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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, NATIONAL COALITION OF AMERICAN NUNS, NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., SOUTHWEST COUNCIL OF LA RAZA AND UNITED MINISTRIES IN PUBLIC EDUCATION

The undersigned, as counsel for the above named organizations, respectfully move this Court for leave to file the accompanying brief *amici curiae.*

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The American Civil Liberties Union is a nationwide, nonpartisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights and the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. Its affiliate in Texas is the Texas Civil Liberties Union. In its 52-year existence, the American Civil Liberties Union has been particularly concerned that the guarantee of the equal protection of the laws be enjoyed by all persons without regard to race or economic condition.

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews, to implement Jewish values and to promote the principles of democracy. It has consistently operated on the principle that Jewish tradition requires opposition to injustice and inequality on the basis of race, religion, national origin and economic status.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a national membership of more than 500,000 men and women and their families. The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of the parent organization to advance good will and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It holds that the welfare and security of the Jews in the United States are inseparably related to the extension and preservation of equal opportunity for all; that an invasion of the rights of any racial, religious or ethnic group is a

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threat to the safety of all groups and the individual members thereof.

The National Coalition of American Nuns is an organization of Roman Catholic Sisters whose purpose is to study and speak out on issues related to human rights and social conscience. The coalition was established in July, 1969. It numbers 1,937 sisters.

The National Catholic Conference for Interracial Justice is a service agency formed in 1960-61 out of the Catholic Interracial Council movement. It is an independent "lay" agency, not an official Church agency, though it is recognized by the Church and maintains close relationships with official national Roman Catholic agencies, with the leaders and structures of many local dioceses, and with a large number of religious orders of men and women.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. Several of the policies established by its General Board have affirmed support of public education for all children, especially for the poor. In particular, the Council holds that tax resources should compensate for rather than accentuate the inequalities caused by the accidents of birth.

The Scholarship, Education and Defense Fund for Racial Equality, Inc. (SEDFRE) is an independent, publicly supported national organization formed in September 1962 to assist local community organizations and civil rights

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groups. Its objectives include solving of individual and neighborhood problems in the nation's rural and urban slums and providing an environment in which concerned citizens take the lead in achieving their human and constitutional rights.

The Southwest Council of La Raza is a private nonprofit corporation whose goals include providing program support and technical assistance services to barrio community development programs in several priority areas which include education opportunities. It has established as one of its major objectives the stimulation of interest in needed public educational system reforms so as to secure a public educational system which is genuinely responsive to the need of furthering the advancement of Mexican American educational attainment levels.

The United Ministries in Public Education (UMPE) is the joint agency of national boards, divisions and offices of the Episcopal Church, Presbyterian Church in the United States, the United Church of Christ, the United Methodist Church, and the United Presbyterian Church, U. S. A. Its purpose is to work on behalf of these churches, expressing their active concern and sense of accountability for education. The UMPE serves to support the public educational system where it is contributing to the humane development of persons and to call for reevaluation of the system where needed.

Each of these organizations believes that the outcome of this case will directly and substantially advance or retard efforts to end existing gross disparities in the quality of

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education now being made available to children in our public schools. On the basis of their experience in combatting discrimination in education, they seek to submit to this Court the reason why they believe that the judgment below should be affirmed.

The annexed brief notes that the discrimination caused by the inequitable system of financing public schools in Texas primarily affects Mexican American children. It argues that, in a case like this where a clear showing of gross discrimination on the basis of wealth is not countered by any effort at justification, the courts must at least call the public officials responsible to account.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for appellees has consented. Counsel for appellants has not replied to our request.

Respectfully submitted,

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August 1972

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BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, NATIONAL COALITION OF AMERICAN NUNS, NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., SOUTHWEST COUNCIL OF LA RAZA AND UNITED MINISTRIES IN PUBLIC EDUCATION

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

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Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statement of the Case

This suit was brought as a class action on behalf of Mexican-American school children and parents living in the Edgewood Independent School District in Bexar County, Texas, and on behalf of school children living in similarly situated school districts. It was filed on July 10, 1968, and named as defendants school districts and State and local officials. The complaint charged that the system of public school financing discriminated against school districts containing a large percentage of Mexican-American children. It was also charged that public school financing in Texas was discriminatory because wealth determined the quality of education in the various school districts. A three-judge District Court, duly convened in the Western District of Texas, entered its decision and judgment on December 23, 1971 (App. 259) and a clarification of the judgment on January 26, 1972 (App. 272). The District Court upheld the complaint but stayed entry of its judgment for two years in order to allow the Texas Legislature to take appropriate steps (App. 270). The case is here on direct appeal from the judgment of the District Court.

