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

BRIEF FOR REPUBLIC NATIONAL BANK OF DALLAS, FIRST CITY NATIONAL BANK OF HOUSTON, MERCANTILE NATIONAL BANK AT DALLAS, BANK OF TEXAS, AND SECURITIES INDUSTRY ASSOCIATION, INC. AS *AMICI CURIAE*

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Amici curiae, four Texas banks which hold more than $100 million in principal amount of Texas school district bonds and the Securities Industry Association, Inc. (hereinafter "SIA"), many of whose members are underwriters of Texas school district bonds, submit this brief to urge this Court, if it should affirm the decision of the District Court, to make clear that its decision should only be applied prospectively from the ultimate determination of the action, and should not affect the enforceability of Texas school district bonds outstanding at the time of the District

Court's decision (hereinafter "outstanding bonds") and bonds authorized and issued prior to the ultimate disposition of this action (hereinafter "interim-issued bonds"). Counsel for all parties have given written consent to the filing of this brief pursuant to Rule 42(2).*

Question Presented

The *amici* banks and the SIA do not wish to, and do not, take any position with respect to the District Court's basic holding that the present Texas system of financing public education denies equal protection. This brief is addressed solely to the following question:

> Should any restructuring of the system of financing public education in the State of Texas pursuant to this Court's decision on the present appeal protect the continuing collectibility of property taxes levied to pay the principal and interest on outstanding and interim-issued Texas school district bonds?

The District Court in its Clarification of Original Opinion dated January 26, 1972 held that this question should be answered in the affirmative, and we support this holding.

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* The *amici* banks and the SIA were denied leave to intervene of right in the District Court, and appealed directly to this Court from this denial in order to establish their right to participate as parties and to present two issues not then fully presented by the existing parties, (1) the need to assure the continuing enforceability of outstanding and interim-issued bonds, and (2) the need to allow the states broad flexibility in framing any new system of financing public education. *Republic Nat'l Bank* v. *Rodriguez,* Oct. Term, 1971, No. 71-1339. This Court dismissed the appeal for want of jurisdiction, but granted leave to file the jurisdictional statement as a brief *amici curiae* in connection with the jurisdictional statement on the present appeal pursuant to Rule 42(1). 40 U.S.L.W. 3575 (June 7, 1972). This brief is limited to the first issue presented in the earlier appeal, because we believe that the need for flexibility has now been adequately presented by the earlier jurisdictional statement and by other *amici.*

Interest of *Amici Curiae*

About $3 billion in principal amount of Texas school district bonds were sold during the 25 years 1946-1971 (R. 199, 2*), of which over $2 billion are still outstanding (R. 184, 3-4). About $250 million in principal amount of Texas school district bonds were sold in 1971 alone (R. 200, Ex. F). Members of the SIA, a voluntary national organization of more than 700 securities firms and banks, served as underwriters for the great majority of these bonds (R. 199, 1-2) and intend to continue to underwrite Texas school district bonds (R. 204, Masterson Aff., 2). Many SIA members also hold outstanding Texas school district bonds as investments (*ibid.*), and the four *amici* banks hold over $100 million in principal amount of Texas school district bonds (almost five per cent of the total outstanding) for their own account and as trustees for various charitable, testamentary, and other trusts.**

Any impairment of the continuing collectibility of the property taxes levied to pay the Texas school district bonds held by the *amici* banks and other SIA members would adversely affect their value and their status as legal investments for fiduciaries, and would jeopardize the marketability of future issues of Texas school district bonds.*** Thus the interest of the *amici* banks and the SIA in the continuing enforceability of outstanding and interim-issued Texas school district bonds is immediate and substantial.

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* Citations in the form "R. 199, 2" refer to page 2 of document 199 of the record on appeal.

