROOS: That is correct, Your Honor.

24 QUESTION: You think that is the finding?

25 MR. ROOS: Yes, and that was the testimony of Mr.

1 Castillo's. That is not the official policy, but that is
2 the de facto policy. When you have --

3 QUESTION: But can any person who is here in
4 violation of an Act of Congress be a de facto legal resident
5 if the Act of Congress says he is not a legal resident?

6 MR. ROOS: I suppose without getting into -- I
7 think when the term was used by the former commissioner of
8 the Immigration and Naturalization Service, he was not using
9 it as a term of art, he was using it to describe the
10 situation. These children are here. They are going to
11 remain here. And that testimony was repeatedly --
12 repeatedly repeated by his subordinates, the director of
13 the Immigration and Naturalization Service in Dallas and the
14 director in Houston, that indeed they do not find families.
15 Families generally are not reported to the Immigration and
16 Naturalization Service, and thus in fact will remain here.

17 Mr. Castillo also in making the statement observed
18 that, as others observed in the record, that indeed there
19 are something like 250 INS border patrol agents for 2,000
20 miles of Texas border, a number that is substantially fewer
21 than the number of police in Dallas, Texas. Those
22 statistics, I think, tell us something about the commitment
23 to manning the border, and certainly tell us the likelihood
24 of these children ever being identified and deported.

25 QUESTION: May I ask you, would it be contrary to

1 federal law if state authorities when they found aliens who
2 were illegally in the country to escort them to the border
3 and tell them to go home? Is that contrary to federal law?

4 MR. ROOS: I believe it would, Your Honor, under --

5 QUESTION: Well, is there some case that says that?

6 MR. ROOS: Well, Hines versus Davidowitz, and the
7 line of cases under pre-emption. Those cases make clear
8 that regulating the ebb and flow of a national border is
9 exclusively a federal --

10 QUESTION: Of course, that was a state law. That
11 was a state law. But suppose just as a self-help matter,
12 the state escorted people to the border. Do you think that
13 is contrary to -- they would have no authority to do that?

14 MR. ROOS: I would certainly argue that they would
15 not, and the policy reasons that underline Hines and those
16 cases would militate against permitting such a policy.

17 QUESTION: What about a posse comitatus, where a
18 judge is theoretically, he may have difficulty doing it, but
19 he is entitled to call upon bystanders to enforce an order
20 of a court. Wouldn't the people escorting these people to
21 the border be much like a posse comitatus? They are not
22 officially endowed with status, but they are helping to
23 enforce a federal statute?

24 MR. ROOS: I would think, Your Honor, if there
25 were an express policy of the federal government permitting

1 states to engage in this sort of activity, that the policy
2 implications of Hines and other cases would not be -- would
3 not be implicated, but absent essentially a deputizing of
4 state officials --

5 QUESTION: Well, what about DeCanas?

6 MR. ROOS: What about?

7 QUESTION: What about our employment case?

8 MR. ROOS: DeCanas, Your Honor. I suppose it is
9 notable for purposes of this case that of course DeCanas was
10 not an equal protection case.

11 QUESTION: Well, I was just talking pre-emption.
12 That is all you were talking just a moment ago.

13 MR. ROOS: Yes. Well, as I read DeCanas, it
14 allows states to enact laws that have purposes other than
15 regulating the border, and if those purposes have --

16 QUESTION: What if the purpose is to deter coming
17 to this country? What about DeCanas?

18 MR. ROOS: Your Honor, we believe that such a
19 purpose ought to be declared impermissible under the equal
20 protection clause, putting aside any implications it may
21 have under pre-emption, that under this Court's rulings,
22 that for a state to go about regulating the border, to have
23 as a --

24 QUESTION: So you think if the state of Texas
25 passed a law that said aliens illegally in the country may

1 not be employed, that it would be unconstitutional?

2 MR. ROOS: Your Honor, we have given that matter
3 considerable thought.

4 QUESTION: I would think you would.

5 MR. ROOS: It seems to us that this Court's
6 alienage decisions, equal protection decisions have always
7 kept one eye on what the federal government has done, and in
8 this particular area, when we are talking about employment,
9 the federal government has essentially prohibited the
10 employment of undocumented aliens. Now, it is our belief
11 that indeed, that not only is this legislation irrational,
12 but indeed ought to be measured under a compelling state
13 interest test.

