

Case No. 05-3309

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

KRISTEN DAY, et al.,

Plaintiffs/Appellants,

v.

RICHARD BOND et al.,

Defendants/Appellees,

and

**HISPANIC AMERICAN LEADERSHIP ORGANIZATION and
KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS,**

Intervenors-Defendants/Appellees.

**On Appeal from the United States District Court
for the District of Kansas Case No. 04-4085-RDR
(Honorable Richard D. Rogers)**

**PLAINTIFF-APPELLANTS'
OPENING BRIEF**

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STATEMENT OF RELATED CASES

Appellants certify that there are no prior or related cases.

I. STATEMENT OF JURISDICTION

Appellants, Kirsten Day, along with 18 other similarly situated U.S. citizen students and four parents (hereinafter “Students”) appeal from an Order by the United States District Court for the District of Kansas, entered July 5, 2005 (376 F. Supp. 2d 1022, hereinafter “D. Ct. Order”). The District Court’s jurisdiction was invoked under 42 U.S.C. 1983, 8 U.S.C. 1331, and 8 U.S.C.1332. This Court’s jurisdiction is pursuant to 28 U.S.C. § 1291, which grants federal appellate courts jurisdiction to review “all final decisions of the district courts of the United States.” In accordance with Federal Rule of Appellate Procedure Rule 4(a), a timely notice of appeal was filed on August 1, 2005.

II. ISSUES PRESENTED FOR REVIEW

Did the District Court err as a matter of law:

1. In requiring the Students to possess a private right of action to bring their preemption claim under 8 U.S.C. § 1623?
2. In holding that no private right of action exists to bring a preemption claim under 8 U.S.C. § 1623 or 42 U.S.C. § 1983?
3. In holding that the Students lacked standing to challenge the implementation of KS.A. 76-731a under the Equal Protection Clause of the Fourteenth Amendment?

III. STANDARD OF REVIEW

The standard of review governing an order of dismissal under F.R. Civ. P. 56(c) is *de novo*. *Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004). Under this standard, the reviewing court is required to determine whether "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence is viewed "in a light most favorable to the non-moving party." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, at 1265 (10th Cir. 2004).

IV. STATEMENT OF THE CASE

Students filed suit against the defendant Kansas Board of Regents, the Governor, and particular university officials to restore the constitutional and statutory rights denied to them under color of state law. This case arises from the Kansas Legislature's 2004 enactment, and the Defendants' implementation, of K.S.A. 76-731a, titled "Certain persons without lawful immigration status deemed residents for purpose of tuition and fees." The intent and effect of this statute was to make certain aliens who are not lawfully present in the United States eligible for resident (or "in-state") tuition rates at Kansas postsecondary educational institutions while denying those benefits to U.S. citizen students classified as nonresidents by those institutions.

The Students asserted in their complaint that K.S.A. 76-731a conflicts with federal regulations and statutes, and was thus preempted by the Supremacy Clause of the United States Constitution. Amd. Complaint, 10-26. The Students also argued that K.S.A. 76-731a violates their rights under the Equal Protection Clause of the U.S. Constitution. Amd. Complaint, 26-27. The Students requested declaratory and injunctive relief to invalidate K.S.A. 76-731a, enjoin its further enforcement, and enjoin the Defendants to reimburse Students for the excess tuition and fees erroneously charged to them. The Students sought this relief pursuant to 8 U.S.C. § 1623, which prohibits any state from providing "any postsecondary educational benefit" to aliens

not lawfully present in the United States unless any “citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope).” Amd. Complaint, 13-16.

The Defendants and Intervenors filed motions to dismiss, and the Students filed a motion to dismiss the Intervenor-Defendants. The District Court granted the Defendants’ and Intervenors’ motions to dismiss, which the Court converted to motions for summary judgment. The District Court held that the Students were required to establish a private right of action to bring their preemption claim under 8 U.S.C. § 1623, that no such private right of action exists, and that the Students lacked standing to bring their claim under the Equal Protection Clause.¹ The Governor of Kansas was dismissed as a party, and the plaintiffs’ motion to dismiss the Intervenor-Defendants was denied.

V. STATEMENT OF FACTS

On May 20, 2004, Kansas Governor Kathleen Sebelius signed Kansas House Bill 2145 into law (codified at KS.A. 76-731a), with an effective date of July 1, 2004. The Students are a diverse group of United States citizen students (and the parents of three dependent students) enrolled at the University of Kansas, Kansas State University or Emporia State University as graduate or undergraduate students, who have been classified as non-residents for purposes of payment of tuition and fees. (App. 1). Each has suffered financial injuries in the form of excess tuition and fees paid at non-resident rates during the period that aliens not lawfully present in the United States (hereinafter “illegal aliens”) were charged resident rates under the

¹ The District Court also held that the students lacked standing to bring five other related preemption claims.

direction of Appellees. Appellees conceded that during the 2004-2005 academic year, numerous illegal aliens attending Kansas postsecondary educational institutions availed themselves of the in-state tuition rates made available to them under KS.A. 76-731a. The Students argued that KS.A. 76-731a is clearly preempted by 8 U.S.C. § 1623:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The Students also argued that KS.A. 76-731a violates their rights under the Equal Protection Clause of the Fourteenth Amendment. They contended that K.S.A. 76-731a discriminates against U.S. citizens by providing in-state tuition benefits to aliens who are unable to establish legal residency in the United States (and therefore possess no lawful domicile in Kansas) while denying those same benefits to similarly situated U.S. citizen students who do not possess a domicile in Kansas.

VI. SUMMARY OF ARGUMENT

The District Court erroneously required the Students to establish a private right of action to bring their preemption claim under 8 U.S.C. § 1623. In doing so, the District Court inexplicably failed to apply the Tenth Circuit precedent of *Qwest Corp. v. City of Sante Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004), which states clearly that “A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.” The District Court also appeared to impose a novel rule of pleading, requiring the specific word “preemption” to be used in a plaintiff’s complaint in order to invoke the

Court's authority to adjudicate such a claim. See section VII, A, below.

Section VII, B, argues in the alternative that, if this Court were to overturn *Qwest* or to hold that it does not apply in this case, 8 U.S.C. § 1623 does create an implicit private right of action. The statute uses rights-creating language evincing congressional intent to create a private right of action. The focus of the statutory text and the use of terms of entitlement also support such intent. The legislative record further validates this conclusion. Finally, the phrasing of the statute, which does not use prohibitory terms, stands in stark contrast to the bulk of federal immigration law. This statutory construction must be interpreted to support the existence of a private right of action. *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979).

The District Court also erred in concluding that the Students lacked standing to bring a separate claim under the Equal Protection Clause of the Fourteenth Amendment. The Court declined to follow *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993), in which the Supreme Court held that it is *not necessary* for a party bringing an Equal Protection claim to show that it would have received the sought-after benefit if the challenged law were not in place. The Court also failed to address several forms of injury and redress presented by the Students. See section VII, C, below.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED BY REQUIRING STUDENTS TO ESTABLISH A PRIVATE RIGHT OF ACTION TO BRING THEIR PREEMPTION CLAIM UNDER 8 U.S.C. § 1623.

1. A Plaintiff Claiming that a State Law is Preempted by Federal Law Need Not Demonstrate that the Federal Law Provides for a Private Right of Action.

