No. _____

In The
Supreme Court of the United States

KEITH HARRIS,

Petitioner,

v.

HAROLD HAHN; JARVIS HOLLINGSWORTH; ROBERT JENKINS, JR.; SADA CUMBER; CHRISTOPHER HUCKABEE; JACOB MONTY; JANELLE SHEPARD; JOHN STEEN, JR.; DAVID TEUSCHER; RAYMOND PAREDES; TILLMAN FERTITTA; WELCOME WILSON, JR.; BETH MADSON; SPENCER ARMOUR, III; ROGER WELDER; DURGA AGRAWAL; PAULA MENDOZA; PETER TAAFFE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN D. SHEPPARD
Counsel of Record
MORROW & SHEPPARD LLP
3701 Kirby Drive, Suite 840
Houston, Texas 77098
Tel.: 713-489-1206
jsheppard@morrowsheppard.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Texas' Hazlewood Act grants tuition waivers to honorably discharged veterans. To qualify for benefits, the veteran must (a) be a current Texas resident, and (b) have also been a Texas resident at the time of enlistment. This prior residency requirement is called a "fixed-point residency requirement." Veterans who were not Texas residents at the time of enlistment (a fixed date in the past) are permanently barred from benefits and forever treated as second-class Texas veterans.

By reversing the district court and by holding the fixed-point residency requirement is constitutional, the Fifth Circuit has created a circuit split, has created a conflict with state courts of last resort, and failed to follow this Court's "clear" holdings. The Supreme Court has repeatedly and always struck such fixed-point residency requirements as unconstitutional. Nevertheless, the Fifth Circuit has signaled that "a clearer indication from the Supreme Court" is needed. App. 27.

This case affects the fundamental rights of all residents in connection with all state benefits, not just veterans and tuition benefits. The questions presented are:

1. Whether the Constitution's equal protection and fundamental right to travel rights will tolerate a state benefit program that creates fixed and permanent distinctions between similarly-situated residents based on their length or timing of residence in the state; and

2. Whether the Hazlewood Act's "fixed-point residency requirement" therefore offends the Constitution.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Mr. Keith Harris, the plaintiff-appellee in the court of appeals.

Respondents, and defendants-appellants in the court of appeals are as follows: (A) The following individuals in their official capacity as members of the Texas Higher Education Coordinating Board: Harold Hahn, Robert Jenkins Jr., Sada Cumber, Christopher Huckabee, Jacob Monty, Janelle Shepard, John Steen, Jr., and David Teuscher; and (B) the following individuals in their official capacity as members of the University of Houston Board of Regents: Jarvis Hollingsworth, Raymond Paredes, Tillman Fertitta, Welcome Wilson, Jr., Beth Madson, Spencer Armour III, Roger Welder, Durga Agrawal, Paula Mendoza, and Peter Taaffe.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner and Respondents are individuals, and are not corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Harris respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-27) is reported at 827 F.3d 359. The reversed opinion of the district court (App. 30-62) is reported at 81 F. Supp. 3d 566.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2016. App. 28-29. A timely petition for rehearing *en banc* was denied on July 26, 2016. App. 63-64. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following U.S. Constitutional provisions:

> (a) The Equal Protection Clause, which states "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1.

(b) The Commerce Clause, which gives to Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., Art. I, sec. 8, cl. 3.

(c) Privileges and Immunities Clause of Article IV, which states "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, sec. 2, cl. 1.

(d) Privileges and Immunities Clause of the Fourteenth Amendment, which states "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. Const., amend. XIV, sec. 1, cl. 2.

This case involves the following Texas statute:

Sec. 54.341. VETERANS AND OTHER MILITARY PERSONNEL; DEPENDENTS. (a) The governing board of each institution of higher education shall exempt the following persons from the payment of tuition, dues, fees, and other required 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 person seeking the exemption currently resides in this state and entered the service at a location in this state, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of

Subchapter B at the time the person entered the service:

. . .

(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 which began on the date of the termination of the national emergency cited in Subdivision (3);

(B) the Vietnam era which began on December 21, 1961, and ended on May 7, 1975;

(C) the Grenada and Lebanon era which began on August 24, 1982, and ended on July 31, 1984;

(D) the Panama era which began on December 20, 1989, and ended on January 21, 1990;

(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.
>
> . . .

(e) The exemption from tuition, fees, and other charges provided for by this section does not apply to a person who at the time of registration is entitled to receive educational benefits under federal legislation that may be used only for the payment of tuition and fees. . . .

(e-1) A person may not receive an exemption under this section if the person is in default on a loan made or guaranteed for educational purposes by the State of Texas.

. . .

(k) The Texas Veterans Commission by rule shall prescribe procedures to allow:

> (1) a person who becomes eligible for an exemption provided by Subsection (a) to waive the person's right to any unused portion of the number of cumulative credit hours for which the person could receive the exemption and assign the exemption for the unused portion of those credit hours to a child of the person; and

TEX. EDUC. CODE § 54.341.

STATEMENT OF THE CASE

The principles at stake in this case are fundamentally important to every resident of every state in this country. We all have a position in line as to when we first arrived in our respective states, even if we arrived at birth. There are those ahead of us in line, and those behind us. Imagine a nation in which more established residents are *permanently* entitled to lower tuition rates, better state tax rates, faster treatment at state emergency rooms, preferential access to welfare benefits, and premier access to new library books and state hunting grounds. In this theoretical nation, we find unequal treatment amongst all residents within states, strong disincentives to moving between states, and severe penalties for those who must nevertheless do so. This nation of ranks, castes, constructive walls, and barriers to migration is anathema to our form of Republic – politically, economically, and socially. However, the Fifth Circuit's opinion opens the door to such a nation. In short, the impact of this case cannot be overstated.

The Texas Hazlewood Act (the "Act") waives tuition and fees for honorably discharged military veterans attending Texas public universities if the veterans are currently Texas residents, have exhausted their federal educational benefits, and served during certain defined periods of conflict. *See* TEX. EDUC. CODE § 54.341.

Despite fully meeting the foregoing standard, Petitioner Keith Harris ("Petitioner" or "Harris") permanently does not qualify for Hazlewood benefits because there is another twist: the Act does not apply to current Texas veterans if they were not also residents of Texas when they entered the military and if they entered the military in another state. *Id.* at § 54.341(a) (granting the exemption, "provided the person seeking the exemption currently resides in this state and entered the service at a location in this state, declared this state as the person's home record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B at the time the person entered the service").

Thus, one must either (a) enter the military in Texas as a resident of any state, or (b) enter the military in any state but as a Texas resident in order to get the benefits. Those like Petitioner Harris who entered the military in another state face two Texas residency requirements: (1) a present residency requirement, which he can work to meet, and (2) a past requirement, which he can never satisfy, no matter what he does or how hard he works.

Requiring residency at the time of joining the military is called a fixed-point residency requirement. After later establishing residency in Texas, these *bona fide* Texas veterans can never later overcome or satisfy the prior residency requirement, and are forever classified and treated as lesser Texas veterans than those who were residents of Texas when they entered the

military. On information, the U.S. Supreme Court has always struck fixed-point residency requirements as unconstitutional.

Petitioner Harris is an honorably discharged Army veteran, is a Texas resident of more than ten years, and was a law student at the University of Houston at the time this lawsuit was filed. App. 30-31. At the age of eighteen in 1996, Harris enlisted in the Army in his home state of Georgia to serve his country and support his family. App. 3, 30. Harris served four years in the Army and was honorably discharged, serving some of his active duty overseas in Korea. App. 3. During his service, Harris received several decorations. App. 3. Counsel for Harris are proud to represent him on a *pro bono* basis.

Following his honorable discharge from the Army, Harris initially moved back to Georgia, obtained a job, got married, and started raising a family. App. 3. Harris moved with his family to Texas in 2004, where he lives today. App. 3, 31.

While in the Army, Harris began taking college level courses. App. 31. Using his federal educational benefits under the federal GI Bill, Harris continued to work towards his degree after leaving the Army. App. 31.

In December 2011, Harris completed and was awarded a bachelor's degree in business from the University of Houston – Downtown. App. 31. Harris then enrolled at the University of Houston Law Center in August 2012. App. 31. By then, Harris had exhausted

his federal GI Bill benefits, and was paying for his law school tuition and fees on his own (unlike other honorably discharged Texas veterans). App. 31. Harris applied for the Hazlewood Act benefits and was denied. App. 4.

There is no dispute that Harris qualifies for the Hazlewood Act and meets all of its other requirements (*e.g.*, current Texas residence, length of military service, service during certain times of defined wars and conflicts, honorable discharge status, exhaustion of federal educational benefits, not being in default on student loans), except for the Act's fixed-point residency requirement – which Harris can never meet because he enlisted in Georgia as a Georgia resident. *See* App. 3, 32. It does not matter that Harris has lived in Texas for more than 10 years. *See* App. 3, 31. He is forever barred.

In 1998, the Texas Attorney General opined that – based on prior U.S. Supreme Court holdings – the Hazlewood Act is unconstitutional as it pertains to Texas veterans that enlisted while residents of another state. App. 51. The Texas Attorney General predicted that a court would hold the law unconstitutional. App. 51. For over fifteen years after the Texas Attorney General's opinion issued, however, the Act's constitutionality went unchallenged, and Texas continued to exclude veterans like Harris from the Hazlewood program.

In 2014, Harris filed this suit in the United States District Court for the Southern District of Texas seeking declaratory and injunctive relief, and alleging his

exclusion from the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as the fundamental right to travel recognized under the United States Constitution's privileges and immunities clauses. App. 5, 6-7, 32-33. The district court's subject matter jurisdiction rested on 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

On January 26, 2015, District Judge Ewing Werlein, Jr. granted Harris's summary judgment, struck and severed the fixed-point residency requirement from the Act as unconstitutional, and permanently enjoined the defendants from excluding Harris from Hazlewood Act benefits. App. 56, 60-62.

After the district court's ruling, the current Texas Attorney General handling this case appealed, withdrew the opinion that had stood undisturbed since 1998, and replaced it with a new opinion that supports the state's appellate briefing. App. 6, 6 n.5, 15. On appeal, the Fifth Circuit reversed the district court's ruling and held the Hazlewood Act is constitutional. App. 27.

REASONS FOR GRANTING THIS PETITION

This petition should be granted (1) to resolve a conflict with this Court's holdings, to resolve a circuit conflict, and to resolve a conflict with more than one state court of last resort; (2) to respond to the Fifth Circuit's signal for "a clearer indication from the Supreme Court that Texas's decisions violate

constitutional provisions. . . ." (*see* App. 27); (3) because the Fifth Circuit has unilaterally created unworkable "portability," "prospective," and "gratuity" exceptions to fundamental equal protection and right to travel rights and applied the wrong standards (all in violation of Supreme Court holdings); and (4) because the Fifth Circuit's opinion can be used as a sword to discriminate against all residents and penalize interstate migration in connection with conceivably any state benefit.

I. THE DECISION OF THE COURT OF APPEALS CLEARLY CONFLICTS WITH DECISIONS OF THIS COURT, CREATES A CIRCUIT SPLIT, AND CREATES A CONFLICT WITH MORE THAN ONE STATE COURT OF LAST RESORT

The Fifth Circuit's determination that the fixed-point residency requirement in the Hazlewood Act is constitutional conflicts with the U.S. Supreme Court's clear holdings in a trio of cases named *Zobel*, *Hooper*, and *Soto-Lopez*, which unequivocally held as follows:[1]

> "*Zobel* ***made clear that the Constitution will not tolerate*** a state benefit program

[1] *Zobel* struck down a law that apportioned Alaska oil dividend payments to its residents based on how long they had been residents. *Hooper* struck down a law that granted tax exemptions to Vietnam veterans, but only those that resided in the state before May 8, 1976. *Soto-Lopez* struck down a law that gave extra civil service test points to New York veterans, but only those that entered the military as New York residents.

> that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.' "

Hooper v. Bernalillo, 472 U.S. 612, 623 (1985) (ellipses in original) (quoting *Zobel v. Williams*, 457 U.S. 55, 59 (1982)) (emphasis added); *see also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 908 (1986) ("the Constitution will not tolerate a state benefit program that creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State") (plurality opinion) (ellipses in original).

Remarkably, the Fifth Circuit's opinion does not address, quote, or even cite to the foregoing language or holdings from the Supreme Court. *See generally* App. 1-27.

The Supreme Court has further made clear that, "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after [a fixed point in time]." *Hooper v. Bernalillo*, 472 U.S. 612, 623 (1985).

The Supreme Court has further stated that "the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904.

A state's permanent and disparate treatment of newer state citizens, including those who have exercised their right to migrate, is a fundamental injustice that goes to the essence of our Republic.[2] Unfortunately, that is precisely what is happening here despite the Supreme Court holdings above.