14 QUESTION: But suppose it isn't.

15 MR. ROOS: Even supposing it isn't, Your Honor, we
16 believe that where there is an express federal purpose, such
17 as barring undocumented people from work, that if a state
18 passes a law to essentially implement that express federal
19 purpose, then this Court ought to look at that with the
20 deference it gives to Congressional --

21 QUESTION: Well, the federal government has a law
22 against illegally entering the country, a criminally law,
23 illegally entering the country. And they budget a lot of
24 money to keep people out. Now, a state says, we would like
25 to help the federal government do that, just like -- just in

1 the same way you said they could supplement the federal law
2 with respect to employment.

3 MR. ROOS: First, I suppose there are two levels
4 of response, Your Honor. The first level is that --

5 QUESTION: Mr. Roos, why don't you use the
6 Fourteenth Amendment in one of your responses?

7 QUESTION: Well, I am asking him about
8 pre-emption. I am not asking about the Fourteenth Amendment.

9 QUESTION: I haven't heard the Fourteenth
10 Amendment or whether or not this is a person yet, and this
11 is about five minutes from the end of the argument.

12 MR. ROOS: I will address that.

13 QUESTION: Two minutes.

14 QUESTION: Two minutes.

15 MR. ROOS: Yes, Your Honor.

16 QUESTION: I think some time we ought to get an
17 argument on whether or not these children are persons within
18 the Fourteenth Amendment.

19 MR. ROOS: Your Honor, if you would address your
20 question again.

21 QUESTION: You are on your own.

22 (General laughter.)

23 MR. ROOS: Let me address Justice Marshal's
24 question briefly. It obviously is a central --

25 QUESTION: It is not mine. I bet you even money

1 some others are interested in that point.

2 MR. ROOS: The equal protection clause speaks in
3 terms of coverage of persons, and it is to be contrasted
4 historically with the clause that immediately precedes the
5 equal protection and due process clause, which grants
6 privileges and immunities to citizens. This Court has
7 looked to the due process and equal protection clause, or to
8 the due process clause and have said that persons are
9 undocumented -- include undocumented persons, because they
10 are indeed persons.

11 The legislative history which we have set forth in
12 our brief tells us really two things. It first of all tells
13 us that the primary framers of the Fourteenth Amendment
14 clearly thought of, at least in terms of coverage, of the
15 due process clause and the equal protection clause as
16 protecting the same group of people. In our brief, we cite
17 to Representative Bingham, who was commonly acknowledged to
18 be the author of Section One of the Fourteenth Amendment,
19 and he spoke of the due process and equal protection clauses
20 alike as protecting the citizen and the stranger.

21 QUESTION: Do you think Representative Bingham's
22 comments throughout those debates were consistent with one
23 another?

24 MR. ROOS: Were --

25 QUESTION: Consistent with one another?

1 MR. ROOS: Certainly with respect to coverage. We
2 have found, and there is not cited in any opposing brief,
3 and there are, as the Court is aware, any number of opposing
4 briefs --

5 QUESTION: Well, there is the Congressional vote,
6 too.

7 MR. ROOS: Certainly. We found nothing that would
8 indicate that insofar as coverage is concerned, that
9 Representative Bingham said anything inconsistent with
10 that. Likewise, on the floor of the Senate, the floor
11 manager was Senator Howard, and Senator Howard spoke of the
12 two clauses in terms of coverage in the same words, and
13 spoke of them together, and when he spoke of them, he spoke
14 of them as protecting whomever should be within the country.

15 So, I believe on the basis of the clear language
16 of those provisions, the history, and indeed the logic which
17 has been pointed out earlier, absent the right of coverage
18 under the equal protection clause, the state could do, could
19 treat undocumented people arbitrarily and irrationally.
20 What would be the limitations upon a state should there not
21 be the minimal protection of the equal protection clause?

22 So, as well as the clear language and history of
23 that clause, we believe that logic compells a similar
24 finding.

25 QUESTION: If Texas is giving -- is required to

1 give free bilingual education to all the illegals who want
2 to come to the United States from Mexico, which they
3 apparently can do almost without any limit or hindrance,
4 does that tend to encourage or discourage the continuance of
5 this illegal migration north?

