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# 85-2579

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

LULAC, et al.,

Plaintiffs-Appellees

v.

STATE OF TEXAS, et al.,

Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

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Appellees urge this Court to affirm the district court's decision on numerous grounds not relied on by the district court. As we demonstrate in this reply brief, however, none of these alternative grounds for affirmance withstand scrutiny.

## ARGUMENT

### I

### THE ABSENCE OF JURISDICTION UNDER THE STATE OF TEXAS DECREE REQUIRES REVERSAL OF THE DISTRICT COURT'S DECISION

In our opening brief, we argued (Br. 16-22) that the district court's authority to enforce the State of Texas decree did not give it jurisdiction to decide appellees' challenge to the State's use of the PPST. Appellees contend that even assuming the United States is correct on this point, it should not lead to reversal of the district court's decision. Appellees make two arguments in support of this contention. Neither is persuasive.

Appellees first argue that since appellate review under 28 U.S.C. 1292(a)(1) extends only to those parts of the court's order that relate to its grant of an injunction, this Court should decline any consideration of jurisdiction (LULAC Br. 43-44). It is well established, however, that "[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." Mitchell v. Maurer, 293 U.S. 237, 244 (1934). This duty applies in all cases, including appeals from grants of preliminary injunctions. As the Supreme Court has held, "[t]he right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court." United States v. Mine Workers, 330 U.S. 258, 295 (1947). Thus,

this Court is required to determine whether the district court had jurisdiction over appellees' claims.

Appellees alternatively contend that since they could file a separate suit against the Commissioner of Education under Ex parte Young, 209 U.S. 123 (1908), the absence of jurisdiction under the State of Texas decree should not matter (LULAC Br. 43). The fact is, however, that appellees have not filed such a suit. Had they done so, it presumably would have been assigned randomly. By filing a motion to enforce the State of Texas decree, appellees could effectively select the judge of their choice. But neither the judicial code nor the rules of procedure allow the plaintiff to select the judge. Accordingly, if, as we argue, the district court did not have jurisdiction under the State of Texas decree, this Court should reverse and remand with directions to dismiss appellees' motion. Such a disposition would leave appellees free to file a separate suit challenging the State's use of the PPST and thereby return them to the position they would have been in had they not improperly invoked jurisdiction in this case.

## II

## THERE ARE NO ALTERNATIVE GROUNDS THAT WOULD SUPPORT AFFIRMANCE OF THE DISTRICT COURT'S HOLDING THAT APPELLEES WERE LIKELY TO PREVAIL ON THE MERITS

In our opening brief, we argued that the district court erred in holding that appellees were likely to prevail on the merits. In particular, we showed that the district court was mistaken in concluding that appellees were likely to prevail on their claims that (1) the State's use of the PPST reflected intentional discrimination in violation of the Equal Protection Clause (Br. 22-31); (2) the State failed to give adequate notice of the test in violation of the Due Process Clause (Br. 31-36); (3) the State's use of the test reflected intentional discrimination in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Br. 37); and (4) the State's use of the test perpetuated the effects of prior segregation in violation of Section 204(b) of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1703(b) (Br. 38-43).

Appellees have now raised five additional theories of liability not relied on by the district court. As we demonstrate below, none of them provide a basis for affirming the district court's decision.

A. The State's use of the PPST as an absolute condition for admission into teacher education programs does not violate the Due Process Clause

Appellees contend (NAACP Br. 20-24) that the State's use of the PPST as an absolute condition for admission into teacher education programs violates the Due Process Clause. This contention is without merit.

State educational decisions violate the Due Process Clause only if they are shown to be without any rational basis. Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976). Appellees have fallen far short of showing that the State's use of the PPST fails to satisfy this baseline requirement.

Appellees are apparently of the view that the use of multiple factors, including a student's grades, would be a better way to measure basic skills. But the State could certainly conclude that because of grade inflation and the variation in grading standards from institution to institution, the use of a student's grades would be neither reliable nor fair (Tr. 1588-1589). More fundamentally, as this Court explained in Tyler v. Vickery, 517 F.2d 1089, 1102 (1975), "the focus of the rational relationship test is not whether the state has superior means available to accomplish its objectives, but whether the means it has chosen is a reasonable one." Since the PPST is undeniably a reasonable way to assess basic skills, the possibility that there may be other ways

for the State to achieve this goal is constitutionally irrelevant.[1/]

In any event, as we pointed out in our opening brief, the State Board adopted the PPST only after concluding on the basis of a thorough validation study that it measured the basic skills needed to absorb teacher training and to perform adequately as a teacher (Br. 27). This validation study was more than sufficient to give the State a rational basis for using the PPST.[2/]

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1/ Contrary to appellees' claim (NAACP Br. 20), Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (5th Cir. 1972), did not hold that tests used as an absolute condition of employment must be subjected to strict scrutiny. To the contrary, Armstead held that such tests must be upheld unless they are "without any reasonable basis." Id. at 280. Applying this standard, this Court struck down a school district's use of the GRE as a basis for teacher hiring, but only because it was undisputed that the test "was not designed to and could not measure the competency of a teacher or even indicate future teacher effectiveness." Ibid. As discussed above, in this case, the State acted on the basis of substantial evidence that the PPST measures skills that are needed to absorb teacher training and to perform successfully as a teacher. Accordingly, to the extent that Armstead is relevant at all, it supports the constitutionality of the State's decision here.