** R. 204, Roberts Aff., 1-2, Rogers Aff., 1, Lyne Aff., 1-2, Hazard Aff., 1.

*** R. 204, Roberts Aff., 2, Rogers Aff., 2, Lyne Aff., 2, Hazard Aff., 2.

The members of the SIA have a similarly direct and substantial interest in outstanding school district bonds throughout the nation, all of which would be affected by this Court's decision in this case. Approximately $50 billion of public school bonds were issued in the United States during the 25 years 1946-1971, and at least 90% of these bonds were underwritten and distributed by SIA members (R. 204, Masterson Aff., 1). $3.9 billion of public school bonds were sold in 1970-1971 alone.* The national total of public school bonds outstanding on June 30, 1970 was more than $31.5 billion.** It is estimated that 95% of these bonds have remaining maturities ranging from one to twenty years, and 57% have remaining maturities ranging from five to twenty years.*** The continuing collectibility of the property taxes which support these bonds will thus remain of vital importance for years to come.

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* U. S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-71 (DHEW Publication No. (OE) 72-63), at 11 (1972).

** U. S. Bureau of the Census, Governmental Finances in 1969-70 (Series GF-70, No. 5), at 28 (1971).

*** According to estimates based on SIA data for state and local general obligation bonds as a whole (which include virtually all public school bonds), the distribution of the time remaining at December 31, 1971 until maturity of such bonds was as follows:

1-4 Years	$39.4 Billion	(37.2%)
5-9 Years	$31.3 Billion	(29.6%)
10-14 Years	$17.3 Billion	(16.4%)
15-19 Years	$11.9 Billion	(11.2%)
20 Years or More	$ 5.9 Billion	(5.6%)

Statement

1. The Nature of Texas School District Bonds

Article 7, § 3 of the Texas Constitution authorizes the Texas Legislature to establish school districts and to permit them to levy and collect ad valorem property taxes. Pursuant to this authorization, the Legislature has authorized Texas school districts to issue negotiable coupon bonds "for the construction and equipment of school buildings in the district and the purchase of the necessary sites therefor," provided that both the issuance of the bonds and the levying of the property taxes necessary to pay them are authorized by the voters of the district in a special bond and tax election. Texas Educ. Code §§ 20.01, 20.04. Before such bonds may be issued, they must be approved as properly authorized by the Attorney General of Texas and registered by the Comptroller of Public Accounts,

> "and after such approval and registration such bonds shall be incontestable in any court, or other forum, for any reason, and shall be valid and binding obligations in accordance with their terms for all purposes." Texas Educ. Code § 20.06.

General bond market practice also conditions the sale of school district bonds to investors upon the unqualified approving opinion of recognized bond counsel (R. 199, 7-8). Both the Attorney General of Texas and bond counsel require as a condition of their approval a "no-litigation certificate" by the issuing school district that it knows of no pending or threatened litigation in any manner questioning the validity of the bonds or the levying of property taxes to pay them (R. 199, 6-7, Ex. B). The certificate of the Comptroller of Public Accounts attesting the approval

of the Attorney General and, in most cases, the approving opinion of bond counsel are set forth in full on the bonds themselves (R. 199, Ex. A).

Texas school district bonds are payable solely from ad valorem taxes levied on property within the district. *See* Texas Educ. Code § 20.01. A specific rate of property tax is levied each year to pay each specific issue of bonds, and the funds collected therefrom become trust funds for the benefit of the bondholders and may not lawfully be expended for any other purpose. *Love* v. *City of Dallas*, 120 Tex. 351, 367-68, 40 S.W.2d 20, 27 (1931); *McPhail* v. *Tax Collector*, 280 S.W. 260, 265 (Tex. Civ. App. 1926). If the bonds are not paid, the bondholders' only remedy is by mandamus to compel the school district to levy the specific property tax to pay the principal and interest on the defaulted bonds. *City of Waco* v. *Mann*, 133 Tex. 163, 174, 127 S.W.2d 879, 885 (1939). The property of a Texas school district has been held not to be subject to execution or garnishment. *National Surety Corp.* v. *Friendswood Ind. School Dist.*, 433 S.W.2d 690, 694 (Tex. Sup. Ct. 1968).*

