No. 16-575

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

REPLY BRIEF OF PETITIONER

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

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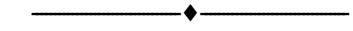
INTRODUCTION

The Texas Hazlewood Act waives tuition and benefits for honorably discharged veterans who are current Texas residents, but only if the veterans were also Texas residents when they entered the military. Requiring residence at a fixed-point in the past is called a fixed-point residency requirement. Such requirements have always been struck as unconstitutional – until now.

The impact of this case cannot be overstated. Indeed, the Fifth Circuit's opinion can be used to discriminate against all new residents and penalize interstate migration in connection with conceivably any state benefit. And the opinion will open the door to a nation or ranks, castes, constructive walls, and second-class citizens.

The Fifth Circuit recognizes that review is warranted by seeming to welcome "a clearer indication from the Supreme Court[.]" *See* Petition at 15.



ARGUMENT

I. RESPONDENTS ATTEMPT TO MINIMIZE THE VAST CONFLICT THAT EXISTS

Respondents contend that Petitioner "fixates on a single quotation from *Hooper*." *See* Brief in Response at 26. The quote is below:

> "*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.' "

Hooper v. Bernalillo, 472 U.S. 612, 623 (1985) (ellipses in original) (emphasis added).

The foregoing is more than a "single quotation from *Hooper*." The quote (a) represents a clear holding established by the U.S. Supreme Court in *Zobel* outlawing fixed-point residency requirement in state benefit programs, (b) was reaffirmed and quoted by the Supreme Court in *Hooper*, (c) was reaffirmed and quoted by the Supreme Court in *Soto-Lopez*, (d) was relied upon and quoted by the California supreme court in *Del Monte*, (d) was relied upon and quoted by the Ninth Circuit in *Bunyan*, and (f) was relied upon and quoted by the Vermont supreme court in *Bagley*. *See* Petition at 10-13. Each of the foregoing cases involved the striking of fixed-point residency requirements in state benefit programs, and three remarkably addressed benefits for veterans. Nevertheless, the Supreme Court's holdings were wholly ignored and not followed by the Fifth Circuit.

To be clear, there is not a single case in any jurisdiction or court in which a fixed-point residency requirement has been upheld, besides this one.

II. RESPONDENTS HAVE NOT NEGATED THE CIRCUIT SPLIT

To deny a conflict with the Ninth Circuit, Respondents distinguish *Bunyan v. Camacho* because it allegedly dealt with retroactive benefits as opposed to prospective incentives. Brief in Response pg. 10. The Respondents contend it matters whether the benefits at issue are given in response to past conduct, versus whether they incentivize future conduct.

Rather than turning on a retrospective issue, *Bunyan* struck the fixed-point residency requirement because it "creates 'fixed, permanent distinctions between . . . classes of concededly bona fide residents[,]' " as outlawed by the Supreme Court. *See Bunyan v. Camacho*, 770 F.3d 773, 776 (9th Cir. 1985) (quoting *Zobel*) (striking law that granted retirement credit only to state employees who were residents of Guam before they started college).

Further, *Bunyan* did address a prospective incentive, namely, encouraging Guam residents to stay in Guam. Nevertheless, the law was struck because the prospective aspect of the incentive is irrelevant. *See id.* at 776 ("Furthermore, the statute's distinction . . . is not rationally related to the asserted goal of rewarding, ***encouraging*** and compensating persons for the alleged sacrifices.") (emphasis added).

III. RESPONDENTS HAVE NOT NEGATED THE SPLIT WITH STATE SUPREME COURTS

As to a conflict with the California supreme court, Respondents acknowledge this case and *Del Monte* involve similar statutes. Brief in Response at 12. In fact, this case and *Del Monte* are identical, and both involve veteran educational benefits only for those who were also residents at enlistment. Nevertheless, Respondents claim no conflict exists because the Respondents have offered (*i.e.*, invented) different factual justifications, and because *Del Monte* was decided before *Saenz v. Roe.* Brief in Response at 12.

It is true that prospectively incentivizing high school graduation was not argued in *Del Monte*. However, the prospective purpose of "encouraging residents to return to California" was addressed, and the court addressed other prospective justifications. *See Del Monte v. Wilson*, 824 P.2d 632, 640 (Cal. 1992); *see id*. at 637 (discussing how *Soto-Lopez* rejected the argument of prospectively encouraging enlistment). The respondents in *Del Monte* also attempted to make a prospective versus retroactive distinction, and it was rejected *Id.* at 640.

The California supreme court held, "We conclude that we are constrained by recent decisions of the United States Supreme Court." *See id.* at 826. The court further held, "*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.'" *Id.* at 830 (ellipses in original).

The fact that *Saenz v. Roe* had not yet been decided is irrelevant. *Saenz* is not a fixed-point residency requirement case, and does not help the Respondents' argument. *Saenz* dealt with a durational residency requirement, which imposes less punitive temporary deprivations of state benefits for new residents. Even then, a *temporary* deprivation of a state welfare benefit was struck as an unconstitutional violation of the right to travel. *Saenz v. Roe*, 526 U.S. 489 (1999). It is perplexing why Respondents continue to raise *Saenz v. Roe*, when it actually supports the Petitioner's argument.

