No. 05-3309

IN THE 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
Judge Richard D. Rogers

BRIEF OF WASHINGTON LEGAL FOUNDATION, THOMAS J. BRENNAN, ZAN BRENNAN, BRIGETTE BRENNAN, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATION OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation and or stock owned by a publicly owned company. Pursuant to Circuit Rule 46.1, WLF and AEF state that they are not financially interested in the outcome of this litigation. Brigette Brennan states that she is a U.S. citizen, is enrolled as a student at the University of Kansas, and has been paying nonresident tuition. Her tuition payments, as well as the tuition payments of other U.S. citizens enrolled at postsecondary institutions in Kansas, may be affected by the outcome of this appeal. Thomas and Zan Brennan are the parents of Brigette Brennan and provide financial support to her. Except as noted, *amici* are unaware of additional parties, entities, or attorneys – other than those previously listed by the parties – who are financially interested in the outcome of the litigation.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF's members include United States citizens who are not Kansas residents and who attend or are interested in attending (or whose dependent children attend or are interested in attending) public postsecondary education institutions within the State of Kansas. WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully in this country. *See, e.g., Podberesky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994) (successful challenge to university's denial of scholarship benefits to Hispanic student on account of race). On August 9, 2005, WLF filed a complaint with the U.S. Department of Homeland Security (DHS), challenging Texas's policy of favoring illegal aliens over U.S. citizens in the award of in-state tuition rates at colleges and universities. On September 7, 2005, WLF filed a complaint with DHS, challenging a similar policy in the State of New York.

Brigette Brennan is enrolled as a fifth-year undergraduate student at the University of Kansas (KU). She grew up in the State of Missouri. While living in Missouri, she graduated from Bishop Miege High School in Kansas after attending that high school for four years. She has resided in Lawrence, Kansas

ever since she began her studies at KU. She repeatedly has asked to be allowed to pay college tuition at in-state rates but has been told by KU officials that she does not qualify for those rates despite living in Kansas and having graduated from a Kansas high school. She believes that Appellees are violating her rights under federal law and the U.S. Constitution by charging her higher tuition rates than they charge to illegal aliens who attend KU.

Thomas and Zan Brennan are the parents of Brigette Brennan and are residents of Kansas City, Missouri. They provide Brigette with financial support to assist her with the cost of attending KU. Those costs are higher than they would have been had KU offered Brigette the same discounted tuition rates that they offer to all illegal aliens who, like Brigette, graduated from a Kansas high school.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in State and federal courts on civil rights issues on a number of occasions.

Amici are concerned that Kansas has adopted a policy that discriminates

against U.S. citizens in favor of aliens who are in this country illegally and are not domiciliary residents of Kansas. *Amici* are also concerned that the district court decision effectively denies those U.S. citizens any recourse against that discrimination, even though such discrimination is explicitly banned by a federal statute. DHS has resisted all entreaties to enforce the statute, thereby making it particularly important that the federal courts address the merits of Appellants' claims.

STATEMENT OF THE CASE

Kansas law provides that, in general, those attending public colleges and universities in Kansas qualify as "residents for fee purposes" (and thus qualify for significantly reduced tuition rates) only if they "have been domiciliary residents of the state of Kansas for at least 12 months prior to enrollment." K.S.A. § 76-729. Although it is theoretically possible for those who first move to Kansas for the purpose of attending college to later qualify as "residents for fee purposes," regulations adopted by Kansas make it exceedingly difficult for them ever to do so. *See* K.A.R. § 88-3-2. Kansas does not deem any of the Appellants who are college students to qualify as "residents for fee purposes" within the meaning of the statute and regulations. *Amici* do not understand any of

the Appellants to contest that determination, or to challenge Kansas's right to charge them higher tuition rates than it charges domiciliary residents of the State.

