IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RAUL DOMINGUEZ, *ET AL*.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. SA-07-CA-0549-FB
	§	
STATE OF TEXAS, *ET AL*.,	§	
	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

Raul Dominguez, Naser Alzer, Jose Silva, Martin Lujan, Guillermo Sanchez and Anthony Dvizac, Plaintiffs and honorably-discharged veterans of the U.S. Armed Forces, move for a preliminary injunction under FED. R. CIV. P. 65(a) and ask the Court to immediately and temporarily restrain Defendant officials from excluding Plaintiffs from receiving the tuition Exemption available under the Hazlewood Act (TEX. EDUC. CODE § 54.203) on the basis of their status as legal permanent resident immigrants[1] of the United States at the time they entered into the service.[2]

Defendants' continuing exclusion of Plaintiffs, who otherwise qualify for the Exemption under the Hazlewood Act, has now forced Plaintiffs to face the threat of imminent and

[1] The terms "legal permanent resident immigrant" and "legal permanent resident" are used interchangeably throughout this brief and connote the same meaning as "resident alien" of the United States of America. *See* Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15) (2007).

[2] Plaintiffs seek to enjoin the unconstitutional application of the Act by Defendant officials, namely: Texas Higher Education Commissioner Raymund A. Paredes, Texas Higher Education Coordinating Board Chairperson Robert Shepard, University of Texas at San Antonio President Ricardo Romo, West Texas A&M University President J. Patrick O'Brien, Texas A&M System Board of Regents Chairman Bill Jones, University of Texas at Austin President William Powers, University of Texas System Board of Regents Chairman James R. Huffines, Lone Star College-North Harris President Stephen Head, Lone Star College System Chancellor Richard Carpenter, Lone Star College System Board of Trustees Chairman Randy Bates, University of Houston President John M. Rudley, and University of Houston Board of Regents Chairman Welcome W. Wilson.

irreparable harm; some Plaintiffs will drop out during the course of the semester and other Plaintiffs will have to put their college and futures on hold indefinitely. *See* Dominguez Decl., Ex. 1; Alzer Decl., Ex. 2; Silva Decl., Ex. 3; Lujan Decl., Ex. 4; Sanchez Decl., Ex. 5; Dvizac Decl., Ex. 6 (fully incorporated by reference with attachments). Defendants have violated the constitutional right of Plaintiffs to equal protection under the law, and Plaintiffs now move the Court for a preliminary injunction in order to halt the continuing discrimination that prevents Plaintiffs from receiving the Hazelwood Exemption[3] as each semester passes until a final order on the merits can be reached.[4]

Plaintiffs assert: 1) there is a substantial likelihood that Plaintiffs will prevail on the merits; 2) there is a substantial threat that irreparable injury will result if the injunction is not granted; 3) the threatened injury to Plaintiffs outweighs the threatened harm to Defendants; and 4) granting the preliminary injunction will not disserve the public interest. In support of this Motion, Plaintiffs state the following:

I. FACTS

Background of the Implementation of the Hazlewood Act

The State of Texas enacted the Hazlewood Act in 1923 in order to provide college tuition Exemptions for Texas veterans who served honorably during times of war and conflict.[5] In its current form, the Act requires the governing board of an institution of higher education to exempt:

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[3] Herein, "Hazlewood Exemption" or "Exemption" refers to the tuition Exemption available to veterans under the Hazlewood Act, TEX. EDUC. CODE § 54.203.

[4] For purposes of this motion, Plaintiffs focus on their claim under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution but expressly reserve their ability to pursue the other claims presented in their complaint.

[5] *See* Letter from Senate Committee on Veteran Affairs and Military Installations to Lt. Gov. David Dewhurst, Interim Charge Report Letter (Nov. 15, 2004) (*available at*: http://www.senate.state.tx.us/75r/Senate/Commit/c650/downloads/2004VAMI.pdf). Ex. 7 at 5.

> the following persons from the payment of all dues, fees, and charges, including fees for correspondence courses but excluding property deposit fees, student service fees, and any fees or charges for lodging, board, or clothing, provided the persons seeking the Exemptions were citizens of Texas at the time they entered the services indicated and have resided in Texas for at least the period 12 months before the date of registration:
>
> . . .(4) all persons who were honorably discharged from the armed forces of the United States after serving on active military duty . . . for more than 180 days and who served a portion of their active duty during:
>
> (A) the Cold War . . .;
> (B) the Vietnam era . . .;
> (C) the Grenada and Lebanon era . . .;
> (D) the Panama era . . .;
> (E) the Persian Gulf War which began on August 2, 1990, and ends on the date thereafter prescribed by Presidential proclamation or September 1, 1997, whichever occurs first;
> (F) the national emergency by reason of certain terrorist attacks that began on September 11, 2001; or
> (G) any future national emergency declared in accordance with federal law.

TEX. EDUC. CODE ANN. § 54.203.