At least one circuit court, multiple state courts of last resort, and other courts have needed no clarification to understand the clear and unequivocal holdings from the Supreme Court addressed above, and the Fifth Circuit's opinion creates a direct conflict with them as well. *See Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985) (*certiorari denied*) (striking law that granted retirement credit only to state employees who were residents of Guam before they started college because "[t]he statute in the case at bar also creates 'fixed, permanent distinctions between . . . classes of concededly bona fide residents'") (quoting *Zobel*); *Del Monte v. Wilson*, 824 P.2d 632, 636 (Cal. 1992) (*en banc*) (*certiorari denied*) (striking law identical to Hazlewood Act that provided tuition exemptions to veterans, but

[2] *See Zobel v. Williams*, 457 U.S. 55, 70 (1982) ("In short, as much as the right to travel, equality of citizenship is of the essence in our Republic. As the Court notes, States may not 'divide citizens into expanding numbers of permanent classes.'") (Burger, C.J., concurrence); *id.* at 76 ("Certainly the right infringed in this case is 'fundamental.' . . . It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State.") (O'Connor, J., concurrence) (striking Alaskan law that apportioned state oil dividends to residents based on length of residence).

only if they were California residents at the time of entering the military) ("*Zobel* made clear that the Constitution will not tolerate a state benefit program that 'creates fixed permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.' ") (quotations and ellipses in original); *Bagley v. Vermont Dept. of Taxes*, 500 A.2d 223, 226 (Vermont 1985) ("*Hooper* and *Zobel* make clear that the Constitution will not tolerate a tax credit scheme that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.' ") (quotations and ellipses in original) (striking tax benefit law that required residency on a specific date in the past); *Lloyd v. City of Philadelphia*, Cause No. 88-5812, 1990 WL 92531, *6 (E.D. Pa. 1990) ("the Constitution will not tolerate a state benefit program that creates fixed, permanent distinctions between classes of concededly bona fide residents, based on how long they have been in the State") (quoting *Soto-Lopez*).

The Fifth Circuit's opinion is revolutionary. Indeed, Petitioner Harris is not aware of a single case in which any court, including the U.S. Supreme Court, has ever tolerated a fixed-point residency requirement creating fixed and permanent distinctions between classes of bona fide residents.[3]

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[3] Fixed-point residency requirements are permanently punitive. Temporary durational requirements are less punitive, but even they are suspect under the U.S. Constitution. Durational requirements require individuals to be residents for a certain period

Soto-Lopez is remarkably similar to the case at hand. There, the Supreme Court struck down a New York law that apportioned bonus points on civil service exams to current New York veterans, but only if they were also New York residents at the time of enlistment. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). The fixed-point residency requirement struck in *Soto-Lopez* is constitutionally identical to the fixed-point residency requirement upheld by the panel's decision.

Six years after *Soto-Lopez*, the California supreme court struck down a law identical to the Hazlewood Act. *Del Monte v. Wilson*, 824 P.2d 632, 632 (Cal. 1992) (*en banc*) (*certiorari denied*). Just as here, California's law afforded tuition benefits to California veterans, but only if they were also Californians when they entered the military. *Id*. In striking down the fixed-point residency requirement as irrational, the court held: "We conclude that we are constrained by recent decisions of the United States Supreme Court to hold the statutes providing for such a distribution are unconstitutional." *Id.* at 632, 636 ("*Zobel* made clear that the Constitution will not tolerate a state benefit program that 'creates fixed permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'") (quotations and ellipses in original).

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of time before they qualify for increased benefits. Unlike fixed-point requirements that can never be overcome, durational requirements can be fully overcome simply through the passage of time. *See* App. 4 n.4.

In 1998, the Texas Attorney General was asked and concluded in formal opinion DM-468 that the Hazlewood Act's fixed-point residency requirement is unconstitutional based on *Zobel*, *Hooper*, and *Soto-Lopez*. App. 51-52. For seventeen years, this formal opinion stood undisturbed as the formal opinion of Texas's top law enforcement officer, but the Hazlewood Act was never changed. After the district court rendered its judgment in favor of Petitioner Harris, the opinion was revoked and replaced with opinion KP-0015 by Mr. Ken Paxton, the Texas Attorney General handling this case. App. 6, 6 n.5, 15.

II. THE FIFTH CIRCUIT'S OPINION INVITES A "CLEARER INDICATION" FROM THIS COURT

The Fifth Circuit's opinion does not address, quote, or even cite to the "*Zobel* made clear" and "will not tolerate" language or holdings from the U.S. Supreme Court discussed above. *See generally* App. 1-27. Instead, in conclusion, the Fifth Circuit states that "[w]ithout a clearer indication from the Supreme Court that Texas's decisions violate constitutional provisions, we are hesitant to impose further restrictions on the sovereign power of the State to regulate its own education system." App. 27. Fundamental rights of veterans are being abridged, and the door has been opened to discrimination against all residents (discussed further below). This is a case of critical importance, and this petition should be granted to address any lack of clarity in the Fifth Circuit.

III. THE FIFTH CIRCUIT'S OPINION CREATES NEW, BROAD, AND UNWORKABLE EXCEPTIONS TO FUNDAMENTAL RIGHTS AND APPLIES THE WRONG STANDARDS, ALL OF WHICH OFFEND THE CONSTITUTION AND SUPREME COURT AUTHORITY

Rather than address the "*Zobel* made clear" and "will not tolerate" language or holdings from the U.S. Supreme Court addressed above, the Fifth Circuit attempts to distinguish *Zobel*, *Hooper*, and *Soto-Lopez* – but in doing so creates a complicated and unworkable assortment of new rules and concepts premised on faulty Constitutional standards that violate existing Supreme Court decisions, including but not limited to:

> (1) Erroneously concluding that strict scrutiny (which Hazlewood indisputably does not meet) is not required unless the statute was designed to or actually does create a "disincentive to migration," when in fact the law need only effectively serve as a "penalty"

through unequal treatment in the new state for those who have already traveled.[4,5]

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[4] *See* App. 22 n.11. The Supreme Court has rejected this actual disincentive argument, and has clearly held that strict scrutiny is triggered and a compelling state interest is required for classifications that act as a "penalty" to travel and migration, even after travel has been completed. *See Saenz v. Roe*, 526 U.S. 489, 499 (1999) ("We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause 'unless shown to be necessary to promote a *compelling* governmental interest' ") (quoting *Shapiro v. Thompson*, 394 U.S. 618, 635 (1969)); *see also id.* at 504 ("[T]his case involves discrimination against citizens who have completed their interstate travel . . . Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. . . . But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty"); *Shapiro v. Thompson*, 394 U.S. 618, 635 (1969) ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional"); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 (1986) ("[O]ur cases have also established that only where a State's law operates to penalize those persons who have exercised their constitutional right of interstate migration is heightened scrutiny triggered") (quotations removed); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258 (1974) ("*Shapiro* and *Dunn* stand for the proposition that a classification which 'operates to Penalize those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling state interest").

[5] There is no dispute that the Hazlewood Act's fixed-point residency requirement fails strict scrutiny review. Indeed, the state has never argued that the fixed-point residency requirement is necessary to advance a compelling state interest, and the panel's opinion does not state it passes strict scrutiny either. *See*

(2) Failing to recognize that being permanently treated unequally in one's new state necessarily constitutes a Constitutional "penalty."[6]

(3) Incorrectly claiming that Petitioner Harris and other veterans have "lost nothing" and have suffered "no penalty" under the Constitution by moving to Texas because Texas' benefits are more robust than most states.[7]

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also Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 909-910 (1986) ("As we held in *Dunn*: "If there are other, reasonable ways to achieve a compelling state purpose with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' "). There are innumerable less intrusive ways of incentivizing high school graduation – which is the purported interest the state claims Hazlewood advances (discussed further, *infra*) – than excluding veterans who enlisted out of state.

[6] *Compare* Opinion (containing no Supreme Court definition or discussion of a right to travel "penalty") *with Saenz v. Roe*, 526 U.S. 489, 499, 500 (1999) ("But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty") ("The 'right to travel' . . . protects . . . for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 907 (1986) ("In previous cases, we have held that even temporary deprivations of very important benefits and rights can operate to penalize migration."). *See also* n.4, *supra*.

[7] *See* App. 22 n.11, App. 23 ("no penalty" argument), App. 24 ("lost nothing" argument), App. 25 n.13. These contentions conflict with Supreme Court holdings and the U.S. Constitution. First, highlighting that Texas has better benefits than other states is irrelevant and illogical, as Harris is now entitled to no benefits from any states. When a veteran moves to Texas, he or she necessarily gives up any benefits available to resident-veterans of his former state, and thus "loses something." As conceded in the Fifth

(4) Adopting for the first time a nebulous and undefinable "portability" exception to fixed-point residency requirement analysis; incorrectly stating that *Zobel, Hooper*, and *Soto-Lopez* did not deal with "portable" benefits; and incorrectly labeling Hazlewood benefits as "portable."[8]

Circuit's opinion, resident-veterans of Georgia (where Harris entered the military and resided before Texas) are entitled to state educational benefits of up to $8,000 per year, and veterans coming to Texas from Illinois give up a benefit comparable to Hazlewood offered in Illinois. App. 25. Harris gave up his Georgia benefits to move to Texas. Nevertheless, even if veterans moving to Texas had "lost nothing" and if their former states offered no veteran benefits, the right to travel encompasses the right to be treated equally in one's new state as those similarly situated, and discriminatory classifications are penalties regardless of what rights were afforded in the prior state. *See Saenz v. Roe*, 526 U.S. 489, 499, 500 (1999) ("But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty") ("The 'right to travel' . . . protects . . . for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.") (striking law that temporarily limited new residents to benefits enjoyed in prior state for one year).

[8] *See* App. 7-8; App. 23. First, there simply is no recognized "portability" exception to the clear Supreme Court determinations against permanent discrimination through fixed-point residency requirements. To create this "portability" theory, the Fifth Circuit relies solely on *dicta* from *durational* residency cases, a very different and less extreme breed of cases in which new residents are temporarily deprived benefits. *See id.*; *see also*, n.3, *supra* (explaining durational residency cases). At best, in durational residency cases, the Supreme Court has suggested that waiting periods may be appropriate if the benefit is portable. But there is a vast difference between being required to earn benefits, or wait for them, as opposed to being forever denied them no matter what you do or what you accomplish. The Supreme Court has made it

(5) Incorrectly concluding that *Zobel* and *Hooper* did not deal with "prospective" incentives.[9]

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clear that permanent deprivations through permanent classes of residents based on timing of residence in the state will not be tolerated. In any event, oil revenue dividends paid to Alaska residents in *Zobel*, and tax exemptions granted to New Mexico residents in *Hooper*, and civil service points granted to New York residents in *Soto-Lopez* are more portable than any benefit here. *See generally Zobel*, 457 U.S. 55 (1982); *Hooper*, 472 U.S. 612 (1985); *Soto-Lopez*, 476 U.S. 898 (1986). Dividends could easily be sent and spent outside of Alaska, money exempted from taxes could easily be sent and spent outside of New Mexico, and workers who directly won civil service jobs in New York with the aid of extra exam points could get hired, trained as master plumbers by the state of New York, send their earnings outside the state, and then leave the state and put their subsidized plumbing training to use elsewhere. Finally, even if a "portability" exception were workable and could be read into fixed-point residency analysis, Hazlewood tuition benefits are simply not portable, and certainly not as "portable" as those in *Zobel*, *Hooper*, and *Soto-Lopez*. The Hazlewood tuition exemption must be used and expended at Texas public universities. App. 2. Further, while the state suggests that the portable benefit at issue here is a college degree, the truth is that Texas is not giving a degree to the veterans, or even granting them admission to Texas schools. To the contrary, the veterans must earn admission and any degrees they receive. Thus, the Texas attorney general seeks not only to create a new "portability" exception, it seeks to apply the exception to *by-products* of the actual state benefits at issue. This exemplifies why the exception is simply not workable.

[9] *See* App. 16-17. This is simply not true. There is no "prospective" exception to the Supreme Court's "clear" mandate. Moreover, in *Soto-Lopez*, the state likewise argued that the law was designed to encourage "New York residents to join the Armed Services." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909 (1986). In *Hooper*, New Mexico argued the law was designed

(6) Concluding that incentivizing enlistment was "perfectly rational," and thus disregarding the Supreme Court authority to the contrary in *Soto-Lopez* whereby the Court expressly rejected this identical justification.[10]

(7) Incorrectly concluding that *Soto-Lopez* is distinguishable because it was decided at a time when there were more draftees versus people who enlisted.[11]

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to encourage veterans to settle in the state. 472 U.S. 612, 618 (1985). These are "prospective" incentives.

[10] *Compare* App. 19 (stating the encouragement of enlistment was "perfectly rational") with *Soto-Lopez*, 476 U.S. at 909 (rejecting as irrational "the encouragement of New York residents to join the Armed Services" through a fixed-point residency requirement). Moreover, even if encouraging enlistment through a fixed-point residency requirement were rational and even if the Supreme Court had not spoken on the issue, it would not pass strict scrutiny (which must be conducted if the law first passes rational review), because Texas does not need to exclude Harris from Hazlewood benefits to encourage enlistment.