6 MR. ROOS: The evidence quite clearly reflects
7 that education is a minimal pull factor in terms of illegal
8 immigration.

9 QUESTION: What evidence?

10 MR. ROOS: That is repeatedly --

11 QUESTION: What evidence are you referring to?

12 MR. ROOS: I am referring to testimony by the
13 state's own witnesses. We would, for example, refer to
14 Shane Davies, who said, as an attractive factor, no, it is
15 not. We would refer to the testimony of the director of the
16 Immigration and Naturalization Service in Dallas, a Mr.
17 Heston, who said, no, indeed, immigration, unlawful
18 immigration has little to do with -- or education has little
19 to do with unlawful immigration.

20 I would also point this Court to, with respect to
21 undocumented people returning to Mexico after the statute,
22 the evidence by, again, the state's own witness, the
23 superintendent of Brownsville, said, no matter what, these
24 children will remain here. So, I think that the fact is,
25 they will remain here, that indeed education is a minimal

1 pull factor, and the preclusion of education will not
2 appreciably deal with the unlawful immigration problem.

3 QUESTION: Mr. Roos --

4 QUESTION: Mr. Roos --

5 QUESTION: After you, Justice Brennan.

6 QUESTION: After you. Go on.

7 QUESTION: Is the question of domicile a matter of
8 state law?

9 MR. ROOS: Your Honor, I am aware of cases that
10 have gone up and down on Elkins --

11 QUESTION: What did this Court hold in Elkins
12 against Moreno?

13 MR. ROOS: This is not certainly a domicile law.
14 As we have pointed out, some --

15 QUESTION: My question is, is it a question of
16 state law?

17 MR. ROOS: It is -- it would certainly be my view
18 that one could not use domicile as a proxy for alienage.
19 For example, well, that if undocumented persons are indeed
20 persons under the equal protection clause, and thus a state
21 legislation must treat them minimally rationally, and indeed
22 we believe insofar as they are denied -- innocent children
23 are denied an education with heightened scrutiny, that that
24 indeed -- it could not then turn around and say, we have got
25 a domiciliary law, aliens cannot become domiciliaries, and

1 then keep all these innocent children out of school. That
2 would seem to be contrary to any sort of basic notions of
3 justice or of the Fourteenth Amendment.

4 QUESTION: Mr. Roos, are you arguing that even if
5 this statute were to be regarded as implementing a federal
6 policy to exclude illegal aliens, even so regarded, that
7 nevertheless, you are entitled to a holding that the equal
8 protection clause renders the statute unconstitutional, even
9 if it is implementing of a federal policy?

10 MR. ROOS: If there were an express federal policy
11 excluding --

12 QUESTION: I know. Take my hypothetical. Not if
13 there were. Assume that there is an express federal policy,
14 and that this statute implements that policy.

15 MR. ROOS: If there were an express federal policy
16 saying undocumented children should not attend school, then
17 it would be our position that Texas might well be able to --

18 QUESTION: That is not my question, Mr. Roos. My
19 question is, if the Federal policy is to exclude illegal
20 aliens from the United States, and this statute is to be
21 regarded as implementing that federal policy, are you
22 arguing that nevertheless the statute violates the equal
23 protection clause?

24 MR. ROOS: We are arguing that, and indeed, as
25 indicated, this has minimal impact on keeping undocumented

1 people out of the country.

2 QUESTION: Mr. Roos, this is why I have been
3 trying to get in here. It seems to me that, or else I am
4 confused, that just what Mr. Justice Brennan has asked you
5 is driving you from any pre-emption argument into the equal
6 protection argument. Aren't you confronted flatly with the
7 DeCanas case?

8 MR. ROOS: We are --

9 QUESTION: How can you avoid it?

10 MR. ROOS: With respect to equal protection -- as
11 the Court has recognized, indeed, the primary thrust of this
12 case is an equal protection case. We do not argue pursuant
13 to DeCanas that this statute, because it has an incidental
14 effect on immigration, is thus pre-empted. Now, we do make
15 other pre-emption arguments that the Court should be aware
16 of. Indeed, it is our position that federal education
17 policy as found primarily in the Elementary and Secondary
18 Education Act expresses a federal policy that all children,
19 especially those children who are most in need, and in many
20 instances those are undocumented children, should be
21 provided with education if they are to be here.