The students brought this action seeking a declaration that K.S.A. 76-731a is preempted by contrary federal law—8 U.S.C. § 1623—and an injunction against further enforcement of the preempted state statute. When a plaintiff makes a claim that a state statute is preempted by federal law, it is black-letter law in the Tenth Circuit that the *plaintiff need not demonstrate that the federal law provides for a private right of action*:

A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law. *A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.*

Qwest Corp. v. City of Sante Fe, 380 F.3d 1258, 1266 (10th Cir. 2004) (emphasis added and citations omitted).

2. Supreme Court and Circuit Court Precedents Fully Support the Tenth Circuit Rule in the *Qwest* Case.

Supreme Court opinions affirm the Tenth Circuit’s holding in *Qwest*. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Court explained that “[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.” *Id.* at 96. The Court concluded: “[I]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.” *Id.* The Supreme Court has applied this principle numerous times. In *Crosby v. National Foreign Trade Council*, 520 U.S. 363 (2000), the Court considered a preemption claim brought by a nonprofit corporation representing

companies engaged in foreign commerce. The Court determined that a similar federal law had preempted a Massachusetts law governing U.S. companies doing business in Burma. *Id.* at 388. The federal law, however, clearly did not create a private right of action. See generally David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L.R. 355, 396 (2004) (explaining that neither the text, legislative history, nor executive orders implementing the federal statute in *Crosby* indicated that Congress intended to create a private cause of action).

Crosby is just one example among many recent Supreme Court cases adjudicating preemption claims without requiring a showing that Congress intended for a private cause of action to exist in the federal preemptive statute. See, e.g., *Pharm. Research & Mfr. v. Walsh*, 538 U.S. 644 (2003) (preemption of state statute by federal Medicaid statute); *Ky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 644 (2003), (preemption of state statute by Employment Retirement Income Security Act (ERISA)); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002) (preemption of city ordinance by Interstate Commerce Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (preemption of state regulations by Federal Cigarette Labeling and Advertising Act); *United States v. Locke*, 529 U.S. 89 (2000) (preemption of state regulations by various federal statutes); *Foster v. Love*, 522 U.S. 67 (1997) (preemption of state statute allegedly preempted by federal election statutes); *De Buono v. NYSA-ILA Med. & Clinical Serv. Fund*, 520 U.S. 806 (1997) (preemption of state statute by ERISA); *Cal. Div. Of Labor Standards Enforcement v. Dillingham Const., N. A., Inc.*, 519 U.S. 316 (1997) (preemption of state statute by ERISA). In all of these cases, the Supreme Court reached the merits of the preemption claim without considering whether the federal statute created a private right of action. Furthermore, in many of these cases it is obvious that the federal statute did *not* create

a private right of action. See *Sloss* at 366 (“In most of these [preemption] cases, the allegedly preemptive federal statute does not create a private cause of action.”).

Decisions from other federal circuits also confirm that the Students in this case need not demonstrate that 8 U.S.C. § 1623 creates a private right of action in order to bring a preemption claim under that statute. The Second Circuit explained why a private right of action is not a prerequisite to bringing a preemption claim: a “claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.” *Western Airlines, Inc. v. Port Auth.*, 817 F.2d 222, 225 (2d Cir. 1987). Accordingly, “a claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law.” *Id.* See also *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003).

3. The District Court Erred in Failing to Apply the *Qwest* Precedent.

In its order, the District Court did not dispute the *Qwest* precedent that “[a] federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law.” *Qwest*, 380 F.3d at 1266. Nevertheless, the District Court declined to apply the *Qwest* precedent, apparently because the relevant section of the Students’ amended complaint did not expressly use the word “preemption,” when describing how the state statute violated federal law. According to the District Court:

Although only one of the claims in the amended complaint appeared to be a preemption claim, plaintiffs suggested that the first six claims were all preemption claims. The court notes that none of the claims other than Count 4 use the word preemption or preempt in them. Plaintiffs

apparently chose to take this approach because they believed they had clear Tenth Circuit authority, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), that allowed them to proceed on preemption claims without the requirement that the particular statute or series of statutes provided a private cause of action. This plan, however, did not cure the standing problem they faced on their claims.

D. Ct. Order at 24-25. Strangely, the District Court failed to explain why *Qwest* would not apply in this case. This passage in the District Court Order is rendered all the more confusing by the final sentence, in which the Court abruptly switches to the issue of standing, which is wholly unrelated to the *Qwest* precedent. However, the Court then acknowledged that the students *do* have standing to bring their claim under 8 U.S.C. § 1623. D. Ct. Order at 25.

The District Court's holding appears to be: Unless a plaintiff expressly uses the word "preemption" in that section of his complaint describing a preemption claim, the court will refuse to recognize the claim as a preemption claim. The District Court has apparently imposed an archaic formal rule of pleading, whereby the use of a particular term at a particular time is necessary to invoke the authority of the court. The District Court cited no legal authority for this rule. Indeed, the District Court's holding contradicts the pleading requirements of Fed. R. Civ. Pro. Rule 8(e)(1) ("No technical forms of pleadings or motions are required.") and Rule 8(f) ("All pleadings shall be so construed as to do substantial justice."). Moreover, as the District Court acknowledged, the Students' counsel used the term "preemption" repeatedly when describing this claim in subsequent briefs to the court and in oral arguments before the court. Counsel for the Appellees also described the claim as a preemption claim. See e.g., Defendants' Reply Memo. in Further Supp. of Mtn. to Dism. at 15.

The nuances of terminology do not change the simple fact that the students have always argued what is indisputably a preemption claim. It is possible that the

District Court may have been confused as to what exactly a preemption claim is. This is evident from the first sentence in the passage quoted above: “Although only one of the claims in the amended complaint appeared to be a preemption claim, plaintiffs suggested that the first six claims were all preemption claims.” D. Ct. Order at 24. All six were plainly preemption claims. See Amd. Complaint at 10-25. The District Court was apparently distracted by the choice of titles for the six relevant sections of the complaint, where the Students’ counsel included the term “preemption” in only one of the six titles. A preemption claim is, by definition, a claim that a state or local statute is contrary to federal law. “Preemption: The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.” BLACK’S LAW DICTIONARY, 8th Ed., at 1216 (Garner, Bryan A., Ed.) (2004). Specifically, the students’ claim under 8 U.S.C. § 1623 is a claim of “conflict preemption,” in which the state statute is in direct conflict with federal law or frustrates the purpose of Congress. As defined by the Supreme Court:

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2; ... [S]tate law is naturally preempted to the extent of any conflict with a federal statute. ... We will find preemption where it is impossible for a private party to comply with both state and federal law, and where “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” ... What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects....

Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)). The District Court failed to recognize that a claim that a state law conflicts with federal law is a preemption claim, by definition.

Moreover, it was obvious in the Students’ complaint that their claim under 8

U.S.C. § 1623 was a preemption claim. The complaint stated quite clearly that “8 U.S.C. § 1623 prohibits States from offering illegal aliens any postsecondary education benefit ‘on the basis of residence within a State.’ [KS.A. 76-731a] violates this prohibition and provides such benefits on the basis of residence in three ways.” Amd. Complaint at 14. “Unless and until judicial relief is granted, implementation of HB 2145 by Kansas postsecondary educational institutions under the direction of the Defendants violates and will continue to violate 8 U.S.C. § 1623.” Amd. Complaint at 16. Accordingly, the Students urge this Court to reverse the District Court’s holding, permit them to bring their preemption claim under 8 U.S.C. § 1623 regardless of the existence of a private right of action, and remand the case to the District Court for adjudication of this claim on the merits.

