

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

FILED

JAN 17 2008  
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY \_\_\_\_\_ DEPUTY CLERK

RAUL DOMINGUEZ, NASER ALZER, §  
JOSE SILVA, MARTIN LUJAN, GUILLERMO §  
SANCHEZ, ANTHONY DVIZAC and §  
AMERICAN GI FORUM OF TEXAS, §

Plaintiffs, §

VS. §

CIVIL ACTION NO. SA-07-CA-0549-FB

STATE OF TEXAS, the TEXAS HIGHER §  
EDUCATION COORDINATING BOARD, §  
ROBERT SHEPARD, in his Official Capacity §  
as Chairman of the Texas Higher Education §  
Coordinating Board, RAYMOND A. PAREDES, §  
in his Official Capacity as Commissioner of §  
Higher Education, the UNIVERSITY OF §  
TEXAS AT SAN ANTONIO, RICARDO §  
ROMO, in his Official Capacity as President of §  
the University of Texas at San Antonio, WEST §  
TEXAS A&M UNIVERSITY, J. PATRICK §  
O'BRIEN in his Official Capacity as President §  
of West Texas A&M University, BILL JONES, §  
in his Official Capacity as Chairman of the Texas §  
A&M System Board of Regents, the §  
UNIVERSITY OF TEXAS AT AUSTIN, §  
WILLIAM POWERS in his Official Capacity as §  
President of the University of Texas at Austin, §  
JAMES R. HUFFINES, in his Official Capacity §  
as the Chairman of the University of Texas §  
System Board of Regents, LONE STAR §  
COLLEGE-NORTH HARRIS, STEPHEN §  
HEAD, in his Official Capacity as President of §  
Lone-Star College-North Harris, LONE STAR §  
COLLEGE SYSTEM, RICHARD §  
CARPENTER, In his Official Capacity as §  
Chancellor of Lone Star College System, §  
RANDY BATES, in his Official Capacity as §  
Chairman of the Board of Trustees of Lone Star §  
College System, the UNIVERSITY OF §  
HOUSTON, JOHN M. RUDLEY, in his Official §  
Capacity as President of the University of §  
Houston, and WELCOME W. WILSON, SR., §  
in his Official Capacity as Chairman of the §  
University of Houston Board of Regents, §

Defendants. §

**ORDER ON PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION AND  
DEFENDANTS' RESPONSES SUGGESTING MOOTNESS**

**Warriors' Stories**

Six individual plaintiffs, the modern version of the greatest generation,<sup>1</sup> seek equal protection from the Constitution of the United States of America, to which they swore allegiance when becoming American citizens and when enlisting in the armed services of the United States.

Messrs. Dominguez, Alzer, Silva, Lujan, Sanchez and Dvizac were at one time legal permanent residents from Bosnia, Jordan, and Mexico who obeyed the immigration laws of this country. They were willing to lay down their lives as Soldiers, Sailors and Marines in defense of other Americans, many of whom are willing to take our blessings for granted and unwilling to serve.

Collectively, plaintiffs dedicated over twenty-five years in military uniform, resulting in several years of separation from family while in training and serving in Iraq, Somalia, Italy, the Middle East, and Guantanamo Bay. Their bravery earned National Defense Service Medals, the Southwest Asia Service Medal with Bronze Service Star, the Kuwait Liberation Medal, the Armed Forces Expeditionary Medal, Good Conduct Medals, Navy Achievement Medal, Army Service Ribbon, M16 and Hand Grenade Expert Badges, and Humanitarian Service Medal. One individual was named Marine of the Year in 1996 for the Houston, Texas region, giving true meaning to the words, "Semper Fidelis." All were honorably discharged.

Tyrants tremble when they awake to thoughts of men like these.

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<sup>1</sup> TOM BROKAW, THE GREATEST GENERATION (Random House Publishing Group 2004), for example:

Corporal Lafayette Joseph Mattingly (1919-1990), United States Marine Corps, Silver Star, Battle of Peleliu, September 1944.

Sergeant Joseph Anthony Ward (1923-2005), United States Army. Survivor of Bataan Death March; Past National Commander, Defenders of Bataan and Corregidor.