For over 80 years, Texas public colleges and universities granted the Hazlewood Exemption to qualifying Texas veterans regardless of their status as legal permanent residents at the time they entered the military. However, on August 18, 2005, Texas Attorney General Greg Abbott issued an opinion regarding the "Correct interpretation of the Texas citizenship requirement in Education Code section 54.203 (RQ-0309-GA)" and concluded that:

> The phrase "citizen of Texas" in section 54.203(a) of the Education Code refers to a person who is a United States citizen and who resides in Texas.

Op. No. GA-0347, Ex. 8. The Attorney General issued a second letter on July 21, 2006, confirming that, in his opinion, honorably-discharged veterans who qualified for the Hazlewood

Exemption, but for the fact that they were legal permanent resident immigrants at the time they entered active duty, were not eligible to receive the Exemption.[6] *See* Op. No. GA-0445, Ex. 9.

Although the opinions written by the Texas Attorney General do not operate as judicial opinions or orders[7] and do not excuse the duties owed by Defendant officials to the U.S. Constitution, Defendants nevertheless began excluding otherwise qualified veterans from eligibility for the Hazlewood Exemption. Defs.' State of Texas, *et al.*, Answer to First Am. Compl., Dkt. No. 28 ¶33; Defs.' Romo, *et al.*, Answer to First Am. Compl., Dkt No. 31 ¶33. Defendant Texas Higher Education Coordinating Board ("THECB") and Defendant Commissioner Raymund Paredes subsequently adopted new rules in late January 2006 and distributed a new application for the summer of 2006 informing public universities and colleges that otherwise qualified veterans were no longer eligible to receive the Exemption.[8] *See* Memo from THECB to institutional Hazlewood officers and Summer Hazlewood Application, Exs. 10 & 11. However, some defendants and defendant officials were already excluding otherwise qualified veterans effective for the spring semester of 2006—*prior to* the issuance of the new rules and application by the THECB. Defs.' State of Texas, *et al.*, Answer to First Am. Compl., Dkt. No. 28 ¶33; Defs.' Romo, *et al.*, Answer to First Am. Compl., Dkt No. 31 ¶33.

The new Hazlewood application for veterans who have not previously received the Exemption includes a question regarding the citizenship of the applicant when the applicant

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[6] Herein, "otherwise qualified veterans" refers to those veterans who, like Plaintiffs, qualify to receive the Hazlewood Exemption, but for the fact that they were not U.S. citizens at the time they entered the U.S. military.

[7] *See generally*, *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 950 (Tex. App.—Austin, 1993, writ denied) ("The attorney general's opinions under section 7, like the other opinions given by that officer, are purely ministerial and advisory.") (citing James G. Dickson, Jr., *Vital Crucible of the Law: Politics and Procedures of the Advisory Opinion Function of the Texas Attorney General*, 9 Hous. L. Rev. 495, 517-23 (1972)).

[8] Those veterans who were receiving the Hazlewood Exemption at the time of the opinion were "grandfathered" in and continue to remain eligible to receive the Exemption. *See* Hazlewood Exemption Application for *Previous* Exemption Recipients (Veterans and Defendants), Ex. 12 (no question regarding U.S. citizenship requirement).

entered the military.[9] *See* Hazlewood Exemption Application for Veterans who have Never Used the Exemption, Ex. 13. This application states:

"7. Were you a citizen of the United States at the time you entered the service?

[ ] yes [ ] no.

If you answered 'no', you are not eligible for the Hazlewood Exemption.

There is no need to submit an application."

See id. Defendants have continued to exclude Plaintiffs from receiving the Exemption based on their alienage at the time they entered the armed forces.

Plaintiffs' Qualifications for Hazlewood Exemption

Each plaintiff enlisted into active duty to serve the United States, although they were not U.S. citizens at the time of their entry into the service, and each meets the requirements for the Hazlewood Exemption, notwithstanding the citizenship requirement at the time of their entry. *See* Dominguez Decl., Ex. 1; Alzer Decl., Ex. 2; Silva Decl., Ex. 3; Lujan Decl., Ex. 4; Sanchez Decl., Ex. 5; Dvizac Decl., Ex. 6.

Plaintiff Dominguez lived nearly all of his life in Texas prior to joining the U.S. Army. Decl. of Dominguez, Ex. 1, ¶2. He attended schools in Hereford, Texas and graduated from Hereford High School in 1990. *Id.* ¶2. At the time he enlisted active duty in the Army in 1990, Plaintiff Dominguez was a Texas resident and a legal permanent resident immigrant of the United States. *Id.* ¶4. He completed his service commitment, including a tour of duty in 1991 during the Persian Gulf War as an Ammunitions Specialist. *Id.* ¶5. He received awards and medals for his service, including the Southwest Asia Service Medal with Bronze Service Star

[9] Although some university Hazlewood Exemption applications differ in appearance from that distributed by Defendants THECB and the Commissioner, the same question concerning the citizenship requirement prior to entry into the service is listed on all Defendants' applications for veterans who have never received the Hazlewood Exemption. Compare UTSA's Hazlewood Exemption Application, Ex. 14 to Ex. 13.

and the Kuwait Liberation Medal (Saudi Arabia). *Id*. ¶6. Plaintiff Dominguez was honorably discharged in 1992, and he has resided in Texas since that time. *Id*. ¶8.