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Statement of Facts

The workings of the system of public school finance in Texas are complex and in many respects unique to that State.* The system is described in detail in the record and the briefs of the parties submitted to this Court. It relies primarily on taxes levied on the value of real property in school districts, plus a supplemental contribution from the State, primarily under a "foundation" plan. Money resulting from the local property tax represents approximately one-half of all monies for public school financing in the State. School districts' tax bases vary considerably in the State—from below $10,000 of value per child to over $500,000, or a ratio of fifty to one. Predictably, this results in the spending by school districts of widely disparate amounts on the education of children. This inequity is in some respects heightened by the State's additional funding.

The Minimum Foundation Program (Texas Education Code §§16.01, *et seq.*) determines how the State's contribution is allocated to the school districts. The system of allocating some funds on the basis of the experience and education of the teachers hired by the school districts (See Texas Education Code, §§16.31, *et seq.* and 16.98) leads to State support of better quality education for the schools in wealthier districts. This is so because the school

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* The system is ably described in the second part of an article by Berke, Carnevale, Morgan and White, "The Texas School Finance Case: A Wrong in Search of a Remedy," which will be published in October in the Fall 1972 issue of *The Journal of Law and Education.*

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district supplements State aid with its own funds, and richer districts can more easily supplement State funds than poorer districts. Moreover, better qualified teachers will generally go to those school districts offering them the highest salaries and the State gives school districts more money if they have better qualifed teachers. In this and other ways, the State gives more money per pupil to wealthier districts, which are overwhelmingly white, than it does to poorer districts which tend to contain large concentrations of minority group children. This occurs even though poorer school districts tend to tax themselves, in general, at a higher tax rate than wealthier districts.

It is this system which results in the unequal treatment of poor and minority children by the State, which the court below, largely on the basis of uncontroverted evidence, found to violate constitutional standards.

Questions to Which This Brief is Addressed

1. May the judgment below requiring the appellants to end the unequal financing of school districts in Texas be affirmed on the ground that such unequal financing constitutes discrimination on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. May that judgment be affirmed on the ground that, aside from the matter of race, the proven inequality has not been justified on any reasonable grounds and therefore constitutes a violation of the Equal Protection Clause?

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Summary of Argument

I. It has been clearly established, and the court below found, that school districts in Texas are unequally financed and that the districts which are best able to finance themselves have the lowest proportion of minority group pupils and vice versa. Even under the law as it existed prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), this constitutes a plain case of racial discrimination in violation of the Equal Protection Clause. Appellants presented no rational explanation or reasonable justification for this discrimination.

II. The evidence of inequality, considered independently of the racial character of the various school districts, reveals a system of school financing in Texas which provides more education for some children than it does for others. This by itself establishes a violation of the Equal Protection Clause.

(a) Appellants' arguments for reversal here rest primarily on issues not presented by this record. Offering no justification for the gross differences in expenditures, appellants argue rather that affirmance of the decision below would result in unmanageable problems of redress. Since the court below postponed the effective date of its decree for two years in order to permit the State of Texas to develop procedures for equalizing its schools, the question of the availability of effective relief is not before this Court. In addition, there is no evidence to support the dire predictions made by appellants as to the effects of the judgment below.

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(b) The same is true of appellants' efforts to raise issues as to the whole range of public education problems throughout the United States. These arguments ignore the fact that there are substantial differences from state to state.

(c) Since appellants have failed to show any justification for the unequal treatment of public school districts in Texas, this Court should not make findings on questions which could and should have been the subject of evidentiary presentation below. It should rather find that the record presents a clear case of unreasonable classification in violation of the Equal Protection Clause.

Argument

The issue of the wisdom and constitutionality of unequal financing of public school districts and what steps, if any, should be taken to correct it has arisen in many parts of the country. We submit, however, that this case need not be treated as a vehicle in which all of the problems associated with that issue must be resolved by this Court. Regardless of how this Court may view the broad issue of equal financing of public schools, the decision below, we submit, would at least have to be affirmed on the basis of the narrow grounds outlined below.

What is before this Court is a single lawsuit initiated by specific plaintiffs, seeking specified forms of relief. It was litigated on the basis of the evidence and argument presented to the District Court. Whatever may be this Court's view on the broad questions here involved, it is called upon only to resolve the issues in this case. Those

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issues are much narrower than the appellants' brief suggests. That brief focuses largely on the remedy. However, the remedy may never become an issue; it was not the subject of trial below; and it will at best be a separate question presented some two years in the future. Moreover, the brief argues factual questions which could and should have been the subject of an evidentiary presentation at trial and which are now raised for the first time in this Court. Furthermore, aside from race, it was established that there is gross disparity in the quality of education made available to children in the various school districts of Texas, unexplained and unjustified by any considerations of public policy. This Court is called on only to decide whether disparities exist in violation of the Constitution and whether, if so, some form of relief is called for, directed at correction of those disparities.