* The principle that an obligation of a Texas school district may not be enforced by execution or garnishment applies to all school district obligations, not merely to school district bonds. For this reason, the District Court's Clarification of Original Opinion in the present case protects any outstanding or interim "contractual obligation incurred by a school district in Texas for public school purposes". *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971). The need to protect outstanding and interim-issued school district bonds is especially acute, however, for two reasons: (1) such bonds, unlike other obligations, are negotiable instruments backed by an express pledge of property tax revenues whose validity is certified by the Attorney General of Texas and upon which bond purchasers rely; and (2) such bonds are of much longer duration than other contractual obligations of school districts. Texas school district bonds may have maturities of up to forty years, Texas Educ. Code § 20.01, while other contractual obligations are limited to shorter periods. *See, e.g.*, Texas Educ. Code §§ 12.29(a) (textbook adoption

Most public school bonds elsewhere in the nation are likewise supported by local property taxes and other local taxes.* Thus an affirmance of the District Court without making clear that outstanding and interim-issued bonds will be protected would have severe repercussions not only in Texas but throughout the country.

2. The District Court's Clarification of Original Opinion

On December 23, 1971 the three-judge District Court issued its decision in the present case holding that the present Texas system of financing public education denies equal protection and enjoining (after a two-year stay) the enforcement of Article 7, § 3 of the Texas Constitution, the State constitutional basis for all Texas school district property taxes. *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 285-86 (W.D. Tex. 1971). The question of the continuing enforceability of outstanding and interim-issued Texas school district bonds had not been raised by any party, and the District Court's decision was silent on this question. For this reason it had a devastating impact upon Texas school district bonds.

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contracts; six years), 13.102 (teachers' probationary contracts; three years), 13.107 (teachers' continuing contracts may be terminated at end of any year "because of necessary reduction of personnel"), 23.28(b), (c) (employment contracts; three or five years), 23.76 (depository banks; two years).

* Putting aside revenue bonds, over 90% of the public school bonds sold in 1970-1971 were sold by school districts and other local bodies. *See* U. S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-71 (DHEW Publication No. (OE) 72-63), at 6, 14 (1972). Property taxes are estimated to comprise 97 to 98% of all local school tax revenues. Moore, *Local Nonproperty Taxes for Schools,* in Johns, Alexander & Stollar, eds., Status and Impact of Educational Finance Programs (National Educational Finance Project, Volume 4), at 209-10 (1971).

Neither the Attorney General of Texas nor bond counsel for issuers were able to approve Texas school district bonds issued after the decision (R. 199, 7-10). The sale of such bonds halted abruptly (R. 199, 10), and only resumed after the District Court's Clarification of Original Opinion was issued on January 26, 1972. The value of outstanding Texas school district bonds fell immediately after the decision (R. 199, 10).

Defendants, joined by the SIA as *amicus curiae* and by other *amici*, urged the District Court to clarify its decision to specify that it was not intended to affect the continued collectibility of property taxes levied to pay outstanding and interim-issued bonds (R. 184, 192, 199). The SIA took no position on the merits of the District Court's decision. The SIA explained that in order to safeguard the value and marketability of outstanding and interim-issued bonds it was necessary to insure the collectibility of property taxes to be levied to pay such bonds after the ultimate disposition of the action (R. 199, 10-11). The District Court's Clarification of Original Opinion dated January 26, 1972 expressly insured such continuing collectibility. *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971).

The purpose of the present brief is to urge this Court, if it should affirm the District Court, to make clear that the District Court acted rightly in issuing its Clarification of Original Opinion to protect outstanding and interim-issued Texas school district bonds.

3. Judicial Protection of Outstanding and Interim-Issued Bonds in Other Jurisdictions

All of the courts which have held that the present system of financing public education denies equal protection have assured bond investors that this holding does not under-

mine the enforceability of outstanding and interim-issued school district bonds. This assurance has taken diverse forms, but in all three cases which have gone to final judgment—the present case and the cases in Arizona and New Jersey—it has taken the form of an express provision in the final judgment safeguarding the continuing collectibility of property taxes levied to pay outstanding and interim-issued bonds.

