

STATE OF TENNESSEE

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Opinion No. 08-36

Constitutionality of the eligibility criteria for the Tennessee Hope Scholarship under Tenn. Code Ann. § 49-4-926

QUESTION

Do the eligibility criteria codified under Tenn. Code Ann. § 49-4-926 unconstitutionally discriminate against the dependent children of members of the military on active duty who lawfully reside in Tennessee?

OPINION

The criteria under Tenn. Code Ann. § 49-4-926 governing eligibility of dependent children of members of the military for the Tennessee Hope Scholarship are constitutionally suspect.

ANALYSIS

“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.” *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 910, 106 S.Ct. 2317, 2325, 90 L.Ed.2d 899 (1986) (citing *Hooper v. Bernalillo*, 472 U.S. 612, 105 S.Ct. 2826, 86 L.Ed.2d 487 (1985)); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 551, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, n. 25, 99 S.Ct. 2282, 2296, n. 25, 60 L.Ed.2d 870 (1979)). To that end, the provisions of Tenn. Code Ann. § 49-4-926, dealing with eligibility of dependent children of active members of the armed forces and national guard for the Tennessee Hope Scholarship, read:

(a) Notwithstanding any provision of this part to the contrary, a student who is a Tennessee citizen, and a dependent child of a military parent, shall be eligible for a Tennessee HOPE scholarship as an entering freshman, if such student meets all eligibility requirements for such scholarship, except that, while the parent is a military parent, the student does not reside in Tennessee immediately preceding the date of application for financial assistance; and the student did not graduate from an eligible high school, as defined in § 49-4-902([9]), graduate from a Tennessee high school that is not an eligible high school, complete high school in a Tennessee home school program, or obtain a GED from a state-approved institution or organization. If such student graduated from a high school outside of Tennessee, then such high

school shall be considered an eligible high school for purposes of determining the student's eligibility for a scholarship, if the school was operated by the government of the United States, accredited by the appropriate regional accrediting association for the state in which the school is located, or accredited by an accrediting association recognized by the foreign nation in which the school is located. If such student graduated from a high school outside of Tennessee that does not meet the requirements of this section to be considered an eligible high school, completed high school in a home school program, or obtained a GED, then such student shall meet the eligibility requirements for Tennessee HOPE scholarships for students graduating from Tennessee high schools that are not eligible high schools.

(b) As used in this section:

(1) "Dependent child" means a natural or adopted child or stepchild whom a military parent claims as a dependent for federal income tax purposes; provided, however, that such child is under twenty-one (21) years of age, and resides in another state or nation only while the military parent is engaged in active military service, on full-time national guard duty, or actively employed by the department of defense;

(2) "Military parent" means a parent of a dependent child who is:

(A) A member of the armed forces engaged in active military service of the United States and stationed on active duty outside of Tennessee;

(B) A member of the Tennessee national guard engaged in active military service of the United States and stationed on active duty outside of Tennessee; or

(C) A full-time civilian employee of the department of defense working outside of Tennessee; and

(3) "Tennessee national guard" means any federally recognized unit of the Tennessee army and air national guard.

(c) *This section shall only apply to:*

(1) *Dependent children of members of the armed forces or Tennessee national guard whose home of record, at the time of entry into military service, was determined to be Tennessee; and*

(2) Dependent children of full-time civilian employees of the United States department of defense, who are legal residents of Tennessee.

(emphasis added). This statute grants an advantage to the dependent children of active military personnel who are Tennessee residents, allowing them to receive the Hope Scholarship even though they did not attend high school in Tennessee. The advantage is granted, however, only if the

military parent was a resident of Tennessee upon entry into the armed forces. As written, the statute differentiates between Tennessee citizens who are the dependent children of military personnel who entered military service while a resident of a state other than Tennessee and the dependent children of military personnel who entered military service while a resident of Tennessee. The United States Supreme Court has ruled that such a distinction may raise constitutional questions as it may deter a citizen's right to travel freely between states. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986).