Affirmance of the decision below would not break new ground. It would allow the slow and orderly development of legal doctrine and legislative reform in Texas as well as in other states facing the same problems. It would, at the same time, constitute a reaffirmation by this Court of the "mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon,* 286 U. S. 73, 88 (1932).

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POINT ONE

The judgment below should be affirmed on the ground that the record establishes discrimination based on race, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Appellees represent a class composed of Mexican American children and their parents in Bexar County and throughout the State of Texas (App. 13). As Chicanos, they have long been the orphans of the Texas school system. In the Edgewood District of Bexar County, where three-fourths of the pupils are Mexican American, the students have one-third as many library books per child as in neighboring Anglo districts, one-fourth as many guidance counselors, and classes which are fifty percent more crowded.

Nor is this pattern unique to Bexar County. As one of plaintiffs' expert witnesses declared (App. 196):

> There is a consistent pattern of higher quality education in districts with higher proportions of Anglo-Americans, and lower quality education in districts with lower proportions of Anglos.

Such deprivation—in light of this Court's injunction that education "is a right which must be made available to all on equal terms" (*Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954))—presents a classic case of racial discrimination.[1]

1. The above statistics were only a small part of plaintiffs' case below, which was built upon both factual and opinion evidence. Moreover, this uncontroverted evidentiary showing of discrimination has been confirmed by every study done in Texas. See, for example,

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This Court has repeatedly held that racial discriminations are suspect and may be justified only if necessary to achieve a compelling state interest. *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Loving* v. *Commonwealth of Virginia,* 388 U. S. 1, 11 (1967). Indeed, discrimination of the type found here was repeatedly held by this Court to violate the Equal Protection Clause, even before the decision in *Brown.* In these earlier cases, stretching back as far as *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), this Court held that racial segregation could be constitutionally justified only if the State provided equal facilities to all races. For example, in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), the Court found a violation of equal protection where the law school for Black Texans was significantly inferior to the White law school in terms of library size, number and background of faculty, curriculum and availability of extracurricular activities. See also *McLaurin* v. *Oklahoma,* 339 U.S. 637 (1950); *Sipuel* v. *Board of Regents,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938).

As *Sweatt* makes clear, the evil condemned in these cases was neither racially separate education, nor racially

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U. S. Civil Rights Commission, Report, "The Unfinished Education" (1972). This report found that minority students in the Southwest —Arizona, California, Colorado, New Mexico, Texas—do not obtain the benefits of public education at a rate equal to that of their Anglo classmates. These minority students include Mexican Americans, Blacks and American Indians. Five standard measures were used: school holding power, reading achievement, grade repetitions, overageness, and participation in extracurricular activities. Disparities were shown on all these measures. The proportion of minority students who remain in school through the twelfth grade is significantly lower than that of Anglo students, with Mexican Americans demonstrating the most severe rate of attrition. College entrance rates reveal an even greater gap between Anglos and minority group students. Similar discrepancies are also found in reading achievement, grade repetition and overageness.

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discriminatory motivation. Before *Brown,* neither segregation nor discriminatory intent was constitutionally suspect. Rather, in these decisions the Court was concerned only with the bare fact of racially unequal schooling. Where a law's effect was to deprive minority students of "education equivalent to that offered by the State to students of other races" (*Sweatt* v. *Painter, supra,* 339 U.S. at 635), this Court struck it down.

The decision in *Brown,* of course, did not sap the vitality of these decisions. As Judge Skelly Wright noted in *Hobson* v. *Hansen,* 269 F. Supp. 491, 496 (D.C., 1967), aff'd *sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. 1969):

> To the extent that *Plessy's* separate-but-equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance does not survive Brown. Nevertheless, to the extent the *Plessy* rule, as strictly construed * * * is a reminder of the responsibility entrusted to the courts for insuring that disadvantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes.

Judged by these longstanding and familiar principles, the Texas school financing system simply cannot withstand constitutional scrutiny. Plaintiffs' evidence, both statistical and opinion testimony, establishes the consistently inferior educational opportunities provided in districts with heavily minority populations. This evidence was undisputed by the State of Texas below. Texas called no witnesses and produced no testimony on the racial issue in the trial court. The State did not challenge the accuracy

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or significance of plaintiffs' statistical evidence, nor contest the credentials of plaintiffs' expert witnesses.