[11] App. 18. This distinction is incorrect for several reasons. First, there is no evidence in the record about the number of draftees versus enlistees, or when drafts have occurred in the past. More importantly, on information, there was no ongoing draft in 1986 when *Soto-Lopez* was decided, just as there is no ongoing draft today. Moreover, the law in *Soto-Lopez* applied equally to draftees and enlistees, just as Hazlewood applies equally to draftees and enlistees today. *See* TEX. EDUC. CODE § 54.341(a). Even if there are less former draftees today (which does not matter from a Constitutional perspective), it must be remembered that Hazlewood can now be passed along to children of veterans. *See* TEX. EDUC. CODE § 54.341(k). Thus, any Vietnam draftee today is free to utilize the benefits himself, or to pass them along to his children. Finally, like the law in *Soto-Lopez*, Hazelwood benefits also

In a final attempt to circumvent Supreme Court precedent, the panel classifies the Hazlewood Act as "purely a gratuity." App. 26-27. All state benefits, unless safeguarded elsewhere by the U.S. Constitution (*e.g.*, the right to vote, freedom of speech, etc.), can be labeled "pure gratuities." There is no U.S. Constitutional right to welfare or emergency room services, and thus welfare benefits and public emergency rooms are pure gratuities.[12] The Fifth Circuit's pure gratuity distinction enjoys no support in relevant Supreme Court jurisprudence. That said, it is patently misguided to label an educational benefit a pure gratuity when it is provided to someone that disrupted their life, left their home, left their family, honorably served abroad in times of conflict and war, and risked their life for their

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only apply to those who serve in certain legislatively defined conflicts. *See* TEX. EDUC. CODE § 54.341(a)(4)(A-G). Thus, just as was criticized in *Soto-Lopez*, if there is no ongoing legislatively defined conflict, then a Texas resident enlisting in the military in peacetime would have no idea if the benefits would ever apply. The fact that, currently, there happens to be a legislatively defined conflict (*e.g.*, post 9-11 state of emergency) (*see* TEX. EDUC. CODE § 54.341(a)(4)(F)), does not save the Hazlewood Act. Texas is free to legislatively close or redefine conflict periods at any time. Hazlewood has existed since 1923 (*see* App. 2), and there are several gaps in time for which there was no legislative conflict and during which veterans did not qualify for benefits. *See* TEX. EDUC. CODE § 54.341(a)(4)(A-G). The Hazlewood Act is indistinguishable from the law struck in *Soto-Lopez*.

[12] The fact that there may be current laws providing for public high schools and emergency rooms does not mean they could not be taken away in a discriminatory fashion that violates equal protection rights.

country. A Department of Veterans study recently released found that twenty veterans commit suicide nationwide each day.[13] If educational benefits to veterans are pure gratuities, then it is difficult to think of any state benefit that is not a pure gratuity.

IV. THE FIFTH CIRCUIT'S OPINION IS IRRATIONAL AND CAN DANGEROUSLY BE USED AS A SWORD TO DISCRIMINATE IN CONNECTION WITH CONCEIVABLY ANY STATE BENEFIT

Using the Fifth Circuit's opinion, nearly any benefit can be semantically classified as "portable" and "prospective" and a "gratuity" to allow a state to permanently deny the benefits to its newer residents, whether they be veterans, residents originally from Mexico, Muslims, single moms on welfare, the sick, the unemployed, those not born in the state, those who frequently move between states, or any and all residents based on how long they have been in the state.

When this lawsuit was filed, the Supreme Court in *Soto-Lopez* had already expressly rejected as irrational the true legislative reasons for the fixed-point residency requirement in the Hazlewood Act (*i.e.*, to reward and thank those who served our country as Texas residents, to encourage enlistment of Texans, and a belief that other states should take care of their "own"

[13] http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2807

veterans).[14] Undeterred but needing to come up with something new, the state has urged in this litigation that the Hazlewood Act also encourages high school graduation. Specifically, the state argues that Hazlewood (supposedly a gratuity) is designed to encourage Texas high school students to graduate high school (prospectively), and because Hazlewood benefits can ultimately lead to the veteran earning a diploma (which is portable), it is rational to permanently exclude Petitioner Keith Harris and the state therefore need not follow the holdings of *Soto-Lopez* or *Hooper*. *See* App. 16.

Respectfully, but as one might expect with an argument created out of whole cloth, the state's justification is even more irrational than those previously rejected by the Supreme Court, which is why the argument is so dangerous given its Fifth Circuit blessing. First, there is absolutely no requirement that one graduate high school in Texas to get Hazlewood benefits. To be clear, there is no mention of high school anywhere in the law. *See generally* TEX. EDUC. CODE § 54.341. An out of state resident can simply enlist in Texas to get the benefits, regardless of where, whether, or if they have completed high school in Texas. *See* TEX. EDUC. CODE § 54.341(a) (containing

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[14] *See, e.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909, 912-914 (1986) (rejecting (a) the encouragement of enlistment and (b) the rewarding of veterans as irrational to requiring New York residence at enlistment because such goals could be achieved by granting the benefits to all veterans, and because veterans serve the country as a whole, not just New York).

only a current residency requirement for those who entered the military in Texas). Indeed, had Petitioner Harris simply traveled to Texas to enlist, he would get Hazlewood benefits.

Second, the state's high school argument completely misses the point. Harris does not challenge the affirmative *provision* of benefits to those who enlist while residents of Texas (and who may have gone to high school in Texas). Rather, he challenges his express *exclusion* from the Act. Whatever theoretical incentive a current Texas high school student might have to graduate (none) in light of Hazlewood Act benefits would still exist if the benefits were granted to all current Texas residents. Excluding Petitioner Harris is not rationally related to incentivizing current Texas high school students.

Third, the state's creative argument also fails to overcome strict scrutiny, which is the level of review that must be complied with next even if the law did pass rational basis review. *See* n.4, n.5.

Nevertheless, and setting aside the fatal irrational flaws in the state's arguments, it must be appreciated that these same arguments, if allowed to stand, can also be used to permanently deny any conceivable state benefit to newer residents. The formula to do so is quite simple: (a) identify any worthwhile goal that typically occurs in time before the benefit is given, regardless of a causal nexus between the two; and (b) argue without evidence that the goal is what the benefit encourages. For added credibility, one should aim to (c) choose a goal that is within the same subject matter as

the benefit (*e.g.*, education incentivizing later education, health incentivizing later health, etc.), but this is certainly not necessary.

To illustrate, consider a Texas school system overburdened with a growing population of new residents. To remedy this problem, Texas could restrict free public high school (a "gratuity" not guaranteed by the U.S. Constitution) to those who were already Texas residents in junior high (or elementary school, if more restriction were needed). Texas could argue that free Texas high school education is meant to prospectively incentivize Texas residents to complete junior high (or elementary school). And since a high school diploma is "portable," Texas's fixed-point residency requirement would be permissible.

To further curb the issue of overcrowded schools and politically target first-generation Texans whose parents hail from Mexico, Texas could limit public schools to those whose parents graduated high school in Texas. Texas could argue that public schools are meant to incentivize future parents to graduate high school (just as Hazlewood is targeted to future veterans to graduate high school), which they will be more likely to do if it means school for their future children. This argument makes as much sense (in fact more sense) than the state's argument regarding Hazlewood. The discrimination possibilities are endless, and suspect classes can be easily targeted.

To alleviate the strain on Texas geriatric hospitals, emergency rooms, and surgical services, Texas could

restrict access to those who were Texas residents at the age of 30 and who got health check-ups before then (or any chosen age, depending on how restrictive or inclusive Texas wanted to be). Texas could argue that public geriatric benefits are meant to prospectively incentivize Texas residents to obtain periodic check-ups in their younger years. And since healed bodies and surgical hardware are readily portable to other states, Texas's fixed-point residency requirement to obtain public geriatric health services would be permissible.

If Texas wanted to limit hunting licenses, Texas could limit them to those who were Texas residents and who first obtained licenses before their eighteenth birthday. Texas could argue that hunting licenses are meant to prospectively incentivize Texas youth to develop an interest in wildlife and conservation. And since hunting trophies and harvested meat is "portable," Texas's fixed-point residency requirement would be permissible.

Further, if the Fifth Circuit's opinion stands, the veteran benefit laws in *Soto-Lopez*, *Hooper*, and *Del Monte* could all be reinstated through simple semantics. Each of these laws would also survive today had the states simply argued the veteran benefits at issue in those cases were designed to prospectively promote high school – which is precisely what is being argued here.

The Supreme Court has come up with its own, perhaps more likely, alternative scenario, asking as follows: "If the states can make the amount of a cash

dividend depend on length of residence [the benefit at issue in *Zobel*], what would preclude varying university tuition on a sliding scale based on years of residence . . . ?" *See Zobel v. Williams*, 102 S. Ct. 2309, 2314-2315 (1982). The same question can be asked here based on the Fifth Circuit's opinion, and the answer is "nothing." If the Fifth Circuit's ruling is allowed to stand, there is nothing to prevent increasingly expansive, continued, and permanent discrimination against newer state residents in violation of the U.S. Constitution's equal protection and right to travel rights.

Over 30 years ago, this Court "made clear that the Constitution will not tolerate a state benefit program that creates fixed, permanent distinctions between classes of concededly bona fide residents, based on how long they have been in the State." Given the Fifth Circuit's ruling and newly created exceptions, the conflicts created, the call for more clarity, and the dangers in allowing the ruling to stand, it is necessary to make that clear again.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. SHEPPARD
Counsel of Record
MORROW & SHEPPARD LLP
3701 Kirby Drive, Suite 840
Houston, Texas 77098
Tel.: 713-489-1206
jsheppard@morrowsheppard.com
Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20105

KEITH HARRIS,

Plaintiff-Appellee,

v.

HAROLD HAHN; JARVIS HOLLINGSWORTH; ROBERT JENKINS, JR.; SADA CUMBER; CHRISTOPHER HUCKABEE; JACOB MONTY; JANELLE SHEPARD; JOHN STEEN, JR.; DAVID TEUSCHER; RAYMOND PAREDES; TILMAN FERTITTA; WELCOME WILSON, JR.; BETH MADSON; SPENCER ARMOUR, III; ROGER WELDER; DURGA AGRAWAL; PAULA MENDOZA; PETER TAAFFE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 23, 2016)

Before STEWART, Chief Judge and CLEMENT and ELROD, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Keith Harris is a resident of Texas and an honorably discharged veteran of the United States Army. He

challenges the constitutionality of the residency requirements in the Hazlewood Act, which provides tuition waivers at public universities for certain Texas veterans who enlisted in Texas or were residents of Texas at the time they enlisted. Because Texas has presented a rational basis for its residency-at-enlistment requirement and because Texas's decision to impose the condition on a portable benefit does not infringe Harris's right to travel, we reverse the district court's judgment.

I.

The Hazlewood Act, first passed in 1923, allows certain classes of veterans to attend public universities in the state of Texas free of charge.[1] Tex. Educ. Code § 54.341. The Act grants qualifying veterans 150 hours of tuition-free credit at Texas's public universities, provided the veterans are not also receiving federal education benefits. *Id*. § 54.341(a)-(c), (e). In order for a veteran to qualify for benefits, the Act requires that the applicant:

> entered the service at a location in this state, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for

[1] The Act's name honors Grady Hazlewood, a Texas State Senator who spearheaded a series of amendments in 1943 that greatly expanded the benefits offered under the Act. S. Comm. On Veterans Affairs & Military Installations, Interim Rep., 78th Leg. Interim Sess., at 6 (Tex. 2004).

> purposes of [in-state tuition] at the time the person entered the service.

Id. § 54.341(a).[2] The Act only applies to veterans honorably discharged from the armed forces who served during any of a number of foreign engagements, including the Persian Gulf War and the conflicts against terrorism following the attacks of September 11, 2001. *Id*. § 54.341(a)(4)(E), (F).

Harris grew up in Georgia and enlisted in the Army at age eighteen in order to serve his country and support his family. At the time of his enlistment, he was a resident of Georgia. He served in the Army for four years and was honorably discharged in 2000. During his service, Harris served abroad in Korea and received several decorations.

After his discharge he returned to Georgia, married, and started a family. In 2004, Harris moved to Texas. He expended his federal veterans' education benefits completing his undergraduate degree. In the fall of 2012, Harris began law school at the University of Houston Law Center, where he is currently in his third year. The parties agree that Harris meets all of the qualifications for Hazlewood benefits other than the residency-at-enlistment requirement.

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[2] To qualify for in-state tuition, a person must have "established a domicile in this state not later than one year before the census date of the academic term in which the person is enrolled in an institution of higher education; and maintained that domicile continuously for the year preceding that date." Tex. Educ. Code § 54.052(a)(1).

