TESTIMONY OF

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BEFORE

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ON

"Immigration Policy by Court Order: The Adverse Effects of *Plyler v. Doe*"

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We are here today to discuss the Supreme Court's decision in *Plyler v. Doe.* That decision rewrote—rather than interpreted—the Equal Protection Clause, thereby transforming a Texas funding rule into a national mandate that states must provide free K–12 education to children who have no legal right to be in the United States. The majority reached this result not by applying settled doctrine, but by importing their personal policy preferences (about the costs of illiteracy and hoped-for social outcomes) into constitutional analysis, and by crafting a novel, heightened form of "rational-basis" scrutiny that the Court itself conceded usually does not apply to non-suspect classes or non-fundamental interests. The result is a paradigmatic instance of judicial legislation that: (1) intrudes on Congress's plenary authority over immigration; (2) restricts state discretion to allocate scarce educational resources; and (3) has imposed very substantial fiscal and operational burdens on already underperforming school systems. In plain English, *Plyler* can only be understood as an egregious example of judicial activism that has damaged public education.

The Constitution of the United States assigns the power to regulate immigration to Congress, with executive authority derived primarily from congressional delegations of authority. From their earliest days, the federal courts have recognized that immigration is a uniquely federal domain, belonging exclusively to the political branches of government. In *Fiallo v. Bell*, the Court noted that, "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[1] That principle does not merely describe the admission of aliens; it broadly encompasses the policy consequences of admission and exclusion decisions, including how government may draw distinctions between aliens and citizens.

Hewing to this principle, the Supreme Court has recognized that, "In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens."[2] And, in *Mathews v. Diaz*, the Court explicitly held that, "Congress…has no constitutional duty to provide all aliens with the welfare benefits provided to citizens."[3] Therefore, "when allocating government benefits to a given class of aliens, [government officials] may take into account the character of the relationship between the alien and this country" and "when that relationship is a federally prohibited one, there can, of course, be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of its governmental benefits."[4]

In May 1975, Texas passed a statute making it illegal to spend state funds for the education of children who were not legally admitted to the United States and authorizing school districts to deny enrollment to such children.[5] And, based on the precedential decisions cited above, that statute was a constitutional exercise of legislative authority allocating publicly funded benefits on the basis of a valid legal distinction that Congress made between those who are lawfully present in the United States and those who are present here in violation of the law.

Still, a group of illegal aliens mounted a constitutional challenge to the statute, claiming it was an instance of invidious discrimination, denying them the equal protection of the laws required under the Fourteenth Amendment to the U.S. Constitution. That challenge made its way to the Supreme Court, where the majority – quite shockingly – ruled in favor of the illegal aliens, not on the basis of law, but solely on the basis of policy concerns that lay well beyond the purview of the Court.

In relevant part, the Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[6] An astute observer will note the conspicuous absence of any reference to free public education in the Fourteenth Amendment or, for that matter, in any portion of the Constitution.

So, how exactly did the American taxpayer become saddled with the responsibility of educating every foreign child who washes up, uninvited, upon our shores? The Supreme Court in deciding *Plyler* abandoned any pretense of judicial objectivity, usurped the authority of Congress, and legislated from the bench. Rather than delivering an opinion based on the sound application of legal principles, the *Plyler* majority acted as an unelected supra-legislature and took it upon itself to set the nation's social policy. According to the Court, "'[T]he illegal alien of today may well be the legal alien of tomorrow'…without an education, these undocumented children, 'already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices…will become permanently locked into the lowest socio-economic class.'"[7] [Internal citations omitted.]

In other words, failure to enforce laws against illegal entry and unlawful employment has created an underclass of illegal aliens who live in the shadows. Should a state choose to protect American students and limited educational resources by denying a free public education to illegal alien children, it is guilty of "promoting the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime." These are legislative policy considerations, not legal constraints mandated by the Constitution's text or history. Nevertheless, in the *Plyler* Court's estimation, as a matter of social justice, there can be no rational basis for excluding illegal alien children from public schools. Or, put more plainly, the Court reached the paradoxical conclusion that children who

have no legal right to be in the United States somehow have a right to a free public education in America's schools.

This conclusion was grossly at odds with the Court's other holdings in similar matters. In *Colegrove v. Green*, the Court made it clear that the federal judiciary should avoid involvement in matters traditionally left to legislative policy-making. It stated that, "An aspect of government from which the judiciary…has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate."[8] Furthermore, when it comes to matters involving immigration, the Court, "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[9] [Internal citations omitted.]