California. On August 30, 1971 the California Supreme Court held that the present California system of financing public education denies equal protection under the Federal and State Constitutions. *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). There was widespread concern that the *Serrano* decision might be construed as affecting outstanding and interim-issued bonds, and many school bond issues across the country were withdrawn or postponed indefinitely.*

On October 21, 1971, in response to this concern, the California court issued a Modification of Opinion adding the following paragraph to its original opinion:

> "In sum, we find the allegations of plaintiffs' complaint legally sufficient and we return the cause to the trial court for further proceedings. We emphasize, that our decision is not a final judgment on the merits. We deem it appropriate to point out for the benefit of the trial court on remand (see Code Civ. Proc. § 43) that if, after further proceedings, that Court should enter final judgment determining that the existing system of public school financing is unconstitutional and invalidating said system in whole or in part, it may properly

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* *E.g., American Banker*, Nov. 11, 1971, p. 1; *Daily Bond Buyer*, Nov. 15, 1971, p. 1.

> provide for the enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system of school financing. As in the cases of school desegregation (see Brown v. Board of Education (1955) 349 U.S. 294) and legislative reapportionment (see Silver v. Brown (1965) 63 Cal.2d 270, 281), a determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or an immediate implementation of a constitutionally valid substitute. Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect." 5 Cal. 3d at 618, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

Minnesota. In a Memorandum and Order filed on October 12, 1971 the United States District Court for the District of Minnesota denied defendants' motion for summary judgment and held that the present system of financing public education in Minnesota violates the Equal Protection Clause. *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (D. Minn. 1971). The court made clear that it did not intend its holding to have any immediate effect upon school financing; it did not direct any affirmative relief, but deferred to the action of the Minnesota Legislature. 334 F. Supp. at 877.

Wyoming. On December 14, 1971 the Supreme Court of Wyoming adopted the *Serrano* principle. *Sweetwater County Planning Committee* v. *Hinkle,* 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972). The Wyoming court stated, however, that "[n]o invidious discrimination

will be involved if bonds are voted by any school district for capital improvements, and if special levies are made within the district to retire such bonds." 491 P.2d at 1238. Since school bonds may be issued in Wyoming only for capital improvements, *see* Wyo. Const., Art. 16, § 5; Wyo. Stat. § 21.1-253, this statement obviated any question as to the continuing validity of Wyoming school bonds.

New Hampshire. The New Hampshire Supreme Court held on December 23, 1971 that a city council was required to furnish the board of education with funds required to meet state minimum standards. *Laconia Bd. of Educ.* v. *City of Laconia*, 285 A.2d 793 (N.H. 1971). It refused to consider a belated argument that such a holding would violate the *Serrano* principle, in part on the ground that *Serrano* was not made retroactive:

> "Thirdly, it is doubtful that any consideration of this contention would have any retroactive effect whatever result was reached. See October 21, 1971 modification of opinion in Serrano v. Priest *supra* reported in 40 U.S.L.W. 2339 where it was stated that the 'existing system of school financing is to remain in effect until it has been found unconstitutional and replaced by an appropriate new system'." 285 A.2d at 796-97.

New Jersey. On January 19, 1972 the New Jersey Superior Court held that the present system of financing public education in New Jersey violates the Equal Protection Clauses of the Federal and State Constitutions and the Education Clause of the State Constitution. *Robinson* v. *Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972). It made clear, however, that

> "this declaration shall operate prospectively only and shall not prevent the continued operation of the school system and existing tax laws and all actions

> taken thereunder. This declaration shall not invalidate past or future obligations (such as school bonds, anticipation notes, etc.) incurred under the provisions of existing school laws and tax laws. Said laws shall continue in effect unless and until specific operations under them are enjoined by the court." 118 N.J. Super. at 280, 287 A.2d at 217.*

Arizona. On June 1, 1972 the Arizona Superior Court entered a declaratory judgment that the present Arizona system of financing public education violates the Federal and State Equal Protection Clauses. *Hollins* v. *Shofstall*, Ariz. Super. Ct., Maricopa County, No. C-253652, June 1, 1972. On June 6, 1972 the court issued a Supplemental Memorandum making clear that it intended to protect the continued enforceability of outstanding and interim-issued bonds throughout their entire life:

> "Notwithstanding anything to the contrary stated in the memorandum and order of June 1, 1972, it is the intention of the court that general obligation bonds heretofore or hereafter issued by school districts shall enjoy full and complete security afforded by the applicable bond-enabling statute, and the bondholder shall have recourse to the levy of an ad valorem tax upon all taxable property within the district to compel the payment of the principal of and interest on such bonds, throughout their entire life and as the same shall become due, in the event that funds for the payment of such bonds are not lawfully available from other sources."

