

# IN THE SUPREME COURT OF TEXAS

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No. 98-0679  
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WARREN LEE TUNE, PETITIONER

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS  
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**Argued on October 6, 1999**

JUSTICE ABBOTT, joined by JUSTICE BAKER, JUSTICE HANKINSON, and JUSTICE O'NEILL, dissenting.

I would hold that when a person who paid a nonrefundable application fee challenges the denial of a concealed-handgun license, there is no amount in controversy, and therefore the court of appeals lacked jurisdiction over this case. Accordingly, I dissent.

A license-denial case, like this one, is not an ordinary lawsuit in which a party files suit in court pleading damages or seeking the recovery of any amount. Rather, the Legislature has set up a unique system for the review of administrative handgun-license decisions. Under that system, the applicant first applies to DPS for the license. *See* TEX. GOV'T CODE § 411.174. If DPS denies the application, the applicant may request a hearing. *See id.* § 411.180(a). On receipt of the applicant's request for a hearing, DPS, not the applicant, files a petition in the appropriate justice court. *See id.* § 411.180(b). The justice of the peace then determines whether DPS's denial of the application is

supported by a preponderance of the evidence. *See id.* § 411.180(c). The applicant does not seek — and the justice court cannot award — the recovery of any damages or any other monetary relief. *See id.* (providing that, if the agency’s denial is not supported by a preponderance of the evidence, the court shall order DPS to immediately issue the license to the applicant). Rather, the justice of the peace merely acts as an administrative officer in affirming or reversing the agency’s decision to deny the license. *See id.* § 411.180(a) (“In a proceeding under this section, a justice of the peace shall act as an administrative hearing officer.”). Thus, the amount of the fee is not “in controversy.” The Court creates a fiction when it concludes that the \$140 application fee is an amount in controversy or is an amount “originally sued for.” \_\_\_ S.W.3d at \_\_\_, \_\_\_. Tune sought no monetary relief, nor could he. There simply is no amount in controversy in this case.

Nonetheless, even if the application fee constituted an amount in controversy, I would hold that the \$100 amount-in-controversy requirement has not been satisfied. Tune paid a \$70 application fee, not a \$140 application fee. The Court attempts to avoid this fact by likening Tune’s prorated two-year license to a reduced-fee four-year license: “[W]e can see no principled reason why an appeal should be allowed if an applicant pays \$140, but denied for *the same license* if the applicant is like Tune and pays only \$70 at DPS’s discretion for DPS’s administrative convenience, or is indigent and pays only \$70, or is a senior citizen who pays only \$70, or is a retired peace officer who pays only \$25.” *Id.* at \_\_\_ (emphasis added).

But unlike a reduced-fee four-year license, a prorated two-year license is not *the same license* as a four-year license. A person who receives a reduced-fee four-year license and a person who receives a license for \$140 are both “subject to all of the same duties and obligations” for the same

four-year period. *Id.* at \_\_\_. But a person, like Tune, who receives a two-year prorated license is subject to those duties and obligations for only half as long. The Court bases its holding on the theory that “the amount of money that a state’s citizens are willing to pay for a privilege is some evidence of its value.” *Id.* at \_\_\_. While there may be some evidence that Texas citizens are willing to pay \$140 for a four-year concealed-handgun license, there is no evidence that those citizens would pay \$140 for a two-year license. Thus, even under the Court’s amount-in-controversy analysis, the court of appeals lacked jurisdiction over Tune’s case.

Perhaps even more troubling is the possibility that the Court’s opinion may vastly broaden courts of appeals’ jurisdiction to cases that the Legislature did not intend to be appealable to the courts of appeals. Under the Court’s holding that a license fee is some evidence of the amount in controversy, the courts of appeals gain jurisdiction over all license and permit disputes in which the related fees exceed \$100. By my last count, this includes more than 350 licenses and permits issued by the State of Texas. *See, e.g.*, TEX. ALCO. BEV. CODE § 51.05 (setting fee for original minibar permit at \$2000); TEX. PARKS & WILD. CODE § 45.003 (requiring a minimum \$100 fee for a class-1 commercial game bird breeding license); *id.* § 47.010 (requiring a minimum \$250 fee for a wholesale truck dealer’s fish license). Surely the Legislature did not intend for jurisdiction in the courts of appeals – which is mandatory, not discretionary – to arise from the denial or revocation of all these licenses and permits. But that is the result of today’s holding.

I believe that the Court’s conclusion is contrary to the Legislature’s intent. The Legislature has seemingly recognized — if not intended — that many license-denial or license-suspension cases do not satisfy the amount-in-controversy requirement that triggers appellate review. Instead, the Legislature has established a framework governing the review of many licensing and administrative

decisions. For instance, the Legislature has made many licensing statutes expressly subject to the Administrative Procedure Act (APA), which potentially provides limited appellate review. *See, e.g.*, TEX. OCC. CODE § 1703.352 (providing that a proceeding for the refusal, suspension, or revocation of a license to administer polygraph exams is governed by the APA). Also, under section 2001.054 of the APA, some license decisions are subject to contested case hearings and any appellate review provided by the APA. *See* TEX. GOV'T CODE § 2001.054 (“The provisions of this chapter concerning contested cases apply to the grant, denial, or renewal of a license that is required to be preceded by notice and opportunity for hearing.”). Notably, whatever appellate review is afforded by the APA is not invoked here because the Handgun Act specifically prohibits its application. *See id.* § 411.180(a) (“A hearing under this section is not subject to Chapter 2001 (Administrative Procedure Act).”).

In sum, I would reject DPS’s arguments that the nonrefundable application fee satisfies the amount-in-controversy requirement. The action establishing original jurisdiction in the justice of the peace court is merely a hearing to determine whether the license denial was supported by a preponderance of the evidence. Thus, I would hold that the court of appeals lacked jurisdiction under the general grant of jurisdiction in Article V, section 6 of the Texas Constitution.

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GREG ABBOTT  
JUSTICE

OPINION DELIVERED: July 6, 2000