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

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Chairman Roy, Ranking Member Scanlon, and Members of the Subcommittee on the Constitution and Limited Government: Thank you for the invitation to testify on this critical topic.

My expertise on our country's immigration system is multifaceted. From 2015 to 2021, I served our country as a Foreign Service Officer at the Department of State. From 2017 to 2019, I served as a Consular Officer conducting visa interviews in Brazil. I then spent two years—from 2019 to 2021—as an attorney advisor in the Office of the Assistant Legal Advisor for Consular Affairs. Since leaving the State Department and returning to the practice of law, a significant part of my practice has been litigating border security and immigration cases.

In 1982, the Supreme Court decided *Plyler v. Doe*, 457 U.S. 202 (1982), holding by a 5–4 vote that the State of Texas could not deny free public K–12 education to children who were illegally present in the United States. *Plyler* was wrongly decided from the outset. The majority opinion acknowledged the very legal premises that should have compelled it to uphold the Texas law—yet proceeded to strike it down anyway, using a standard of constitutional review it invented for the occasion, untethered from constitutional text or prior precedent. Chief Justice Burger's dissent, joined by three colleagues, clearly exposed this, and its reasoning has only grown more persuasive with time.

Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Supreme Court now has both the legal framework and the factual grounds to overrule *Plyler*. The *Dobbs* decision articulated a rigorous set of factors for reconsidering prior constitutional decisions, and *Plyler* fails every one of them. Moreover, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, supplying the very "articulable federal policy" that the *Plyler* majority said was missing.

Finally, even while *Plyler* remains on the books, states, localities, and the federal government are not without tools. This testimony outlines concrete actions that can be taken today, within *Plyler*'s constraints, to limit the burdens illegal alien enrollment imposes on America's public schools.

## I. *Plyler v. Doe*: Why the Dissent Was Right

### A. What *Plyler v. Doe* Decided

In 1975, the Texas Legislature enacted a statute that withheld state education funding from local school districts for the education of children who were not "legally admitted" to the United States and authorized school districts to deny enrollment to such children or to charge them tuition. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court, by a 5–4 vote, struck that statute down as a violation of the Fourteenth Amendment's Equal Protection Clause. The majority opinion, written by Justice Brennan, held that illegal aliens are "persons" within the meaning of the Equal Protection Clause and that states cannot deny children a free public K–12 education on the basis of immigration status unless the state can show that the denial furthers a "substantial state interest."

### B. A Primer on Constitutional Standards of Review

To understand why *Plyler* is legally problematic, it helps to understand the framework courts use to evaluate whether a law violates the Equal Protection Clause. Courts apply different levels of scrutiny depending on who is harmed and what right is affected.

**Strict scrutiny** is the most demanding standard. It applies when a law discriminates against a "suspect class"—such as a racial minority—or burdens a "fundamental right" such as the right to vote. Under strict scrutiny, the government must show that the law serves a *compelling* government interest and is *narrowly tailored* to achieve it. Laws rarely survive this level of review.

**Rational basis review** is the default, most permissive standard. It applies to ordinary legislation affecting no suspect class and no fundamental right. Under rational basis, a law is presumed constitutional and will be upheld if there is *any* rational reason a legislature could have had for enacting it. Laws almost always survive this level of review.

The outcome of a constitutional challenge often depends entirely on which standard applies. And the standard is supposed to be determined by the *nature of the classification* and the *nature of the right at stake* — not by the sympathies of the reviewing judges.

**C. The Majority's Analytical Problem**

The *Plyler* majority found itself in a difficult position. It acknowledged that its own precedents required it to conclude that *neither* strict scrutiny *nor* any heightened standard applied. The Court stated explicitly: "Undocumented aliens cannot be treated as a suspect class because" they are "presen[t] in this country in violation of federal law.... 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." *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

Having made those admissions, the Court was legally obligated under its own precedents to apply ordinary rational basis review—the permissive standard under which virtually any conceivable government justification suffices. Yet the Court refused to do so. Instead, it invented a novel, intermediate standard of review without any clear constitutional basis, demanding that Texas show a "substantial state interest"—a test that appears nowhere in the Court's prior Equal Protection jurisprudence and that the majority never adequately explained or grounded in the actual text of the Constitution.