2/ While appellees have attacked the State's validation study on numerous technical grounds (NAACP Br. 38-44), they do not and cannot contend that the study's conclusions that the test measures skills that are needed to absorb teacher training and to perform adequately as a teacher are wholly irrational. In citing the State's validation study as evidence of the rationality of the State's decision to use the PPST, we do not suggest that a state must perform a validation study before using a test. As long as a state's use of a test is rationally related to a permissible purpose, the Due Process inquiry is at an end.

B. The State's failure to provide remedial programs specifically directed at the PPST does not violate the Due Process Clause

Appellees argue (NAACP Br. 27-36) that the State has a duty under the Due Process Clause to provide students who fail the PPST with remedial programs specifically designed to help them pass that test. Appellees rely on this Court's decision in Debra P. v. Turlington, 644 F.2d 397 (1981), as the source of this extraordinary obligation. Appellees' reliance on Debra P. is misplaced.

In Debra P., this Court held that a state may not use a test as a high school graduation requirement unless it tests what has been taught. 644 F.2d at 404-406. This Court's decision did not in any way suggest, however, that a state has a general duty under the Due Process Clause to provide remedial education to those who fail state-administered tests. To be sure, the Eleventh Circuit subsequently alluded to Florida's remedial efforts in sustaining the constitutionality of that state's graduation test. Debra P. v. Turlington, 730 F.2d 1405, 1410-1412 (1984) (Debra P. II). But those remedial efforts were simply regarded as evidence that the graduation exam tested material that had been taught. Ibid.

Properly viewed, Debra P. lends no support to appellees here. To begin with, the district court found that appellees had failed to show that they were likely to prevail on their claim that the PPST tests material that has not been taught (Memo. Op. 38). Appellees do not attack this finding as clearly erroneous.

More fundamentally, Debra P. did not hold that a state can never test material that has not been taught. Debra P. dealt only with a high school graduation test, and the Court carefully limited its holding to that kind of test. 644 F.2d at 404-406. Nothing in Debra P. implies that its holding encompasses tests used for admission into professional schools and ultimately into the profession itself. A state has a legitimate -- indeed, compelling -- interest in preventing those who lack basic skills from entering the teaching profession. That interest does not disappear simply because the reason that particular individuals lack basic skills is that they have not been taught them. For this reason, a state is free under the Due Process Clause to give a basic skills test as a condition of entry into a teacher training program regardless of whether the test covers material that certain students have not been taught. Nothing in Debra P. suggests otherwise.[3/]

3/ To buttress all their Due Process claims, appellees assert that the PPST not only interferes with their liberty interest in pursuing the profession of their choice, but also with their property interest in fair access to teacher education programs (NAACP Br. 16-17). As the district court properly held, however, State law does not give students any entitlement to teacher education training (Memo. Op. 34-35). It may be, as appellees suggest (NAACP Br. 17), that many students had hoped they would be able to enter teacher education programs without having to pass a basic skills test. But as the Supreme Court has held, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In any event, even assuming appellees had a property interest in entry into teacher education programs, Due Process would be violated only if the State's removal of that interest was arbitrary or capricious. Debra P., supra, 644 F.2d at 404. As we have already discussed, the State's decision to use the PPST was neither arbitrary nor capricious.

C. This Court should not reach the question whether the State's use of the PPST violates the Title VI effects test regulation

We pointed out in our opening brief (Br. 37, n. 7) that the district court did not reach the question whether appellees were likely to succeed on their claim that the PPST has "the effect of subjecting individuals to discrimination" in violation of the Title VI effects test regulation (34 C.F.R. 100.3(b)(2)). We therefore urged this Court to refrain from deciding that issue (Br. 37, n. 7). Appellees now make the remarkable suggestion that the district court did decide that they were likely to prevail on their claim under the Title VI effects test regulation (NAACP Br. 37, n. 8). According to appellees, this conclusion follows from "a fair reading of the Opinion as a whole" (ibid.). We submit that whether this Court reads the district court's opinion page by page, or whether it reads it "as a whole," it will not find a single word in it that remotely suggests that the district court found that appellees were likely to prevail on their Title VI regulation claim.