22 QUESTION: And would you distinguish DeCanas then
23 by restricting it to the employment field?

24 MR. ROOS: I would restrict DeCanas to dealing
25 with the employment field and the incidental effect on

1 unlawful immigration.

2 QUESTION: And on that basis, you are not to be
3 driven off your pre-emption argument?

4 MR. ROOS: No, the pre-emption argument is
5 predicated upon a different federal statute or set of
6 statutes, the Elementary and Secondary Education Act, which
7 in our view mandate that all children, especially those in
8 need, receive free public education, and we would point out,
9 as we do in our brief, that there are a number of federal
10 titles to the elementary and secondary education act which
11 would have been -- would invited openings by Congress if it
12 had been so inclined. For example, there is the Federal
13 Bilingual Education Act, Title VII of the Elementary and
14 Secondary Education Act. And in that Act, one of the
15 definitions of who is entitled to a program are people born
16 in another country. They have never said anything about
17 undocumented aliens. There is obviously a common assumption
18 that undocumented aliens frequently are migrant children.
19 There is a Title I migrant program. Never has Congress
20 said, we exclude from inclusion in the Title I migrant
21 programs undocumented children.

22 QUESTION: Mr. Roos, let me interrupt you to ask a
23 refinement of Justice Brennan's question. You answered,
24 when he said, supposing that the state statute implements
25 the federal policy of keeping aliens, unlawfully admitted

1 aliens out, you said you would nevertheless make the equal
2 protection claim. Would you make the same argument if you
3 -- if it were demonstrated that the state statute
4 substantially implements the federal policy, not just
5 theoretically or minimally, but if it could be shown that
6 there is a substantial deterrent as a result of a state
7 statute?

8 MR. ROOS: The distinction that we draw, and I
9 tried to draw with Justice Brennan, is that where the
10 federal policy is expressed with respect to this particular
11 service, education in this case --

12 QUESTION: Well, but the policy that I think -- at
13 least I understood Justice Brennan to refer to is the policy
14 to keep aliens out unless they are lawfully admitted, which
15 is clearly a valid federal policy.

16 MR. ROOS: We argue that it would be offensive to
17 the principles of Hines and this Court's long line of cases
18 that this would be -- that for a state to set about to
19 regulate the border, even if it were in pursuance of a state
20 policy --

21 QUESTION: I am not talking about -- If this
22 statute, just denying them an education, substantially
23 furthered that federal policy, would you say that still was
24 a violation of equal protection? You can just say yes or no.

25 MR. ROOS: Yes.

1 QUESTION: All right.

2 QUESTION: I take it then you would say that if
3 Congress passed a law saying, pursuant to our power to
4 control immigration and naturalization, we hereby forbid
5 states to offer education to illegal alien persons, people
6 who are here illegally, would you say that would violate
7 equal protection? Would it be the equal protection
8 component of the Fifth Amendment, or not?

9 MR. ROOS: Obviously --

10 QUESTION: That can be yes or no, too.

11 MR. ROOS: I am not certain that it can, but it is
12 -- I mean, each case has to be decided on its own.

13 QUESTION: Well, how about that one?

14 (General laughter.)

15 MR. ROOS: It would be our view that if there
16 indeed were an express federal policy excluding undocumented
17 children from school, that if the state passed a law --

18 QUESTION: Not if a state. The federal government
19 passes a law that says no illegal aliens shall be educated
20 by the states. Would that violate equal protection?

21 MR. ROOS: I would certainly feel that there are
22 reasons for holding that it would violate equal protection,
23 but I understand this Court has traditionally given
24 deference to Congressional alienage classifications.

25 QUESTION: You spoke a while ago of a 15-year-old

1 who came to the country when he was six. Is Texas required
2 to grant him admission to all its state universities and
3 graduate schools as a resident, or could they charge him
4 non-resident tuition?

5 MR. ROOS: It would certainly be --

6 QUESTION: Illegal, now.

7 MR. ROOS: Yes.

8 QUESTION: He is illegally in the country.

9 MR. ROOS: There are distinctions --

10 QUESTION: That is a yes or no, too, isn't it?

11 MR. ROOS: There may be distinctions between
12 elementary and secondary education --

13 QUESTION: I am just asking about university,
14 undergraduate and graduate schools. If they charge
15 non-residents of Texas three times as much as residents of
16 Texas to make the stakes high, must they admit this illegal
17 on a Texas residence rate?