Even the majority itself acknowledged the sensitivity of this area, recognizing that "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. And yet, having recognized that caution was warranted, the Court proceeded to intrude all the same.

**D. The State's Justifications and the Court's Rejection of Them**

Texas offered several justifications for its statute, all of which the Court rejected — in most cases with very little legal analysis.

*First*, Texas argued that the law served the state's interest in **preserving its limited educational resources** for lawful residents. The

Court dismissed this almost out of hand, stating that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.* at 227. The Court provided no persuasive explanation for why resource conservation—a plainly legitimate government interest under any rational basis analysis—failed to satisfy even a "substantial interest" test.

*Second*, Texas argued the law was justified by the State's desire to **protect itself from an influx of illegal immigrants** and the economic burdens they impose. The Court rejected this as well, finding "no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy." *Id.* at 228.

*Third*, Texas argued that illegal alien children impose **special burdens on the State's ability to provide high-quality public education.** The Court disagreed because, under an invented standard that it failed to justify, Texas needed to show that "exclusion of undocumented children is likely to improve the overall quality of education in the State." *Id.* at 229.

*Fourth*, Texas argued that illegal alien children are appropriately singled out because their **unlawful presence makes them less likely to remain in the state and put their education to productive use**. The Court rejected this too, stating that "it is an interest that is most difficult to quantify" and that Texas had no "assurance" whether the illegal alien children would remain or leave the State. *Id.* at 230.

*Finally*, and critically, the Court acknowledged that the outcome might have been different, but **Congress had not enacted a clear federal policy** on point. The majority wrote: "We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226. As discussed in Part II below, Congress has since spoken directly on this subject— removing the very premise upon which the Court rested its decision.

### E. Why the Dissent Was Right

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, wrote a dissent that, with the benefit of four decades of hindsight, reads as the more principled and constitutionally sound analysis. The dissent rested on several powerful arguments.

**The Court substituted its own policy preferences for those of the Texas Legislature.** As Chief Justice Burger wrote: "The Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today." *Id.* at 242 (Burger, C.J., dissenting) (cleaned up).

**The majority was acting to compensate for congressional failure.** The dissent captured, with unusual candor, exactly what the Court was doing: "The Court makes no attempt to disguise that it is acting to make up for Congress' lack of 'effective leadership' in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders. The failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socioeconomic dilemma. It is a dilemma that has not yet even been fully assessed, let alone addressed. However, it is not the function of the Judiciary to provide 'effective leadership' simply because the political branches of government fail to do so." *Id.* at 242–43 (cleaned up).

This critique goes to the heart of the separation of powers. Whatever one thinks of the underlying policy, federal immigration law is entrusted by the Constitution to Congress and the Executive, not to the federal judiciary. When courts step in to fill perceived policy gaps left by legislative inaction, they undermine the democratic process and exceed their constitutional role.

**The majority distorted the Constitution.** Burger was unflinching: "The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others." *Id.* at 243. He added that "the extent to

which the Court departs from principled constitutional adjudication is ... disturbing." *Id.*

**The Court invented a standard of review with no constitutional basis.** Having conceded that illegal aliens are not a suspect class and that education is not a fundamental right, the majority was required to apply rational basis review. As Burger wrote: "Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose." *Id.* at 248. The majority's invention of a hybrid, intermediate standard was, as Burger bluntly observed, "a prime example" of a court being "was guilty of an unabashedly result-oriented approach." *Id.* at 244.

**The Equal Protection Clause does not mandate identical treatment of all persons in all circumstances.** The dissent correctly noted that "[t]he Equal Protection Clause does not mandate identical treatment of different categories of persons" and that "[t]he distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional." *Id.* at 243–44. Furthermore, "[t]he Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services." *Id.* at 248.

**Resource conservation of limited resources is a rational and legitimate state interest.** Under ordinary rational basis review—which the Court itself admitted was the appropriate standard—conservation of limited public resources is an entirely legitimate government objective. As Burger wrote: "I assume no Member of this Court would argue that prudent conservation of finite state revenues is per se an illegitimate goal." *Id.* at 249. The majority's offhand dismissal of Texas's resource-conservation justification thus could not be reconciled with rational basis doctrine.