Plaintiff Dominguez used his GI Bill and the Army College Fund to obtain his Bachelor's Degree in 1997 from West Texas A&M and currently recruits migrant students, who dropped out of school, to assist them with obtaining the General Equivalency Diploma and help them in becoming eligible to apply to college. *Id.* ¶10. Plaintiff Dominguez no longer has access to federal veterans' educational benefits and requires the Hazlewood Exemption in order to pursue his planned graduate degree. *Id.* ¶8. He sought to apply for the Exemption at Defendant West Texas A&M University (WTAMU) but was informed that because he was not a U.S. citizen at the time of his entry, he did not qualify for the Exemption. *Id.* ¶14.

Plaintiff Alzer has lived in the United States for over twenty years. Ex. 2 ¶2. Within two years of arriving in the U.S., Plaintiff Alzer joined the Texas Army National Guard and in 1990, he enlisted active duty in the U.S. Army. *Id.* ¶3. At the time Plaintiff Alzer enlisted active duty, he was domiciled and residing in Texas and a legal permanent resident immigrant of the U.S. *Id.* ¶4. His active duty service included a tour in Somalia. *Id.* ¶5. He received awards and medals for his service, including the Armed Forces Expeditionary Medal for his tour in Somalia and the National Defense Service Medal. *Id*. ¶6. Plaintiff Alzer was honorably discharged in 1994 and has lived in Texas since that time. *Id.* ¶8.

Plaintiff Alzer used his GI Bill to obtain his Bachelor of Arts Degree in Electrical Engineering and Masters Degree in Business Administration and recently started his own financial planning business. *Id.* ¶10. Plaintiff Alzer has exhausted his federal veterans' educational benefits and requires the Hazlewood Exemption in order to pursue graduate coursework necessary to expand his business and earn a doctoral degree. *Id.* ¶18. He sought to

apply for the Exemption at Defendants University of Texas at Austin ("UT") and University of Texas at San Antonio ("UTSA") but was informed that because he was not a U.S. citizen at the time of his entry, he did not qualify for the Exemption. *Id.* ¶19.

Plaintiff Silva has also lived in the United States for over twenty years. Ex. 3 ¶2. He earned his General Equivalency Diploma after he arrived in Texas. *Id.* ¶3. At the time Plaintiff Silva enlisted active duty into the U.S. Army in 1993, he was domiciled and residing in Texas and a legal permanent resident immigrant of the United States. *Id.* ¶¶3, 5. He served as a Chemical Operations Specialist, training civilians and military personnel to protect themselves in the event of a chemical, nuclear, or biological attack. *Id.* ¶6. Plaintiff Silva received a number of awards and medals for his service including the National Defense Service Medal and the Army Service Ribbon. *Id.* ¶7. He was honorably discharged from the Army in 1996 and has lived in Texas since that time. *Id.* ¶9. He continues to serve the United States as a Health Care Specialist in the Army Reserve. *Id.* ¶9.

Plaintiff Silva attended San Antonio College for two years and is currently pursuing his Bachelor's Degree in Psychology from Defendant UTSA. *Id.* ¶11. When his federal veterans' educational benefits expired in 2006, he sought to apply for the Hazlewood Exemption at San Antonio College but was rejected because he was not a U.S. citizen at the time he entered into active duty. *Id.* ¶12. He sought to apply for the Exemption at Defendant UTSA and was verbally informed by a staff person on January 4, 2008, that his application was accepted. *Id.* ¶15. However, he does not know whether he will actually receive the Exemption for this semester and he does not know whether he will receive the Exemption in the upcoming semester and fall sessions of 2008. *Id.* ¶15. Plaintiff Silva requires the Hazlewood Exemption in order to pursue his degree. *Id.* ¶¶16 - 17.

Plaintiff Lujan has lived in the United States since he was a child. Ex. 4 ¶2. He attended schools in Terlingua, Texas and graduated from Alpine High School. *Id.* ¶2. Plaintiff Lujan was domiciled and residing in Texas and was a legal permanent resident immigrant of the United States at the time he enlisted active duty into the U.S. Navy. *Id.* ¶4. His active duty service included tours in support of military flight operations into Bosnia and in support of Operation Desert Watch and he received a number of awards and medals for his service, including the Honor Man Recruit, Plain Captain of the Quarter and the Good Conduct Medal. *Id.* ¶6. Plaintiff Lujan was honorably discharged from the Navy in 1999 and has lived in Texas since that time. *Id.* ¶8.

Plaintiff Lujan used his GI Bill to obtain his Bachelor's Degree from Defendant UT in December 2007 and currently is applying to go to law school at Defendant UT and Defendant University of Houston ("UH"). *Id.* ¶15. While at UT, he exhausted his federal educational benefits and applied for the Hazlewood Exemption but was denied because of the U.S. citizenship requirement. *Id.* ¶13. Plaintiff Lujan requires the Exemption in order to pursue his J.D. degree. *Id.* ¶15. He has sought to apply for the Exemption at Defendants UT and UH for law school but was informed that he was ineligible because he was not a U.S. citizen at the time of his entry into the service. *Id.* ¶13.