Harris applied for Hazlewood Act benefits and was denied on the basis of his enlistment in Georgia. He sued seeking declaratory and injunctive relief requiring the University of Houston to grant him a tuition waiver for his remaining semesters.[3] The district court granted summary judgment in Harris's favor. After comparing the Hazlewood Act to the statutes invalidated in *Zobel v. Williams*, 457 U.S. 55 (1982), *Hooper v. Bernalillo County*, 472 U.S. 612 (1985), and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the district court concluded that Texas lacked a rational basis for its fixed-point residency requirement.[4] The district court considered the Act "indistinguishable from the provision in *Soto-Lopez*," and therefore concluded that Texas lacked any rational basis for providing benefits only to veterans who were residents at the time of their enlistment. *Harris v. Cantu*, 81 F. Supp. 3d 566, 574 (S.D. Tex. 2015). The district court dismissed Texas's asserted interest in promoting

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[3] Harris concedes that Texas's sovereign immunity prevents him from recovering in damages the tuition he has already paid to the University for the semesters that passed before he commenced his suit.

[4] Durational residency requirements are those that demand a person reside in a state for a given period of time before gaining benefits. Fixed-point residency requirements demand that at a legislatively determined moment (a specific date or event, for example, a veteran's date of enlistment) the applicant was a resident in the state. While an unsuccessful applicant can satisfy a durational residence requirement in the future, an applicant who fails to satisfy a fixed-point residence requirement cannot cure the defect with the passage of time.

education by creating an incentive for Texans to graduate from high school and enlist by observing:

> Promoting education plainly is a legitimate state interest, and by providing financial assistance for postsecondary education, the Act plausibly – albeit tenuously – encourages Texas high school students to graduate, join the military, and return to attend college and graduate school after exhausting their federal benefits. However, Plaintiff does not challenge the Act's provision of financial assistance, but rather its exclusion of Texas resident veterans who enlisted in other states, and Defendants do not explain how not providing benefits to veterans like Plaintiff furthers Texas's interest in its students' education.

Id. at 575 (citing *Soto-Lopez*, 476 U.S. at 909-10).

Because the district court determined the fixed-point residency requirement violated the Equal Protection Clause, the district court did not address whether it unconstitutionally restricted Harris's right to travel. The district court further determined that, under Texas law, the fixed-point residency requirement was severable from the remainder of the statute regardless of the additional costs because the fixed-point residency requirement could be removed from the statute without undermining what the district court saw as the statute's purpose: "reward[ing] honorably discharged qualified Texas veterans with educational benefits." *Id*. at 579.

For both its constitutional conclusion and its analysis on the question of severability, the district court relied on two opinions. The first, *Del Monte v. Wilson*, is a decision of the Supreme Court of California assessing the validity of a California statute conditioning certain veterans' benefits on residence in the California at the time of enlistment. 824 P.2d 632 (Cal. 1992). The second is an opinion of the Attorney General of Texas in response to a question about the Hazlewood Act. Tex. Att'y Gen. Op. No. DM-468 (1998).[5]

Texas appealed.

II.

We review a grant of summary judgment *de novo*, applying the same legal standards used by the district court. *Apache Corp. v. W & T Offshore, Inc.*, 626 F.3d 789, 793 (5th Cir. 2010). Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The questions presented here are purely legal as both parties agree on the relevant facts.

Harris argues that the Hazlewood Act infringes two constitutional provisions: (1) it denies him the

[5] That opinion has since been withdrawn and the Attorney General has formally issued a new opinion reaching the opposite conclusions. Tex. Att'y Gen. Op. KP-0015 (2015).

equal protection of the laws as guaranteed by the Fourteenth Amendment; and (2) it violates his constitutional right to travel from one state to another. We examine each in turn.

A.

We begin with a brief discussion of Supreme Court precedent on state laws that distinguish between residents and non-residents. The Supreme Court has held that the Equal Protection Clause restricts the extent to which a state may discriminate between newly established and incumbent state residents in apportioning benefits. *See Saenz v. Roe*, 526 U.S. 689 (1999); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988); *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982).

At the same time, the Supreme Court has upheld benefits schemes based on residence when the benefit offered is a portable one that a nonresident could immediately obtain and take out of the state. *See, e.g.*, *Martinez v. Bynum*, 461 U.S. 321, 332-33 (1983) (upholding requirement that child's parents reside in and intend to remain in school district before allowing child access to tuition-free public schools); *Sosna v. Iowa*, 419 U.S. 393, 408-09 (1975) (upholding a durational residency requirement before allowing residents to petition for divorce in state courts); *Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (acknowledging that "the state

can establish such reasonable criteria for in-state [college tuition] status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates."); *Starns v. Malkerson*, 401 U.S. 985 (1971) (affirming a judgment upholding Minnesota's residency requirement for tuition benefits); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998) (upholding preferential admissions to medical school for residents of New Mexico based on the duration of their residence in the state).

Even in decisions that ultimately overturned waiting periods or residency requirements, the Court has been careful to observe that states can impose certain residency requirements without constitutional impediment. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969) (invalidating a one-year waiting period for public assistance while acknowledging the permissibility of "residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession").

Unfortunately, it is difficult to draw direct guidance from the decisions overturning state laws as unlawfully discriminatory against out-of-state citizens. These decisions lack a clear statement of rule and have often been fractured, with several justices concluding the programs violated the Equal Protection Clause, several justices concluding the programs violated the right to travel, and several justices concluding the programs violated no constitutionally protected rights.

Early cases assessing fixed-point residency requirements for public benefits addressed the statutes as potential violations of the Equal Protection Clause. *See Zobel*, 457 U.S. at 60 ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."); *Hooper*, 472 U.S. at 618 (quoting the same passage from *Zobel*). Although later cases have considered a plaintiff's right to travel, some members of the Court continued to use the Equal Protection Clause as the correct framework for such challenges. *Soto-Lopez*, 476 U.S. at 913 (Burger, C.J., concurring) ("Because this case involves a distinction between residents based on when they first established residence in the State . . . we must subject this case to equal protection analysis." (internal quotation marks omitted)); *id.* at 916 (White, J., concurring) ("I agree with Justice O'Connor that the right to travel is not sufficiently implicated in this case to require heightened scrutiny."). In the three cases considering fixed-point residency requirements, the Court used rational basis review. *Zobel*, 457 U.S. at 60; *Hooper*, 472 U.S. at 618; *Soto-Lopez*, 476 U.S. at 904.[6] Therefore we do the same.

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[6] The *Soto-Lopez* plurality suggested that the appropriate standard in *Hooper* and *Zobel* was strict scrutiny but that strict scrutiny was not necessary because the statutes in those cases also failed rational basis review. *Soto-Lopez*, 476 U.S. at 903-04. Only four justices, however, joined that plurality and supported the use of strict scrutiny in *Soto-Lopez*. Chief Justice Burger and Justice White regarded equal protection as the correct framework.

B.

Harris contends that the distinctions made in the Hazlewood Act between resident veterans who enlisted in Texas or resided in Texas at the time of their enlistment and resident veterans of Texas who entered the armed forces elsewhere is irrationally discriminatory and violates the Fourteenth Amendment's guarantee of equal protection of the laws. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The clause "does not forbid classifications" because "most laws differentiate in some fashion between classes of persons." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Id.*

In cases that do not implicate suspect classes or fundamental rights, "[t]he appropriate standard of review is whether the difference in treatment between [classes] rationally furthers a legitimate state interest." *Id.* at 11. Statutory classifications are given broad deference under rational basis review and will survive "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Texas is under no obligation to prove its reasons; it need only offer them. " 'The burden is on the one attacking the

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Id. at 912 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring).

legislative arrangement to negative every conceivable basis which might support it' whether or not the basis has a foundation in the record." *Id.* at 320-21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Classifications survive rational basis review "even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321.

Harris, arguing the Act lacks a rational basis, relies on a trio of Supreme Court cases addressing fixed-point residency standards. In *Zobel*, the Court considered whether an Alaska statute dividing oil revenues among residents based on the number of years of their residency in Alaska was constitutionally permissible. 457 U.S. at 56-58. The Court held that the tiered payment system based on years of residency lacked a rational basis and was impermissible. *Id.* at 65.

Zobel was quickly followed by *Hooper* and *Soto-Lopez*. In *Hooper*, the Court considered a New Mexico statute, passed in 1981, that provided property tax exemptions for veterans of the Vietnam War living in New Mexico who had been residents on May 6, 1976.[7] *Hooper*, 472 U.S. at 616-17. New Mexico argued that the property exemption "encourage[d] veterans to settle in the State and . . . serve[d] as an expression of the state's appreciation to its 'own citizens for honorable military service.'" *Id.* at 618. New Mexico also suggested the statute "assist[ed] veterans who, as New

[7] The tax exemption existed prior to 1981 with different residency restrictions. The fixed-point requirement was added in a 1981 amendment. *Hooper*, 472 U.S. at 614 n.2.

Mexico citizens, were dependent on the State during a time of upheaval in their lives." *Id.* at 619 (internal quotation marks omitted). Because New Mexico set the fixed-point long after it had passed, the Court quickly dismissed the argument based on encouraging veterans to settle in the state. *Id*. The Court accepted that the second goal, honoring veterans for their service, was "plainly legitimate." *Id.* at 620 (adding "only recently, we observed that 'our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.' " (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983))). New Mexico's statute failed rational basis review, however, because it did not "require any connection between the veteran's prior residence and military service." *Id.* at 622. A person who was born in New Mexico but left the state as an infant would be eligible for the benefit immediately upon his return while a veteran immigrating to the state immediately after his term of service ended in June 1976 would not.[8] The Court concluded that "[t]he State may not favor established residents over new residents based on the view that the state may take care of 'its own,' if such is defined by prior residence." *Id*. at 623.

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[8] The Supreme Court observed, in a footnote, that several courts had upheld Equal Protection challenges to statutes that, like the Hazlewood Act, conditioned benefits on residence in the state at the time of enlistment. Because the issue was not presented in *Hooper*, the Court made no determination on the validity of such benefit schemes. *Hooper*, 472 U.S. at 621 n.11.

The following term, the Court considered a New York law which gave hiring preferences for civil service positions to resident veterans who had resided in New York at the time of their enlistment. *Soto-Lopez*, 476 U.S. at 900. New York offered four justifications for its fixed-point residence requirement:

> (1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service.

Id. at 909. Applying heightened scrutiny under the right to travel, four justices concluded other less restrictive means would accomplish the same end (for example, a statute with the same preference absent the fixed-point residency requirement). *Id.* at 910. Chief Justice Burger's concurrence, casting the decisive vote, argued heightened scrutiny was inappropriate and rested solely on the rational basis test. *Id.* at 914 (Burger, C.J., concurring).[9] Both opinions questioned

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[9] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)).

New York's arguments that the benefit encouraged enlistment (because it applied to inductees as well as enlistees) or that it aided reintegration (because it was not tied to a veteran's length of service). *Id*. at 910; *id.* at 914 (Burger, C.J., concurring). The concurring opinion also found wanting the state's arguments that the preference encouraged veterans to settle in the state (because having the preference without the residence requirement would encourage even more veterans to settle) or that the preference targeted veterans with a particular combination of local knowledge and military skills (because all current resident veterans would combine local knowledge with military skills). *Id.* at 914-15.

Harris, like the district court, also points to two sources – a decision of the California Supreme Court considering a California benefits scheme and a withdrawn opinion of the Texas Attorney General – that are not binding on this court and that we do not find persuasive. *Del Monte*, 824 P.3d 632; Tex. Att'y Gen. Op. No. DM-468. *Del Monte*, however, considered only California's argument that the law was tailored to minimize expenditures and that its purpose was to "compensate[] and provide[] assistance to those who were residents when they made the sacrifice of entering active military service." 824 P.2d at 639. This focus casts the statute in a retrospective rather than prospective view. California, unlike Texas, did not argue that the statute's purpose was to create an educational incentive for Californians considering enlistment.

Harris also relies on a 1998 opinion of the Attorney General of Texas. The Attorney General's opinion considered only the arguments California advanced in *Del Monte* to defend the scheme on the basis of financial stability. It did not consider Texas's argument that the Act incentivizes enlistment and graduation. The memorandum, therefore, does not assist us in weighing the defenses of the Act that Texas argues here. We generally give "careful consideration" to the formal opinions of state attorneys general on questions of state law. *Welmaker v. Cuellar*, 37 S.W.3d 550, 552 (Tex. App. – Austin 2001, pet. denied) (collecting cases); *see Stenberg v. Carhart*, 530 U.S. 914, 941-42 (2000) (according state attorney general the same weight given by the relevant state's courts on a question of state law). We need not do so here, however, because the 1998 opinion no longer reflects the views of the Attorney General. During the course of this litigation it was withdrawn and replaced with a new opinion concluding that the incentives created by the Hazlewood Act do provide a rational basis for the distinctions created by the law. Tex. Att'y Gen. Op. No. KP-0015 (2015).