Because they answered their adopted nation's call to duty and met other legal requirements, they became our fellow Americans. Seeking more of that dream lead them to pursue various undergraduate and graduate degrees in fields such as electrical engineering, business administration, and psychology. They now seek to further their education in law school, obtaining Master's degrees, certified public accounting and chartered financial analyst certification, a doctoral degree in finance, a Bachelor's Degree, a degree in nursing, and a high school teaching certificate. Those academic endeavors are aided by educators and institutions whose calling it is to create a rising tide lifting all boats, and who now find themselves caught in the middle of this dispute.

In gratitude for plaintiffs' sacrifices, the State of Texas denied plaintiffs the financial aid otherwise available to military veterans under the Hazlewood Exemption, leading to the filing of this lawsuit. That Exemption found in section 54.203(a) of the Texas Education Code provides in part:

The governing board of each institution of higher education shall exempt the following persons from the payment of all dues, fees, and charges, including fees for correspondence courses but excluding general deposit fees, student services 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 of 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, excluding training, 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 . . .
  - (f) the national emergency by reason of certain terrorist attacks . . .
  - (g) any future national emergency declared in accordance with federal law.

Tex. Educ. Code Ann. § 54.203(a) (Vernon 1996).

But what the Texas legislative hand giveth, the Texas executive hand taketh away. Tex. Atty. Gen. Op. GA-0445, 2006 WL 2076598 (July 21, 2006) (“[t]o receive benefits under Education Code section 54.203(a), an honorably discharged veteran must (1) have been a United States citizen and Texas resident at the time he or she entered the service”); Tex. Atty. Gen. Op. GA-0347, 2005 WL 2004148 (August 19, 2005) (“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”; “section 54.203(a) exempts from the payment of higher-education tuition and certain fees a veteran who (1) was a United States citizen and a Texas resident at the time he or she entered the service”). Plaintiffs, though legal permanent residents, were not yet United States citizens at the time they entered military service. Indeed, one motive for plaintiffs’ enlistment would be the attainment of American citizenship.<sup>2</sup> Plaintiffs seek injunctive relief to obtain the benefits of Hazlewood, relying on the Equal Protection Clause, the Due Process Clause, and the Supremacy Clause of the United States Constitution, and Title VI of the Civil Rights Act of 1964. A prompt preliminary ruling is important because the next semester begins January 21, 2008.

#### **Preliminary Injunction Standard**

In order for plaintiffs to obtain a preliminary injunction in this matter, they must show:

- (1) a substantial likelihood of success on the merits,
- (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted,
- (3) that the threatened injury outweighs any damage that the injunction might cause the defendant[s], and
- (4) that the injunction will not disserve the public interest.

Planned Parenthood v. Sanchez, 403 F.3d 324, 329 (5<sup>th</sup> Cir. 2005). Because a preliminary injunction is considered an “extraordinary remedy,” it “should only be granted if the plaintiffs have ‘clearly carried the burden of persuasion’ on all four requirements.” Id.

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<sup>2</sup> 8 U.S.C. § 1440 (providing for naturalization through active-duty service in the Armed Forces during periods of military hostilities).

**Plaintiffs' Contentions**

Plaintiffs believe they are likely to succeed on the merits of their Equal Protection Claim, and because the challenged action subjects legal permanent residents to discrimination, this Court must apply a strict scrutiny standard of review, as explained by the Supreme Court in In re Griffiths, 413 U.S. 717, 721-22 (1973), as follows:

“(C)lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” (Quoting Graham v. Richardson, 403 U.S. 365 (1971)).

The Court has consistently emphasized that a State which adopts a suspect classification “bears a heavy burden of justification,” a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is “necessary . . . to the accomplishment” of its purpose of the safeguarding of its interest.