The fact that the racial discrimination inheres in the Texas school financing system may not have been deliberate or willful does not preclude a finding that the resulting inequalities violate equal protection. The Courts of Appeals for all the major Circuits are in agreement that even unintentional racial discrimination may be unconstitutional. See, for example, *Hawkins* v. *Town of Shaw, Mississippi,* 437 F.2d 1286, 1291-1292 (5th Cir. 1971); *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.,* 436 F.2d 108, 114 (3d Cir. 1970), *cert. den.,* 401 U.S. 1010 (1971); *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 931 (2d Cir. 1968); *Southern Alameda Spanish Speaking Organization* v. *Union City, California,* 424 F.2d 291, 295-296 (9th Cir. 1970); *Hobson* v. *Hansen,* 269 F.Supp. at 497, aff'd in part, 408 F.2d 175 (D.C. Cir. 1969). See also *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971).[2]

2. Although this Court in *Jefferson* v. *Hackney,* —— U.S. ——, 92 S. Ct. 5724 (1972), declined to invalidate a state welfare scheme which paid a higher percentage of need to the predominantly white recipients in certain categories than to the largely minority recipients in other programs, in the absence of any showing of intentional discrimination, that decision is not controlling here for several reasons.

First, that case involved welfare, not education, which this Court has long recognized as "perhaps the most important function of state and local governments." *Brown* v. *Board of Education,* 347 U.S. at 493. See *Palmer* v. *Thompson,* 403 U.S. 217, 229 (1971) (Blackmun, J. concurring).

Second, unlike the recipients in the various welfare categories in *Jefferson,* who differed significantly in age, disability, and need, school children—whether Black, Brown, or White—are essentially similar. Certainly, it could not reasonably be said that White children have more critical educational needs than minority students, and consequently deserve better schooling. Indeed, the District Court's Pre-Trial Order specifically recites as conceded that the educational needs of the children in the predominantly White districts of Bexar County were no greater than those of the largely Chicano Edgewood pupils (App. 45). Thus, the rational basis for distinguishing among categorical aid programs in *Jefferson* is lacking in the instant case.

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Appellants contend that the court below "quite properly" ignored appellees' claim of racial discrimination (Brief, p. 4; see also p. 23). However, the court below specifically found (App. 262):

> As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils while the poor property districts are low in income and predominantly minority in composition.[3]

Since appellees asserted their constitutional claim based on racial discrimination in their complaint and a factual finding on the point, based on compelling and unrefuted evidence, was made by the court below, this Court is in a position to affirm the judgment below on the basis of that claim, whether or not the judgment below was so based. See, for example, *Erie* v. *Tompkins,* 304 U.S. 64 (1938); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Texas' minority population is concentrated in school districts with low assessed valuations. Despite more stringent tax efforts, such districts simply cannot raise enough revenue through local property taxes to begin to match the

3. This finding on the factual issue raised by the complaint was based on an extensive record presented by appellees. The State made no effort to controvert this evidence. Its present attempt to discredit some of plaintiffs' statistical evidence (Brief for Appellants, p. 21) illustrates the danger of raising factual questions for the first time on appeal. Plaintiffs' expert witness presented a representative range of statistics and gave his interpretation thereof. Now the State—without any evidentiary support—has taken a carefully selected portion of those statistics and attempted to establish a different result. If that contention had been made in the trial court, plaintiffs could have rebutted the State's arguments with additional evidence. By raising these claims for the first time in this Court, however, the State has effectively foreclosed such rebuttal, thus depriving both the court below and this Court of a complete record.

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educational offerings in the rich, White districts. Nor is this correlation accidental. At the time the present school district lines were being drawn, Texas courts were enforcing deed restrictions that barred Mexican Americans from all but the poorest neighborhoods (App. 232). See *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

This pattern of rich White/poor Brown is apparent both in Bexar County, plaintiffs' home, and throughout Texas. Plaintiff children attend school in the Edgewood School District, which is at once the poorest and most heavily minority district in the county. Seventy-five percent of the students in Edgewood are Mexican Americans, and the district has an assessed valuation per pupil of $5,960. By contrast, the richest district in Bexar County, Alamo Heights, has only one-sixth the percentage of minority students and nearly ten times the tax base ($49,478 per student). The second wealthiest Bexar district, Northeast, contains only seven percent minority pupils and enjoys an assessed valuation of $28,202—five times that of Edgewood. These vast property value differentials are strikingly reflected in annual per pupil expenditures. Alamo Heights spends $558 per pupil annually (from State and local sources); Northeast expends $415. By contrast, property-poor Edgewood can pay only $248 to educate each child—less than half as much as Alamo Heights (App. 216, Table VII).

The spending differentials inexorably result in severely unequal educational opportunities, as shown by the tangible factors surveyed in *Sweatt.* In every category, Mexican American children of Edgewood are critically and consist-

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ently shortchanged. In terms of physical facilities, for example, an Edgewood student has only 50.4 square feet of classroom space, while a White Northeast child enjoys 70.36 square feet—forty percent more (App. 236). Although the State provides all students with classroom texts, Edgewood cannot afford to purchase sufficient supplemental textbooks or library volumes. Its school libraries contain only 3.9 books per child; Northeast's libraries, by contrast, provide 9.42 books per pupil (*Id.*).