B. IF THE STUDENTS ARE REQUIRED TO ESTABLISH A PRIVATE RIGHT OF ACTION TO BRING THEIR PREEMPTION CLAIM UNDER 8 U.S.C. § 1623, SUCH A RIGHT OF ACTION EXISTS.

1. Congressional Intent Manifest in Rights-Creating Language is Controlling.

The second question presented in this appeal is entirely contingent upon this Court’s answer to the first question. If this Court agrees with the Students that the holding of the *Qwest* precedent applies, and a private right of action need not be established in order to bring their preemption claim under 8 U.S.C. § 1623, then this Court need not adjudicate the question of whether a private right of action exists. If, however, the District Court were correct in disregarding the *Qwest* precedent, then the appropriate test for identifying a such a private right of action would be that described in *Cort v. Ash*, 422 U.S. 66, 78 (1975), as refined by the Supreme Court in later cases, including *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001). As this Court has

summarized: “Now, ‘*Cort*’s four factors have been effectively condensed into one—whether Congress expressly or by implication, intended to create a private cause of action.”” *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1266 (10th Cir. 2004) (quoting *Sonnenfeld v. City & County of Denver*, 100 F. 3d 744, 747 (10th Cir. 1996)). “Statutory intent ... is determinative.” *Sandoval*, 532 U.S. at 286.

The primary indicator of such Congressional intent is rights-creating language:

In determining Congressional intent under this newer standard, we examine the statute for “rights-creating language,” *Sandoval*, 532 U.S. at 288—that which “explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979), and language identifying the “the class for whose especial benefit the statute was enacted,” *id.* 688 n. 9 (internal quotation marks omitted).

Boswell, 361 F.3d at 1266. “Such language must clearly impart an ‘individual entitlement,’ and have an ‘unmistakable focus on the benefitted class.’” *Sabree v. Richman*, 367 F.3d 180, 187 (3rd Cir. 2004) (quoting *Gonzaga University v. Doe*, 536 U.S. 273, 287). “For a statute to create such private rights, its text must be ‘phrased in terms of the persons benefitted.’” *Gonzaga University*, 536 U.S. at 283-84 (2002) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979)). In summary, the primary indicator of statutory intent to create a private right of action is rights-creating language, including statements of individual entitlement and phrasing that identifies a benefitted class.

2. 8 U.S.C. § 1623 Contains Unmistakable Rights-Creating Language.

The language of 8 U.S.C. § 1623 contains the rights-creating language necessary for the recognition of an implied right of action. The District Court’s lack of analysis on this point is noteworthy. The District Court devoted a cursory six

sentences to the topic and stated in conclusory fashion that it “fail[ed] to find any support that Congress intended to create a private right of action....” D. Ct. Order at 29-30. The Court did not analyze the language of 8 U.S.C. § 1623 and did not even address the legislative record of Congressional intent presented by the Students. The relevant text of 8 U.S.C. § 1623 is as follows:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

This text evinces Congressional intent to create a private right of action in five distinct ways.

First, 8 U.S.C. § 1623 “identif[ies] the class for whose especial benefit the statute was enacted,” in very specific terms. *Cannon*, 441 U.S. at 688 n. 9. Only one class of beneficiaries is given the statutory right to receive the same benefit provided to illegal aliens—the class of “citizen[s] or national[s] of the United States” attending postsecondary educational institutions in the relevant state. Congress specified this class of beneficiaries narrowly, even though a prohibition against granting postsecondary education benefits to illegal aliens is beneficial to other classes and entities. The federal government benefits, because “it is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.” 8 U.S.C. 1601(6). The state benefits, because its financial resources are conserved. The broader classes of all U.S. citizens and of lawfully-admitted aliens benefit, because the rule of law is preserved. However, none of these classes are expressly identified in 8 U.S.C. § 1623. The sole beneficiary class designated in the statute is the class of citizens or nationals of the United States from other states

attending postsecondary educational institutions in the state—not the government of the United States, the state, lawfully-admitted alien students, or aggrieved citizens of the United States or of Kansas. Accordingly, it is plain from the statutory text that 8 U.S.C. § 1623 was enacted for the especial benefit of that carefully-defined class.

Second, Congress drafted the text of 8 U.S.C. 1623 to focus on the benefiting class. The District Court repeated, without explanation, the Appellees’ assertion that “the focus of § 1623 is illegal aliens, not citizens.” D. Ct. Order at 29. However, this is clearly not the case; the plain language and grammatical structure of the federal statute focuses on students who are United States citizens. 8 U.S.C. § 1623 consists of a single sentence, structured as follows: “*a* shall not be eligible unless *b* is also eligible.” The class that is given preference in the text of § 1623 is clearly *b* (the U.S. citizen students). In statutory construction cases concerning the existence of a private right of action, the Supreme Court has used the term “focus of the statute” to refer to the statutory language describing the rights of the class given preference. *Univs. Research Ass’n v. Coutu*, 450 U.S. 754, 772-774 (1981)(using “language and focus of the statute” as a single factor); *Conn. v. Teal*, 457 U.S. 440, 453 (1982)(identifying the focus of 42 U. S. C. § 2000e-2(a)(2)). It cannot be said that the provision was enacted for the especial benefit of illegal alien students. It can only be said that the provision was enacted for the especial benefit of U.S. citizen students. While the statute describes the “limitation on eligibility” of illegal alien students, the preponderance of the text focuses on a description of the right of the U.S. citizen students to eligibility for equal or better treatment.

The District Court sought to bolster its statement about the focus of 8 U.S.C. § 1623 with an allusion to *Alexander v. Sandoval*: This focus... “creates no implication of an intent to confer rights on the [the plaintiffs].” D. Ct. Order at 29-30 (*quoting*

Sandoval, 532 U.S. at 289). However, the District Court failed to recognize a decisive difference between the statute construed in *Sandoval* and the statute at issue in this case. In *Sandoval*, the Supreme Court considered whether Section 602 of Title VI of the Civil Rights Act of 1964 created a private right of action to bring disparate-impact lawsuits. Importantly, not only did Section 602 not focus on the benefiting class, it *did not even mention the benefiting class*. Instead Section 602 referred only to the regulating agencies of the federal government. As the *Sandoval* Court concluded:

Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754 (1981), § 602 is “phrased as a directive to federal agencies engaged in the distribution of public funds,” *id.*, at 772. When this is true, “there [is] far less reason to infer a private remedy in favor of individual persons,” *Cannon v. University of Chicago*, *supra*, at 690-691.

532 U.S. at 289. In contrast, 8 U.S.C. § 1623 mentions no regulatory agency whatsoever, focusing instead on the benefiting class and its right to any benefits offered to illegal aliens.