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

(Quoting McLaughlin v. Florida, 379 U.S. 184 (1964)). The Fifth Circuit has acknowledged strict scrutiny as the standard in cases “affecting permanent resident aliens.” LeClerc v. Webb, 419 F.3d 405, 415 (5<sup>th</sup> Cir. 2005) (noting the Supreme Court has, beginning in 1971, “applied some variation of strict scrutiny to invalidate state laws affecting ‘resident aliens’ or ‘permanent resident aliens’”). In performing a strict scrutiny analysis, “‘the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether the interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.’ Alienage classifications by a State that do not withstand this stringent examination cannot stand.” Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (quoting Examining Board v. Flores de Otero, 426 U.S. at 605)).

**Defendants' Responses**

In response to plaintiffs' motion, the Court has received and reviewed the following responses: (1) State University Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Suggestion of Mootness (docket #59); (2) The State of Texas's Response to Plaintiffs' Motion for Preliminary Injunction (docket #60); (3) Texas Higher Education Coordinating Board, Raymund A. Paredes, and Robert Shepard's Response to Plaintiffs' Motion for Preliminary Injunction and Brief in Support (docket #62); (4) Defendants Lone Star College System, Lone Star College-North Harris and Stephen Head's Response to Plaintiffs' Motion for Preliminary Injunction (currently docket #63-2, to be refiled electronically), and (5) Texas Higher Education Coordinating Board, Raymund A. Paredes, and Robert Shepard's Supplemental Response to Plaintiffs' Motion for Preliminary Injunction and Brief in Support (docket #67). The defendants all agree that with the withdrawal by the Attorney General of two opinions, the rules will be changed accordingly, Hazlewood benefits will be granted to applicants who were legal residents at the time they entered the military services who otherwise qualify for benefits, and plaintiffs' request for injunctive relief is moot.

The defendant Texas Higher Education Coordinating Board (THECB) is the highest authority in the state in matters of public higher education, is charged with the duty to actively promote quality education in the various regions of Texas, and was given rulemaking authority in 2005. The THECB adopted rules which became effective on August 11, 2005, establishing procedures and criteria for administration of the Hazlewood Exemption. The THECB acknowledges it set forth the requirement that veterans were to be a "resident of Texas" at the time he or she entered military service in order to be eligible to receive a Hazlewood Exemption. However, it was not until August 18, 2005, one week after the THECB's residency rule became effective, that a Texas Attorney General Opinion was issued concluding "citizen of Texas" refers to a United States citizen who resides in Texas. The THECB states it believed it was bound by the

August 18 opinion and amended its residency-based Hazlewood Act Exemption rule accordingly. The new rule which is at issue herein, became effective February 21, 2006, and required the veteran to demonstrate United States citizenship at the time of entrance into military service.

In response to this litigation, on January 14, 2008, the Attorney General issued a letter withdrawing both opinions which define citizen of Texas (Attorney General Opinion No. GA-0347 and Attorney General Opinion No. GA-0445).<sup>3</sup> As a result, the THECB issued a notice of an emergency meeting of the Higher Education Coordinating Board for January 15, 2008, to consider amending the three THECB rules affected by the United States citizenship eligibility requirement. If amended, the THECB states corresponding administrative changes to the Hazlewood Act Exemption applications and other related materials would be made accordingly. The THECB also states that assuming the emergency rules are enacted, colleges and universities could apply the new rules immediately for the Spring 2008 semester. The THECB would then publish the rules for comment in March 2008, and for consideration and final adoption at the April 2008 board meeting. As a result, THECB contends plaintiffs' motion for a preliminary injunction should be denied as moot because plaintiffs will no longer be excluded from receiving the tuition exemption under the Hazlewood Act because they were not United States citizens at the time they entered military service.

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<sup>3</sup> The letter from the Attorney General of Texas to the Honorable Leticia Van de Putte, R.Ph., Chairman, Committee on Veterans Affairs and Military Installations dated January 14, 2008, provides in part as follows:

As a matter of statutory construction, we agreed that the phrase "citizen of Texas" refers to a person who is both a United States citizen and a resident of Texas. Tex. Atty. Gen. Op. Nos. GA-0347 (2005), GA-0445 (2006). We were not asked at that time, and therefore did not answer, whether such a statutory provision would be unconstitutional.

