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Hearing on *Plyler v. Doe*

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Good morning. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has for 58 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where MALDEF was founded; Washington, D.C.; and, most recently, Seattle. MALDEF lawyers today are very proud that our predecessors provided legal representation to the plaintiffs in *Plyler v. Doe*, the lead case in the matter that resulted in the 1982 Supreme Court decision that all children, regardless of immigration status, are entitled to a free public education from Kindergarten through twelfth grade.

Today, almost 44 years after *Plyler v. Doe*, too many forget or fail to take account of the fact that, while the justices split 5-4 on the constitutionality of the challenged Texas law permitting the exclusion of undocumented children from public schools, they were unanimous in their assessment that the Texas law was very bad public policy. Respected conservative Chief Justice Warren Burger authored the dissenting opinion in *Plyler*; that dissent begins with the following:

> Were it our business to set the Nation's social policy, I would agree without hesitation that *It is senseless* for an enlightened society *to deprive any children – including illegal aliens – of an elementary education*. I fully agree that it would be folly – and wrong – to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.[1]

Justices Sandra Day O'Connor, William Rehnquist, and Byron White joined Burger's dissent in full. Justice Rehnquist, considered to be the most conservative justice on the Court at the time, would soon become the chief justice, elevated by President Ronald Reagan. The conservative credentials of those who joined in the conclusion that the Texas law was "senseless" are beyond question.

[1] *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) (emphasis added). "Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them." *Id.* at 252.

It is worth noting that, beyond the dissenters named above, renowned conservative Justice Lewis Powell not only agreed that the Texas law was bad public policy, but also considered it unconstitutional, joining the majority opinion in full. Thus, not only was the *Plyler* decision joined by a lead early strategist of the conservative movement in the federal courts, some of the most conservative justices of the modern era, even as they dissented from the majority's constitutional judgment, agreed that the challenged Texas law was "folly" as a matter of public policy.[2]

All of which begs the question why any conservative today would consider enacting some new version of the Texas law challenged successfully in *Plyler* to be a wise tactic, politically or as a matter of policy. Indeed, the conclusion of Burger's dissenting opinion focused on his view that the justices in the majority were taking on a policymaking endeavor that belonged more appropriately to Congress, not the Court. In Burger's view, the Constitution vested Congress with "primary responsibility" to address the issue of undocumented immigration and to assess and address the social costs of excluding any group of children from public schools.[3]

Thus, Burger would likely have become more solidly against the Texas law following the Congress's 1996 decision to effectively codify the holding in *Plyler*.[4] This congressional action also counsels deference to the conservative view that Chief Justice Burger voiced in his dissenting opinion.

Nothing has changed in the 44 years since *Plyler* was decided that should alter the conclusion on public policy that Burger and his conservative colleagues reached. As the majority opinion stated, many of the undocumented children who would be denied an education, if *Plyler* were not decided as it was, will remain in the United States, and many will also become lawful permanent residents and ultimately naturalized United States citizens. *See Plyler*, 457 U.S. at 230 (majority). Indeed, one estimate shows that 430,000 students whose access to public school is guaranteed by the *Plyler* decision have since adjusted status to become citizens or lawful permanent residents.[5]

The same mechanisms that existed 44 years ago continue to exist today for undocumented immigrants to adjust their status, and many undocumented immigrants, particularly if they have long-term residence and strong community connections -- as those who attended elementary and secondary school in this country are likely to develop -- still have available grounds to suspend removal and to remain in the country long-term or permanently. Thus, the children who would be denied a basic education absent *Plyler* will be expected to contribute to our country, and denying them an education will make that impossible and impose

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[2] *See id.* at 242.
[3] *See id.* at 253-54.
[4] *See* 8 U.S.C. § 1643(a)(2).
[5] Scott D. Levy and Phillip Connor, *The Power of Plyler: The Societal and Economic Gains of Equal Access to Education for Undocumented Children and the Future Losses if It Is Taken Away*," FWD.us, Dec. 2025, https://www.fwd.us/news/the-power-of-plyler/.

a substantial burden on society. The loss to society as a whole dwarfs the loss to each individual recipient of a basic education under the *Plyler* decision.[6] Or, as Justice Powell expressly stated:

> Indeed, the interests relied upon by the State would seem to be insubstantial in view of the consequences to the State itself of wholly uneducated persons living indefinitely within its borders.[7]

In addition, of course, there may well be a forthcoming special legislated program that would allow children who came to the United States as minors and have received a higher education or otherwise prepared themselves for significant contributions to our country to adjust status and remain permanently in the country. The DREAM Act and its related subsequent legislation continue to maintain very high levels of bipartisan support.[8] Depriving the potential beneficiaries of this legislation of even a K-12 education simply robs the nation of a ready and needed, skilled and educated future workforce. This will only increase the necessity for our nation to bring in through special visa programs skilled workers who were raised and educated in countries other than the United States.[9]

The *Plyler* court, both majority and dissent, also focused upon the nature of education and the importance of its availability to all. As Burger noted in his dissent, "[t]he importance of education is beyond dispute."[10] The majority identified as significant "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child . . . ."[11] In the 44 years since the decision, the importance of education has, if anything, become even more pronounced, as more and more career options require skills and training beyond that available in elementary and secondary education. Indeed, it may well be that an updating of *Plyler* would require its application beyond K-12 education, not its elimination with respect to elementary and secondary school.