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* Paragraph 7 of the Judgment entered on February 4, 1972 in *Robinson* v. *Cahill* provided even more explicitly that "nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations . . . ."

Summary of Argument

1. As no appeal has been taken from the portion of the District Court's judgment which protects outstanding and interim-issued bonds, it is therefore not actually before this Court for review. Nevertheless, if the Court affirms the decision of the District Court, we respectfully submit that the Court should make clear that the decision will not affect outstanding and interim-issued bonds, in order to prevent the disruption of school bond markets throughout the nation which might otherwise result.

2. This Court's decisions, especially *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam), and *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 213-15 (1970), which are almost exactly in point, establish that the District Court's decision should not be retrospectively applied. Retrospective application is wholly unnecessary to achieve the purpose of the District Court's holding, and would be strikingly unjust in light of bondholders' reliance upon express legal opinions and representations by the issuers that the bonds are supported by valid and enforceable property taxes.

3. Retrospective application of the District Court's holding would also offend the constitutional values embodied in the Contract Clause and the Due Process Clause. The Equal Protection Clause should not be unnecessarily applied in a manner which brings it into conflict with these coordinate constitutional values.

ARGUMENT

I

This Court Should Reaffirm the District Court's Protection of Outstanding and Interim-Issued Bonds

The District Court's Clarification of Original Opinion issued on January 26, 1972 stated that its decision and order of December 23, 1971 in no way affected the continuing collectibility of property taxes levied to pay outstanding bonds and interim-issued bonds issued and delivered before December 23, 1973, by which time the District Court anticipated that the present system of financing public education in Texas would be replaced by a constitutional system.* *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 285-86 (W.D. Tex. 1971).

Defendants have not appealed from this portion of the District Court's order, and plaintiffs have taken no appeal.** It follows that the portion of the District Court's order which protects outstanding and interim-issued bonds may not be disturbed in this Court. *See, e.g., Swarb* v. *Lennox*, 405 U.S. 191, 201-03 (1972); *Morley Construction Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191-92 (1937).

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* We have spoken in this brief of the need to protect interim-issued bonds issued and delivered prior to the ultimate disposition of this action, rather than interim-issued bonds issued and delivered before December 23, 1973, for two reasons: (1) the necessary transitional period, if the District Court's holding is affirmed, will differ from state to state and may be longer or shorter than two years; and (2) while the District Court's judgment requires the State of Texas to act before December 23, 1973, final judicial approval of a new system of public school financing might not take place until a later date.

** Indeed, plaintiffs represented to the District Court, in order to induce it to deny the motion made by the SIA and the four *amici* banks for permission to intervene, that they would not seek to overturn the District Court's clarification insuring the continuing enforceability of outstanding and interim-issued bonds (R. 207, 28-29).

We nonetheless respectfully urge the Court, if it should affirm the decision of the District Court, to make clear that its decision should only be applied prospectively from the ultimate determination of the action, and should not affect the continued collectibility of property taxes to be levied to pay outstanding and interim-issued school district bonds. Otherwise, especially in view of the numerous similar cases now pending in many jurisdictions,* this Court's decision might have the same sharply disruptive effect upon school bond markets throughout the nation as the initial decision of the District Court had in Texas, and would draw into question the rights of holders of more than $31.5 billion in outstanding public school bonds. Such a disruptive shock, even if later corrected, might permanently lessen public confidence in the security of public school bonds.**

II

This Court's Decisions Establish That the District Court's Holding Should Not Be Applied Retrospectively

The District Court's holding that its decision should be applied only prospectively is squarely supported by two decisions of this Court, also involving local government

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* A partial summary of these cases, listing 24 cases in 15 states, is given in Comment, *The Evolution of Equal Protection: Education, Municipal Services, and Wealth*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 103, 200-13 (1972).