Third, 8 U.S.C. § 1623 uses terms of entitlement. As the Supreme Court emphasized in *Gonzaga*, a case that also involved a private right of action asserted by university students and parents, the focus of the statute must include “the interests of individual students and parents” and must confer an “individual entitlement.” 536 U.S. at 287 (*quoting Blessing v. Freestone*, 520 U.S. 329, 343 (1997)). The act at issue in that case—the Family Educational Rights and Privacy Act of 1974 (FERPA)—focused on the federal government’s exercise of the spending power as an enforcement

mechanism to compel compliance by educational institutions.² Because FERPA focused on the federal regulatory agency and *did not mention any entitlement* held by students, the Court found no right of action. *Gonzaga*, 536 U.S. at 287-91.

The contrast between FERPA and 8 U.S.C. § 1623 could not be more stark. 8 U.S.C. § 1623 does not mention any enforcement mechanism or agency, does not mention the educational institutions, and speaks expressly in terms of entitlement. The phrasing of the statute makes students “eligible” for a “benefit.” 8 U.S.C. § 1623. Moreover, the students’ right to this benefit is described in sweeping terms. The right extends to any postsecondary education benefit offered to an alien who is not lawfully present in the United States “in no less an amount, duration, and scope.” Although the entitlement varies according to the entitlement provided to another class—it includes those postsecondary education benefits offered to illegal aliens in the state—the Supreme Court has recognized a private right of action in such cases. See, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238, (1969) (finding implied right of action in 42 U.S.C. 1982: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”) A Congressional statement that one class shall be afforded the same rights held by another class is sufficient to create a private right of action. *Id.*

Fourth, it is particularly significant that Congress chose not to use the normal,

²FERPA proscribed certain practices by educational institutions, restricted federal funds to institutions that did not comply, and directed the Secretary of Education to establish an office and review board for “investigating, processing, reviewing, and adjudicating violations of [the Act].” 20 U.S.C. § 1232g(g).

prohibitory language that is found throughout federal immigration law.³ Congress could have followed the predominant form and drafted a statute that simply read, “No state shall provide any post-secondary education benefit to any alien who is not lawfully present in the United States.” Instead, Congress chose strikingly different language when drafting 8 U.S.C. § 1623. Congress chose to identify a benefiting class whose members were entitled to the same “benefits” provided to illegal aliens. As the Supreme Court noted in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), a Congressional decision to forego straightforward prohibitory language and to choose instead to identify a benefiting class is of decisive significance:

There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

Cannon, 441 U.S. 677 at 690-693. The identification of a benefiting class in a statute has almost always been sufficient to prompt Supreme Court recognition of a private right of action:

With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Id. at 690 n. 13 (citations omitted).

Fifth, 8 U.S.C. § 1623 contains no specification of an administrative remedy, criminal penalty, or any remedial scheme whatsoever. Consequently, the Secretary of

³ See, e.g., 8 U.S.C. § 1324 (prohibition of bringing in and harboring certain aliens), 8 U.S.C. § 1324c (prohibition of producing, using, or accepting forged documents), 8 U.S.C. § 1325 (prohibition of improper entry by alien).

Homeland Security has never issued regulations or administrative guidance regarding enforcement of this statute. In contrast, throughout the rest of federal immigration law, virtually every obligation imposed by law is followed by a description of the administrative or criminal mechanisms used to enforce that obligation. The Supreme Court has stated that the inclusion of a remedial scheme in a particular provision will be taken as evidence that Congress did not intend to create a private right of action to enforce the provision. In *Sandoval*, the Court found the inclusion of administrative remedies in § 602 of Title VI of the Civil Rights Act of 1964 to be evidence of intent not to create a private right of action: “Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. ... The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” 532 U.S. at 289-90 (citations omitted). Conversely, in this case, administrative enforcement mechanisms and criminal penalties were omitted from 8 U.S.C. § 1623. The decision of Congress not to provide an administrative process for implementation or enforcement, or to specify any sanction that could be imposed by a federal agency on State officials violating 8 U.S.C. § 1623, strongly infers that Congress intended that members of the beneficiary class described in the provision would be able to secure their rights to the public benefits at issue in federal court.

3. Evidence of Legislative Intent Supports a Private Right of Action.

The rights-creating language of 8 U.S.C. § 1623 reflects the manifest statutory intent of Congress. It is plain from the record of Congressional deliberations that this legislation was drafted with the intent of protecting the *right* of U.S. citizens to be treated no worse than illegal aliens with respect to eligibility for in-state tuition

benefits. In the words of Senator Alan Simpson, the legislation's principal sponsor in the Senate: "Without the *prohibition on States treating illegal aliens more favorably than U.S. citizens*, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges." 142 Cong. Rec. S 11508 (Sept. 27, 1996) (emphasis added). Senator Simpson did not describe the provision as a regulation. Rather, he conceived of it as protecting U.S. citizens' right to equal treatment. And this right prohibited states from acting to the contrary.

Senator Paul Coverdell also described the provision as protecting the right of U.S. citizens to be treated no worse than illegal aliens: "Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges." 142 Cong. Rec. S 11507 (Sept. 27, 1996).

Opponents of the provision also conceived of eligibility for in-state tuition as a "right." Representative Daniel O. Lipinski of Illinois introduced an amendment that would have allowed certain Polish and Hungarian immigrants to become lawful permanent residents, entitled to in-state tuition. He described this entitlement as a right: "Without residency or citizenship, they lack some of the *rights* Americans take for granted. These include the ability to qualify for in-state resident tuition at public universities and the right to travel internationally at will." 142 Cong. Rec. E413 (Mar. 19, 1996) (emphasis added).

4. The Context of 8 U.S.C. § 1623 Supports a Private Right of Action.

The District Court stated flatly, without further analysis, that "Congress specifically designated the Secretary of Homeland Security as the individual in charge of enforcing immigration laws." D. Ct. Order at 29. Therefore, the District Court

implied, the Secretary of Homeland Security must be the sole party entitled to vindicate the rights described in 8 U.S.C. § 1623. The District Court was wrong on two counts.

First, although the Secretary is charged with enforcing the terms of immigration law in 8 U.S.C. § 1103, this statutory charge does not give the Secretary *sole* authority. For example, the Attorney General executes all of the criminal provisions of immigration law by bringing criminal prosecutions. Second, the District Court's simplistic statement ignores the fact that the tribunals⁴ designated by Congress as the enforcement mechanism for immigration law cannot be used by the Secretary of Homeland Security to compel a State to obey 8 U.S.C. § 1623. The comprehensive remedial scheme available to enforce immigration laws against aliens (or their U.S. sponsors) is therefore inapplicable.

In fact, 8 U.S.C. § 1623 is an unusual provision of federal immigration law. Federal immigration law is chiefly concerned with the regulation of immigrant and nonimmigrant alien activity in the United States, the removal of aliens not lawfully present, and the prosecution of their smugglers and employers. However, 8 U.S.C. § 1623 is one of only three sections in all of federal immigration law that constrains the actions of *States*, rather than private individuals or entities.⁵ Any State violating 8 U.S.C. § 1623 undermines the federal government's "compelling government interest" in "remov[ing] the incentive for illegal immigration provided by the availability of

⁴ These tribunals are chiefly the immigration courts and the Office of the Chief Administrative Hearing Officer within the Executive Office for Immigration Review, and the Office of Special Counsel for Immigration-Related Employment Discrimination, both of the Department of Justice, and the Office of Administrative Law Judges of the Department of Labor.