The current opinion of the Texas Attorney General does address the arguments raised in this case. After observing that the withdrawn opinion "dismiss[ed] all of the proffered state interests without discussion or analysis," the Attorney General noted that the Hazlewood Act, unlike the statutes in *Hooper*, *Zobel*, and *Soto-Lopez*, creates a prospective incentive. Tex. Att'y Gen. Op. No. KP-0015 at *2. It further argued that the

Act reasonably limits the allocation of a portable benefit to those residents most likely to remain in Texas after graduation, thereby preserving the financial resources of Texas taxpayers and maximizing the returns to the local economy. The parties disagree on the level of deference owed to an Attorney General's opinion issued after litigation on the question has commenced. Because our independent analysis leads us to agree with the current opinion of Texas's Attorney General, we need not determine whether deference is required.

C.

We now turn to Texas's defense of the Hazlewood Act. Texas advances several justifications in defense of the Hazlewood Act's fixed-residency requirement. Texas distinguishes the Hazlewood Act from the benefits offered in *Soto-Lopez*, *Hooper*, and *Zobel* because the benefits Texas offers are prospective. Therefore, Texas argues that the Act creates a prospective incentive that serves two state interests in education and security by encouraging Texas high school students to graduate (because graduation is a prerequisite to enlistment) and to enlist. Texas argues the benefit is tailored to those individuals most likely to stay in Texas after receiving an education at Texas's expense. These are valid bases for the Hazlewood Act and are distinct from those rejected in *Soto-Lopez*, *Hooper*, and *Zobel*.

First, unlike the benefits offered in *Zobel* and *Hooper*, Hazlewood Act benefits are prospective rather

than retroactive. They accrue to the Texas resident not at a single legislatively determined point in the past but rather whenever she enlists in the armed forces, whether she did so in 1996, like Harris, or does so tomorrow. A Texas high school student today may decide to complete school and enlist on the promise of the future benefit offered by the Hazlewood Act.[10] In *Zobel* and *Hooper*, by contrast, the state picked a fixed point in the past, before the creation of the benefit, and tied benefits to residency at that moment. As a result, those legislative actions could have no incentivizing effect. *See Hooper*, 472 U.S. at 619 ("The legislature cannot plausibly encourage veterans to move to the State by passing such retroactive legislation."); *id.* at 623 (announcing its final holding, the Court said "[n]either the Equal Protection Clause, nor this Court's precedents, permit the state to prefer established resident veterans over newcomers in the *retroactive apportionment* of an economic benefit.") (emphasis added); *Zobel*, 457 U.S. at 65 ("The only apparent justification for the retrospective aspect of the program, 'favoring established residents over new residents,' is constitutionally unacceptable." (quoting *Vlandis*, at 412 U.S. at 450)). The district court erred by viewing the benefit retrospectively, as a reward offered for service, rather than

[10] Hazlewood benefits apply during periods of conflict recognized by the Texas Legislature. Such a period has existed since the attacks of September 11 and continues to exist today. Enlistment at any point will qualify a resident for benefits. If Texas chooses the [sic] close the conflict period that began with the attacks on September 11, 2001, prospective enlistees will have notice and may make a different decision.

prospectively, as an incentive offered to Texas students. Because the Hazlewood Act offers prospective benefits, it is not irrational for Texas to expect it to change the behavior of some Texans considering enlistment.

Texas argues the prospective benefit advances two interests – education and security – by offering a benefit to residents considering enlistment. Texas has an obvious interest in encouraging its citizens to complete high school. *Brown v. Bd. of Educ. Of Topeka*, 347 U.S. 483, 493 ("Today, education is perhaps the most important function of state and local governments."). Because the military requires enlistees to obtain a high school diploma or equivalent, *see e.g.*, Army Reg. 601-210 (2-7), Texas can encourage students to complete their education by offering benefits to those students after their service is ended. Texas also has a rational interest in encouraging its citizens to enlist. Today's military is an all-volunteer force. *See* 50 U.S.C. § 3815(c); *Rostker v. Goldberg*, 453 U.S. 57 (1981). Because the military relies entirely on voluntary enlistment, Texas can promote national security by encouraging enlistment. By encouraging those who are willing to enlist, Texas can also reduce the possibility of conscription for other less willing Texans. When *Soto-Lopez* and *Hooper* were decided, many veterans had been drafted into service. The Court in both cases questioned the incentivizing effect of the challenged statutes because the statutes offered equal benefits to inductees and enlistees. *Soto-Lopez*, 476 U.S. at 910;

Hooper, 472 U.S. at 614 & n.1. In the present day, without conscription, Texas can directly create an incentive for its citizens to enlist by offering them a benefit without any need to distinguish between enlistees and inductees.

Therefore, Texas has at least two rational bases for the residency requirement in the statute. Offering Hazlewood benefits to veterans who first enter Texas after completing their service would not advance either of these legislative interests. Although the district court was correct to observe that a state's financial interests alone may be an insufficient reason to separate potential beneficiaries, the state's financial interests are a sufficient reason to limit a benefit to the cases in which the benefit actually serves Texas's interest.

Texas, unlike New Mexico, New York, and Alaska, does not rely on the state's interest in "taking care of its own" to justify the program. Rather, Texas advances the program as a means of incentivizing behavior taking place *before* entry into the military (finishing high school or the act of enlisting itself). The Supreme Court has made clear that a fixed-point residency requirement is highly suspect if the state's sole objective is rewarding past service. On the other hand, when the state's purpose is to encourage enlistment, a fixed-point residency requirement is perfectly rational. Offering benefits to non-Texans who enlist would not further Texas's interest in advancing the education or enlistment of its citizens. Such a gratuitous benefit would merely reduce the resources the state can use to achieve its educational goals. Texas need not explain,

as the district court demanded, "how not providing benefits to veterans like Plaintiff furthers Texas's interest in its students' education." *Harris v. Cantu*, 81 F. Supp. 3d at 575. It is sufficient that Texas has a rational basis for offering benefits to Texas residents (promoting Texans' education and enlistment by Texans); that offering the same benefit to citizens who are residents of other states would not advance those interests; and that the financial burden of offering the benefit to residents of other states would reduce Texas's capacity to advance those same interests.

The fit between Texas's aims and the method used to obtain those aims need not be precise. "[E]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the state] imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)). We conclude that the Act has a rational basis.

D.

Harris next argues that Texas's fixed-point residency requirement is an impermissible restraint on his constitutional right to travel and suggests that the statute must fail under the strict scrutiny applied to restrictions on that right. This argument rests on the plurality opinion in *Soto-Lopez* and on *Saenz v. Roe*, 526 U.S. 489 (1999). The district court, after concluding

the Hazlewood Act failed under rational basis review, did not reach Harris's right-to-travel argument. *Harris v. Cantu*, 81 F. Supp. 3d at 574.

The Supreme Court has identified three components of the "constitutional right to travel from one State to another." *Saenz*, 526 U.S. at 498 (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Id. at 500. The first element "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Id*. at 501 (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)). The second element derives from Article IV's Privileges and Immunities Clause. *Id.*; U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see also Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Corfield v. Coryell*, 6 F. Cas. 546 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3230). The third element of the right derives from the Fourteenth Amendment's Privileges and Immunities Clause. *Saenz*, 526 U.S. at 501; U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."); *see Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). As in *Saenz*, if any element of the right to travel is implicated here, it is the third – the ability of a person to take up residence in a new state and be treated on an equal basis with previously established residents.[11]

The *Saenz* court defined this third prong of an individual's right to travel as "the right to be treated equally in her new State of residence."[12] *Saenz*, 526 U.S. at 505. California's law, which limited welfare benefits for new entrants to California, failed because it created a huge number of classifications. New residents from outside the United States or those who had not been on welfare in their prior state of residence received California's full benefits while each new entrant

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[11] The Supreme Court did not expressly state the standard of review required when a state statute violates the right to travel. *Saenz*, 526 U.S. at 501-03. The Court's analysis of California's statute seemed to suggest that strict scrutiny would apply if the statute's purpose or effect was to create a disincentive to migration. *Id.* at 449. Because Plaintiff has shown neither that the Hazlewood Act was passed to create a disincentive nor that it has the effect of creating a disincentive, strict scrutiny is not demanded here.

[12] The dissenting Justices insisted the traditional understanding still held, namely, that "the right to travel clearly embraces the right to go from one place to another, and prohibits States from impeding the free interstate passage of citizens." *Saenz*, 526 U.S. at 511-12 (Rehnquist, C.J., dissenting).

who had been previously enrolled received the benefits of his state of origin for a year before moving to the full benefits offered Californians. In effect, the statute created fifty classes of California welfare beneficiaries. *Id.* Because California argued only that the statute promoted financial stability in defense of its law, the Court concluded that the law was really erected "to fence out the indigent." *Id.* at 506 ("Neither the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits.").

Applying the standards described in *Saenz* to the Hazlewood Act, we are not persuaded that the Act implicates the right to travel because it imposes no penalty on new entrants to the state. Even assuming, *arguendo*, that the right is implicated, the residency requirement in the Act is justified because the benefit in question, unlike the benefits considered in other right to travel cases, is a portable benefit that can be received in Texas and enjoyed long thereafter if the recipient chooses to immediately leave the state.

The Hazlewood Act is distinguishable from the welfare schemes struck down in *Saenz* and *Shapiro* on several grounds. First, as Justice Stevens, the author of *Saenz*, observed in *Soto-Lopez*:

> A governmental decision to grant a special privilege to a minority group is less objectionable than a decision to impose a special burden on a minority. In a democracy the majority will seldom treat itself unfairly. In

> equal protection analysis, it is therefore appropriate to give some attention to the relative dimensions of favored and disfavored classes.

Soto-Lopez, 476 U.S. at 916-17 (Stevens, J., dissenting). This alone sets apart the Hazlewood Act, which provides a small number of Texans a benefit for which the vast majority of Texans will never qualify, from the scheme in *Saenz*, which set apart a small number of Californians as ineligible for a benefit all other Californians could obtain.

Second, the statutory schemes in both *Shapiro* and *Saenz* left new migrants in a worse position after entering their new homes than if they had remained in their prior states. The several statutes invalidated in *Shapiro* denied all benefits to new migrants for one-year (regardless of whether the migrant received benefits in his prior state of residence). *Shapiro*, 394 U.S. at 622-23. The California statute invalidated in *Saenz* offered new migrants the same payment they would have received in their prior state for their first year in California before offering them the more generous support offered long-term California residents. *Saenz*, 526 U.S. at 493. As the *Saenz* Court observed, the high cost of living in California meant that most new migrants, offered the same nominal welfare payments, would have a decline in their quality of life. *Id.* at 494 n.2, 497, 506. By contrast, the new veteran migrant to Texas has lost nothing that he would have received in

his prior state of residence because Texas is one of only two states to offer full tuition benefits to veterans.[13]

Finally, in both *Shapiro* and *Saenz* the Supreme Court held that the right to travel was infringed on the basis of lower court findings suggesting "exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions." *Shapiro*, 394 U.S. at 628; *see Saenz*, 526 U.S. at 496-97. No such findings exist here, nor could they, for the immigrant veteran has lost nothing that he would otherwise have received in his prior state of residence.

Even if the Act did implicate the right to travel, Texas has offered a sufficient justification for the restriction. The benefit offered by the Act – a college education – is something the beneficiary can take out of state immediately after receiving. In short, unlike a job in the civil service or a welfare check, it is a portable benefit. The benefits offered in *Hooper*, *Soto-Lopez*, and *Zobel* were not portable. New Mexico's property tax exemption, employment in New York's civil service, and Permanent Fund distributions in Alaska could not be taken out of state when the resident beneficiary departed. Similarly the welfare payments offered in *Saenz* and *Shapiro* depended on continuing residence in the state. A cash payment, although it may be essential to the recipient, does not have the lifelong impact

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[13] Only Illinois offers a comparable benefit. 110 Ill. Comp. Stat. 947/40. Georgia, Harris's residence at the time of his enlistment, does not offer full tuition discounts, limiting their veterans to $2,000 per year per deployment served for a maximum of $8,000 per year. Ga. Code Ann. §§ 20-3-485 to -87 (2008).

of a college education. The degree Texas offers is something a veteran will take with her for the rest of her life even if she departs from Texas immediately after her graduation. Differentiating between classes of residents in *Hooper*, *Soto-Lopez*, *Zobel*, *Shapiro*, and *Saenz* served no purpose because the benefit was coterminous with the residency. Texas, on other hand, is trying to safeguard its investment by restricting Hazlewood benefits to those individuals most likely to stay in Texas after graduation.