Appellants do object, however, to being charged higher tuition rates than another group of students who do not qualify as "domiciliary residents" of Kansas: illegal aliens. Certain illegal aliens became eligible for reduced tuition rates as the result of Kansas's adoption of K.S.A. § 76-731a, which took effect on July 1, 2004. Section 76-731a, entitled "Certain persons *without lawful immigration status* deemed residents for purposes of tuition and fees" (emphasis added), provides that individuals "shall be deemed to be a resident of Kansas for the purposes of tuition and fees" if they meet various requirements set forth in the statute. The principal requirements are that one has graduated from a Kansas high school (or has obtained a GED certificate issued in Kansas) and attended high school in Kansas for at least three years. § 76-731a(b)(2). A U.S. citizen who does not qualify for reduced tuition under § 76-729 (because he is not a domiciliary resident of Kansas) has no hope of qualifying under § 76-731a, because the latter statute disqualifies anyone who qualifies for in-state tuition rates at another State's colleges and universities, and every U.S. citizen qualifies as a domiciliary resident of at least one state. For example, Brigette Brennan

does not qualify for reduced in-state tuition rates under § 76-731a despite having graduated from a Kansas high school, because she would have qualified for in-state tuition rates at a Missouri college.[1]

Appellants filed suit in 2004 in federal court against a variety of Kansas officials,[2] alleging that Kansas was improperly discriminating against them by charging them higher tuition and fees than it charges illegal aliens who graduated from Kansas high schools. They alleged *inter alia* that this discrimination violated their rights under the Equal Protection Clause of the Fourteenth Amendment as well as 8 U.S.C. § 1623, which provides:

> 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 complaint sought an injunction against Kansas's use of § 76-731a to continue

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[1] It is more than just the title of § 76-731a that makes plain that the statute was adopted for the purpose of assisting illegal aliens (as well as aliens with a "nonpermanent immigration status") who graduate from Kansas high schools. Another indicator of that purpose is the statute's provision that, to qualify for reduced tuition rates, illegal aliens must sign an affidavit indicating that they have filed (or will file as soon as they are eligible to do so) an application to legalize their immigration status.

[2] *Amici* hereinafter refer to those officials collectively as "Kansas."

such discrimination. Kansas could, of course, end its discrimination in one of two ways: it could either cease offering discounted in-state tuition rates to illegal aliens, or it could offer those same rates to Appellants and all other U.S. citizens.

On July 5, 2005, the district court granted motions to dismiss filed by Kansas and by two organizations that intervened as defendants. The district court dismissed the claim under 8 U.S.C. § 1623 on the ground that that statute does not create a private right of action. District Court Memorandum and Order ("Slip Op.") at 24-30. The court concluded that nothing in the language or structure of § 1623 suggests that Congress intended to create a private right of action to enforce that provision. *Id.* at 29. Rather, the court ruled, only the Department of Homeland Security (DHS) may enforce § 1623. *Id.*

The court also concluded that Appellants lacked standing to raise an equal protection challenge to the discriminatory tuition policy because they could demonstrate neither injury-in-fact nor redressability. *Id.* at 30-37. The court concluded that Appellants had failed to establish injury-in-fact because they could not "demonstrate that K.S.A. 76-731a has any application to them"; rather, the court concluded, they were denied in-state tuition on the basis of lawful, nondiscriminatory provisions of K.S.A. § 76-729. *Id.* at 35-36. The court

concluded that Appellants had failed to establish redressability because even if it struck down § 76-731a, Appellants would not benefit because they still would be paying out-of-state tuition. *Id.* at 36-37.

SUMMARY OF ARGUMENT

The district court's dismissal of the equal protection claims for lack of standing was based on a flawed understanding those claims. The district court proceeded on the assumption that Appellants could not demonstrate injury-in-fact for purposes of their Equal Protection Clause claims unless they could demonstrate some entitlement to in-state tuition rates. But the Equal Protection Clause requires no such showing; rather, Appellants need only show that Kansas is treating them less well than another group of college students (illegal aliens) and that Kansas lacked a proper basis for distinguishing Appellants from those other students. The injury to Appellants consists of that discriminatory treatment, regardless whether they otherwise have any basis for complaining about not being offered discounted, in-state tuition rates. Their injury will have been redressed if, at the conclusion of litigation, Appellants are no longer treated less well than illegal aliens, regardless whether Kansas decides to eliminate the discrimination by offering in-state rates to Appellants or by ceasing to offer in-state rates to

illegal aliens.