Appellees are correct in stating (NAACP Br. 38, n. 8) that as a general rule, this Court may affirm on a ground not relied on by the district court. Bickford v. Int'l Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. 1981). But for two reasons this is not an appropriate occasion for invoking that principle.

First, appellees' Title VI regulation claim presents a substantial unresolved legal issue concerning the nature of a recipient's burden in justifying a practice that has a disproportionate impact on members of a racial minority.

Appellees have simply assumed (NAACP Br. 37) that the validation principles established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, apply with full force to a Title VI regulation claim. Although this is one possible way to structure a recipient's burden, it is not the only one. For example, a showing of a disproportionate impact may simply shift the burden to the recipient to show "that its decision was the product of a rational decision-making process." Bryan v. Koch, 627 F.2d 612, 621 (2d Cir. 1980) (Kearse, concurring in part and dissenting in part). Since the Title VI effects test regulation applies to all programs receiving federal financial assistance, the resolution of this issue will have far-reaching consequences. A decision of this importance should not be made on an appeal from the grant of a preliminary injunction. See University of Texas v. Camenisch, 451 U.S. 390, 394-395 (1981).

More fundamentally, an appellate court can affirm on a ground not relied on by the district court only when the district court's factual findings permit it. Estate of Whitt v. C.I.R., 751 F.2d 1548, 1558 (11th Cir. 1985). In this case, the parties introduced extensive and conflicting evidence on the validity of the PPST (Tr. 251-403, 579-821, 1191-1332, 1349-1398; Hilliard deposition; Pltfs. Ex. 26). In response, the district court discussed only the evidence bearing on instructional validity and found that appellees were unlikely to prevail on this issue (Memo. Op. 38-41).

The court simply did not address most of the validation evidence. Thus, even accepting appellees' contention that the effects test regulation incorporates Title VII validation standards, the district court's findings do not permit this Court to determine whether the State satisfied those standards.

Undaunted by the absence of district court findings, appellees have invited this Court to resolve the conflicts in the evidence and to make its own findings of fact (NAACP Br. 38-44). For example, appellees introduced evidence that the State failed to perform a proper analysis of what skills were needed to absorb teacher training (Tr. 278-279). The State, on the other hand, presented evidence that its analysis was adequate (Tr. 650-651). Appellees now ask this Court to resolve this conflict in their favor (NAACP Br. 40). Similarly, appellees presented evidence that the State failed to conduct a sufficient item analysis (Tr. 316-317). In response, the State offered evidence that a sufficient item analysis had been performed (Tr. 1219-1221, 1359-1369). Appellees urge this Court to rule in their favor on this factual issue as well (NAACP Br. 43). These are only two of the numerous factual issues bearing on validity that appellees would have this Court decide.

As the Supreme Court has made clear, however, the resolution of factual issues is not a proper function for an appellate court. Pullman-Standard v. Swint, 456 U.S. 273 (1982). Indeed, the principle that an appellate court may not assume the role of fact finder has particular force in

preliminary injunction appeals. Thus, when the propriety of injunctive relief depends on the resolution of factual issues and the district court has failed to make the necessary findings, an appellate court must reverse rather than find the facts itself. First-Citizens Bank & Trust Co. v. Camp, 432 F.2d 481, 484 (4th Cir. 1970). That is the course this Court should follow here.

In sum, it would be inappropriate for this Court to address appellees' Title VI regulation claim. Appellees' arguments to the contrary are without merit.

D. The State's use of the PPST does not violate Section 204(d) of the EEOA

Appellees contend (NAACP Br. 47-48) that the State's use of the PPST violates Section 204(d) of the EEOA, 20 U.S.C. 1703(d), which prohibits "discrimination by an educational agency * * * in the employment, employment conditions, or assignment to schools of its faculty." This argument ignores the fact that the PPST is used as a basis for admission into teacher education programs, not as a basis for hiring. Its use, therefore, does not implicate Section 204(d).

In any event, Section 204(d) prohibits only purposeful discrimination. Castaneda v. Pickard, 648 F.2d 989, 1000-1001 (5th Cir. 1981). As we explained in our opening brief, there is no evidence that the State's use of the PPST reflects intentional discrimination (Br. 26-31). For this reason as well, its use does not violate Section 204(d).

E. The State's use of the PPST does not violate Section 204(f) of the EEOA

Appellees finally contend (NAACP Br. 48) that the State's use of the PPST violates Section 204(f) of the EEOA, 20 U.S.C. 1703(f), which requires an educational agency to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." Regardless of the effect of the PPST, however, the State's educational agencies remain under an obligation to provide Mexican-American students with the personnel they need to secure equal educational opportunity. The district court did not find, and the evidence does not support a finding, that the PPST will disable the State's educational agencies from fulfilling this responsibility.

## CONCLUSION

For the reasons discussed in this brief as well as those discussed in our opening brief, the district court's decision should be reversed.

Respectfully submitted,

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