⁵ The other provisions that constrain the actions of states are 8 U.S.C. 1621 and 8 U.S.C. 1373 (duplicated at 8 U.S.C. 1644).

public benefits.” 8 U.S.C. 1601(6). The need for private legal action arises directly from a state actor’s open resistance to federal law. In devising an appropriate legal mechanism to bring a recalcitrant State into conformity with federal immigration law, without curtailing the ability of States to reserve state educational resources for their own bona fide residents, it was entirely rational for Congress to expect a private right of action was particularly well-suited to this task. The exercise of a private right of action under 8 U.S.C. § 1623 does not require any party or court to adjudicate any alien’s legal status or to otherwise regulate immigration in any way. Thus, it requires no “enforcement of immigration law” in the usual sense. It simply requires a court to engage in statutory interpretation in adjudicating a preemption claim. It is therefore reasonable to conclude that Congress intended this provision of federal immigration law to confer a right of action on the private parties specifically designated in the text of the statute.

5. Federal Courts Have Recognized Implied Rights of Action in Other Provisions of Immigration Law.

The District Court’s statement about the Secretary of Homeland Security also proves too much. If it were true that the statutory identification of a Secretary entitled to enforce immigration laws served to rule out any private right of action in federal immigration law, then no court could properly find that such a private right of action exists. However, numerous federal courts have recognized that private U.S. citizens possess an implied right of action to bring suit under particular provisions of federal immigration law, especially those that protect U.S. workers’ right to earn a livelihood without injurious competition from alien workers. In *Manuel Vega v. Nourse Farms Inc.*, 62 F.Supp. 2d 334 (D. Mass. 1999), the Court found an implied private right of

action for U.S. workers to bring suit against employers for violations of 8 U.S.C. 1101(a)(15)(H)(ii) and 8 U.S.C. 1188. There, as here, the relevant provisions of immigration law demanded that U.S. citizens not be discriminated against. 62 F. Supp. 2d at 341 (*quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982) (“...nor are United States workers to be discriminated against in favor of foreign workers.”)). An implied right of action was found even in the presence of an administrative enforcement mechanism, in part because the mechanism was “ineffectual” and because the federal government had never used it to sanction employers. *Id.* at 342. A private civil action provided “the only effective tool to secure the rights of workers whose protection was the explicit goal of the statute enacted by Congress.” *Id.* at 344. In *International Union of Bricklayers and Allied Craftsmen v. Meese*, 245 U.S. App. D.C. 395, 801-803 (D.C. Cir. 1985), the D.C. Circuit held that U.S. workers possessed a right of action to challenge an erroneous administrative interpretation of “the proper manner by which nonimmigrant aliens shall be admitted to perform labor” as set forth in 8 U.S.C. § 1101(a)(15)(H) and 8 U.S.C. § 1182(a)(14)). Other federal courts have recognized a private right of action in the same context.⁶ Thus, the District Court’s conclusion runs contrary to this long line of case law.

6. Plaintiffs Possess a Private Right of Action under 42 U.S.C. 1983.

⁶ See, e.g., *International Longshoremen’s and Warehousemen’s Union v. Meese*, 891 F. 2d 1374 (9th Cir. 1989); *Garrison v. OCK Construction*, 864 F. Supp. 134 (D. Guam 1993) (implied private right of action existed for U.S. worker *against an employer* arising from the unlawful employment of temporary alien worker.); *Saxbe v. Bustos*, 419 U.S. 65 (1974) (farm workers and union had private cause of action to seek declaratory and injunctive relief for claimed erroneous interpretation of 8 U.S.C. 1101 and Part 8 of the Code of Federal Regulations).

In addition to the implied right of action created by Congress in 8 U.S.C. § 1623, the students also possess a right of action under 42 U.S.C. § 1983 to enforce the federal statutory right created by 8 U.S.C. § 1623. The students asserted this Section 1983 right of action before the District Court, Pl. Resp. to Def. Second Mtn. to Dis. at 29-30. But the District Court did not address Section 1983 at all.

Section 1983 creates a private right of action for a party to bring a suit in law or equity arising from “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws....” As described above, 8 U.S.C. § 1623 provides the students with a statutory *right* to any post-secondary education benefits provided by a state to illegal aliens. It also provides the students with the privilege of receiving those benefits “in no less an amount, duration, and scope.” The determination whether a federal statute creates a right enforceable through Section 1983 is as follows:

In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing, 520 U.S. at 340-41 (internal citations omitted).

The text of 8 U.S.C. § 1623 plainly meets the three *Blessing* criteria. First, not only is a benefit conferred upon the plaintiffs, the term “benefit” itself is used in the statutory text. Second, the right to this benefit is not vague and amorphous. It is expressly described as a right to the same postsecondary education benefit enjoyed by illegal aliens in the state. Enforcing such a right would in no way strain judicial

competence. And third, the statute imposes a binding obligation on the states, in mandatory terms. 8 U.S.C. § 1623 declares that a state “shall not” make an illegal alien eligible for such a benefit unless a citizen or national of the United States is also eligible, regardless of his state of residence. This language clearly imposes a binding obligation.

C. THE DISTRICT COURT ERRED IN HOLDING THAT THE STUDENTS LACK STANDING TO CHALLENGE KS.A. 76-731a ON EQUAL PROTECTION GROUNDS

1. The Constitutional Requirements of Standing.

A party seeking to invoke a federal court's jurisdiction must meet the three constitutional requirements of standing. First, the party must demonstrate “injury in fact,” which means “an invasion of a legally protected interest.” *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993). The invasion of a legally protected interest must be “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be “a causal relationship between the injury and the challenged conduct.” *Jacksonville*, 508 U.S. at 663. And third, there must exist “a likelihood that the injury will be redressed by a favorable decision.” *Id. Allen v. Wright*, 468 U.S. 737, 752 (1984).

2. The Students’ Four Forms of Injury and the Redressability of those Injuries.

The Equal Protection challenge brought by the Students is that K.S.A. 76-731a unconstitutionally discriminates against U.S. citizens and in favor of illegal aliens by

providing in-state tuition rates to illegal aliens with no legal domicile in Kansas. The Students and the illegal alien beneficiaries of K.S.A. 76-731a are similarly situated in that neither is domiciled in Kansas. Yet the statute discriminates against the former by excluding them from this benefit while awarding it to the latter. To summarize, there are four relevant “injuries” for the purpose of assessing the Students’ standing to bring this challenge:

- (1) The denial of equal treatment, in and of itself, caused by barriers in K.S.A. 76-731a making it impossible for nonresident U.S. citizens to obtain the benefits extended by the statute.
- (2) The increased tuition faced by Students, as the burden of subsidizing illegal alien beneficiaries of K.S.A. 76-731a is passed along to other students through tuition hikes.
- (3) The injury that results from competition for scarce tuition resources.
- (4) The extra tuition paid by nonresident Students during the 2004-2005 academic year over the in-state tuition paid by nonresident illegal aliens, as a consequence of the discriminatory operation of K.S.A. 76-731a.