The district court stated that it agreed with Kansas that Appellants had standing to raise claims under 8 U.S.C. § 1623. Slip Op. 25. Nonetheless, because the logic of the district court opinion would suggest that Appellants lack standing to raise the § 1623 claim and because this Court is obliged to address all standing claims even if they are not raised, *amici* address the issue briefly. Appellants clearly have standing to seek relief under § 1623 because they adequately allege both injury-in-fact (Kansas's alleged violation of § 1623 is causing them to be offered less favorable tuition rates than are illegal aliens) and redressability (if they prevail on their § 1623 claims, they will no longer be offered less favorable tuition rates).

The district court also erred in finding that Congress did not intend to create a private right of action to enforce § 1623. All available indicia of congressional intent suggest that Congress did, indeed, intend to permit private citizens to sue in federal court to redress injuries inflicted on them by State violations of § 1623.

In attempting to discern congressional intent, the district court misapplied Supreme Court case law regarding the "focus" of a statute. The Supreme Court

has stated that, as a rough rule of thumb, Congress probably did *not* intend a federal statute to create a private right of action if the statute at issue focuses on the regulated entity (in this case, the State of Kansas), but that such an intent is far more likely if the statute focuses instead on the beneficiary of the regulatory statute (in this case, U.S. citizens who are not domiciliary residents of Kansas). Apparently misunderstanding that doctrine of statutory construction, the district court denied a private right of action after determining not that § 1623 focused on the regulated entity (Kansas) but that it focused on the group that the regulated entity was barred from unduly favoring (illegal aliens). That conclusion makes little sense. The district court's conclusion that Congress was focusing on ensuring that illegal aliens are not treated more favorably (with respect to tuition rates) than U.S. citizens is simply another way of saying that Congress was focusing on ensuring that U.S. citizens are not treated less favorably than illegal aliens. Under established case law, either conclusion should have made it *more* likely that Congress had intended to create a private right of action.

The district court also concluded that no private right of action exists because DHS is empowered to enforce the immigration laws, including § 1623. But that enforcement power proves nothing at all. *Amici* are hard-pressed to

think of *any* federal statute that is not enforceable by at least one federal agency; so the district court's rule of statutory construction would result in elimination of *all* implied private rights of action. Moreover, at a practical level, a private suit appears to be the only method by which Appellants can redress the injury they suffered as a result of Kansas's alleged violations of § 1623. DHS has not issued any regulations implementing § 1623 or taken any other steps indicating an intent to enforce § 1623. The silence with which DHS has responded to the petitions filed by WLF (seeking enforcement of § 1623 against the States of Texas and New York) provides additional evidence that Appellants will be left remedy-less if the decision below is affirmed.

ARGUMENT

I. APPELLANTS HAVE STANDING TO ASSERT THEIR CLAIMS

The district court ruled that Appellants lacked standing to assert virtually all of the claims raised in their amended complaint. That ruling was based on a flawed understanding of Appellants' claims and of the requirements imposed on litigants by the Article III case-or-controversy requirement.

A. Appellants Have Standing to Assert That the Policies Embodied in § 76-731a Violate Their Equal Protection Rights

The Supreme Court has explained Article III standing requirements as

follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted).

With respect to Appellants' equal protection claim, the district court held that Appellants failed to meet two of those three requirements: injury-in-fact and redressability. The court held that Appellants had failed to establish injury-in-fact because they could not "demonstrate that K.S.A. 76-731a has any application to them"; rather, the court concluded, they were denied in-state tuition on the basis of lawful, nondiscriminatory provisions of K.S.A. § 76-729. Slip Op. 35-36. The court further held that Appellants had failed to establish redressability because even if it struck down § 76-731a, Appellants would not benefit because they still would be paying out-of-state tuition.