**Illegal aliens are not entitled to the same governmental benefits as lawful residents.** This may be the dissent's most commonsense point: "it simply is not 'irrational' for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for

persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state." *Id.* at 250.

The dissent also observed the inconsistency of the Court's position given federal law: "It is significant that the Federal Government has seen fit to exclude illegal aliens from numerous social welfare programs.... Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents." *Id.* at 250–51.

The Chief Justice was careful to note that his conclusion was not a statement of preferred policy: "Denying a free education to illegal alien children is not a choice I would make were I a legislator." *Id.* at 252. However, he concluded: "The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem.... The solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some." *Id.* at 253–54 (citation omitted).

## II. The Path to Overruling *Plyler* — Applying the *Dobbs* Framework

### A. *Stare Decisis* Is Not an Inexorable Command

The doctrine of *stare decisis* — the principle that courts should generally follow their prior decisions — is an important part of the rule of law. It promotes stability, predictability, and public confidence in the judiciary. But it has never been, and must never be, an absolute rule. Some of the Supreme Court's most celebrated decisions were cases where the Court overruled a prior precedent that was demonstrably wrong.

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the Supreme Court articulated a careful, multi-factor framework for determining when a prior constitutional precedent should be overruled. The Court identified five key factors that bear on whether overruling is appropriate. As shown below, all five factors weigh in favor of overruling *Plyler*.

### B. Applying the *Dobbs* Factors to *Plyler v. Doe*

**Factor 1: The Nature of the Court's Error.** The first *Dobbs* factor is to examine the nature of the court's error, particularly whether the decision was "egregiously wrong." *Dobbs*, 597 U.S. at 268. *Plyler* was wrong from the day it was decided. As the dissent demonstrated, the majority conceded the very legal premises—that illegal aliens are not a suspect class and education is not a fundamental right—that under the Supreme Court's own jurisprudence required application of rational basis review. Having made those concessions, the majority had no principled basis for invalidating the Texas law. The majority's invention of a novel intermediate standard of review, untethered from constitutional text or precedent, was a product of result-oriented adjudication, not principled constitutional analysis. Like *Roe v. Wade*, *Plyler* imposed a judicial policy preference in place of a democratically enacted law, short-circuiting the political process on a question the Constitution entrusted to the states and Congress.

**Factor 2: The Quality of the Reasoning.** *Dobbs* instructs that poor legal reasoning—lacking textual, historical, or precedential grounding—weighs in favor of overruling. *Dobbs*, 597 U.S. at 269-70. *Plyler*'s reasoning is notably thin. The majority never explained the constitutional source of its novel "substantial state interest" standard. It performed no serious engagement with constitutional text or history. It rejected each of Texas's proffered justifications with brief, conclusory responses that would fail under any ordinary rational basis analysis. The majority's analysis more closely resembled a legislative committee's policy assessment—weighing societal costs and benefits—than a legal opinion grounded in constitutional interpretation. This is precisely the kind of judicial legislating that *Dobbs* recognized as a basis for overruling prior precedent.

**Factor 3: Workability.** *Dobbs* asks whether the rule set forth in a prior decision can be understood and applied consistently and predictably. *Dobbs*, 597 U.S. at 280-81. *Plyler*'s "substantial state interest" standard has proven unworkable in at least two respects. First, it has never been clear what makes a state interest "substantial" enough to override the ruling, leading to litigation uncertainty for states and localities. Second, and more significantly, the decision has made it difficult for states to respond to dramatically changed circumstances—including a surge in illegal immigration that dwarfs the numbers the Court considered in 1982. A rule of constitutional law that cannot be coherently applied to changed factual

conditions, and whose outer limits remain undefined, is by definition unworkable.

**Factor 4: Effect on Other Areas of Law.** *Dobbs* recognized that a factor weighing in favor of overruling a decision is if it distorts other legal doctrines. *Dobbs*, 597 U.S. at 286-87. *Plyler* has had a distorting effect on immigration federalism. By holding that courts must review state distinctions based on immigration status under a heightened (if undefined) standard, the decision has chilled legitimate state policy choices across a range of public benefit programs and has been cited as a barrier to state-level immigration enforcement. It has also created interpretive confusion about the relationship between federal immigration law and state benefit programs — confusion that Congress has been unable to fully resolve even through legislation.