The Mexican American pupils of Edgewood suffer significant deprivation in terms of personnel, as well. The teacher-pupil ratio there is one to 28; in Northeast, one to 19 (App. 237). Consequently, each teacher in the minority district has 50 percent more students than in the White district. These faculty differentials are shockingly severe in auxiliary personnel. In Edgewood, 5,672 children must share each counselor, while virtually all-White Northeast has a counselor for every 1,553 students—or four times as many (*Id.*). At every turn, the Mexican American children of Edgewood are guaranteed an education inferior to that provided their Anglo counterparts across the county.

Bexar County's pattern of racially discriminatory educational offerings is mirrored throughout Texas. As plaintiffs' expert testified, a district's property wealth, and consequently its spending, is inversely proportional to its minority population (App. 196).[4] Thus, districts with over $100,000 per pupil in taxable property spend an average of

4. Random sample data collected and analyzed by the U.S. Civil Rights Commission reinforces this testimony concerning the inverse correlation between the proportion of Mexican American students in Texas school districts and expenditure levels (App. 98-99).

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$815 per child per year and have 92 percent Caucasian students. However, districts with less than $10,000 in assessed valuation per pupil generally have a student population that is overwhelmingly minority (79 percent) and are able to spend only $305 per child per year.

The impact on educational quality can be illustrated in terms of two criteria. The richest, Whitest districts spent $413 per pupil on professional salaries—an indicator that subsumes professional training, length of tenure, and pupil-teacher ratio—nearly fifty percent more than the $276 per child expended by the poorest, most minority districts (App. 211, Table VI). Second, the predominantly White districts enjoyed twenty-two percent more professional personnel than the heavily minority districts (*Id.*). The deprivation suffered by minority group children is thus clear.

These grotesque spending differences cannot be attributed to a lack of devotion to education among minority parents, for the most objective evidence of a community's attachment to its schools—the rate at which its citizens tax themselves for learning—reveals precisely the opposite. The richest, heavily Anglo districts paid an average tax of 31 cents per $100 of property, while the poorest, predominantly Brown and Black districts taxed themselves at 70 cents per $100—or well over twice as much (App. 205, Table II). Thus, the Texas school system can best be characterized as one where the poorest and most oppressed pay more for less.

It is ironic, but not surprising, that the instant case, like *Sweatt* v. *Painter,* focuses on the educational system of the State of Texas. For it is clear that Texas has continued at

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the primary and secondary school level the same pattern of racially unequal education that this Court condemned at the graduate level in *Sweatt*. Thus, 22 years after *Sweatt*, Texas is again before this Court, doggedly defending the same position rejected once before.

In large part, this case is for the Mexican American community of this country what *Sweatt* and *Brown* were for our Black citizens. It is an attempt by a substantial and disadvantaged minority to resort to a court of law for the orderly redress of discrimination visited upon them by the State. Their call for racial justice 150 years overdue should not be obscured in the theoretical issues of school finance now raised by Texas.

The racial discrimination issue is not an afterthought to the litigants here and to those millions who are interested in their behalf. It lies at the very core of this case. A failure to affirm the holding below in the face of the strong showing made in the record of racial discrimination against the Mexican American citizens of Texas would push the Chicano community back to the position of despair held by Blacks in our society two decades ago.

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POINT TWO

The judgment below should be affirmed on the ground that the record establishes arbitrary discrepancies in the financing of school districts in Texas, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The facts reviewed in Point One, above, considered independently of the racial character of the various school districts, establish that the system of public financing of schools in Texas, brought about by the law of that State, provides more education for some children than it does for others. If Texas had announced that it was writing its laws with a view to providing more education in some districts than others, no one would doubt that it was denying equal protection. But the test under the Equal Protection Clause is not intent but result.

A. The Defenses Offered by Appellants Raise Issues not Before this Court.

The reversal requested here by appellants would have to be based on unsupported assumptions not appearing in the record and in most respects never even raised below.[5]

5. Among the arguments raised for the first time in Appellants' Brief are the claims that the only certain result of the District Court's ruling will be to put more dollars in the pockets of teachers, and that the ruling will exacerbate the problems of inner city schools. Appellants' Brief, pp. 40-45. The *amicus* brief for various Governors claims that the ruling below will destroy the fiscal powers of the State legislatures; will lead to a shift from the property tax to other forms of taxation; will compel full State funding, with huge increases in overall spending; and, once again, will adversely affect the interests of urban areas and racial minorities. Governors' Brief, pp. 17-35, 83-99. Increases in spending are sometimes generated by equal protection rulings, but are never necessary. The State is

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Whether or not there is a rational explanation, in fact, for the gross differences in expenditures by Texas upon school children is a matter susceptible of proof. Texas, however, presented none. Whether or not there are judicially manageable standards (a) goes to the remedy, which is not at issue here and (b) is a subject of evidence and proof, upon which the State of Texas presented no evidence. In this procedural posture any action other than affirmance would be (1) based on incomplete information and, therefore, likely to be mistaken; (2) would be improper in not being based upon the record; (3) would provide limited guidance for similar litigation now in other courts, and (4) would foster further litigation and confusion. Phrased somewhat differently, a decision adopting any of the arguments of Texas which have no evidentiary foundation would provide no guidance for future litigation in which evidence is presented on the issues which Texas ignored below.