18 MR. ROOS: I would suggest that the answer is not
19 a yes or no, that indeed one would have to look at the state
20 purpose and --

21 QUESTION: The state purpose is already there.
22 Many states charge non-residents, have a resident tuition
23 fee and another.

24 MR. ROOS: What they would do, I believe, under
25 your hypothetical, would be using alienage to define

1 resident. If the --

2 QUESTION: Or is it using illegal alienage?

3 MR. ROOS: Well, using illegal alienage.

4 QUESTION: This is not an alienage case. It is an
5 illegal presence case.

6 MR. ROOS: Your Honor, this Court has at various
7 times noted that subclasses of aliens are still protected by
8 the alienage analysis of this Court's ruling.

9 QUESTION: Prior protection. Due process. We are
10 just talking -- my question is, narrowly, tuition at the
11 University of Texas and the Texas Medical School. Must the
12 state of Texas give him or her residence tuition instead of
13 three times, if that were the statute.

14 MR. ROOS: I think that the analysis would
15 generally be no, Your Honor. I think that the conclusion
16 would generally be no, but of course each case ought to be
17 looked at on its own. You would be dealing with people
18 above the age of majority so the innocent factor that was
19 referred to earlier, certainly, the argument for compelling
20 interest is not the same, and indeed the analysis under a
21 rational basis would be somewhat different.

22 QUESTION: Mr. Roos, isn't Texas somewhat caught
23 in a bind here between the federal education policy which
24 affords funding for bilingual education and the federal
25 immigration policy which renders these people illegally

1 present in the United States, and therefore in Texas, as one
2 of the states? What is Texas supposed to do?

3 MR. ROOS: Well, I suppose the answer is that 49
4 other states admit these children because they feel that
5 they are here and it is their obligation to educate people
6 who are in their boundaries and who in fact need education.
7 Texas alone among the states poses this terrible dilemma,
8 and I think it is important to emphasize, as Mr. Schey
9 mentioned earlier, that indeed California, for example, the
10 testimony reflects likely has twice as many undocumented
11 persons as does Texas, yet the Court will note that an
12 amicus curiae brief was filed by the California State Board
13 of Education.

14 No, I think that the Texas dilemma is something
15 that has been suggested as --

16 QUESTION: Well, but Texas and California are free
17 to follow two different policies on the matter, are they
18 not, unless they violate an Act of Congress or a provision
19 of the federal Constitution?

20 MR. ROOS: They certainly are, and it is our
21 position here, of course, that this violates the federal
22 Constitution.

23 CHIEF JUSTICE BURGER: Mr. Arnett?

24 ORAL ARGUMENT OF RICHARD L. ARNETT, ESQ.,

25 ON BEHALF OF THE APPELLANTS - REBUTTAL

1 MR. ARNETT: I don't have time to answer all the
2 misrepresentations and if not direct, implied, concerning
3 the record. The -- Texas gets 25 percent of the migrant
4 funds. Texas gets far more than 25 percent of the migrant
5 pupils, legal pupils in the state.

6 QUESTION: Mr. Arnett, would you concede that
7 there are children who were not legally admitted to the
8 United States but which later obtain a status that would
9 entitle them to remain as residents, and that the Texas
10 statute would preclude those children from being in school
11 tuition-free?

12 MR. ARNETT: Your Honor, I certainly would agree
13 that they can gain the status at a later date. When they
14 gain that status, they will be entitled to go to school.
15 Furthermore --

16 QUESTION: But the Texas statute as it is written
17 applies to exclude those who are --

18 MR. ARNETT: That has been construed to mean
19 legally present. The school districts construe that to
20 mean, if they are legally living here. And I might note
21 that the example of the particular children involved, those
22 children never went through the hearing process of the state
23 board of education to determine their entitlement,
24 notwithstanding any lack of documentation they may have if
25 they were in the process of application.

1 QUESTION: Is this just a matter of application in
2 the school districts, or do we have a Texas decision?

3 MR. ARNETT: We were proposing regulations on it
4 at the time we were enjoined from --

5 QUESTION: Are there any adopted now?

6 MR. ARNETT: No, Your Honor, but they can be
7 adopted very easily, as soon as we are not enjoined and it
8 becomes meaningful.