The Supreme Court has never invalidated a residency requirement attached to a portable benefit and has expressly reserved state's ability to restrict access to portable benefits. *See Sosna*, 419 U.S. at 407-08; *Vlandis*, 412 U.S. at 453-54. In *Saenz* itself, the Court distinguished the California statute from tuition benefit programs like the Hazlewood Act by observing that:

> because whatever benefits [the plaintiffs] receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed long after they return to their original domicile.

526 U.S. at 505.

Finally, any incidental burden on the right to travel is lessened here because the benefit in question

is purely a gratuity – Texas is under no constitutional obligation to provide any educational benefits to veterans. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 339 n.8, 344 (1972) (invalidating waiting period on voter eligibility as infringement of right to travel because of voter protections in Fifteenth Amendment and Voting Rights Act).

Given the many distinctions between the Hazlewood Act's scheme and the statute rejected in *Saenz*, we decline to conclude that the Act infringes Harris's right to travel. To the extent Harris's right to travel is implicated, we believe Texas is justified in tying the receipt of a portable benefit to residency. The Act suffers no constitutional infirmity.

III.

Texas has provided reasonable justifications for the qualifications used in the Hazlewood Act to advance its interests in promoting education and military service. Our task only permits us to assess whether Texas exceeded its constitutional power when it included a fixed-point residency requirement in the Hazlewood Act not to opine on whether the limitation is wise as a matter of public policy. Without a clearer indication from the Supreme Court that Texas's decisions violate constitutional provisions, we are hesitant to impose further restrictions on the sovereign power of the State to regulate its own education system. We therefore REVERSE the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20105

D.C. Docket No. 4:14-CV-1312

KEITH HARRIS,

Plaintiff-Appellee

v.

HAROLD HAHN; JARVIS HOLLINGSWORTH; ROBERT JENKINS, JR.; SADA CUMBER; CHRISTOPHER HUCKABEE; JACOB MONTY; JANELLE SHEPARD; JOHN STEEN, JR.; DAVID TEUSCHER; RAYMOND PAREDES; TILMAN FERTITTA; WELCOME WILSON, JR.; BETH MADSON; SPENCER ARMOUR, III; ROGER WELDER; DURGA AGRAWAL; PAULA MENDOZA; PETER TAAFFE,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before STEWART, Chief Judge and CLEMENT and ELROD, Circuit Judges.

JUDGMENT

(Filed Jun. 23, 2016)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEITH HARRIS,	§	
Plaintiff,	§	
	§	
v.	§	
ELISEO "AL" CANTU, JR. in his official capacity as chairman of the Texas Veterans Commission, *et al.*,	§	CIVIL ACTION NO. H-14-1312
	§	
	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed Jan. 26, 2015)

Pending are Defendants' Motion for Summary Judgment (Document No. 24) and Plaintiff's Replacement Motion for Summary Judgment (Document No. 28). After carefully considering the motions, responses, replies, and applicable law, the Court concludes for the following reasons that Plaintiff's motion should be granted.

I. Background

The material facts in this case are undisputed. Plaintiff Keith Harris ("Plaintiff") in 1996 enlisted in the United States Army at the age of 18 in his home state of Georgia.[1] Plaintiff served four years in the

[1] Document No. 28, ex. 2 ¶ 3 (Decl. of Keith Harris).

Army and was honorably discharged, after which he returned to Georgia, obtained a job, married, and started a family.[2] Plaintiff moved to Houston, Texas in November 2004, and has been a Texas resident for the past ten years.[3]

Plaintiff began taking college courses when he was in the Army, and after leaving the Army he used his federal GI Bill educational benefits to continue his college education.[4] Plaintiff received a bachelor's degree in business from the University of Houston-Downtown in December 2011.[5] Plaintiff enrolled as a law student at the University of Houston Law Center in August 2012,[6] and began his third year of law school in the fall of 2014.[7] Having exhausted his GI Bill benefits, Plaintiff is paying for his tuition and fees on his own.[8]

The Texas Hazlewood Act ("the Act") exempts Texas veterans from paying tuition, dues, and certain fees at Texas public universities if they have exhausted their federal educational benefits, but only if they were Texas residents at the time of their enlistment. TEX. EDUC. CODE § 54.341(a) (veteran shall be exempt from tuition, dues, and certain fees "provided the person seeking the exemption currently resides in this state

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[2] *Id.*, ex. 2 ¶¶ 3-4.

[3] *Id.*, ex. 2 ¶ 4.

[4] *Id.*, ex. 2 ¶ 5.

[5] *Id.*

[6] *Id.*

[7] *See* Document No. 9 ¶ 9.

[8] Document No. 28, ex. 2 ¶ 5.

and entered the service at a location in this state, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B at the time the person entered the service."). Plaintiff meets all the requirements of the Act except for the requirement that he must have entered the military while a resident of Texas.[9]

Plaintiff filed suit against numerous state employees in their official capacities, seeking to enjoin as unconstitutional his exclusion from the Act's benefits based on his enlistment when he was a Georgia resident.[10] The remaining Defendants include: Texas Veterans Commission Chairman Eliseo "Al" Cantu, Jr, Vice Chair James Scott, Secretary Richard McLeon, IV, Member Jake Ellzey, and Member Daniel Moran (collectively the "Texas Veterans Commissioners"); Texas Higher Education Coordinating Board ("THECB") Chairman Harold Hahn, Vice Chair Robert Jenkins, Jr., Member Sada Cumber, Member Christopher Huckabee, Member Jacob Monty, Member Janelle Shepard, Member John Steen, Jr., Member David Teuscher, and Member Raymond Paredes (collectively the "THECB Members"); and University of Houston Board of Regents Chairman Jarvis Hollingsworth, Vice Chairman Tilman Fertitta, Secretary Welcome Wilson, Jr., Member Beth Madison, Member Spencer Armour, III,

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[9] Document No. 6 ¶ 42; Document No. 6-2.

[10] Document No. 1 (Orig. Compl.); Document No. 6 (1st Am. Compl.).

Member Roger Welder, Member Durga Agrawal, Member Paula Mendoza, and Member Peter Taaffe (collectively the "Board of Regents").[11]

Plaintiff alleges that the Act's "fixed-point residency requirement" – both facially and as applied to him – violates his rights to equal protection and to travel under the United States Constitution.[12] Plaintiff also asserts violation of 42 U.S.C. § 1983, and seeks declaratory and injunctive relief.[13] The parties filed cross-motions for summary judgment.[14]

II. Objections

Defendants raise five objections to statements and evidence in Plaintiff's motion.[15]

Defendants' hearsay objection to Senator Van de Putte's statement cited in footnote 4 of Plaintiff's

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[11] By Order dated November 24, 2014, University of Houston President Renu Khator, then Texas Governor Rick Perry, and then Texas Attorney General Greg Abbott were all dismissed as Defendants for lack of subject matter jurisdiction. Document No. 32.

[12] Document No. 6 ¶¶ 2, 57-60.

[13] *Id.* ¶¶ 61-71. At the Court's initial conference with the parties, the parties agreed, *inter alia*, that Plaintiff would withdraw without prejudice his motion for preliminary injunction and Defendants agreed Plaintiff would not be required to pay tuition and fees for the Fall 2014 and Spring 2015 semesters pending resolution of the case. If Plaintiff did not finally prevail on his claims, then his unpaid tuition and fees became due and owing by him within 30 days after final resolution. Document Nos. 17, 19.

[14] Document Nos. 24, 28.

[15] Document No. 34 at 2-3.

motion is OVERRULED because Plaintiff does not offer the statement in evidence, nor is it offered for the truth of the matter asserted; instead, Plaintiff appears to include it as mere rhetorical flourish.

Defendants' objection that the Act does not require exhaustion of federal benefits is OVERRULED because the Act's exemption does not apply to the extent that federal benefits are available to pay the covered tuition and fees.[16]

Defendants' objection that Plaintiff's attachment to his motion of Defendants' answers to interrogatories does not limit Defendants' proof is SUSTAINED. Defendants were not precluded from offering additional justifications for the Act's fixed-point residency requirement beyond those stated in their Supplemental Answer to Interrogatory at Document No. 28-10.

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[16] *See* TEX. EDUC. CODE § 54.341(e) ("The exemption from tuition, fees, and other charges provided for by this section does not apply to a person who at the time of registration is entitled to receive educational benefits under federal legislation that may be used only for the payment of tuition and fees if the value of those benefits received in a semester or other term is equal to or exceeds the value of the exemption for the same semester or other term. If the value of federal benefits that may be used only for the payment of tuition and fees and are received in a semester or other term does not equal or exceed the value of the exemption for the same semester or other term, the person is entitled to receive both those federal benefits and the exemption in the same semester or other term. The combined amount of the federal benefit that may be used only for the payment of tuition and fees plus the amount of the exemption received in a semester or other term may not exceed the cost of tuition and fees for that semester or other term.").

Defendants' relevancy objection to the University of Houston's mission statement and published information about its graduates is SUSTAINED.

Defendants' objection to Plaintiff's statement that funds will exist for a constitutionally-mandated expansion of the Act is OVERRULED. This is mere argument. Both parties argue their separate views on the consequences of a change in the law in terms of future costs, but their argument does not bear upon the constitutionality of the challenged proviso.

III. Legal Standard

Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). Where both parties move for summary judgment, the court independently reviews each motion with its supporting proof. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 180 (5th Cir. 2009). Summary judgment is appropriate where, as in this case, the material facts are undisputed and the only issue before the court is a pure question of law. *Kornman & Associates, Inc. v. United States*, 527 F.3d 443, 450 (5th Cir. 2008).

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 105 S. Ct. 3249, 3254 (1985) (collecting cases); *see also Noatex Corp. v. King Const. of Houston, L.L.C.*, 732 F.3d 479, 484 (5th Cir. 2013) ("[S]tatutes should be construed, whenever possible so as to uphold their constitutionality.") (quoting *United States v. Vuitch*, 91 S. Ct. 1294, 1298 (1971)).

IV. Analysis

A. Constitutionality of the Act

The Hazlewood Act provides in relevant part:

> (a) The governing board of each institution of higher education shall exempt the following persons from the payment of tuition, dues, fees, and other required 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 person seeking the exemption currently resides in this state and entered the service at a location in this state, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B at the time the person entered the service:*
>
> . . .

> (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:
>
> . . .
>
> (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[.][17]

TEX. EDUC. CODE § 54.341(a) (emphasis added).[18] Plaintiff argues that the Act's fixed-point residency requirement is subject to heightened scrutiny, but that it fails even under rational basis review because Defendants can point to no legitimate government interest rationally related to the exclusion of Texas resident veterans from Hazlewood Act benefits solely on the basis of their state residency status at the time of their enlistment.[19] Defendants argue that rational basis review applies, and advance several reasons as justifications for the fixed-point residency requirement.[20]

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[17] *See* Document No. 28 at 6; Document No. 28-2 at 13 of 14 (Plaintiff served on active duty in the Army from August 1996 through July 2000).

[18] The Act limits this exemption to a maximum of 150 credit hours and provides that it does not apply to tuition and fees for which the veteran is entitled to receive federal educational benefits. TEX. EDUC. CODE § 54.341(c), (e).

[19] Document Nos. 28, 33, 36.

[20] Document Nos. 24, 34, 35.

Both the standard of review and the outcome of this case are governed by a trio of Supreme Court opinions involving challenges to fixed-point residency requirements under the Equal Protection Clause and the constitutional right to travel or migrate.

In *Zobel v. Williams*, 102 S. Ct. 2309 (1982), the Court struck down an Alaska statute that distributed dividends from the state's oil revenue to Alaska residents in amounts dependant on the duration of their residency, with residents receiving one dividend unit for every year of residence after 1959. The Court explained that "[w]hen a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment," and declined to analyze the case under the right to travel, noting that "the nature and source of that right have remained obscure" and that "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.* at 2313 & n.6.[21] The Court declined to decide whether heightened scrutiny applied because it found

[21] Four justices joined the opinion of the Court and also stated that the right to travel – "or, more precisely, the interest in free interstate migration" – provided an independent basis for holding Alaska's statute unconstitutional. *Zobel*, 102 S. Ct. at 2316 (Brennan, J., concurring). Justice O'Connor concurred in the judgment, writing that the statute should be invalidated under the right to travel, which she based in the Privileges and Immunities Clause. *Id.* at 2319-2323 (O'Connor, J., concurring). Justice Rehnquist, the lone dissenter, believed that the statute was an economic regulation that clearly survived rational basis review under the Equal Protection Clause. *Id.* at 2323-2325 (Rehnquist, J., dissenting).

that the statutory scheme could not survive even rational basis scrutiny. *Id.* at 2313.