For example, there is no evidence to support the assertion that there would be a loss of local control. There was no expert testimony to this effect; there is no data as to the extent to which the State now controls and limits local options; there is no evidence as to the State's control (or lack of control) of curriculum, textbooks, length of school term, and other areas; and no educator or other expert tes-

obliged only to eliminate the offending discrimination. This may be achieved by equalizing at any support level, or by basing disparities on rational policy grounds. That teachers may get increased pay if Edgewood receives more funds is hardly a ground for criticism, even if the assertion were properly proven. The flexibility allowed State legislatures under the District Court's rationale is broad indeed, and does not compel centralized financing or control. Neither does the opinion create problems for inner city schools which they do not face today. Legislatures will obviously be free to adjust distribution formulae to provide for greater costs of needs associated with urban schools, or schools with high concentrations of low achievers.

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tified that equalization in Texas would cause any loss of local control. Moreover, the extent to which there would be more or less control depends upon the legislative response and the remedy, to be evolved during the two-year waiting period ordered by the court below.[6]

Texas also argues that the decision of the Court below would lead to a financial crisis in education. Again, there is nothing in the record showing that this is possible, much less probable. No expert on financial affairs, educator or school administrator, even hinted at any such result. Moreover, this argument also goes to the relief. Obviously, some remedies would clearly improve the financial position of education while others might pose difficulties. In addition, all of the available public information demonstrates that financial crisis already characterizes public education in America even today, in its unequalized form. Voter rejection of school bond issues has become commonplace all over the country.[7]

Moreover, appellants simultaneously prophesy a great reduction in expenditures creating a crisis in education and an enormous increase in expenditures causing fiscal

6. If this issue were properly before the Court, it could be argued that, under equalization, poor districts would for the first time have real control over decision-making since they now lack the resources to make control a reality. Districts would still be left free to concentrate spending in particular areas and to innovate or to institute compensatory programs. Under many proposed formulae for equal school financing, local voters in all school districts, rich and poor, would have far more choice than under the present system to decide how much they value education as opposed to other services.

7. In Detroit, a $101 million dollar school deficit is projected for next year. The Board of Education plans to operate schools there for only 117 days instead of the State-required 180, to minimize the fiscal disaster, and to cut teacher payrolls by 35%. *Time Magazine,* June 19, 1972, p. 42.

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difficulties. Both of these arguments are without any support in the record, both cannot be simultaneously true and, of course, there is no reason why either should be the case.

In brief, the arguments about financial crisis are wholly unsupported by the record, are premature, run contrary to available information about the state of public education in the United States, and are logically inconsistent.[8] Most

8. The arguments of appellants about the relationship between expenditures and quality of education also lack logical and evidentiary support. Texas introduced nothing into the record on this question. Indeed, their "Trial Brief" deals with the issue in just two sentences, neither of which raises the arguments they now advance (Defendants' Trial Brief, p. 17). Worse, Texas argues simultaneously that increasing sums of money will not enhance education in poor school districts and that decreasing money to the good school districts will destroy those districts. Appellants assert in effect that spending does not affect education; that decreased spending by the "best" (i.e., rich) districts will affect the quality of education; that equalizing spending on a statewide basis would be done at a level which would not help the poor districts and that a mass exodus to private schools would result. None of these assertions has any support in the record. Moreover, they contradict each other.

Indeed, defendants at the trial level did not question the fact that the cost and quality of education may be related. They contended only that the amount spent "does not *necessarily determine* the quality of the education which the students of the school district will receive" (App. 44), and that the quality of education "cannot be determined solely on the amount of money spent per student" (App. 73) (emphasis added). The basis for this argument, moreover, was not the research data now presented to this Court, but the assertion that costs vary within geographical areas and managerial capacities differ from district to district (Defendants' Trial Brief, p. 17).

Appellants go much further in this Court. They argue that the District Court's decision must be reversed because it is not clearly enough established that "quality is money." But all that the decision below signifies is that the money differences proved by plaintiffs in this case are material enough to warrant judicial intervention, in light of the other factors present, including race and poverty. To be educationally material, expenditures need not be shown to correlate with "achievement," as defined by the educational research professional. Quality is not just achievement in basic skills (as measured by socially biased and scientifically primitive tests). It includes as a minimum

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important, those arguments would only be appropriate when and if a specific remedial decree is being considered.