The district court's standing ruling was a clear error of law. The injury alleged by Appellants – discriminatory denial of in-state tuition rates – is

"concrete," and "actual." Because of that denial, they are paying more to attend Kansas colleges and universities than they otherwise would have paid, *and* they are being treated unequally – they are being charged more than many other students for the same educational services. If they prevail on their equal protection claims, their injury will be redressed: they will no longer be the victims of discriminatory treatment *vis-a-vis* illegal aliens. Kansas will be forced either to extend in-state tuition rates to Appellants or to discontinue offering those rates to illegal aliens. No further showing is required of Appellants to demonstrate Article III standing.

In stating that Appellants lack standing to raise an equal protection claim unless they allege some sort of entitlement to in-state tuition rates, the district court displayed a flawed understanding of the Equal Protection Clause. That clause does not protect substantive entitlements. Rather, it requires that the government treat similarly situated individuals in a similar manner, unless it can demonstrate a proper basis for distinguishing those individuals. *See, e.g. Zobel v. Williams,* 457 U.S. 55, 60 (1982) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."). Kansas may contend that it

has a proper basis for treating illegal aliens more favorably than it treats Appellants, but that contention goes to the merits of Appellants' equal protection claims, not to their standing. Because Kansas does not contest that Appellants are being treated less favorably, their injury-in-fact cannot reasonably be questioned.

Nor does a showing of redressability require Appellants to demonstrate that they would be granted in-state tuition rates if they were to prevail on their equal protection claims. It is enough to demonstrate that the complained-of injury (*discriminatory* denial of in-state rates) would end if they prevailed. While they undoubtedly would prefer Kansas to choose to extend in-state rates *both* to illegal aliens *and* to U.S. citizens from outside Kansas, their injury would also be redressed if Kansas chose instead to cease awarding in-state tuition rates to illegal aliens. The Supreme Court has never required an equal protection plaintiff to demonstrate that success in litigation would result in financial gain, in order to demonstrate their standing. For example, the result in *Zobel*, in which the Court invoked the Equal Protection Clause to strike down an Alaska "dividend" program that provided greater payments for long-term Alaska residents than for newcomers, was to end *all* payments – even those to the plaintiffs. *Zobel*, 457

U.S. at 61-65. Yet, the Court never suggested that the plaintiffs lacked standing because the result of their claims was to place them in a worse financial position than if they had not sued.[3]

A decade later, the Court held explicitly that equal protection plaintiffs need not allege, in order to establish standing, that they would receive a desired benefit if the challenged policy were ended:

> 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 the standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Florida Chapter of Assoc. General Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993).

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[3] The district court noted that the Supreme Court stated in *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973), that "a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential basis." Slip Op. 35. But that statement goes to the merits of Appellants' claims, not to their standing. More importantly, the district court's citation to *Vlandis* overlooks the fact that Appellants are not complaining about being treated less well than Kansas's "bona fide residents." Rather, they complain about being treated less well than illegal aliens who are violating federal laws and who (like Appellants) are physically present in Kansas but are not domiciliary residents of the State. The Supreme Court has never suggested that a State has a "legitimate interest" in treating such lawbreakers better than it treats nonresident U.S. citizens.

The district court's efforts to distinguish *City of Jacksonville* are unavailing. The district court asserted that that case's standing rules apply only to a small subset of equal protection cases in which the challenged policy prevents the plaintiff from competing equally for a sought-after benefit. Slip Op. 34. The court deemed *City of Jacksonville* inapplicable to Appellants because they faced no special barriers to admission to Kansas universities, and because adoption of K.S.A. § 76-731a did not increase the barriers faced by Appellants in seeking to qualify for in-state tuition rates. *Id.* Those facts do not serve to distinguish *City of Jacksonville* in any meaningful way. Regardless whether Appellants could have qualified for in-state tuition rates in the absence of § 76-731a, it remains true that § 76-731a discriminates against Appellants by granting a benefit to illegal aliens that it denies to them. Appellants have established standing by demonstrating that Kansas has "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *City of Jacksonville,* 508 U.S. at 666.[4]