Plaintiff Sanchez has lived in the United States since he was a child and graduated from Sam Houston High School in Houston, Texas. Ex. 5 ¶2. Plaintiff Sanchez was domiciled and residing in Texas and a legal permanent resident immigrant of the United States at the time he enlisted into active duty with the U.S. Marine Corps in 1990. *Id.* ¶4. He completed his service commitment, including a tour in Guantanamo Bay, and he received awards and medals for his service, including Marine of the Year in 1996, the Navy Achievement Medal, and the

Humanitarian Service Medal. *Id.* ¶6. He was honorably discharged in 1997 and has lived in Texas since that time. *Id.* ¶8.

Plaintiff Sanchez was in the process of applying to the Defendant UH in 2006 when he was informed by the university that he would not qualify for the Hazlewood Exemption because of the U.S. citizenship requirement. *Id.* ¶11. He postponed his plans to enroll at Defendant UH for one year but he was informed in 2007 that the policy had not changed. *Id.* ¶11. Plaintiff Sanchez no longer has access to federal veterans' educational benefits and requires the Hazlewood Exemption in order to pursue his planned degree. *Id.* ¶8. He sought to apply for the Exemption at Defendant Lone Star College-North Harris but was informed that because he was not a U.S. citizen at the time of his entry, he does not qualify for the Exemption. *Id.* ¶12.

Plaintiff Dvizac arrived in the United States in 1993 as a refugee when his step-father was killed during the Balkan Conflict. Ex. 6 ¶3. He lived in Texas and graduated from Robert E. Lee High School in Houston, Texas. *Id.* ¶2. He was domiciled and residing in Texas and a legal permanent resident immigrant of the United States when he entered into active duty with the U.S. Marine Corps in 1995. *Id.* ¶4. He served in the Infantry as a Scout Swimmer and Translator. *Id.* ¶7. For his service, Plaintiff Dvizac received medals and awards, including the Marksman Rifle Badge and National Defense Service Medal. *Id.* ¶8. He was honorably discharged in 1999 and has lived in Texas since that time. *Id.* ¶10.

Plaintiff Dvizac had used his GI Bill to obtain his Bachelor's Degree in History from Defendant UH but his federal veterans' educational benefits were exhausted in August 2007. *Id.* ¶13. He sought to apply for the Exemption at Defendant UH but was informed that because he was not a U.S. citizen at the time of his entry, he does not qualify for the Exemption. *Id.* ¶13.

Plaintiffs face irreparable harm as each semester passes because Defendants continue to violate Plaintiffs' constitutional rights to equal protection under the law. Defendants' actions in violation of the Constitution, coupled with the adverse effects and irreparable harm their actions have and will cause Plaintiffs, provide a strong basis for the issuance of a preliminary injunction.

II. STANDARDS FOR ISSUING PRELIMINARY INJUNCTIONS

The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The grant or denial of a preliminary injunction rests in the discretion of the district court. Traditionally, that discretion is exercised in light of the following four prerequisites: (1) a substantial likelihood of prevailing on the merits; (2) a substantial likelihood of suffering irreparable injury if the preliminary injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the threatened harm to the defendant if the preliminary injunction is granted; and (4) that granting the preliminary injunction will not disserve the public interest. *Sierra Club, Lone Star Chapter vs. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993) (citing *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

For the reasons set forth below, Plaintiffs satisfy all four prerequisites for issuing an injunction. Thus, Plaintiffs are entitled to a preliminary injunction from this Court enjoining Defendants from further excluding Plaintiffs from the Hazlewood Exemption.

III. ARGUMENT

A. Plaintiffs are Likely to Succeed on the Merits of their Equal Protection Claim.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985); *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). When a "challenged government action classifies or distinguishes between two or more relevant groups," courts must conduct an equal protection inquiry to determine the validity of the classifications. *Qutb v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993). In situations where the distinction involves an inherently suspect class, the differing treatment of state action is subject to a strict scrutiny standard of review. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) (applying strict scrutiny in striking state law that denied resident aliens disability benefits)). Alienage, like race and national origin, is a suspect classification. *Id.*; *Exam. Bd. Eng'rs v. De Otero*, 426 U.S. 572 (1976) (applying strict scrutiny and striking a Puerto Rico law that prevented resident aliens from obtaining engineering licenses). The Courts have reasoned that strict scrutiny applies in situations subjecting legal permanent residents to discrimination because they, "like citizens pay taxes, support the economy, *serve in the Armed Forces*, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973) (emphasis added).