**Factor 5: Reliance Interests.** *Dobbs* recognizes that strong concrete reliance interests—like those involving property or contract rights—weigh against overruling. *Dobbs*, 597 U.S. at 287-88. *Plyler* does not implicate the kind of concrete, transactional reliance that would make overruling disruptive. Unlike property rights or contract obligations, the expectation of receiving free public education based on illegal presence in the country does not represent the kind of settled reliance interest that the law is designed to protect. The illegal aliens whose children attend public schools under *Plyler* cannot claim they organized their affairs and made irreversible economic commitments in reliance on the decision in the same way that property owners or contracting parties do. Restoring the rule of law in this area would not unwind decades of commercial transactions; it would return a policy question to the democratic branches, where it has always belonged.

### C. Post-1982 Congressional Enactments Remove *Plyler*'s Core Premise

The *Plyler* majority was candid that its holding rested in part on the absence of a clear federal policy on the subject. As Justice Brennan wrote, "undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens." *Plyler*, 457 U.S. at 226.

Congress has since supplied precisely that policy. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which declared it "a compelling government interest to remove the incentive for illegal immigration provided by the availability

of public benefits," 8 U.S.C. § 1601(6)-(7) and declared that illegal aliens who are not "qualified aliens" are ineligible for federal public benefits. 8 U.S.C. § 1611. Congress specifically defined "federal public benefits" to include postsecondary education and other government services. 8 U.S.C. § 1611(c)(1)(b). In the same year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which barred states from offering in-state postsecondary tuition to illegal aliens unless the same rate is offered to all U.S. citizens regardless of state of residence. 8 U.S.C. § 1623.

These enactments—passed with overwhelming bipartisan support—represent exactly the kind of "articulable federal policy" that the *Plyler* majority said could change the constitutional calculus. In light of PRWORA, a state can now argue not only that its distinction between lawful and unlawful residents is rational, but that it *mirrors* an explicit federal policy judgment by Congress. The foundational premise of the *Plyler* majority—that no federal policy supported the Texas classification—no longer holds.

**D. State Challenges Are Already Underway**

Multiple states have already moved to create the legal vehicle for the Supreme Court to reconsider *Plyler* by introducing legislation that would require proof of citizenship or legal immigration status as a condition of enrollment, or that would authorize school districts to charge tuition to illegal alien students. These legislative efforts are deliberate; they are designed to generate litigation that will allow the Supreme Court to reconsider *Plyler* under the current constitutional framework and in light of changed circumstances.

This strategy mirrors the successful approach taken in the abortion context. Mississippi's Gestational Age Act—the law at issue in *Dobbs*—was enacted specifically to create a vehicle for overruling *Roe v. Wade*. The same strategic logic applies here: a state that enacts a law requiring immigration status verification for school enrollment and charges tuition to unlawfully present students will invite a legal challenge. That challenge, if it reaches the Supreme Court, will allow the Court to reconsider *Plyler* using the *Dobbs* framework outlined above.

Congress can accelerate this process by enacting legislation explicitly providing that states are authorized to condition free public K–12 education on lawful presence. Such a statute would not only constitute additional evidence of an "articulable federal policy" under *Plyler*'s own terms,

but would also frame the legal question for any reviewing court in the most favorable manner possible.

## III. What States and Localities Can Do Right Now

Even under the constraints of *Plyler* as currently interpreted, states and localities retain meaningful tools to address the burdens illegal alien enrollment places on public schools. The following is a non-exhaustive list of actions permitted under current law.

### A. Residency Verification

*Plyler* prohibits states from denying enrollment based solely on *immigration status*, but it does not prevent states from defining the threshold concept of *residency* itself in ways that exclude illegal aliens and nonimmigrant aliens from qualifying as district residents in the first place. That distinction matters enormously. A state that denies enrollment because a child is an illegal alien runs directly into *Plyler*. A state that denies enrollment because a child is not a *resident* of the district—applying a carefully crafted, constitutionally grounded definition of residence—raises a fundamentally different legal question.