Alaska argued that the distinction between recent and long-term residents was rationally related to the purposes of (1) creating financial incentives for individuals to establish and maintain residency in Alaska, (2) encouraging prudent management of the fund, and (3) apportioning benefits in recognition of residents' past contributions. *Id.* The Court found that the first two interests were not rationally served by providing increased dividends based on residency during the 21 years since statehood and before the statute's enactment, and that the objective of rewarding citizens for past contributions "is not a legitimate state purpose." *Id.* at 2313-14 (citing *Shapiro v. Thompson*, 89 S. Ct. 1322, 1330 (1969) ("Appellants' reasoning . . . would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services."); *Vlandis v. Kline*, 93 S. Ct. 2230, 2234-35 & n.6 (1973) ("[A]pportion[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment.")). The *Zobel* Court held that "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency," which "would permit the states to divide citizens into expanding numbers of permanent classes" and "would be clearly impermissible." *Id.* at 2315.

Three years later, in *Hooper v. Bernalillo Cnty. Assessor*, 105 S. Ct. 2862 (1985), the Court struck down a New Mexico statute that provided a $2,000 tax exemption for Vietnam veterans, provided that they were New Mexico residents before May 8, 1976. The Court followed its *Zobel* opinion both by evaluating the law under the Equal Protection Clause rather than the right to travel, and by declining to determine whether the statute was subject to heightened scrutiny, finding instead that it could not pass even rational basis review. *Id.* at 2866 & n.6. The *Hooper* Court found that the New Mexico statute's fixed date residency requirement divided resident Vietnam veterans into two groups, creating "'fixed, permanent distinctions between . . . classes of concededly bona fide residents' based on when they arrived in the State." *Id.* at 2865-66 (quoting *Zobel*, 102 S. Ct. at 2312).

New Mexico argued that the distinction was justified by the goals of encouraging veterans to settle in the state and of expressing gratitude to its "own citizens for honorable military service." *Id.* at 2866. The Court found no rational relationship between New Mexico's tax exemption, which applied only to veterans who had been residents long before the statute was enacted, and the desire to encourage immigration of veterans. *Id.* at 2866-67. As to the second justification, the Court acknowledged the nation's longstanding policy of rewarding veterans for their past contributions, but rejected the distinction between veterans based on their pre-war residency:

> Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service.
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> . . .
>
> The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.

Id. at 2867-68. Accordingly, the Court found that the statute "creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens,'" and that this distinction was not supported by any identifiable state interest and was unconstitutional under the Equal Protection Clause. *Id.* at 2869.[22]

Finally, in *Attorney Gen. of New York v. Soto-Lopez*, 106 S. Ct. 2317 (1986), the Court struck down a New York statute providing a one-time civil service preference to veterans who entered the armed forces while

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[22] Three justices dissented, asserting that the state's limited resources provided a rational basis for limiting the benefits it provided to those veterans who were returning home to New Mexico. *Hooper*, 105 S. Ct. at 2869-2874 (Stevens, J., dissenting).

residing in New York. Justice Brennan, writing for a four-justice plurality, applied heightened scrutiny and found that the statute violated the constitutional right to travel or, more specifically, the right to migrate, because it operated permanently to penalize veterans who had exercised their right to migrate, and also violated the Equal Protection Clause. *Id.* at 2325. Chief Justice Burger and Justice White each concurred in the judgment, but found that the law did not survive rational basis scrutiny under the Equal Protection Clause. *Id.* at 2326-2328.[23]

All six justices who agreed that New York's system violated the Equal Protection Clause rejected four justifications for the law proffered by the state of New York: (1) the encouragement of New York residents to join the military; (2) the compensation of residents for service in time of war by helping veterans reestablish themselves upon returning home; (3) the inducement of veterans to return to New York after their service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service. *Id.* at 2324-25. The plurality found that "[a]ll four justifications fail to

[23] Chief Justice Burger wrote that *Zobel* and *Hooper* provided the appropriate framework, and that because the law did not survive rational basis scrutiny, it was improper to address the right to travel and heightened scrutiny. *Soto-Lopez*, 106 S. Ct. at 2326-2328 (Burger, C.J., concurring). Justice White found that heightened scrutiny was inapplicable because the right to travel was insufficiently implicated. *Id.* at 2328 (White, J., concurring). Justices O'Connor, Rehnquist, and Stevens – the three *Hooper* dissenters – dissented again in *Soto-Lopez*. *Id.* at 2328-2333.

withstand heightened scrutiny on a common ground – each of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans." *Id.* at 2324 (emphasis in original).[24] The plurality further observed:

> Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a long-standing policy of our Federal and State Governments. . . . Nonetheless, this policy, even if deemed compelling, does not support a distinction between resident veterans based on their residence when they joined the military. Members of the Armed Forces serve the Nation as a whole. While a serviceperson's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel.

Id. at 2325. Accordingly, the Court struck down the New York statute, holding that "[f]or as long as New York chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services." *Id.* at 2325-26.

The Hazlewood Act's fixed-point residency requirement, which limits benefits to veterans who were residents of Texas when they enlisted in the armed services, is for constitutional purposes indistinguishable

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[24] The concurring justices found these four justifications to be irrational. *Id.* at 2326-2328.

from the provision in *Soto-Lopez*. Because the Act – in light of the foregoing Supreme Court decisions – cannot survive even rational basis review, the Court follows the majority opinions in *Zobel* and *Hooper* in applying rational basis review under the Equal Protection Clause. *See Hooper*, 105 S. Ct. at 2866 ("As in *Zobel*, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends."). This is consistent with the narrowest approach taken by the *Soto-Lopez* Court, where six justices found the law invalid under the Equal Protection Clause and only four of them applied heightened scrutiny based on the right to migrate.[25] *See Marks v. United States*, 97 S. Ct. 990, 993 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' ") (citation omitted).[26]

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[25] Furthermore, including the three dissenters, a majority of the *Soto-Lopez* justices found that the case should be resolved under rational basis review.

[26] Plaintiff argues that the Supreme Court's subsequent opinion in *Saenz v. Roe*, 119 S. Ct. 1518 (1999) mandates heightened scrutiny. Document No. 36 at 3. In *Saenz*, seven justices applied heightened scrutiny to strike down a California law limiting Temporary Assistance to Needy Family ("TANF") benefits to newcomers in their first year as California residents. 119 S. Ct. at 1527 ("Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year."). Although instructive, the *Saenz* opinion focused on the right to travel rather

To survive rational basis review, the Hazlewood Act's fixed-point residency requirement must rationally further a legitimate state purpose. *See, e.g.*, *Zobel*, 102 S. Ct. at 2313. Defendants argue that "the exemption is rationally related to Texas's interests in the education of current Texas schoolchildren who are at risk of not completing high school, postsecondary education of those schoolchildren, and economic development," and that "[t]he requirement that an applicant for the Hazlewood exemption have 'entered the service at a location in this state' is necessary to the State's interest in preserving the educational wellbeing of Texas's current youth."[27] Defendants reason that

> [t]he exemption incentivizes future conduct – that is, the attainment of a postsecondary education – by encouraging current Texas students to complete high school, with the understanding that if those students chose military service, Texas will pay for at least a portion of their college education upon their return and admission to a Texas public institution of higher education.[28]

Promoting education plainly is a legitimate state interest, and by providing financial assistance for postsecondary education, the Act plausibly – albeit tenuously

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than equal protection, and the challenged law did not involve a fixed-point residency requirement. *Zobel, Hooper*, and *Soto-Lopez* still provide the controlling framework for addressing Plaintiff's equal protection challenge to the Hazlewood Act's fixed-point residency requirement.

[27] Document No. 24 at 12.

[28] *Id.*

– encourages Texas high school students to graduate, join the military, *and* return to attend college and graduate school after exhausting their federal benefits. However, Plaintiff does not challenge the Act's provision of financial assistance, but rather its exclusion of Texas resident veterans who enlisted in other states, and Defendants do not explain how *not* providing benefits to veterans like Plaintiff furthers Texas's interest in its students' education. *Cf. Soto-Lopez*, 106 S. Ct. at 2324 ("[E]ach of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans.") (emphasis in original). Thus, the Act's fixed-point residency requirement is not rationally related to Texas's legitimate interest in promoting education.

Defendants next argue that

> another rational basis for the residency requirement is to grow the Texas economy by encouraging Texas veterans to return to the state after honorably completing their military service. More specifically, it encourages these Texas residents, upon their discharge from military service, to return to Texas to obtain a post-secondary education. Not only will those veterans have the skills, discipline and professionalism that only a military experience can provide, they will also be educated.[29]

This argument supports the granting of educational benefits to veterans under the Hazlewood Act, but

[29] *Id.*, at 13.

again, the *exclusion* of Texas resident veterans who enlisted in other states is not rationally related to growing Texas's economy. Indeed, to deny educational benefits to veterans like Plaintiff who have come to Texas to obtain employment and to advance their education, and who as veterans and Texas residents "have the skills, discipline and professionalism that only a military experience can provide," would seem to undermine this rationale for the Hazlewood Act. *Cf. Soto-Lopez*, 106 S. Ct. at 2327 (Burger, C.J., concurring) ("[T]he State asserts that the preference is targeted at a very special group of veterans who have both knowledge of local affairs and valuable skills learned in the military, and who therefore would make exceptional civil servants. But these 'special attributes' are undeniably possessed by all veterans who are currently residents of New York.").

Third, Defendants argue that "[b]y requiring the beneficiary to have been a Texas resident at the time of enlistment, the legislature could have determined that former Texas residents are more likely to return to Texas after they are discharged and stay."[30] This rationale was expressly rejected in *Soto-Lopez*:

> [T]he State contends that it is permissible to encourage past-resident veterans to settle in New York after their military service ends. While such a preference might indeed encourage such veterans to return, it simultaneously has the effect of *discouraging* other veterans from settling in New York who are aware that

[30] *Id.*

> civil service appointments will be hard to obtain. As we observed in *Zobel* and reiterated in *Hooper*, "[t]he separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." Moreover, *Hooper* made it clear that a "selective incentive" such as New York provides here "would encounter the same constitutional barrier faced by the [New Mexico] statute's distinction between past and newly arrived residents."

106 S. Ct. at 2327 (Burger, C.J., concurring) (citations omitted) (emphasis in original); *see also id.* at 2324 (plurality op.) (without fixed-point residency requirement, "both former New Yorkers and prior residents of other states would be drawn to New York after serving the Nation.").

Defendants next argue that "[t]he 'fixed point' residency requirement further prevents veterans from relocating to Texas solely to take advantage of a free post-secondary education, obtaining a portable degree, and then relocating out of Texas."[31] Inhibiting the relocation of veterans to or from Texas is not a legitimate state interest; it squarely contradicts the constitutional right to migrate. *See Saenz v. Roe*, 119 S. Ct. 1518, 1530 (1999) ("Citizens of the United States, whether rich or poor, have the right to choose to be citizens 'of the State wherein they reside.' U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens."); *id.* at 1528 (purpose of

[31] *Id.* at 13-14.

deterring welfare applicants from migrating to California "would be unequivocally impermissible"); *Zobel*, 102 S. Ct. at 2314 n.9 ("Of course, the State's objective of reducing population turnover cannot be interpreted as an attempt to inhibit migration into the State without encountering insurmountable constitutional difficulties."); *Shapiro v. Thompson*, 89 S. Ct. 1322, 1329 (1969) (overruled on other grounds by *Edelman v. Jordan*, 94 S. Ct. 1347 (1974)) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.") (purpose of inhibiting migration of needy people is "constitutionally impermissible").

Finally, Defendants argue that the fixed-point residency requirement "serves to balance the State's interest in supporting veterans by providing the tuition exemption benefit to Texas veterans and, in some instances, their dependants, while controlling the cost so that it is affordable to taxpayers and Texas public higher education institutions."[32] The defect in this rationale is that Plaintiff and other similarly situated veterans *are* Texas veterans, and Texas may not discriminate against its more recent residents in favor of more established residents simply to control costs. *See*

[32] *Id.* at 14.

Soto-Lopez, 106 S. Ct. at 2325 ("Once veterans establish bona fide residence in a State, they 'become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State.'") (collecting cases); *id.* at 2328 (Burger, C.J., concurring) ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after [a fixed date].") (quoting *Hooper*, 105 S. Ct. at 2868); *Zobel*, 102 S. Ct. at 2314 ("[A]pportion[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment.") (quoting *Vlandis v. Kline*, 93 S. Ct. 2230, 2235 n.6 (1973)); *id.* at 2317-18 (Brennan, J., concurring) (Citizenship Clause "does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions. In short, as much as the right to travel, equality of citizenship is of the essence in our Republic"); *Saenz*, 119 S. Ct. at 1528 ("In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.").

Accordingly, Defendants have not shown that the Hazlewood Act's fixed-point residency requirement is rationally related to any legitimate state interest. The Act impermissibly discriminates between equally

situated Texas residents who have served their country honorably in the armed forces, based solely upon their state residency when they enlisted in the military, in violation of the Equal Protection Clause.