Under strict scrutiny, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (citing *Exam. Bd. Eng'rs, 426 U.S.* at 605). Consequently, courts have routinely struck down discrimination against persons based on

their alienage in which the political function exception does not apply.[10] *Id.* For example, in *Nyquist v. Mauclet*, the State of New York passed a law which prevented legal permanent residents from receiving state financial assistance. 432 U.S. 1 (1977). Applying strict scrutiny, the Supreme Court struck down the law as violative of the Equal Protection Clause of the Fourteenth Amendment and failed to find any legitimate or substantial state interest in denying the tuition assistance to certain legal permanent residents. *Id.*

In a more recent opinion, the Fifth Circuit upheld a Louisiana Supreme Court rule denying admission to the Louisiana Bar to nonimmigrant aliens. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). The Court highlighted the distinction between nonimmigrant aliens and legal permanent residents, finding that strict scrutiny applies to local laws affecting legal permanent residents and rational basis applies to laws affecting nonimmigrant aliens. *Id.* at 721. As the Fifth Circuit concluded, "Given the extent to which resident aliens are legally entrenched in American society, their inability to participate in the political process qualifies them as 'as a prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate.'" *Id.* at 421 (quoting *In re Griffiths*, 413 U.S. 719, 721 (1973)).

Defendants each admit that they deny otherwise qualified veterans the Exemption based on the veterans' alienage at the time they entered the service (namely, because they were not

[10] The narrow exception to the rule that alienage triggers strict scrutiny is limited to those cases that involve a "political function," which thereby justifiably "exclude(s) aliens from positions intimately related to the process of democratic self-government." *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (reversing the Fifth Circuit and striking down a Texas statute that prevented legal permanent resident immigrants from become notaries public because it did not fall within the "political function exception"); *cf. Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state statute requiring police to be citizens); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state statute barring non-citizens, who had not declared their intent to become citizens, from teaching in the public schools); and *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding state law that barred noncitizens from becoming probation officers).

U.S. citizens at the time they entered the service) and, therefore, strict scrutiny applies.[11] Defs.' State of Texas, *et al.*, Answer to First Amended Complaint; s*ee In re Griffiths*, 413 U.S. at 721. Plaintiffs' testimony also provides ample proof that Defendants' implementation of the Hazlewood Act excludes Plaintiffs from receiving the Exemption on the basis of their alienage at the time they entered the service.

In January 2007, Plaintiff Dominguez sought to apply for the Exemption at Defendant West Texas A&M University (WTAMU). Dominguez Decl, Ex. 1 ¶14. Defendant WTAMU informed Dominguez that he did not qualify for the Hazlewood Exemption, because he was a legal permanent resident when he entered the military. *Id*. Defendant THECB also informed Plaintiff Dominguez that he was excluded from eligibility for the Hazlewood Exemption because he was a legal permanent resident at the time he enlisted. *Id.* Plaintiff Dominguez also complained to legislators about his exclusion but without success. *Id.*

Likewise, Plaintiff Alzer sought to apply for Exemption at Defendant University of Texas at San Antonio ("UTSA") and Defendant University of Texas at Austin ("UT") during the summer of 2006. Ex. 2 ¶19. However, Plaintiff ALZER was informed by Defendants UTSA and UT that he did not qualify for the Hazlewood Exemption because he was a legal permanent resident when he entered the military. *Id*.

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[11] Although Defendants Lone Star College System and Stephen Head answered that they were "without knowledge or sufficient information" to admit that they denied the Exemption to otherwise qualified veterans (*see* Defs.' Original Answer to Plfs.' First Am. Compl., Dkt. No. 35, ¶33), their website addressing the Hazlewood Exemption (*available at* http://dstc.nhmccd.edu/35980/, true copy attached as Ex. 15) links directly to the College For Texans website, (*available at* http://www.collegefortexans.com/cfbin/tofa2.cfm?id=31, true copy attached as Ex. 16), which is a project of the Texas Higher Education Coordinating Board. The first question on the College For Texans website asks: "Who can apply?" The first response and qualification listed is: "Veterans who: Are citizens of the United States at the time of entry." *Id*.

Defendant THECB also informed Plaintiff Alzer that he was excluded from eligibility for the Hazlewood Exemption, because he was a legal permanent resident at the time he enlisted. *See* Ex. 2 ¶20. After learning of his exclusion from the Hazlewood Exemption by Defendants, Plaintiff Alzer was deterred from applying for admission to enroll in graduate coursework and into the doctorate program at Texas public universities, including Defendant UTSA and Defendant UT, because he could not afford the tuition without the Exemption. Ex. 2 ¶23.

In 2006 and in 2007, Plaintiff Silva sought to apply for the Hazlewood Exemption at San Antonio College ("SAC"). Silva Decl., Ex. 3 ¶12. SAC informed Plaintiff Silva that he did not qualify for the Hazlewood Exemption, because he was a legal permanent resident when he entered the U.S. Army. *See id.* ¶12. Plaintiff Silva, thereafter, was forced to take out personal loans to pay for his tuition and fees to attend SAC. *Id.* ¶13.