Respondents also claim no conflict with the Vermont supreme court in *Bagley* because the reasons there were rejected as irrational, whereas the reasons here are not irrational. Brief in Response at 12-13. In reality, there is a direct conflict with *Bagley* because it too addressed a fixed-point resident requirement that permanently excluded newer residents from a state benefit, and because the Vermont supreme court unequivocally and correctly applied clear Supreme Court rulings to hold, "Placing newer residents in a lower tier as 'second-class citizens' discriminates on the basis of residence in a way 'not supported by any identifiable state interest.' *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.'"

Bagley v. Vermont Dept. of Taxes, 500 A.2d 223, 226 (Vermont 1985) (ellipses in original).

IV. RESPONDENTS HAVE NOT NEGATED A CONFLICT WITH THIS COURT

Respondents falsely contend the Supreme Court has only struck fixed-point residency requirements dealing with "retroactive" benefits to residents. Brief in Response at 14.

There is simply no "prospective" exception to the Supreme Court's "clear" mandate. *See* Petition at 20 and n.5. Second, in *Soto-Lopez*, the state expressly argued that the law was designed to prospectively encourage enlistment. *Soto-Lopez*, 476 U.S. 898, 909 (1986). *Hooper* and *Zobel* likewise addressed allegedly prospective incentives. *See* Petition at n.9.

The Respondents claim that there is no concrete rule against fixed-point residency requirements in this context. Brief in Response at 26. Respondents contend that multiple opinions would not have resulted if there was such a categorical rule. Brief in Response at 27. This argument is misplaced. When Legislators pass laws that violate Supreme Court authority, it can take time to address the issue, and often the issue must be addressed over time in multiple jurisdictions. The Supreme Court established the framework against fixed-point residency requirements in state benefit programs between 1982, 1985, and 1986 in *Zobel*, *Hooper*, and *Soto-Lopez*, respectively. The Ninth Circuit and Vermont came in accordance with the Supreme Court's

holdings in 1985 after *Bunyan* and *Bagley* were decided. California came in accordance in 1992 with *Del Monte*. Texas should have changed its law in 1998, when the Texas Attorney General opined that the Hazlewood Act would likely be held unconstitutional. *See* Petition at 8.

As to whether a mandate exists, the Supreme Court language could not be any clearer, and if there was an intent to create a rule, the Supreme Court seems to express that one was created as follows:

> "*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.'"

Hooper v. Bernalillo, 472 U.S. 612, 623 (1985) (ellipses in original) (emphasis added); *see also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 908 (1986).

Again, the Fifth Circuit did not cite and certainly did not follow this rule, and Respondents are incorrect in arguing that Petitioner merely complains about the Fifth Circuit misapplying a correctly stated rule of law. *See* Brief in Response at 14.

Finally, Respondents continue to insist that *Soto-Lopez* has lost its weight because it was decided at a time (1986) in which there were presumably more draftees than today, and claim the distinction was recognized in the case. This argument is incorrect. On information, there was no draft in 1986, just as there is

none today. One of the many circumstances recognized in *Soto-Lopez* to strike the law was not the number of draftees, but the fact that the benefit applied equally to draftees and enlistees. 476 U.S. 898, 914 ("Moreover, the preference applies to *all* servicemen. . . .") (emphasis in original). The same holds completely true for Hazlewood today.

V. IN ADDITION TO UNFOUNDED "PROSPECTIVE" ARGUMENTS, RESPONDENTS' "PORTABILITY" ARGUMENTS ARE WITHOUT MERIT

Respondents incorrectly contend Petitioner Harris fails to address the alleged "portability" issue. Response Brief at 2. Respondents also incorrectly contend the Petition fails to "identify a single case holding that a State's decision to offer a prospective, portable benefit to current residents violates the Equal Protection Clause or the constitutional right to travel." Brief in Response at 9.

As addressed in the Petition, *Zobel*, *Hooper*, and *Soto-Lopez* all dealt with so-called "portable" benefits – and it is the Respondents that have improperly failed to address the Petition. *Compare* Brief in Response *with* Petition at 19-20 and n.8-9. Moreover and as discussed, in *Del Monte* the California supreme court struck an ***identical*** law involving educational benefits for veterans that contained a fixed-point residency requirement at the time of enlistment. *Del Monte v. Wilson*, 824 P.2d 632, 640 (Cal. 1992). It is unfathomable

how the Respondents can claim there is no such case that has been struck, when in fact there happens to be an identical case.

VI. RESPONDENTS' ARGUMENTS ABOUT THE STANDARD OF REVIEW ARE INCORRECT

There is a dispute as to whether rational basis (under equal protection) and/or strict scrutiny (under the fundamental right to travel) review applies to cases like this.

First, Respondents claim that, even if the right to travel and strict scrutiny is implicated, that Texas has offered sufficient justification. Brief in Response at 15. In reality, the Respondents have never argued that they satisfy strict scrutiny, have never attempted to meet strict scrutiny, and it is undisputed that strict scrutiny is not met here. *See* Petition at 16-18 and n.4-7.