** It is to avoid such adverse consequences that the courts which have held that existing school financing systems deny equal protection have assured bond investors that this holding does not affect outstanding and interim-issued bonds (*see* pp. 8-12 *supra*). Similarly, a New York trial court declined to anticipate the decision of this Court on the basic equal protection issue in order to avoid "placing the sword of Damocles over school bond financing in this State for the next several years." *Spano* v. *Board of Educ.*, 68 Misc. 2d 804, 808, 328 N.Y.S.2d 229, 234 (Sup. Ct. Westchester County 1972).

bonds and the Equal Protection Clause, which are almost exactly in point. In *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam), this Court ruled that the franchise in a municipal revenue bond election cannot constitutionally be limited to property taxpayers, but held that this decision should be given prospective effect only:

> "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the 'injustice or hardship' by a holding of non-retroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). Cf. *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Therefore, we will apply our decision in this case prospectively."

Just as in *Cipriano*, a decision retrospectively wiping out the sole security for Texas school district bonds would impose "significant hardships" and "produce substantial inequitable results". As in *Cipriano*, such an injustice should be avoided by a holding of nonretroactivity.

In *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 213-15 (1970), this Court extended *Cipriano* to voting on municipal general obligation bonds, and likewise held that its decision should be given prospective effect only. The District Court's holding of nonretroactivity in the present case is identical to *Cipriano* and *Kolodziejski*, except that the District Court made its decision prospective from December 23, 1973, by which time the District Court anticipated that a new system of financing public education would be

instituted. This difference is a practical necessity because the pressing capital needs of school districts must continue to be met by the issuance of bonds under the present system until another system has been finally approved by the Legislature and the Courts.

This Court recently summarized the three key factors bearing on the question whether a new decision should be applied retroactively in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971): (1) whether the effect of the decision is to "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retroactive application of the decision would further or retard its purpose; and (3) whether retroactive application would produce substantial inequitable results. All three of these factors argue strongly against retrospective application of the District Court's decision in the present case.

Although, as already stated, the SIA and the *amici* banks do not wish to and do not take any position with respect to the merits of the present appeal, there can be no question that a decision by this Court affirming the judgment of the District Court would "establish a new principle of law". So far as we are aware, no action challenging the validity of existing systems of financing public education under the Equal Protection Clause was ever brought until 1968. When such cases were brought, this Court twice sustained existing systems against equal protection attacks. *See McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969); *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970). We recognize that the

District Court held *McInnis* and *Burruss* to be distinguishable from its decision, *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 283-84 (W.D. Tex. 1971), and take no position with respect to the validity of the distinction on the merits; but we respectfully submit that, even accepting the distinction, the District Court's decision was not "clearly foreshadowed" by any decision of this Court.

The second factor recognized in *Chevron Oil Co.* v. *Huson* is the purpose of the new decision. *See also Desist* v. *United States*, 394 U.S. 244, 249-50 (1969); *Linkletter* v. *Walker*, 381 U.S. 618, 636-37 (1965). The purpose of the District Court's holding—removing disparities in educational expenditures arising from disparities in taxable wealth—does not require the elimination of the property taxes needed to pay outstanding and interim-issued bonds. It merely requires that, without altering school districts' duty to levy property taxes to pay outstanding and interim-issued bonds as they have solemnly contracted to do, the State adjust the allocation of remaining State and school district educational funds to insure that any constitutionally mandated balance of educational expenditures is achieved.* The thrust of *Serrano* and the decisions that have followed it, including the decision of the District Court, is to condemn the end result of the school financing system, not any specific component of the collective source of funds.