Since that time, federal-court litigation has ensued, and arguments have now been raised concerning the constitutionality of a statutory requirement for benefits that would exclude legal permanent residents. It is now urged that a decision of the U.S. Supreme Court compels the conclusion that any such statutory requirement would be unconstitutional. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971); see also *LeClerc v. Webb*, 419 F.3d 405, 415-16 (5<sup>th</sup> Cir. 2005).

In light of these legal claims, we are now presented with the question that was not asked of us in GA-0347 and GA-0445. With the benefit of additional briefing and analysis, we conclude that, as a constitutional matter, section 54.203(a) cannot exclude from its reach honorably discharged veterans who were legal permanent residents at the time they enlisted.

Accordingly, in light of these new constitutional arguments, CA-0347 and GA-0445 are withdrawn.

In anticipation of the rule change by the THECB, the State University defendants advise, in their response, they will begin processing applications for Hazlewood benefits from applicants who were legal residents at the time they entered military service and will process those applications in the normal course of business. Defendant State of Texas concurs that, based on the change to the THECB's rules, "all Texas public institutions of higher education will grant the Hazlewood Exemption to qualified veterans regardless of their citizenship at the time they enlisted in the military. Likewise, defendants Lone Star College System, Lone Star College-North Harris and Stephen Head indicate in their response that once the THECB announces and implements its new rules and forms for the Hazlewood Exemption, they too will "follow such rules and utilize such forms as they are bound to do."

On January 16, 2008, the THECB filed a supplemental response to plaintiffs' motion. In this supplement, the THECB advises the meeting was held on January 15, 2008, amendments to the THECB rules were adopted, and after the meeting, the THECB filed the emergency rules in the Texas Register as required by the Texas Administrative Procedure Act. The THECB also advises of its intent to file the identical rules for comment in the Texas Register for consideration for adoption as permanent rules at the April 2008 meeting of the THECB.

The supplemental response also indicates Raymund A. Paredes, the Commissioner of Higher Education, sent a memorandum on the morning of January 16, 2008, to the Chancellors, Presidents, and Provosts of all Texas public institutions of higher education informing them of the adoption of the emergency Hazlewood Act Exemption rules. The recipients of the memorandum were advised the new rules allow veterans who were Texas legal permanent residents at the time they entered the service and who meet all other program requirements qualify for the Hazlewood tuition exemption beginning with the Spring 2008 semester.<sup>4</sup>

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<sup>4</sup> The memorandum set forth the information as follows:

On Monday, January 14, 2008, the Attorney General withdrew two previously issued opinions which



### Conclusion

This case exemplifies the best of what federal lawyers do to present constitutional issues to the Courts of the United States and to preserve equal justice under law. The THECB, ably and professionally represented by public servant assistant attorneys general, has graciously and correctly done justice by plaintiffs when it could have prolonged this litigation through gamesmanship and sharp tactical maneuvers. Had Attorney General Opinions GA-0347 and GA-0445 not been withdrawn and had defendants not filed their 11<sup>th</sup> hour proposal, the Court was prepared to make the following findings:

- (1) Those who have borne our burdens are entitled to federal constitutional equal protection for Texas Veterans' benefits.
- (2) Plaintiffs should not be penalized because the date of their citizenship came after their military accomplishments.
- (3) Plaintiffs will be irreparably harmed if denied financial assistance to better themselves.
- (4) The State of Texas will not be financially damaged in any significant way if plaintiffs prevail.
- (5) The public interest will be served by plaintiffs having the monetary support to pursue higher education.

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had defined "citizen of Texas" for purposes of qualifying for the Hazlewood Exemption. The withdrawal of these opinions, coupled with the Coordinating Board's action yesterday, allows veterans who were Texas legal permanent residents at the time they entered the service and who meet all other program requirements to qualify for the exemption beginning with the Spring 2008 semester.

If your institution previously denied any otherwise eligible veterans or their qualifying dependents based on the US citizenship requirement, you should offer the exemption to these individuals *even though the deadline for submitting Hazlewood application materials may have passed for the spring term.*

We are currently revising the Hazlewood Fact Sheet and application materials on our website, but, until these electronic updates are made, feel free to print and use copies of the attached applications.

(Emphasis in original).