In *Soto-Lopez*, the Supreme Court invalidated provisions of the New York Constitution and Civil Service Law which granted a civil service employment preference to New York residents who are honorably discharged veterans of the Armed Forces, serving during time of war, and were New York residents when they entered the military. *Id.* at 911-912. Justice Brennan, writing for himself and three other Justices, concluded that the "veterans' preference violates . . . constitutionally protected rights to migrate and to equal protection of the law." *Id.* at 911. The plurality ruled that veterans may not be discriminated against solely on the basis of the date of their arrival in the State. *Id.* The plurality concluded that as long as New York chooses to offer veterans a civil service preference, the Constitution requires that it do so without regard to residence at the time of entry into military service. *Id.* at 911-912. Chief Justice Burger and Justice White also voted to invalidate the New York scheme, not because it implicated the right to migrate but rather because, in their view, the distinction drawn by the statute was completely irrational. 447 U.S. at 912-916.

The Supreme Court has a long history of recognizing the freedom to travel throughout the United States as a basic right under the Constitution. *Id.* at 901. (citations omitted); *Saenz v. Roe*, 526 U.S. 489, 498-499, 119 S.Ct. 1518, 1524, 143 L.Ed.2d 689 (1999). The Court has made it clear that the freedom to travel includes the "freedom to enter and abide in any State in the Union." *See Soto-Lopez*, 476 U.S. at 902. The recognized right to free interstate travel has been accredited to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause and to the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* The Court will also rely on the Equal Protection Clause and "undertake intensified equal protection scrutiny of the law" when the creation of different classes of residents raises equal protection concerns. *Id.* at 904. Additionally, the right has "been inferred from the federal structure of government adopted by our Constitution." *Id.* at 902. While the origins of the right to free interstate travel have not been isolated, the right to travel has been repeatedly recognized by the Court and is firmly established in case law. *Id.* at 903.

There are three situations in which a state law might implicate the right to travel: when it actually deters such travel; when impeding travel is its primary objective; or, when it uses "any classification which serves to penalize the exercise of that right." *Id.* The inquiry becomes whether the distinction drawn by the State between older and newer residents burdens the right to migrate among the states. If the distinction creates such a burden, the State will be required to articulate a compelling justification for the distinction. *Id.* at 904. The timing of an individual's migration should not become a disadvantage and be a basis for being treated differently from other similarly situated residents. *Id.* Heightened scrutiny is triggered when a state law "operates to penalize those persons . . . who have exercised their constitutional right of interstate migration." *Id.* at 905.

The Supreme Court further instructed that the “‘right to travel’ . . . embraces at least three different components. 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.” *See Saenz*, 526 U.S., at 500, 119 S.Ct. 1518. It is the right to be treated like other citizens of the State that is implicated by the provisions of Tenn. Code Ann. § 49-4-926.

In Tennessee, assuming all other eligibility criteria are met, a student who attended high school in another state is eligible for the Tennessee Hope Scholarship if the student’s parent is a member of the military, as long as the parent entered into the military while a resident of Tennessee. This creates the possibility that dependent students, who are otherwise similarly situated, will be treated differently based upon where their family resided when the parent entered into military service. *See* Tenn. Code Ann. § 49-4-926. Such a differentiation would result in the permanent deprivation of a significant state benefit, based solely on the fact that one parent was not a resident at a past point in time. In the view of the *Soto-Lopez* plurality, this result operates to penalize some dependent students’ parents for exercising their rights to migrate. *Soto-Lopez*, 476 U.S. at 909. Because “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[,]’” the provisions of Tenn. Code Ann. § 49-4-926 are constitutionally suspect and susceptible to challenge. *Soto-Lopez*, 476 U.S. 898, 908. (quoting *Hooper v. Bernalillo*, 472 U.S. 612, 105 S.Ct. 2826, 86 L.Ed.2d 487 (1985); *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982)). Alternatively, even if the distinction drawn by Tenn. Code Ann. § 49-4-926 is not deemed to burden the right to travel, it still must be supported by a rational basis in order to survive constitutional scrutiny. *See Soto-Lopez*, 476 U.S. at 912 (Burger, C.J., concurring). Because none readily appears, the statute is vulnerable to attack on that basis as well.

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