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[4] The district court's reliance on *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), was misplaced. Slip Op. 35. In *Wilson,* this Court held that plaintiffs lacked standing to complain about gender-segregated student housing because they were not injured by the policy – they were not students and thus were otherwise ineligible to apply to live in the housing. *Id.* at 593-94. In contrast, there are no independent grounds that render Appellants ineligible for the benefit conferred

Indeed, Appellants' claim to standing is *far stronger* than those of the *City of Jacksonville* plaintiffs, who were seeking the chance to bid on city contracts on a race-neutral basis. The plaintiffs' standing was somewhat doubtful because they could not demonstrate that they would have won the bidding but for the racially discriminatory bidding rules to which they objected. The Court nonetheless upheld standing, holding that the denial of the opportunity to compete on an equal basis – regardless of the outcome of the competition – was sufficient to establish standing. *Id.* In contrast, students at Kansas universities do not engage in a bidding process for a limited number of in-state tuition slots. Instead, *every* student who meets the State's criteria for in-state tuition will be offered those lower tuition rates. Thus, if Appellants demonstrate that Kansas acted unconstitutionally in placing them in a less favorable position than illegal aliens, they will become *automatically* entitled to the same benefits that illegal aliens receive – without any need to enter into a further competition for

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by K.S.A. § 76-731a. The only reason that Appellants are not eligible is that the Kansas legislature (in adopting § 76-731a) declared them ineligible; it is that declaration that Appellants are challenging as a violation of their equal protection rights.

benefits.[5] It would be illogical to grant standing to the *City of Jacksonville* plaintiffs (who would gain only the opportunity to *compete equally* for benefits if they were placed in the same position as the favored group) but to deny standing to those, such as Appellants, who would actually receive the desired benefits if they were placed in the same position as the favored group.

In sum, the district court erred in dismissing Appellants' equal protection claims for lack of standing. This Court should reverse and remand the case to the district court for further proceedings.

B. Appellants Have Standing to Assert that the Policies Embodied in § 76-731a Violate Their Rights Under 8 U.S.C. § 1623

The district court stated that it agreed with Kansas that Appellants had standing to raise claims under 8 U.S.C. § 1623. Slip Op. 25. *Amici* nonetheless feel compelled to address that issue because the logic of the remainder of the district court's decision suggests that, if the district court had looked at the issue

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[5] Of course, as noted above, Kansas might choose at that point to deny benefits to both groups. But that possibility cannot plausibly affect Appellants' standing claims. The government is always free to end disagreements over the method by which it distributes a discretionary benefit, by eliminating the benefit altogether. For example, a government could eliminate challenges to a contract award by deciding to cancel the contract and eliminate its contracting program. But that possibility has never been thought to deprive plaintiffs of standing to raise equal protection challenges to government programs alleged to operate in a discriminatory manner.

carefully, it would have determined that Appellants also lacked standing to raise their § 1623 claims.[6] *Amici* recognize that the question of standing is not subject to waiver and that appellate courts "are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *United States v. Hayes,* 515 U.S. 737, 742 (1995). Accordingly, we briefly address the standing issue to ensure that the rationale of the decision below does not lead the Court to the erroneous conclusion that Appellants lack standing to raise their § 1623 claims.