Plaintiff Silva was recently accepted into Defendant UTSA for the upcoming Spring Semester 2008. *Id.* ¶15. He applied for the Hazlewood Exemption and was verbally informed by an employee of Defendant UTSA on January 4, 2008, that he was set to receive the Exemption for the upcoming semester. *Id.* However, Plaintiff Silva is uncertain whether he will actually he receive the Exemption this semester and whether he will receive the Exemption for the upcoming semesters. *Id.* Plaintiff Silva asked the UTSA employee whether he would be eligible to receive the Exemption in the future but the employee did not know. *Id.* Based on UTSA's website, the policy of UTSA continues to exclude veterans from receiving the Hazlewood Exemption. *See* UTSA Student Financial Aid and Enrollment Services, Hazlewood Exemption (*available at* http://www.utsa.edu/financialaid/ hazlewood.html); *see also* Ex. 3 ¶15. Plaintiff Silva does not know whether he must now seek loans to pay for his tuition and fees to continue to attend Defendant UTSA this semester and in the summer and fall of 2008 and

whether those loans would be enough to cover the tuition; if not, he would be forced to work in addition to his studies and would likely drop out of school. *Id*. ¶17.

In 2007, Plaintiff Lujan sought to apply for the Hazlewood Exemption at Defendant UT Austin. Lujan Decl., Ex. 4. Plaintiff Lujan was informed by Defendant UT Austin that he did not qualify for the Hazlewood Exemption because he was a legal permanent resident when he entered the U.S. Navy. *Id.* ¶13. He was forced to take out loans to pay for his tuition and fees to attend UT Austin. *Id.* ¶14. Plaintiff Lujan is now seeking to apply for admission to law school at Texas public universities, including Defendants UT Austin and University of Houston. *Id.* ¶15. However, he has been deterred from applying for admission because none of the public universities will grant him the Hazlewood Exemption because he was a legal permanent resident when he joined the military. *Id*. ¶15.

In 2007, Plaintiff Sanchez sought to apply for the Hazlewood Exemption at Defendant University of Houston ("UH"). Sanchez Decl., Ex. 5 ¶11. Plaintiff Sanchez was informed by Defendant UH that he would not qualify for the Hazlewood Exemption because he was a legal permanent resident when he entered the U.S. Army. *Id*. ¶11. Because he could not afford the tuition at Defendant UH without the Exemption, he did not attend UH. *Id.* ¶11. However, Plaintiff Sanchez still desires to re-enroll and attend UH. *Id.* ¶11.

Plaintiff Sanchez presently attends Defendant Lone Star College-North Harris ("LS-NHC"). *Id*. ¶10. In 2007, he sought to apply for the Exemption but was informed by Defendant LS-NHC that he will not qualify for the Exemption for the upcoming semester, because he was a legal permanent resident when he entered the U.S. Army. *Id*. ¶12. As a result, Plaintiff Sanchez was forced to expend his savings for his tuition and fees for the fall semester. *Id*. ¶13.

In 2006 and 2007, Plaintiff Dvizac sought to apply for the Hazlewood Exemption at Defendant UH. Dvizac Decl., Ex. 6 ¶13. Plaintiff Dvizac was informed by Defendant UH that he did not qualify for the Hazlewood Exemption because he was a legal permanent resident when he entered the U.S. Marine Corps. *Id.* ¶13. As a result, Plaintiff Dvizac was forced to take out loans to pay for his tuition and fees to attend Defendant UH. *Id.* ¶15.

In this case, there is no legitimate and substantial state interest in discriminating against Plaintiffs based on their status as legal permanent residents at the time they entered the military, much less any necessary and precisely drawn means adopted to achieve the goal. Therefore, because the implementation of the Act makes a distinction based on alienage without any legitimate and substantial state interest and the means are neither necessary nor precisely drawn, Plaintiffs will likely succeed on their claim that Defendants' application of the Hazlewood Act as to Plaintiffs violates the Equal Protection Clause.

It does not matter that at this point Plaintiffs are U.S. citizens. Defendants continue to discriminate against them because they *were* aliens at the time of their entry into the service and have today become naturalized citizens. When faced with statutes that distinguish between native-born citizens and naturalized citizens federal courts have routinely, applying strict scrutiny, found them unconstitutional. For example, in *Faruki v. Rogers*, the D.C. Circuit struck down several portions of a statute that required foreign service officers to be U.S. citizens for a minimum of ten years. 349 F. Supp. 723, 725 (D.C. Cir. 1972). More recently, in the voting rights context, a court found unconstitutional an Ohio statute that required naturalized citizens, but not native-born citizens, to provide citizenship documentation as proof of citizenship when their eligibility to vote was challenged at the polling place. *Boustani v. Blackwell*, No. 1:06CV2063, 2006 WL 3064102, at *4-5 (N.D. Ohio Oct. 26, 2006); s*ee also Fernandez v. Ga.*,

716 F. Supp. 1475, 1479 (M.D. Ga. 1989) (striking down a Georgia law that did not allow naturalized citizens to become state troopers); *Huynh v. Carlucci*, 679 F. Supp. 61, 66 (D.D.C. 1988) (applying strict scrutiny and striking down a regulation that imposed stricter requirements on naturalized citizens to gain Department of Defense security clearance).