Respondents further contend the district court found that the Hazlewood Act was only subject to rational basis scrutiny. Response Brief at 6. This is not accurate. The district court (Judge Ewing Werlein) recognized that first a law must pass rational basis review before strict scrutiny is applied, and recognized that the Hazlewood's fixed-point residency requirement failed even rational basis review. *See* Petitioner's Brief App. 38-53. In *Soto-Lopez*, the plurality opinion analyzed how the right to travel and strict scrutiny was violated, and the concurrences (Burger, C.J. and Stevens, J.) ruled that the law did not even pass

rational basis review. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

Respondents contend there is no penalty triggering the right to travel (and strict scrutiny) because there is no evidence of a discriminatory purpose. Brief in Response at 23-24. Respondents cite no case law for the proposition that such a purpose is required. In any event, even when carefully choosing their words, the Respondents have admitted a discriminatory purpose: They want to deny benefits to those less "likely to stay in Texas," which they have defined as newer arrivals to Texas. *See* Brief in Response at 6, 9. Imbedded in this purpose is a discriminatory belief that new arrivals to Texas (whether they hail from Georgia or another country) are less loyal and are permanently deserving of second-class treatment. This is unconstitutional. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986) ("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.").

Respondents incorrectly suggest right to travel and strict scrutiny cases are confined to cases in which the benefit is "essential." Brief in Response at 9. First, education is essential to veterans. Second, there is no such limitation to right to travel cases. Instead, the case law is clear that the right to travel and strict scrutiny is applied where there has been a "penalty," which includes permanently unequal treatment once travel is completed. *See* Petition at 16-18 and n.4-7.

Respondents argue there has been no penalty because a college tuition exemption is a "gratuity" that is "not constitutionally required." Brief in Response at 25. This newly crafted "gratuity" exception finds no support in the case law when analyzing permanent deprivations of benefits.

Respondents again advance the blatant falsehood that Petitioner Harris "lost nothing" upon moving to Texas and has therefore suffered no penalty. Brief in Response pg. 23. This is simply not true. He gave up all of his Georgia benefits, including those for veterans, when he gave up his Georgia residence to come to Texas over 10 years ago, and in any event the Constitution protects the right to be treated equally with those similarly situated once moving to a new state. *See* Petitioner's Brief at 18 and n.6-7. It is not clear why Respondents continue to ignore this fact. Those who come from landlocked states cannot be denied access to the pure gratuity of a Texas park at the beach simply because their prior states did not have such parks.

Respondents defend the Fifth Circuit's ruling and seek to distinguish the right to travel and strict scrutiny cases *Saenz* and *Shapiro* by claiming new residents denied Hazlewood benefits are only being treated differently than a special group of veterans, whereas new residents in *Saenz* and *Shapiro* were being treated "differently from the majority of state residents in terms of eligibility for welfare benefits." Brief in Response pg. 23. While this point is somewhat confusing, Respondents seem to be suggesting it matters

from a constitutional perspective that more people receive welfare benefits than Hazlewood benefits. There is no basis for this argument.

VII. RESPONDENTS HAVE NOT NEUTRALIZED THE DANGEROUS PRECEDENT SET BY THE FIFTH CIRCUIT'S DECISION

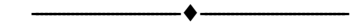
Finally, Respondents brush aside the Petitioner's hypotheticals about other contexts in which the Fifth Circuit's opinion could be used to discriminate, and contend Petitioner's hypotheticals "blur the distinction" between equal protection (rational basis) and right to travel (strict scrutiny) arguments. Brief in Response at 32. The Fifth Circuit's opinion creates huge holes by way of unworkable and nebulous exceptions regarding "portable benefits" and "prospective benefits" and "pure gratuities" that trump both equal protection and right to travel analysis, which is why they are so dangerous.

For example, the Respondents speculate that *Saenz*, a welfare right to travel case (526 U.S. 489), would likely disallow any attempt to limit Texas public high school to those who were already Texas residents in junior high school. Brief in Response at 33. But the Respondents fail to appreciate that *Saenz* would be inapplicable, because the Fifth Circuit has now adopted an unworkable portability exception to *Saenz*. Indeed, a high school diploma is portable, and thus *Saenz* would not apply. Moreover, although cost-saving rationales were rejected in *Saenz*, Texas would easily circumvent

this prohibition by arguing the law is not meant to save cost, but rather to "prospectively" incentivize junior high students to graduate from junior high. Texas has already shown a propensity to make such creative arguments in the context of defending Hazelwood Act discrimination.

As to the state admitting any improper motives or designs (whether well-intentioned or not), it would of course never be necessary to expressly admit racial, national, or other improper discrimination against suspect classes because the exceptions in the Fifth Circuit's opinion would do the heavy lifting, and because they can mask any and all true motives. Targeting new arrivals to the United States from Mexico would never be expressly done. Instead, a law would simply be innocuously written with a purpose of incentivizing those who are already in the country, or whose parents were already residents.

In short, the only way the Respondents can argue against other applications of the Fifth Circuit's opinion is by ignoring the very exceptions and standards created by it.



CONCLUSION

The 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