Section 1623 provides that a State may not grant in-state tuition rates to illegal aliens on the basis of residence within the State, unless the State also makes *all* U.S. citizens, regardless of their State of residency, eligible for those same in-state tuition rates. Appellants allege that Kansas violated § 1623 by adopting K.S.A. § 76-731a; that the violation has caused them injury (*i.e.,* they are being treated less well than illegal aliens with respect to the grant of in-state

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[6] *See, e.g.,* Slip Op. at 23. In the course of discussing other statutory claims not encompassed within this appeal, the court stated,

> A favorable decision for the plaintiffs would require those who have received the benefit of K.S.A. 76-731a to pay more, but the plaintiffs' tuition bills would not change. Since the relief that could be granted to plaintiffs by the court will provide them with no personal benefit, they lack standing.

tuition rates); and that a victory in this lawsuit would redress that injury (*i.e.*, illegal aliens would no longer be eligible for in-state tuition rates on a preferential basis). Appellants need not allege anything further to establish standing.

For all the reasons explained above, it matters not that § 1623, in the absence of § 76-731a, would not have provided Appellants an entitlement to in-state tuition rates. Section 1623 is similar to the Equal Protection Clause in that it does not mandate the award of any specific benefit, but rather simply requires that a State not treat nonresident U.S. citizens worse than it treats illegal aliens living in the State. Kansas is free to charge nonresidents more to attend Kansas universities than it charges its own domiciliary residents; but if Kansas charges them more than it charges illegal aliens, that discrimination constitutes injury-in-fact cognizable in a claim filed under § 1623.

II. CONGRESS CREATED A PRIVATE RIGHT OF ACTION TO ENFORCE 8 U.S.C. § 1623

Section 1623 provides that if a State makes illegal aliens eligible for in-state tuition rates on the basis of residence, it must make *all* citizens of the United States so eligible, regardless of their State of residency. Like the vast majority of federal statutes, § 1623 does not state explicitly whether it is privately enforceable by U.S. citizens denied in-state tuition rates in violation of the

statute. Nonetheless, an examination of the statutory language and the context of its adoption make reasonably clear that Congress intended to permit private enforcement.

The Supreme Court has identified four factors that can be "indicative" of "whether Congress intended to make a remedy available to a special class of litigants." *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979). The factor invariably cited first: "'[I]s the plaintiff one of the class for whose especial benefit the statute was enacted.'" *Id.* at 688 n.9 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).[7] As this Court has explained, there is reason to infer that Congress intended to create a private right of action by individuals in the class for whose especial benefit the statute was enacted, but courts should be "'especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large.'" *Chemical Weapons Working Group, Inc. v. U.S. Dep't of Army*, 111 F.3d 1485, 1494 (10th Cir. 1997)

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[7] Other factors identified by the Court as bearing on the issue of congressional intent include: is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?; is it consistent with the legislative scheme to imply such a remedy for the plaintiff?; and is the cause of action one traditionally relegated to state law, in an area basically of concern to the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *Id.*

(quoting *Cannon,* 441 U.S. at 693 n.13).[8]

The most logical reading of 8 U.S.C. § 1623 is that it was adopted for the benefit, not of the public at large, but of a discrete, limited group: U.S. citizens who seek to attend public universities outside the State in which they are domiciled. The statute imposes but one condition on State governments: they are free to offer to illegal aliens whatever tuition discounts they wish to offer, but any such offers based on the illegal aliens' residence must also be extended to U.S. citizens living outside the State. The statute cannot reasonably be viewed as one designed to protect the public at large because even if one assumes that the public at large has an interest in limiting the use of public funds to subsidize the education of those who are in this country illegally, § 1623 imposes no such limitation. The statute's sole function is to ensure that a State does not treat U.S. citizens less favorably than illegal aliens with respect to tuition rates. Because

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[8] *Chemical Weapons* was a suit by environmental groups seeking an injunction against Army plans to incinerate chemical warfare agents stored in Utah. The plaintiffs claimed *inter alia* that the Army's plans violated the 1986 Defense Authorization Act; § 1521(c) of the Act required the Army to provide "maximum protection for the environment [and] the general public" when destroying chemical warfare agents. The Court held that § 1521(c) of the Act did not create a private right of action, in large measure because, the Court determined, the statute was adopted for the benefit of the public at large, not for the especial benefit of a class of litigants of which the plaintiffs were a part. *Id.*

§ 1623 was intended for the especial benefit of a relatively small class of individuals of which Appellants are members, it is reasonable to infer that Congress intended to create a private right of action to enforce § 1623 by those U.S. citizens – such as Appellants – who allege that they have been injured by a State's violation of § 1623.