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[6] "Lifetime income gains for adult *Plyler* beneficiaries who are currently living in the U.S. are expected to be $2.7 trillion, or nearly $1 million per beneficiary." *Id.*

[7] *Plyler*, 457 U.S. at 239 (Powell, J. concurring).

[8] Jens Manuel Krogstad, *Americans broadly support legal status for immigrants brought to the U.S. illegally as children*, Pew Research Center, June 17, 2020, https://www.pewresearch.org/short-reads/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/ ("[a]bout three-quarters of U.S. adults say they favor granting permanent legal status to immigrants who came illegally to the United States when they were children"). *See also NEW POLL: Overwhelming Majority of U.S. Voters Across Political Spectrum Support Legislation for Dreamers Paired with Border Security*, FWD.us, Oct. 27, 2022, https://www.fwd.us/news/new-poll-overwhelming-majority-of-u-s-voters-across-political-spectrum-support-legislation-for-dreamers-paired-with-border-security/.

[9] "The exclusion of undocumented children from U.S. schools would result in an estimated future loss of 341,000 people working in jobs typically requiring some college education . . . ." Levy and Connor, *The Power of Plyler*, FWD.us, supra note 5.

[10] *Plyler*, 457 U.S. at 247 (dissent).

[11] *Id.* at 221 (majority).

Of course, another major consideration in the *Plyler* case was that the children who would be denied an education played no role in their status as undocumented. They are children who followed the decision of their parents in immigrating to the United States. As the majority opinion stated, "directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[12] It was Justice Powell who raised the imperfect but helpful analogy to cases involving illegitimate children, noting that in *Plyler*, the challenged Texas law punished children who are "innocent" with respect to their immigration status.[13]

In this regard, too, little has changed in 44 years. It remains "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[14] While some might assert that the increase in unaccompanied teenagers migrating to the United States in recent years somehow undercuts this notion, the numbers are simply not so significant as to change the fact that the vast majority of those who attend school because of the *Plyler* holding simply played no role in their immigrating to the United States or staying here in an undocumented status.

In encapsulating his agreement with the majority, renowned and respected conservative jurist, Justice Lewis Powell, put it this way: "I agree with the Court that [these] children should not be left on the streets uneducated."[15] With respect to this aspect of eliminating *Plyler*, the impacts are severe for the community and for public schools. The simple fact is that children denied entry and enrollment in public school will literally be on the streets and sidewalks of our cities, small and large. The presence of such a group of children is not a desirable consequence for any community. Indeed, their mere presence would be uncomfortable for many residents, including the constituents of many of those who most assiduously seek the overturning of *Plyler*.

In addition, as many police chiefs would predict (and have predicted in prior post-*Plyler* litigation), these children are likely to become the victims of criminal activity, including recruitment of older children into participation in crime. More important, children out of school with impunity will have a tendency to draw their peers out of school, even if those peers retain the right to attend. Given the widespread phenomenon of mixed-status families, where younger children may be United States citizens by birth, while older children are undocumented, the first students to follow the excluded students out of class are their siblings. But they will quickly be followed by friends and acquaintances; over time, public schools may lose enough attendance that districts are required to lay off significant staff, including teachers, and to shutter longstanding school campuses.

This threat may be accelerated as children who retain the right to attend public school confront increasing obstacles to thriving in class. For some, these obstacles may come from the looming threat of undifferentiated immigration enforcement leading to detention of their parents.

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[12] *Id.* at 220 (majority).
[13] *See id.* at 238 (Powell, J., concurring).
[14] *Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).
[15] *Id.*

For others, the obstacles may stem from the deprivation of adequate nutrition, health care, and stable housing. The cuts to the social safety net, enacted last year by Congress, that are to be implemented this year and in following years are already going to strain public education, as students become preoccupied with hunger, illness, and anxiety. These students will find it more difficult to thrive in school, and may find it easier to avoid school. These phenomena would be exponentially exacerbated if these students have peers who are already out of school because they are categorically barred from attendance if the *Plyler* decision were overturned.

In short, it is impossible not to recognize that the threat to *Plyler* is a serious threat – particularly in the current context – to the continued existence of public schooling in large swaths of our nation. *Plyler v. Doe* is most emphatically not about immigration policy; it is more appropriately about education policy; it is at present an important support to success of the public education system. Threatening or eliminating *Plyler* would betray the views of the many conservative jurists who saw the Texas law struck down in the case as "folly."