B. Plaintiffs Will Suffer Irreparable Injury if a Preliminary Injunction is Not Granted.

It is well-settled that the violation of constitutional rights for even minimal periods of time constitutes irreparable injury justifying the grant of preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (citing, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm."). For purposes of injunctive relief, an injury is also "irreparable" if it cannot be undone through monetary remedies. *Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir. 1981); *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975). Monetary damages cannot compensate for "the loss of intangible rights that cannot be bought or sold in the marketplace." *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 821 (N.D. Tex. 1991); *see also Dearmore v. City of Garland*, 400 F. Supp.2d 894, 905 (N.D. Tex. 2005) ("[C]onstitutional violations should be enjoined as soon as practicable; otherwise, the Constitution is of little value."). Therefore, no further showing of irreparable injury is necessary where a constitutional deprivation is involved. *Louisiana Seafood Mgm't Council, Inc. v. Foster*, 917 F. Supp. 439, 442 n.1 (E.D. La. 1996) (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948:1, 160-61 (1995)).

As described in their attached declarations, Plaintiffs have suffered irreparable harm as a result of the violation of their constitutional rights for which there is no adequate remedy at law. *See* Exs. 1 - 6. They suffer this harm despite having honorably served in the United States Armed Forces during periods of conflict at a time when they were not U.S. citizens, and they will continue to suffer this harm if the Court does not grant a preliminary injunction against their exclusion from the Hazlewood Act. *See* Exs. 1 - 6.

Beyond the violation of their constitutional rights, Plaintiffs will be adversely affected and irreparably harmed in other ways that cannot be undone through monetary remedies if the Court allows Defendants to continue excluding them from the Hazlewood Exemption before deciding this case on the merits. For example, as a consequence of their continued exclusion from the Hazlewood Exemption, Plaintiffs Silva, Sanchez, and Dvizac, who are all currently enrolled in school, will be forced to drop out in the near future because they have insufficient financial resources to continue paying their tuition and fees out of pocket. *See* Silva Decl., Ex. 3 ¶17; Sanchez Decl., Ex. 5 ¶16; Dvizac Decl., Ex. 6 ¶19. They are also forced to work while attending school, detracting from their studies and scholastic performance, which will directly affect their ability to pursue their short and long term professional goals. *See* Silva Decl., Ex. 3 ¶¶13, 17 ; Sanchez Decl., Ex. 5 ¶15; Dvizac Decl., Ex. 6 ¶18. Working while attending school also prevents Plaintiffs Dvizac and Sanchez from spending time with their spouses and/or children, and forces them to divert financial resources to the cost of their education and away from their dependents. *See* Sanchez Decl., Ex. 5 ¶¶10, 13; Dvizac Decl., Ex. 6 ¶18.

Similarly, Plaintiffs Dominguez, Alzer and Lujan are being forced to forgo their graduate degrees indefinitely, because they are unable to afford the tuition and fees for such programs without the Exemption. *See* Dominguez at Ex. 1 ¶16; Alzer Decl., Ex. 2 ¶22; Lujan Decl, Ex. 4

¶15. Plaintiff Dominguez will not be able to enroll in his graduate degree course beginning January 22, 2008, if he does not receive the Exemption by that date. Dominguez Decl., Ex. 1 ¶18. Plaintiff Alzer owns a financial planning business, and his inability to receive the Exemption and pursue a doctoral degree and advanced degree coursework precludes him from completing the credit hours he needs to sit for certification exams that would serve to expand his business and clientele. *See* Alzer Decl., Ex. 2 ¶11. Plaintiff Lujan will not complete his law school applications if he cannot secure funding through the Exemption by the deadline of February 1, 2008 and will not enroll in law school for the coming fall term of 2008. Lujan Decl., Ex. 4 ¶15.

Not only is it impossible to measure the lost earning potential that even the smallest delay in obtaining those degrees will cause all of the individual Plaintiffs, but there is simply no monetary value sufficient to measure the loss of time pursuing their life goals and aspirations. *See* Dominguez Decl., Ex. 1 ¶11; *See* Alzer Decl., Ex. 2 ¶¶15 - 16; Silva Decl., Ex. 3; Lujan Decl., Ex. 4; Sanchez Decl., Ex. 5 ¶19; Dvizac Decl., Ex. 6 ¶21.

C. Granting a Temporary Restraining Order Does Not Result in Greater Harm to the Nonmoving Party.

The balance of hardships also tips heavily in favor of Plaintiffs. Although a court may deny an injunction that adversely affects the "public interest for whose impairment, even temporarily, an injunction bond cannot compensate," no such harm exists in this case. *Yakus v. United States*, 321 U.S. 414, 440 (1944). As described in the previous section, the harm to Plaintiffs is real and immediate, but any injury claimed by Defendants from the issuance of the requested injunctive relief is speculative and unsupported by any rational evidence.