This conclusion draws support from two additional persuasive opinions. The California Supreme Court in 1992 unanimously struck down a substantially similar statute providing veterans benefits including tuition and living expenses for students, but only if the veteran had been "at the time of entry into active duty a native of, or bona fide resident of [California] or, if a minor at that time, entered active duty while in [California] and had lived in [California] for six months immediately preceding entry into active duty." *Del Monte v. Wilson*, 824 P.2d 632 (1992). The court held that *Zobel, Hooper*, and *Soto-Lopez* compelled the conclusion that California's statute could not survive rational basis scrutiny and was unconstitutional under the Equal Protection Clause. *Id.*

Second, the Texas Attorney General in 1998 was questioned about the constitutionality of the fixed-point residency requirement in the Hazlewood Act, and issued an opinion letter which – based on his review of *Zobel, Hooper*, *Soto-Lopez*, and the California Supreme Court's *Del Monte* decision – concluded:

> [W]e believe a court would conclude that the Education Code section 54.203(a) is unconstitutional because it invidiously or irrationally discriminates against honorably discharged, resident veterans who did not reside in Texas at the time they entered the service. Using the

> rational-basis standard, we believe a court would consider all of Texas' proffered rationalizations, but we can think of none that the Supreme Court has not already declared insufficient to justify the classification. In particular, we do not think a court would deem discrimination against one group of honorably discharged, resident veterans rationally related to saving the state money.

Tex. Att'y Gen. Op. No. DM-468 (1998).[33] This Opinion has not been withdrawn in the 17 years since it was issued. *See also* Matthew B. Allen, *The Unconstitutional Denial of A Texas Veterans Benefit*, 46 Hous. L. Rev. 1607 (2010) (discussing, *inter alia, Zobel, Hooper, Soto-Lopez*, and the 1998 Texas Attorney General Opinion, and arguing that the Hazlewood Act's fixed-point residency requirement is unconstitutional and unfair).

These additional well-reasoned opinions, while not binding on this Court, are in accord with the conclusion that the Act unconstitutionally discriminates between Texas resident veterans based on their residency at that point in time when they enlisted in the Armed Forces. Defendants cite to no authority upholding the constitutionality of the Hazlewood Act's fixed-point residency requirement or upholding any comparable provision from any other jurisdiction decided during the approximate 30 years since the

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[33] The opinion is found in the record at Document No. 24, ex. 5 and at Document No. 28, ex. 1.

Supreme Court's decisions in *Zobel, Hooper*, and *Soto-Lopez*.

Accordingly, the Court holds that the fixed-point residency requirement found in TEX. EDUC. CODE § 54.341(a) violates the Equal Protection Clause because it unconstitutionally discriminates against Plaintiff, an honorably discharged Texas veteran, for the sole reason that when he enlisted in the United States Army in 1996 he was a resident citizen of another state.

B. Severability

Having found that the Hazlewood Act's fixed-point residency requirement is unconstitutional, the question arises whether the entire Act must be held unconstitutional, in which event Plaintiff would receive no benefit, or if only the offending proviso can be severed and excised. *See Califano v. Westcott*, 99 S. Ct. 2655, 2663 (1979) ("'Where a statute is defective because of underinclusion, . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'") (quoting *Welsh v. United States*, 90 S. Ct. 1792, 1807 (1970) (Harlan, J., concurring)).

Plaintiff urges that the unconstitutional exclusion is severable and that severance is the proper remedy.[34] The Texas Veterans Commissioners agree that this is the appropriate remedy "because such relief would be in the best interests of veterans currently receiving the benefit."[35] The other Defendants state no specific position on severability; but Defendants' response argues that given "the Legislature's apparent concerns regarding the increasing cost of providing this benefit to veterans and their families, severance of the statute is contrary to the Legislature's intentions."[36]

Whether unconstitutional provisions of a state statute are severable is a matter of state law. *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011) (citing *Virginia v. Hicks*, 123 S. Ct. 2191, 2198 (2003)). In Texas, severability of statutes is governed by the Code Construction Act, Section 311.032 of the Texas Government Code. *Id.* The present enactment of the Hazlewood Act contains neither a severability clause nor a proscription on severability.[37] Hence, Section 311.032(c) applies:

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[34] Document No. 28 at 21-23.

[35] Document No. 34 at 8.

[36] *Id.* at 8-10.

[37] Interestingly, the 1959 amendment to the Hazlewood Act which, among other things, added for the first time the fixed-point residency requirement, did contain a severability clause providing:

> If any Section, sentence, clause or part of this Act is held to be unconstitutional or invalid for any reason, such decision shall not affect the remaining portions of

> In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

TEX. GOV'T. CODE § 311.032(c);[38] *see also Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1999) ("[I]f any provision of the statute is held to be invalid, the invalidity does not affect other provisions that can properly be given effect in the absence of the invalid provisions.").

In applying Section 311.032(c) of the Texas Code Construction Act, the unconstitutional fixed-point residency requirement, which as observed above has not

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> this Act. The Legislature hereby declares that it would have passed this Act and each Section, sentence, clause or part thereof despite the fact that one or more Sections, sentences, clauses or parts thereof be declared unconstitutional or invalid for any reason.

Act of July 15, 1959, 56th Leg., 2d C.S., ch. 12, § 4, 1959 Tex. Gen. Laws 99, 101. Over the years the Act has been amended and recodified by the Legislature numerous times, and at least since the Amendment that enlarged benefits to include Persian Gulf War veterans, which includes Plaintiff, the Legislature has not incorporated either a severability or a nonseverability clause.

[38] *See also* TEX. GOV'T CODE § 312.013(a) ("Unless expressly provided otherwise, if any provision of a statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.").

always been a part of the Hazlewood Act, may readily be severed from the body of the Act without affecting other provisions and applications of the Act. Thus, the principal legislative objective to reward honorably discharged qualified Texas veterans with educational benefits may continue unabated. The specific unconstitutional clause in Section 54.341(a), which the Court severs and declares as null and void, is shown in the stricken language that follows:

> (a) The governing board of each institution of higher education shall exempt the following persons from the payment of tuition, dues, fees, and other required 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 person seeking the exemption currently resides in this state ~~and entered the service at a location in this state, declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B at the time the person entered the service~~:

TEX. EDUC. CODE § 54.341(a). *See also Del Monte*, 824 P.2d at 643 (extending benefits to all veterans when striking down unconstitutional exclusion); Tex. Att'y Gen. Op. No. DM-468 ("We believe a court would conclude that the legislature intended the limitation [in the Hazlewood Act] to be severable from the remainder

of the subsection, and the court accordingly would invalidate only the offending fixed-point residency requirement. The remainder of [the Act] would be left intact, and the court thus would extend the tuition exemption to every honorably discharged veteran who satisfies the statutory durational residence requirement.").

C. Injunctive Relief

Plaintiff has established that the Hazlewood Act's fixed-point residency clause violates the Equal Protection Clause, and the remaining Defendants are involved in the enforcement and administration of the Act,[39] which Defendants no longer dispute.[40] Plaintiff applied for and was denied benefits under the Act based on the unconstitutional restriction, and therefore has a valid cause of action against Defendants under 42 U.S.C. § 1983, pursuant to which he seeks injunctive relief.[41] *See Mitchum v. Foster*, 92 S. Ct. 2151, 2162 (1972) ("Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress.").

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[39] Document No. 32.

[40] *See* Document No. 34 at 2 n.1 ("Defendants withdraw the arguments in paragraph D of their summary judgment motion [that certain Defendants are not connected to the enforcement of the Act or Plaintiff's injury].").

[41] Document No. 6.

A plaintiff seeking a permanent injunction must demonstrate: (1) that he has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006).

Because Defendants are entitled to Eleventh Amendment immunity from money damages, Plaintiff is unable to recover his past tuition payments that would not have been required from him but for his having been unconstitutionally excluded from the Act's benefits. Accordingly, Plaintiff has suffered and – if no injunction is issued – will continue to suffer irreparable injury for which money damages are inadequate.[42] Defendants' costs in providing to Plaintiff the tuition and fee waiver to which he is constitutionally entitled are heavily outweighed by the harm to Plaintiff if the waiver is denied, and the public interest is not disserved by requiring Defendants to cease and desist from violating Plaintiff's rights under the Equal Protection Clause. Accordingly, Plaintiff is entitled to injunctive relief prohibiting Defendants from enforcing against him the unconstitutional statutory provision.

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[42] The parties' agreement mentioned in footnote 13, above, obligates Plaintiff – if the fixed-point of residency is upheld – to pay the full tuition and fees for both semesters within 30 days after final resolution.

Defendants argue that the precedential effect of this ruling portends a vast expansion of state benefits under the Act, which benefits have already increased dramatically in recent years from $25 million in 2009 to $169 million in 2014.[43] The parties dispute the extent of the incremental cost that the State will incur by awarding the benefits to all qualified honorably discharged Texas veterans. The Court recognizes the State's legitimate concerns over escalating costs of Hazlewood Act benefits. Indeed, just last month the Legislative Budget Board submitted to the new 84th Texas Legislature a comprehensive Report on the Hazlewood Exemption that forecasts tuition and fee waivers, if left unchanged, reaching $379.1 million by 2019, with a majority of the increase being attributable to the Legacy Program that, since 2009, has allowed eligible veterans to pass on their Hazlewood benefits to their children.[44] The mounting costs of Hazlewood Act benefits, of course, implicate policy matters and legislative priorities within the exclusive purview of the Texas Legislature. This Court's limited federal jurisdiction permits it to render judgment only on the constitutional claim presented by Plaintiff, and on this, the Court is constrained to hold, as the Supreme Court did in *Soto-Lopez*, that "[f]or so long as [Texas] chooses to offer its resident veterans [educational benefits under the Hazlewood Act] the Constitution requires that it do so without regard to residence at the time of entry

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[43] *See* Document No. 33, ex. 12 at 6 of 50 (December 2014 Legislative Policy Report on the Hazlewood Exemption).

[44] *Id.*, ex. 12 at 34 of 50 to 35 of 50.

into the services." *Soto-Lopez*, 106 S. Ct. at 2325-26. *See also Saenz*, 119 S. Ct. at 1528 ("[T]he state's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.") Accordingly, Plaintiff Keith Harris is entitled to injunctive relief to prevent further unconstitutional discrimination preventing him from receiving Hazlewood Act benefits.

V. Order

For the foregoing reasons, it is

ORDERED that Defendants' Motion for Summary Judgment (Document No. 24) is DENIED. It is further

ORDERED that Plaintiff's Replacement Motion for Summary Judgment (Document No. 28) is GRANTED, and it is

ORDERED that Defendant members of the Texas Veterans Commission, namely,

> Eliseo "Al" Cantu, Jr., in his official capacity as chairman;
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> James Scott, in his official capacity as vice chair;
>
> Richard McLeon, IV, in his official capacity as secretary;
>
> Jake Ellzey and Daniel Moran, in their official capacities as members, and

Defendant members of the Texas Higher Education Coordinating Board, namely,

Harold Hahn, in his official capacity as chairman;

Robert Jenkins, Jr., in his official capacity as vice chair;

Sada Cumber, Christopher Huckabee, Jacob Monty, Janelle Shepard, John Steen, Jr., David Teuscher, and Raymond Paredes, in their official capacities as members, and

Defendant members of the University of Houston Board of Regents, namely,

Jarvis Hollingsworth, in his official capacity as chairman;

Tilman Fertitta, in his official capacity as vice chairman;

Welcome Wilson, Jr., in his official capacity as secretary;

and Beth Madison, Spencer Armour, III, Roger Welder, Durga Agrawal, Paula Mendoza, and Peter Taaffe, in their official capacities as members,

together with their successors in office in their official capacities as members and/or officers of the Texas Veterans Commission, the Texas Higher Education Coordinating Board, and the University of Houston Board of Regents, respectively, and all persons acting in concert with them or at their direction or subject to their control who receive actual notice of this injunction, are

PERMANENTLY ENJOINED from excluding Plaintiff Keith Harris from receiving the benefits of the Hazlewood Act, TEX. EDUC. CODE § 54.3411, solely by reason of the fact that he enlisted in the United States Army at a point in time when he was a resident of a State other than Texas, which exclusion violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 26th day of January, 2015.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20105

KEITH HARRIS,

Plaintiff-Appellee

v.

HAROLD HAHN; JARVIS HOLLINGSWORTH; ROBERT JENKINS, JR.; SADA CUMBER; CHRISTOPHER HUCKABEE; JACOB MONTY; JANELLE SHEPARD; JOHN STEEN, JR.; DAVID TEUSCHER; RAYMOND PAREDES; TILMAN FERTITTA; WELCOME WILSON, JR.; BETH MADSON; SPENCER ARMOUR, III; ROGER WELDER; DURGA AGRAWAL; PAULA MENDOZA; PETER TAAFFE,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed July 26, 2016)

(Opinion 6/23/16, 5 Cir. ___, ___ F.3d ___)

Before STEWART, Chief Judge, and CLEMENT and ELROD, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jennifer W. Elrod
UNITED STATES CIRCUIT JUDGE