The relief requested by Plaintiffs specifically redresses the four injuries described above:

- (1) Eliminating the unequal treatment by invalidating the program that distributes benefits in unconstitutionally discriminatory fashion.
- (2) Preventing the increased tuition that would have been paid by Students to bear the cost of the universities subsidizing the tuition of illegal aliens, by invalidating K.S.A. 76-731a.
- (3) Eliminating the injury stemming from the competition for scarce tuition resources by placing nonresident Students and nonresident illegal alien students back in the same tuition category (nonresident), by invalidating K.S.A. 76-731a.
- (4) Compensating Students for the extra tuition paid since July 1, 2004, by enjoining Appellees to provide tuition rebates or credits for future

semesters.

In reaching its conclusion that the Students lacked standing to bring their Equal Protection challenge to K.S.A. 76-731a, the District Court addressed only the first, second, and fourth of these injuries, saying nothing about the third. With respect to redressability, the Court only considered the first and second forms of relief. D. Ct. Order at 30-37. These flaws in the District Court Order are addressed in subsections 6 and 7 of this brief, below.

3. The District Court Erred in Declining to Apply the *Jacksonville* Precedent.

In *Jacksonville*, the Supreme Court provided specific guidance on the question of standing to bring an Equal Protection Clause challenge. There, the question was whether an association of contractors was required to show that one of its members would have received a city contract in the absence of the challenged city ordinance (a race-based set-aside program). The Court held that it is *not necessary* for a party bringing an equal protection claim to show that it would have received the sought-after benefit if the challenged law were not in place. 508 U.S. at 664-666. In the words of the Court:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.*

Id. at 666 (emphasis added).

In this case, the “barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group” is chiefly Section 1(c)(2)

of K.S.A.76-731a, which denies benefits to any individual who “is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.” This barrier excludes U.S. citizens who would not already be classified as Kansas residents in the absence of K.S.A.76-731a—since state residency laws operate in complementary fashion to ensure that all U.S. citizens possess a state of domicile. At the same time, it is impossible for an illegal alien not to meet the requirement of Section 1(c)(2). K.S.A.76-731a as a whole also constitutes a barrier that makes it more difficult for U.S. citizens to obtain the benefit of in-state tuition, since the phrasing of Sections 1(b)(2)(C) (the requirement that a beneficiary sign an affidavit pledging to legalize his status or apply for citizenship when it becomes possible to do so), and 1(d) (requirements that a beneficiary obtain permanent legal immigrant status or naturalized citizen status in the future) clearly reflect the Kansas Legislature’s intent to confer in-state tuition benefits *only* on illegal aliens. This was the intent of the Legislature when it passed the statute, according to the sponsor of the bill: “[Representative Sue Storm] said the Legislature never contemplated the law being used by U.S. citizens—just undocumented immigrants. ‘This is really about what price they pay,’ she said.” Chris Moon, *Tuition Law Tested in Court: ‘We Can Say for Certain this Increases the Cost Burden,’* TOPEKA CAPITAL JOURNAL, May 11, 2005.⁷

⁷ In an effort to avoid this Equal Protection Clause challenge, the Appellees asserted before the District Court below that U.S. citizens might actually be able to obtain in-state tuition benefits under K.S.A. 76-731a, despite the fact that the text, title, and legislative intent of the K.S.A. 76-731a clearly exclude U.S. citizens. In support of this assertion, the Appellees offered a few cases of U.S. citizens who had apparently received benefits at two of the Kansas postsecondary institutions—Kansas State University and Wichita State University. However, depositions of the relevant officials at those two institutions revealed that the officials were not actually verifying whether applicants met the statutory requirements of K.S.A. 76-731a. In fact, none of the U.S. citizens were eligible. *See* App. 108-118.

The *Jacksonville* Court reached its holding in light of several earlier precedents, which also support the standing of the Students. With respect to its standing conclusion in *Turner v. Fouche*, 396 U.S. 346 (1970), which involved an equal protection challenge to a state law limiting school board membership to property owners, the *Jacksonville* Court stated: “All that was necessary was that the plaintiff wished to be considered for the position.” 508 U.S. at 665. Similarly, in *Clements v. Fashing*, 457 U.S. 957 (1982), the Court considered an “automatic resignation” provision in the Texas Constitution, which required the immediate resignation of some, but not all, officeholders upon their announcement of candidacy for another office. The plaintiffs would have announced their candidacy were it not for the adverse consequences of doing so. The Court concluded that the “obstacle to their candidacy” was sufficient to confer standing. *Id.* at 962. As the *Jacksonville* Court characterized the *Clements* holding, “we did not require any allegation that the plaintiffs would actually have been elected but for the prohibition.” 508 U.S. at 665. Similarly, the Students in this case need not show that they would have succeeded in obtaining resident status in the absence of K.S.A. 76-731a. As the Supreme Court concluded in *Jacksonville*, “the ‘injury in fact’ is the inability to compete on an equal footing....” *Id.* at 666 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (principal opinion of O’Connor, J.)). Plainly, U.S. citizens cannot compete for the benefits offered by K.S.A. 76-731a on an equal footing with illegal aliens.

This Court has adhered closely to the *Jacksonville* precedent: “The Supreme Court has stated that the denial of equal protection *is itself* the injury required to bring such a claim.” *Abdulhaseeb v. Saffle*, 65 Fed. Appx. 667, 673 (10th Cir. 2003) (emphasis in original) (citing *Jacksonville*, 508 U.S. at 666). “Injury in fact in an equal protection case like this may simply be the existence of a government-erected

‘barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.’” *Buchwald v. Univ. of New Mexico School of Medicine*, 159 F. 3d 487, 493 (10th Cir. 1998) (quoting *Jacksonville*, 508 U.S. at 666).

The District Court, however, declined to apply the *Jacksonville* precedent, asserting that the Supreme Court’s phrase “in an equal protection case of this variety” limited the applicability of the *Jacksonville* analysis to an extremely narrow range of circumstances—only those cases in which the benefit is already enjoyed by the plaintiff, prior to the challenged government action. Therefore, the District Court reasoned, the *Jacksonville* precedent does not apply because the Students were ineligible for in-state tuition rates before the passage of K.S.A. 76-731a. D. Ct. Order at 34-35 (quoting *Jacksonville*, 508 U.S. at 666).⁸ However, in *Jacksonville* the Supreme Court spelled out the meaning of its phrase “case of this variety” in the preceding sentence: “When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group....” *Jacksonville*, 508 U.S. at 666. The *Jacksonville* Court did not limit its holding to barriers creating unequal access to *existing* benefits. Nor did the Court even hint that such a limitation was intended. Whenever a state or locality imposes a barrier that makes it “more difficult for members of one group to obtain a benefit,” *id.*, the group excluded by that barrier has standing to challenge it under the Equal Protection Clause, regardless of whether the benefit is newly-created or already in place. That is precisely what K.S.A. 76-731a does. A new benefit is created—an avenue for nonresidents to obtain in-state tuition. But the benefit is intentionally limited using a

⁸ Of course, the illegal alien beneficiaries were also ineligible for in-state tuition rates before K.S.A. 76-731a was enacted. The Equal Protection Clause violation arises from the creation of a new benefit, which is made available only to members of a particular class while others are excluded using a quasi-suspect classification.

quasi-suspect classification: illegal aliens are eligible, but U.S. citizens are not. Finally, it should be noted that the District Court did not cite any authority for its cramped interpretation of the *Jacksonville* holding.