Prior to the issuance of the Attorney General's opinion in 2005, the policy and practice of Defendants was to grant the Hazlewood Exemption to veterans such as Plaintiffs who were legal permanent resident immigrants at the time they entered active duty service. Certainly, Defendants were not harmed for the 80 years prior to the issuance of the opinions, and they are not harmed now if this Court grants the preliminary injunction.

In addition, Defendants grandfather all veterans who were receiving the Hazlewood Exemption at the time of the new rules in 2006. *See* Ex. 10. Regardless of a veteran's citizenship status at the time of his or her entry into the service, a grandfathered veteran continues to receive the Exemption to this day and Defendants maintain separate applications for those veterans who have previously received the Exemption. *See* Application Packet for Previous Exemption Recipients, Ex. 12; *cf.* Application Packet for Veterans who have Never Used Exemption, Ex. 13. Any injury alleged by Defendants from the granting of a preliminary injunction can be no greater than the "injury" presented by the grandfathered veterans, and therefore, does not amount to a harm worthy of denying Plaintiffs the opportunity to obtain their post-secondary education.

D. Granting the Preliminary Injunction is in the Public Interest.

The public interest is greatly served by preventing the further exclusion of veterans from a program that violates the U.S. Constitution and does not remedy any identified problems. *Deerfield Medical Center*, 661 F.2d at 338-39. The Hazlewood Act was established to reward veterans for their honorable service to this country, not to single out and exclude veterans based on their foreign birth and citizenship status at the time they entered the service. It also provides an incentive to all persons, citizens and noncitizens alike, to serve in the military and help protect the freedoms we enjoy in the U.S.

Furthermore, the public interest would be served by a preliminary injunction because each plaintiff plans to use his education in a way that will benefit the public interest; on the other hand, denying the injunction will delay their education, which will only delay their contributions to society. Plaintiff Dominguez desires to get his Master's Degree so he can become a coordinator or director in his department and improve upon the program for migrant students who have dropped out of school. Ex. 1 ¶¶10 - 11. Plaintiff Silva wants to become a psychologist so he can help soldiers who suffer from disorders such as Post-Traumatic Stress Disorder (PTSD) and other illnesses that result from the stress of combat and military service. Ex. 3 ¶11. Plaintiff Lujan wants to become a lawyer so he can draft better laws for Texas, including in the areas of healthcare and education. Ex. 4 ¶11. Plaintiff Alzer seeks to expand his financial planning business and provide better and more holistic investment services to his clients. Ex. 2 ¶10. Plaintiff Sanchez seeks to become a nurse, so he can help people recover from illnesses and offer his bilingual services to patients and the community. Ex. 5 ¶11. Plaintiff Dvizac seeks to become a teacher and principal in order to help educate future generations of children. Ex. 6 ¶11. A preliminary injunction can only serve the public interest.

E. Plaintiffs Urge the Court to use its Discretion and Dispense With, or at Most Require Only a Nominal Bond.

The amount of a security bond, if any, required as a condition for injunctive relief is a matter resting within the sound discretion of the Court. The Court may dispense with the requirement of a bond altogether where the relief requested is in the public interest. *Yakus v. United States*, 321 U.S. 414, 441 (1944); *see also City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084 (5th Cir. 1981); *Corrigan v. Dispatch Co. v. Casa Guzman*, 569 F.2d 300 (5th Cir. 1978). In this case, the relief requested by these honorably discharged

veterans lies at the heart of the public interest. *See supra* § D. Therefore, Plaintiffs respectfully urge the Court to dispense with the bond requirement or at most require only a nominal bond.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court issue a preliminary injunction. To the extent that Defendants dispute the factual allegations of Plaintiffs in this motion, Plaintiffs request an opportunity to present evidence at a hearing.[12]

DATED: January 7, 2008

Respectfully submitted,

David Hinojosa /s/_____
David Hinojosa
State Bar No. 24010689
Nina Perales
State Bar No. 24005046
Marisa Bono
State Bar No. 24052874
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
110 Broadway, Suite 300
San Antonio, TX 78205
Tel: (210)224-5476
Fax: (210)224-5382

CERTIFICATE OF SERVICE

I certify that on January 7, 2008, a correct copy of the foregoing document was forwarded via the Electronic Court Filing System and/or via electronic mail to the following:

Shelley N. Dahlberg
Assistant Attorney General
Litigation Division
Post Office Box 12548,
Capitol Station
Austin, Texas 78711-2548
Attorney for State of Texas

David Mattox
Chief, Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
Attorney for University of Texas, *et al.*

[12] *Kaepa v. Achilles*, 76 F.3d 624, 628 (5th Cir.), cert. denied, 519 U.S. 821 (1996).

Nancy Juren
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Attorney for THECB, *et al*.

Mario Barrera
Bracewell & Guiliani LLP
800 One Alamo Center
106 S. St. Mary's Street
San Antonio, Texas 78205
Attorney for Lone Star College, *et al*.

David Hinojosa /s/_____
David Hinojosa