That is not the situation now. The court below specified that "The mandate of this cause shall be stayed * * * for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law * * * in the event the Legislature fails to act within the time stated, the court is authorized to and will take such further steps as may be necessary * * *. Needless to say, we hope that no further action by this Court will be necessary" (App. 271-72).

Over 80 years ago, this Court said in *Liverpool, etc. Steamship Co.* v. *Commrs. of Emigration,* 113 U.S. 33, 39 (1885):

> [The Supreme Court] is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

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access to all the material and non-material facilities and resources that experience has led us to believe are related to enabling students to become better citizens, earners, and human beings.

Many of the same comments apply to appellants' assertion that the cities will be injured by the decision below. This contention is again unsupported by expert testimony, statistics or facts of any kind. Moreover, the court held only that school spending cannot be made a direct function of local wealth. The decision of the court does not change the political equation. If education costs more in the cities than in rural areas, the Legislature could clearly respond by providing more funds for the cities without in any way violating the decision below.

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Similarly, this Court said, in *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 569 (1947):

> * * * (C)onstitutional issues affecting legislation will not be determined * * * in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of * * *

Again, in *Sweatt* v. *Painter,* 339 U.S. 629, 631 (1950), this Court said:

> We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible.

See also *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194 (1934).

We respectfully submit that these principles directly apply to the instant case.

B. Appellants Improperly Raise Issues as to School Financing in States Other than Texas.

Appellants have attempted to characterize this case as involving questions applicable to the whole range of public education problems throughout the United States, ignoring the fact that there are substantial differences from State to State. A careful factual showing (uncontroverted by any evidence) was made below of the relationship between money expended and quality of education in Texas schools,[9]

9. Appellants invite this Court to deal definitively with the extraordinarily complex dispute about money and achievement in all circumstances for all school districts. The invitation should, and must, be declined. The District Court had ample evidence before it

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of the inadequacy of equalization and foundation programs in Texas, of a history of discriminatory housing patterns in the Southwest, of the insufficiency of the tax base in many school districts, and of a close correlation between minority group enrollment in school districts and poor quality education. These factors may not appear, or may appear to a lesser extent, in other States.

The court below expressly found that "the adverse effects of this erroneous assumption [the assumption that property within a district will be sufficiently equal to sustain comparable expenditures] have been vividly demon-

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to warrant its finding referred to below, that the money differences in this case are material. The complaint alleged that "the children *in the Edgewood District* are provided substantially inferior education compared to the children in other * * * districts" (App. 21) (emphasis added). Affidavits demonstrated that cost was related to quality among the relevant Texas districts by several measures, including professional salaries, the degrees held by teachers, the proportion of teachers on "emergency" permits, student-counselor ratios, the number of professionals per 100 students, drop-out rates, achievement levels, etc. (App. 209-214; 241). The Superintendent of the Edgewood School District, Dr. Cardenas, testified to his funding problems, pointing out that, because of its sharply lower level of support, Edgewood "cannot hire sufficient qualified personnel, nor provide the physical facilities, library books, equipment and supplies afforded by other Bexar County districts" (App. 234). And he documented the inadequate space in, and maintenance of, Edgewood schools, their inadequate libraries and curriculum, the large classes, the lack of counselors, the loss of Federal matching funds, and the far higher-than-average drop-out rate (App. 234-238).

No effort was made to challenge the evidence proving disparities in educational services and achievement for these plaintiffs in the State, and none is made now. The attack launched is against a broad principle—"quality is money"—that has nothing to do with this case, and the evidence and argument marshaled for the attack proceeds on an extremely narrow definition of quality (i.e., achievement in basic skills), and is only one side of a highly controversial subject. Even if the subject were pertinent to this case, it should have been explored below.

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strated at trial through the testimony and exhibits adduced by plaintiffs'' (App. 261). This Court cannot know whether this finding would or would not be applicable in another State or upon a different record. An affirmance here can be based on the narrow ground that, on the record in this case, there has been a gross and unjustified discrimination based on poverty.

Similarly, the discriminatory patterns in Texas may not be present in other parts of the country. The equalization and foundation programs so inadequate in Texas may well work better in other states. The percentage of cost of education borne by the State (as opposed to the local community) and the precise spread between richer school districts and poorer bears heavily upon the question of local control. The high percentage (over 50%) borne by the State of Texas shows the deep involvement of that State in seeing to it that, in fact, local options do not come into play. It is on the basis of this record, not speculation as to the situation in other states, that this case should be decided.