4. The Untenable Consequences of the District Court’s Holding.

The District Court asserted a novel standing doctrine that would deny any plaintiff standing to challenge a law that provides new benefits on a discriminatory basis, if the invalidation of the law would mean that no one receives the benefits. The invalidation of K.S.A. 76-731a would mean that the *status quo ante* would return, and all nonresidents (U.S. citizens and illegal aliens alike) would be denied access to in-state tuition rates. Under the District Court’s view, the Students cannot seek this outcome and still possess standing. According to the Court, “Plaintiffs will still pay out-of-state tuition rates even if the court found that K.S.A. 76-731a violated the Equal Protection Clause.” *Id.* at 37. Under the District Court’s theory, a plaintiff can only bring an Equal Protection challenge against the unconstitutional allocation of benefits under such a program if the remedy ordered by the court extends the benefits to the plaintiff too. The remedy of removing the discriminatory treatment is not enough to establish standing, according to the District Court.

This theory would dramatically roll back the jurisdiction of Article III courts to enforce the Equal Protection Clause. If the District Court’s view were correct, for example, a non-white student would lack standing to challenge a racially-discriminatory law providing new tuition discounts only to white students at a state university. If a court declared the law invalid, no one would be able to obtain the tuition discounts. Under the District Court’s theory, non-white plaintiffs would have no standing to bring an Equal Protection challenge, because they didn’t receive the

benefit before the enactment of the law; and they wouldn't receive the benefit after judicial invalidation of the law. Indeed, no one would have standing to challenge the law. Fortunately, the Supreme Court has never iterated such a doctrine. In Equal Protection cases involving access to government benefits or privileges, "the 'injury in fact' is the inability to compete on an equal footing," itself, not the denial of any benefit that would otherwise be obtained. *Jacksonville*, 508 U.S. at 666 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. at 493). The injury is the discriminatory treatment in violation of the Equal Protection Clause, regardless of whether it results in a different allocation of state benefits.

5. The District Court Erred in Applying the *Wilson* Precedent to this Case.

In declining to apply the Supreme Court's *Jacksonville* rule, the District Court relied primarily on a passage from the Tenth Circuit case of *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996). D. Ct. Order at 35. There are three fatal flaws in District Court's use of the *Wilson* case. The first flaw is that Court's interpretation of the *Wilson* holding contradicts *Jacksonville*. The Supreme Court's holding in *Jacksonville* is unambiguous: "a member of the ... group seeking to challenge the barrier *need not allege that he would have obtained the benefit but for the barrier in order to establish standing.*" *Jacksonville*, 508 U.S. at 666 (emphasis added). Moreover, it is clear that the Tenth Circuit has consistently applied the *Jacksonville* rule. "The Supreme Court has stated that the denial of equal protection *is itself* the injury required to bring such a claim." *Abdulhaseeb v. Saffle*, 65 Fed. Appx. 667, 673 (10th Cir. 2003) (emphasis in original) (citing *Jacksonville*, 508 U.S. at 666).

Injury in fact in an equal protection case like this may simply be the

existence of a government-erected ‘barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.’ ... It is not necessary for plaintiff to show that she would have received the benefit but for the operation of the policy, because the injury is the imposition of the barrier itself.

Buchwald v. University of New Mexico School of Medicine, 159 F. 3d 487, 493 (10th Cir. 1998) (quoting *Jacksonville*, 508 U.S. at 666). If the District Court’s interpretation of the *Wilson* case were correct, then the *Wilson* holding would stand in direct conflict with the *Buchwald* and *Abdulhaseeb* holdings.

The second flaw in the District Court’s use of *Wilson* reveals why there is, in fact, no conflict with *Buchwald* and *Abdulhaseeb*. The *Wilson* case *did not involve a challenge under the Equal Protection Clause*. Rather, the plaintiffs in *Wilson* challenged the defendant landlords’ renting practices under the Fair Housing Act (42 U.S.C. §§ 3601-3631) and challenged the landlords’ advertisement of the housing under 42 U.S.C. § 3604(c). There was no Equal Protection Clause issue before the Court. Indeed, in reaching its standing conclusion, the *Wilson* Court stated expressly that it was evaluating “[s]tanding under the Fair Housing Act.” The standing requirements necessary to bring an Equal Protection challenge are not the same as those necessary to bring a statutory challenge. See, e.g., *Comer v. Cisneros*, 37 F.3d 775, 788-92 (2d. Cir. 1994) (Circuit Court applied different standards in assessing standing to bring Equal Protection claim and Fair Housing Act claim). Accordingly, *Wilson* has no bearing on the question of standing to bring a constitutional claim under the Equal Protection Clause.

Assuming purely for the sake of argument that the *Wilson* case involved an Equal Protection Clause challenge, the District Court’s use of the case would be flawed in a third respect. The facts in *Wilson* are not analogous to the facts in this case. In *Wilson*, the plaintiffs were non-students challenging defendant landlords who

operated housing facilities in conformity with Brigham Young University’s policy segregating student housing by sex. *Wilson*, 98 F. 3d at 592. The Court in *Wilson* concluded that non-students had no standing to challenge the landlords’ decision not to rent to them under the Fair Housing Act. *Id.* at 593. Plainly, a non-student has no injury and no personal stake in a university policy governing the statutory rights of students with respect to certain landlords. A non-student is too far removed from the injury caused by unconstitutional discrimination in favor of one group of students and against another group of students. That is not the situation in this case, where the plaintiffs are members of the student community. Specifically, they are members of the nonresident student community that includes alien students. Unconstitutional discrimination within this community directly injures them.

6. The District Court Erred in its Consideration of the Four Forms of Injury.

As explained in subsections 3-5 above, the District Court erred in its consideration of the primary injury suffered by the Students—the unequal treatment itself, regardless of any financial impact. The Students’ exposure to unequal treatment in violation of the Constitution is injury enough to establish standing to bring an Equal Protection challenge. However, as noted in subsection 2 above, the Students suffered three additional forms of injury, including financial injuries. The third form of injury—that stemming from competition for scarce tuition resources—has long been recognized by the Supreme Court as sufficient to establish standing in Equal Protection Clause cases. “Adverse personal interest, even of such an indirect sort as arises from competition, is ordinarily sufficient to meet constitutional standards of justiciability. The courts may thereof by statute be given jurisdiction over claims based on such interests.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S.

123, 151 (1951) (citing *Federal Communications Comm'n v. Sanders Radio Station*, 309 U.S. 470 (1940)). Tuition subsidies are a scarce resource. The dollars that go to subsidize in-state tuition for illegal aliens will not be used to support the education of the nonresident Students, resulting in larger tuition amounts to be paid by the Students. The District Court was utterly silent on this point.