9 I would like to address the point you asked about
10 the innocent children, and I would like to point out that in
11 Dandridge, in Lalli, in Matthews versus Lucas, all of those
12 cases affected the right of children on the basis of the
13 parents' conduct. In fact, this case is much less
14 reprehensible, if you want to use that term, than those,
15 because here the parents' conduct is now. The parents are
16 free to effect the conduct in question at this time. They
17 were not free in Lalli once they were deceased. They were
18 not free once they were deceased in Matthews versus Lucas.
19 It is clear -- and indeed, if you take the innocent children
20 line of reasoning, all children are a suspect class or
21 heightened scrutiny for purposes of residency, whether they
22 be illegal aliens or not. Our society is somewhat based on
23 the control of parents over children, and that
24 differentiates it from trying to control the acts of parents
25 as to themselves with the illegitimacy through restrictions

1 on their children.

2 The other thing that has come up is domicile
3 versus residency, and the reason that has been somewhat
4 confused is, Texas does not require strict domicile to go to
5 school. We do not require an indefinite intent to remain.
6 We require sort of quasi-domicile, and I think that we call
7 it residence under the statutes. It has been interpreted by
8 our courts, and there are several decisions on this point,
9 that it is not as much as domicile, but it is more than
10 simply staying overnight, you know.

11 QUESTION: I take it your policy is that until you
12 are documented or have some basis for being here legally,
13 that no one can acquire either domicile or this
14 quasi-residence.

15 MR. ARNETT: That is exactly right, and my answer
16 to Justice O'Connor's question earlier that there was no
17 state court decision on it, that is in the domicile area.
18 In the area of residency, both the legislature and the Texas
19 Supreme Court by denying the writ in Hernandez and upholding
20 the statute have made the decision that residency for school
21 purposes cannot be illegal, it must be legal, and so to that
22 extent I would say, yes, state law does make that
23 determination.

24 I would also like to point out as to incentive, if
25 it is not an incentive, why has Brownsville grown from 182

1 undocumented alien children one month after the order to
2 over 1,300, 1,400 this year? I would point out that the
3 findings of the --

4 QUESTION: But constitutional rights are
5 individual rights and are not permitted to depend on
6 intuition or anything else.

7 MR. ARNETT: Your Honor, Vance versus Bradley says
8 it is not the --

9 QUESTION: Well, McKay versus Santa Fe and Topeka
10 Railroad 40 or 50 years ago said just that.

11 MR. ARNETT: I agree, Your Honor.

12 QUESTION: And that is still the law. It is an
13 individual right.

14 MR. ARNETT: I would point out that Vance versus
15 Bradley says it is not the office of findings of fact to
16 make conclusions against the legislative judgment, and that
17 is exactly what was done at the lower level here, and
18 furthermore, all the evidence that they are referring to
19 about it not being incentive have to do with adults. It is
20 clearly an incentive for children.

21 QUESTION: General Arnett, I didn't understand one
22 thing you said. You said that as a matter of state
23 construction of its own statutes, state law, that a person
24 not lawfully here was not a resident within the meaning of
25 the laws governing school attendance. If that were so, why

1 did they need this 1975 statute?

2 MR. ARNETT: Well, all I am saying is that the
3 statute makes that determination from a legislative point of
4 view, and that has been established by the court.

5 QUESTION: You mean just the statute in issue here.

6 MR. ARNETT: Yes, Your Honor.

7 QUESTION: Oh, I see.

8 MR. ARNETT: I think that is a legislative
9 definition. I think it clearly is.

10 QUESTION: It intended -- it was a reaction to the
11 Attorney General's opinion, was it?

12 MR. ARNETT: I think it's pretty clear that it was.

13 QUESTION: Yes.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
15 case is submitted.

16 (Whereupon, at 11:38 o'clock a.m., the case in the
17 above-entitled matters was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JAMES PLYER, SUPERINTENDENT OF THE TYLER INDEPENDENT SCHOOL DISTRICT AND
VS BOARD OF TRUSTEES ET AL. v. J. AND R. DOE,., ET AL: and TEXAS ET AL. vs.
CERTAIN NAMED AND UNNAMED ALIEN CHILDREN ET AL. NO. 80-1538 & 80-1934
and that these pages constitute the original transcript of the
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