The legal tools for this approach are well-established. The Supreme Court has recognized that "usual residence" for purposes of the census means more than mere physical presence; it includes "some element of allegiance or enduring tie to a place." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). An illegal alien, by definition, lacks both. As the Court held in *United States v. Wong Kim Ark*, the reciprocal relationship of protection and allegiance that defines lawful residence depends on the sovereign's *permission* to reside here. 169 U.S. 649, 694 (1898). Because illegal aliens are present in defiance of federal law, the United States has not consented to their residence; they remain subject to removal at any time, possess no enduring tie to any particular state, and owe their primary political allegiance to a foreign nation—not to the state in which they temporarily find themselves. Aliens present on temporary visas are similarly situated: their authorized stay is, by definition, contingent and time-limited, and it cannot create the durable allegiance and enduring tie that lawful residency requires. States can codify these principles by adopting statutes that only allow residents to attend public schools without paying tuition and including in their definition of "resident" for school enrollment purposes to mean a person who has legal permission to live in the school district—thereby excluding illegal aliens and nonimmigrant visa holders

as a matter of *residence law*, not immigration-status discrimination. The Supreme Court expressly recognized in *Burns v. Richardson*, 384 U.S. 73, 92 (1966), that states possess the constitutional authority to exclude aliens and other non-permanent residents from their electoral apportionment bases, reflecting the broader principle that state-conferred benefits may rationally be limited to those who share a genuine, lawful connection to the community.

**B. Data Collection and Fiscal Reporting**

Nothing in *Plyler* prevents states from requiring school districts to collect and publicly report aggregate data on the number of enrolled students who cannot demonstrate lawful presence, the associated per-pupil costs, and the total fiscal burden on the state's public school system. This kind of fiscal transparency is valuable for two reasons: it provides an honest accounting of the costs that the public is bearing; and it builds the evidentiary record that may be needed to support future litigation or legislation.

**C. Restricting Benefits Beyond Basic K–12 Education**

*Plyler* protects access to "basic education"—the core K–12 curriculum. It does not guarantee every supplemental program, enrichment activity, or government benefit offered by a school or district. States can adopt policies restricting illegal alien students' access to, for example, specialized gifted and talented programs that involve additional state funding, dual-enrollment college tuition subsidies, extracurricular travel, and similar optional programs that go beyond the baseline *Plyler* requires. These distinctions must be applied carefully and not used as a pretext for wholesale exclusion, but legitimate distinctions between "basic education" and "supplemental benefits" are constitutionally defensible.

**D. Withholding State Funding for Postsecondary Education**

States have clear authority to deny in-state tuition and state financial aid to illegal alien students in postsecondary education. As discussed above, PRWORA explicitly recognizes this, and IIRIRA bars states from offering discounted in-state tuition to illegal aliens unless the same rate is offered to all U.S. citizens. Any state that currently offers in-state tuition to illegal aliens in defiance of IIRIRA should reconsider that practice, and Congress should vigorously enforce the IIRIRA prohibition.

**E. Federal Program Eligibility Verification**

While *Plyler* constrains states regarding basic K–12 enrollment, it does not control eligibility for federally funded programs administered

through schools. In 2025, the Department of Education issued interpretive guidance concluding that federally funded career and technical education programs under the Perkins Act, adult education programs under WIOA, and other federal workforce education grants are "federal public benefits" subject to PRWORA's citizenship-verification requirements. *Clarification of Federal Public Benefits Under the Personal Responsibility and Work Opportunity Reconciliation Act*, 90 Fed. Reg. 30,896 (Jul. 11, 2025). Under the guidance, schools receiving federal funds must verify eligibility for such programs and exclude ineligible illegal aliens accordingly. Head Start and federally funded preschool programs are similarly subject to federal eligibility verification and are not protected by *Plyler*.

## Conclusion

*Plyler v. Doe* was a decision driven by judicial sympathy for children in a difficult situation — a sympathy that is entirely understandable on a human level. But as Chief Justice Burger correctly observed, "the Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem." *Plyler*, 457 U.S. at 253–54 (Burger, C.J., dissenting). The Court's role is to interpret the Constitution, not to serve as a policymaking body filling in the gaps left by legislative inaction. Where the Constitution's text, history, and precedent all point in the same direction—and where the Court's own analytical concessions compel application of a standard under which the challenged law would clearly survive—the Court must follow the law, not its own policy preferences.

*Plyler* failed that test in 1982. The *Dobbs* framework gives the Court a principled path to correct that error now.