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* Some courts have held that the *Serrano* principle serves the additional purpose of equalizing the property tax burden on taxpayers in different school districts. *See, e.g., Robinson* v. *Cahill*, 118 N.J. Super. 223, 276-80, 287 A.2d 187, 215-16 (1972). This purpose can likewise be met by statewide redistribution of educational funds without disturbing the property tax security for outstanding and interim-issued bonds.

Finally, it is plain that retrospective application of the District Court's decision would produce substantial inequitable results, the third factor identified in *Chevron Oil Co.* v. *Huson.* Investors acquired outstanding Texas school district bonds in reliance upon express representations by the issuers and legal opinions of bond counsel and the Attorney General of Texas that the bonds were valid obligations supported by an enforceable duty to levy ad valorem taxes on property within the issuing school district. These opinions, indeed, were commonly printed on the face of the bonds themselves, which are fully negotiable. Without these opinions, the bonds could not have been sold. In reliance upon these opinions, the bonds have been accepted as investments not only by numerous individuals but also by the *amici* banks and many other institutions for their own account and as trustees for charitable, testamentary, and other trusts. Under these circumstances, to apply the District Court's decision retroactively so as to wipe out the property tax security for the bonds would be strikingly unjust. The District Court correctly made clear that it intended no such result.*

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* This Court recognized the injustice of retroactively invalidating bonds as early as *Gelpcke* v. *City of Dubuque,* 68 U.S. (1 Wall.) 175, 205-07 (1863), which held that bonds whose validity had been upheld by the highest State court would be recognized in a federal court despite an overruling decision by the State court. Although the precise holding of *Gelpcke* v. *City of Dubuque* has probably been overruled by *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 69 n.1 (1938), its underlying principle was discussed with approval in *Linkletter* v. *Walker,* 381 U.S. 618, 624-25 (1965).

III

Retrospective Application of the District Court's Holding Would Offend the Principles Embodied in the Contract Clause and the Due Process Clause

Retrospective application of the District Court's holding to outstanding and interim-issued bonds would contravene the principle of governmental good faith embodied in the Contract Clause. This Court has long held that a State may not, under the Contract Clause, withdraw a power to tax which has been made the basis for bonds which are still outstanding. *E.g.*, *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 554-55 (1866). Under this principle the District Court's holding could not be utilized as a ground for legislative repeal of the property taxes supporting school district bonds, because such invalidation is not necessary to achieve the purpose of the District Court's holding, and the decisions of this Court establish that governmental obligations may not be repudiated unless "the extent of the repudiation is only that which is reasonably necessary to effectuate a valid objective". Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 244 (1960).

Retrospective application of the District Court's holding would also run counter to the values embodied in the Due Process Clause. It would drastically change the nature of the bondholders' contracts because of a constitutional problem which they did not cause and from which they derived no benefit. If it were sought to be legislatively imposed, such an imposition of a burden upon a group which did not cause or benefit from the underlying problem would deny due process of law. *Cf.*, *e.g.*, *Atchison, T. & S.F. Ry.* v. *Public*

Util. Comm'n, 346 U.S. 346, 352-53 (1953); *Nashville, C. & S.L. Ry.* v. *Walters*, 294 U.S. 405, 428-32 (1935).

The principles embodied in the Contract Clause and the Due Process Clause are of coordinate dignity with the principle of equality embodied in the Equal Protection Clause. Wherever possible, such coordinate constitutional principles should be accommodated, as this Court has observed, for example, with respect to the Establishment and Free Exercise Clauses of the First Amendment. *E.g.*, *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-72 (1970). This consideration strongly supports the conclusion of the District Court that its decision should not be retrospectively applied.

CONCLUSION

For the reasons given above, Republic National Bank of Dallas, First City National Bank of Houston, Mercantile National Bank at Dallas, Bank of Texas, and Securities Industry Association, Inc., respectfully urge the Court, if it should affirm the decision of the District Court, to make clear that the District Court correctly held that its decision should in no way affect the continuing collectibility of property taxes to be levied to pay the principal and interest on Texas school district bonds outstanding at the time of the District Court's decision or authorized and issued prior to the ultimate disposition of this action.

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Respectfully submitted,

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