C. Appellants have Failed to Show any Justification for the Unequal Treatment of Public School Districts in Texas.

The court below found that, ''Not only are defendants unable to demonstrate compelling State interests for their classifications based upon wealth, they fail to establish a reasonable basis for these classifications'' (App. 266). As we have seen, this conclusion quite accurately reflects the record before this Court.

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Accordingly, it is not necessary to consider whether the "compelling State interest" test applies to this case.[10] Appellants have failed to satisfy the elementary test applicable as a minimum in all equal protection cases by establishing a "reasonable basis" for the State's discrimination.

Appellants appear to be urging that the reasonableness of the system is demonstrated by the fact that it has been in existence for 50 years (Brief, pp. 38-39). Similar arguments of course have been used to justify racial segregation, denial of counsel for criminal defendants, onerous restrictions on the right to vote and other practices that have been condemned by this Court. The argument can hardly be viewed as a statement, much less as evidence, of a reason for preserving the system.

Texas is, in effect, asking this Court to make findings on questions which could and should have been the subject of an evidentiary presentation below. For example, is the State's desire to encourage local educational experimental programs one reason for differences in expenditures from district to district? If so, has a single experimental program ever emerged in fact as a result of giving one school

10. As indicated in Point I of this brief, *amici* believe that the compelling state interest test should be applied in this case because, since this is a case of racial discrimination, the classification is inherently "suspect", carries a "very heavy burden of justification", and is subject "to the most rigid scrutiny." *Korematsu* v. *United States, supra; Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964). Moreover, enjoyment of a quality education is a fundamental personal right. See note 2, *supra.* Regardless of the basis upon which a classification conditioning such rights is made, the conditioning must be justified by a compelling state interest. See, e.g., *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Certainly, the court below was correct in its conclusion that appellants have not met this test.

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district twice as much as other districts? Indeed, is there any factual basis for the assumption that local control of schools requires that each school district expend upon itself the money it raises within its own district? If Texas had made any effort to prove that rational basis below, the evidence might well have shown that there was no local control in any realistic sense and that the State already controls curriculum, textbooks, and every other important detail of the educational process. If so, local control as a rational basis for the financing scheme might have proven to have had no basis in fact.

Here again, Texas is in effect inviting this Court to intrude upon the domain of the Legislature. For example, is it in fact a goal of the Texas Legislature to foster local control or, on the other hand, is it the intention of that State body to encourage greater centralization of decision making for its school systems? This Court should not and need not be in a position of telling the State of Texas what its educational and financial objectives should be.

Finally, the absence of evidence showing a rational basis also means that any decision which *assumes* that some rational basis exists will not be effective in precluding further litigations, because litigants will bring cases designed to *show* as a matter of fact that no rational basis exists.

By saying that there is no proof of even a rational basis, all this Court would be doing is asking the Legislature to look at reason as the basis for distributing money. *Cf. Lindsey* v. *Normet,* —— U.S. ——, 92 S. Ct. 862 (1972) (irrationality in wealth classification). Such action represents the most minimal intrusion by the judiciary. Once

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the legislative body is forced to use minimum rationality as the criterion for distributing school funds, it seems fair to predict that all segments of our society are likely to benefit. Affirmance on this ground would also fully preserve the integrity of the court system. It would amount to a simple statement that litigants are going to have to try these issues so that the courts may decide them on the basis of substantial evidence rather than speculation.

Totally aside from the absence of factual support for the argument of Texas that there is a rational basis for the scheme, even its theoretical arguments are far from compelling. Although it may be emotionally appealing to talk about "local control," there is simply no rational reason why that goal cannot be accomplished without the onerous discriminations of the present scheme. In fact, the decisions below provide the first opportunity in several decades to return decision making to smaller communities and to provide them with the resources to carry out their priorities.

In this framework, to talk about the decisions below as a limitation on the freedom of the States or as undermining home rule not only has (and could have) no basis in evidence before the Court but is directly contrary to the realities of public education in our society. Moreover, that again goes to the remedy which has not been reached by the court below. Equally important, even assuming the legitimacy of the goals advanced, the State has not advanced any rational reason why one school district must have three times as much as another district to further those goals, especially when the school districts being shortchanged are overwhelmingly poor and minority group. Finally, but of crucial importance to the *Amici* here, the

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system has no rational basis because those children with the most pressing educational requirements are receiving the most inadequate education.

Conclusion

In light of the record, the judgment of the lower court was the minimum warranted by the evidence. There is nothing before this Court that would support the extension of the decision below in the way contended for by the State of Texas. By staying its decree for two years, the court below accorded due respect for the legislative process, prescribed no remedies, and dealt only with the clearest kind of gross inequities on a virtually uncontroverted record. We respectfully urge that its judgment should be affirmed.

Respectfully submitted,

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