Even more disturbing than the appropriation of legislative authority, or the departure from precedent, is the extent of the abuse to which the Court subjected the logic of the law in *Plyler*. The Court clearly acknowledged that "illegal aliens" is not a suspect classification and that education is not a fundamental right. It plainly stated, "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."[10] [Internal citations omitted.] Nonetheless, the *Plyler* majority proceeded to treat illegal aliens as a suspect class, consider education as a fundamental right, and require Texas to justify its decision. In the end, the matter was decided on a bespoke standard of review, created by the Court from whole cloth, specifically to apply to the facts of *Plyler.*

Ordinarily, in cases where neither a suspect class nor a fundamental right is implicated, rational basis review applies. Under that deferential test, a statute survives if any conceivable

legitimate interest rationally supports it. Yet in *Plyler*, the Court innovated a heightened variant – often described by scholars as "rational basis with bite" – demanding that Texas show the law furthered a substantial goal. In so doing, the majority balanced its own predictive social policy judgments – about the costs of illiteracy and future societal participation – against legislative choices—a textbook example of policy making from the bench.

Ultimately, the decision reached by the Court in *Plyler* was not constitutional interpretation; it was judicial legislation. And its consequences—federalizing an unfunded mandate that compels states to provide free K–12 education to children lacking lawful presence, while limiting state flexibility to manage scarce resources—have been profound. According to the Center on Budget and Policy Priorities, kindergarten through twelfth grade educational expenditures have now become the largest category in the budgets of most states, counties and municipalities throughout the United States.[11] As of 2023, there were an estimated 1.2 million illegal alien children, under age eighteen, in the United States.[12] According to FAIR's estimates, during the Biden Administration's disastrous embrace of open borders, more than one million additional illegal alien children may have entered the country.[13] That means that roughly 2.2 million foreign children, many of whom do not speak English, have been crammed into American public schools which are already underperforming.[14] And U.S. taxpayers spend nearly $80 billion annually educating these children, none of whom have any legal right to be in the United States.[15]

In sum, *Plyler v. Doe* stands as a troubling departure from constitutional text, established doctrine, and the proper limits of judicial power. By elevating policy preferences above legal principle, the Court not only intruded on Congress's exclusive authority over immigration and state discretion in allocating educational resources, but also fashioned a novel standard of review

untethered from precedent. The resulting mandate has imposed immense financial, administrative, and operational burdens on state and local governments, all while diminishing democratic accountability for decisions of profound national consequence. Far from vindicating the Constitution, *Plyler* exemplifies the hazards of judicial overreach—substituting the judgment of an unelected Court for that of the political branches and, in the process, inflicting long-term harm on both the integrity of constitutional governance and the effectiveness of public education in the United States.

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[1] *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
[2] *Demore v. Kim*, 538 U.S. 510, 522 (2003).
[3] *Mathews v. Diaz*, 426 U.S. 67, 68 (1976).
[4] *Mathews v. Diaz* at 80.
[5] Tex. Educ.Code Ann. § 21.031 (Vernon Supp.1981).
[6] U.S. Const. amend XIV § 1, https://constitution.congress.gov/constitution/amendment-14/
[7] *Plyler v. Doe*, 457 US 202, 207 (1982).
[8] *Colegrove* at 327.
[9] *Oceanic Navigation Co. V. Stranahan*, 214 U.S. 320, 214 U.S. 339 (1909).
[10] *Plyler* at 223.
[11] Center on Budget and Policy Priorities, "Where Do Our State Tax Dollars Go?", July 25, 2018, https://www.cbpp.org/research/policy-basics-where-do-our-state-tax-dollars-go#:~:text=By%20far%20the%20largest%20areas,low%2Dincome%20families%20has%20declined.
[12] Jeffrey S. Passel and Jens Manuel Krogstad, "U.S. Unauthorized Immigrant Population Reached a record 14 Million in 2023," August, 21, 2025, https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023/
[13] Andrew R. Arthur, "Reuters: 500K+ School-Age Migrant Children Have Arrived Since 2022," October 15, 2024, https://cis.org/Arthur/Reuters-500K-SchoolAge-Migrant-Children-Have-Arrived-2022#:~:text=According%20to%20DHS's%20Office%20of,the%20past%20three%20fiscal%20years
[14] Kansas University School of Education and Human Sciences, "How USA Education Measures Up Worldwide," May 15, 2023, https://educationonline.ku.edu/community/how-usa-education-measures-up-worldwide
[15] Federation for American Immigration Reform, "The Fiscal Burden of Illegal Immigration on United States Taxpayers," March 2023, https://www.fairus.org/issue/publications-resources/fiscal-burden-illegal-immigration-united-states-taxpayers-2023