The second form of injury suffered by the Students—the increased tuition burden placed on the Students (and other out-of-state tuition payers)—was documented extensively before the District Court. By increasing the number of students receiving subsidized in-state tuition, K.S.A. 76-731a places upward cost pressure on the tuition rates paid by all students, driving nonresident tuition rates higher. This has been demonstrated empirically in states that have had laws similar to K.S.A. 76-731a in place for a longer period of time.⁹ The extent of this injury is

⁹ See Congressman Elton Gallegly, *TB Uptick*, VENTURA COUNTY STAR, March 20, 2005, p. 13 (“Illegal immigrants who enroll in the University of California system pay in-state tuition. Their educations are subsidized not only by Californians, but also by U.S. citizens who come to our state legally from Nevada, Oregon, Washington or Arizona and pay higher tuitions.”); Daniel K. Webster, *In-State Tuition for Illegal Aliens is a Bad Idea*, THE PATRIOT LEDGER, May 14, 2005, p. 14 (“[I]t is likely we would be admitting illegal immigrants to our state colleges and universities at the expense of out of state U.S. citizens, residing legally in our country. These same U.S. citizens pay tuition at a rate significantly higher than the in-state rate.”); Jeffrey Leib, *In-State Tuition Hikes at CU Stir Outrage*, DENVER POST, June 5, 2005, p. C-01 (“By paying considerably more in tuition, each nonresident student ‘subsidizes three resident students...’”); Amy Argetsinger, *William & Mary President to Move On*, WASHINGTON POST, June 19, 2004, p. A04 (“... the higher tuition non-Virginians pay subsidizes costs for in-state residents.”); Karen Rivedal, *The Campus Crunch*, WISCONSIN STATE J., March 7, 2004, p. A1 (“Resident students pay only about 40 percent of the cost of their instruction through tuition; state funds and nonresident tuition subsidize the rest.”); *Costs of Educating Illegal Alien Children Total \$7.4 Billion*, PR NEWswire, Aug. 20, 2003 (“[A] growing number of states are choosing to provide subsidized in-state college tuition rates to illegal aliens as well. The report notes that doing so on a nationwide scale would raise costs by millions of dollars each year, even as public universities are raising tuition for everyone....”).

measurable and has been calculated by economists in other states.¹⁰ However, it will vary from year to year, depending on the number of illegal alien students who take advantage of the benefits offered by K.S.A. 76-731a. The District Court offered no analysis of this empirical and economic evidence, noting only that tuition rates in Kansas have increased for other reasons in the past (which is beside the point) and wrongly assuming that the Students are claiming that tuition rates have *already* increased as a result of the enactment of K.S.A. 76-731a. See D. Ct. Order at 21-22. The Students have presented empirical and economic evidence that out-of-state tuition rates must inevitably increase *in the future* to pay the cost of subsidizing the tuition of illegal aliens.

¹⁰ The total annual cost at each public university of granting illegal aliens in-state tuition has two components: (1) The actual cost, i.e. the difference between the in-state tuition collected from the student and the cost of instruction, and (2) the opportunity cost, which is equal to the difference between the out-of-state tuition that would have been paid had K.S.A. 76-731a not been enacted, minus the cost of instruction. The total cost to the state per university is expressed as “Total Cost = Actual Cost + Opportunity Cost.” The total aggregate cost for state public universities is the total cost per student multiplied by the total estimated number of illegal alien students who attend each year. C. Mehta & A. Ali, *Chicago’s Undocumented Immigrants and Their Access to Higher Education*, Appx. B, U. Ill. at Chicago, March 2003. This cost is then passed along to nonresident students (as well as to resident students) in the form of tuition hikes. Because the Kansas Legislature has been unwilling to allocate significant additional tax revenues to postsecondary educational institutions, virtually all cost increases faced by Board of Regents universities (from other sources) have been passed along to students through four tuition hikes in four successive years. “Members of the Board of Regents say they were forced to increase tuition at Kansas’ six public universities because the state isn’t putting enough money into higher education. Increases this fall for Kansas residents taking 15 credit hours of undergraduate courses will range from 8.9 percent at Fort Hays State to 18 percent at the University of Kansas.” “Surely Tax Talk is Just a Coincidence,” TOPEKA CAPITAL-JOURNAL, June 29, 2004.

7. The District Court Erred in its Consideration of Redressability.

With respect to the redressability of the four forms of injury presented by the Students, the District Court stated flatly, “Plaintiffs will still pay out-of-state tuition rates even if the court found that K.S.A. 76-731a violated the Equal Protection Clause.” *Id.* at 37. Therefore, the District Court concluded, the Students’ injuries are not redressable. This conclusory statement misunderstands the Supreme Court’s holding in *Jacksonville*. When the injury in fact is the implementation of a program that offers benefits in an unconstitutionally discriminatory fashion, that injury is eliminated when the program is eliminated. The redressability requirement of standing is met by the removal of the unequal treatment: “It follows from our definition of ‘injury in fact’ that petitioner has sufficiently alleged both that the city’s ordinance is the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury.” *Jacksonville*, 508 U.S. at 656. In the case at bar, a judicial declaration invalidating K.S.A.76-731a would suffice to redress the injury caused by this unequal treatment, for the purposes of standing. The constitutional injury caused by unequal treatment would be removed, even if neither class were able to obtain the benefit in the future. No longer would illegal alien nonresidents of Kansas be awarded a valuable educational benefit that U.S. citizen nonresidents are denied.

The District Court’s cursory statement on redressability also completely ignored the fourth form of redress requested by the Students—reimbursement or credit for the extra tuition paid while K.S.A. 76-731a has been in effect. The Students requested injunctive relief compelling Defendants to provide a tuition rebate or credit equal to the excess tuition that the Students paid during the 2004-2005 academic year, in order to repair the unequal treatment suffered during that year. The District Court

Order made no mention of this requested relief. Plainly, this form of relief would redress the unequal treatment, regardless of the District Court's view of the *Jacksonville* precedent.

VIII. CONCLUSION

In conclusion, the District Court erred in disregarding the Tenth Circuit precedent of *Qwest*, which makes clear that the Students need not establish a private right of action to bring their preemption claim under 8 U.S.C. § 1623. If, however, this Court concludes that *Qwest* does not apply to this case, the Students request that this Court recognize the implied private right of action created by Congress with the enactment of 8 U.S.C. § 1623. The District Court also erred in holding that the Students lack standing to bring their Equal Protection Clause claim under the Fourteenth Amendment. Accordingly, the Students request that this Court remand this case to the District Court for adjudication of the merits of both claims.

IX. REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff/Appellants respectfully request oral argument of thirty minutes by each side. Counsel believe that oral argument will materially benefit the work of this Court by providing an opportunity for clarification of the extensive and relevant arguments made by all sides before the District Court, as they relate to what Counsel believe is a case of first impression at the Circuit Court level.

Dated: October 17th, 2005

Respectfully submitted,

=/signed/=

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X. ADDENDUM TO BRIEF (PURSUANT TO 10th CIR. RULE 28.2)

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XI. REQUIRED CERTIFICATIONS

By his undersigned signature, Counsel for Appellants certifies that:

A. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B). The brief contains 11,831 words, excluding the parts of the brief exempted from the word count by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5). The brief has been prepared using proportionally spaced typeface in Times Roman 13-point font, as produced by Microsoft Word 97-2003 software.

B. CERTIFICATE OF SERVICE

1. Every document submitted in digital format is an exact copy of the document submitted in written format to the Clerk, with the exception of required privacy redactions. These documents have been scanned for viruses using Symantec AntiVirus version 9 (2005), and according to that program are free from viruses.
2. Two paper copies of this brief, along with one copy of the Case Appendix, along with required documents in digital (PDF) format, were delivered on the 17th day of October 2005 for service via UPS air courier service to the attorneys listed below:

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