The district court asserted that § 1623's principal objective was to disadvantage illegal aliens, not to benefit U.S. citizens attending colleges outside their home States. Slip Op. 29. That assertion is belied both by the language of § 1623 and the circumstances of its adoption as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Had Congress wanted to disadvantage illegal aliens by preventing them from being offered discounted, in-state tuition rates at State colleges and universities, it could easily have written such a prohibition into § 1623. Indeed, other provisions within IIRIRA included just such prohibitions. For example, 8 U.S.C. § 1611 bars illegal aliens from receiving virtually any "Federal public benefits," with only a very few exceptions such as emergency medical assistance and emergency disaster relief.[9] Also, 8 U.S.C. § 1621

[9] "Federal public benefits" covers virtually any benefit financed in whole or in part by federal funds. 8 U.S.C. § 1611(c). It thus covers a wide array of government

similarly bars illegal aliens from receiving virtually any "State or local public benefit." States are permitted to grant "State or local public benefits" to illegal aliens only if they adopt a statute after 1996 that affirmatively provides for such eligibility. 8 U.S.C. § 1621(d).

In sharp contrast to §§ 1611 & 1621, § 1623 includes no language of prohibition. Instead, as noted above, it simply mandates that whatever tuition discounts are offered to illegal aliens on the basis of residence must also be offered to nonresident U.S. citizens. The only reasonable conclusion to be drawn from this conscious decision not to bar the award of residence-based tuition discounts to illegal aliens but instead to mandate that any such discounts by granted on a nondiscriminatory basis is that Congress adopted § 1623 for the especial benefit of U.S. citizens who wish to attend a public university outside of their State of residence.

In support of its conclusion that Congress did not intend to create a private right of action to enforce § 1623, the district court asserted that the "focus" of § 1623 is illegal aliens, not nonresident U.S. citizens. Slip Op. 29. The court

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assistance programs administered not only by the federal government but also by State governments, which often receive a major portion of their funding from the federal government.

then cited *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001), in support of its conclusion that such a "focus on aliens, rather than plaintiffs or citizens in general, creates no implication of an intent to confer rights on the plaintiffs." *Id.* at 29-30. In doing so, the district court totally misconstrued relevant Supreme Court case law regarding the "focus" of a statute.

The Supreme Court has stated that, as a rough rule of thumb, Congress probably did *not* intend a federal statute to create a private right of action if the statute at issue focuses on the regulated entity (in this case, the State of Kansas), but that such an intent is far more likely if the statute focuses instead on the beneficiary of the regulatory statute (in this case, U.S. citizens who are not domiciliary residents of Kansas). *See, e.g., Alexander v. Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'") (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

Apparently misunderstanding that doctrine of statutory construction, the district court denied a private right of action after determining not that § 1623 focused on the regulated entity (Kansas) but that it focused on the group that the regulated entity was barred from unduly favoring (illegal aliens). That

conclusion makes little sense. The district court's conclusion that Congress was focusing on ensuring that illegal aliens are not treated more favorably (with respect to tuition rates) than nonresident U.S. citizens is simply another way of saying that Congress was focusing on ensuring that nonresident U.S. citizens are not treated less favorably than illegal aliens. Under established case law, either conclusion should have made it *more* likely that Congress had intended to create a private right of action. Only if § 1623 had focused on restrictions being imposed on States (as, for example, by flatly prohibiting States from providing discounted, in-state tuition rates to illegal aliens and establishing a mechanism by which that prohibition could be enforced) would the statute have had the type of focus that the Supreme Court has deemed inconsistent with a congressional intent to permit private enforcement.[10]

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[10] *California v. Sierra Club* provides a good illustration of the type of statute the Supreme Court had in mind when it referred to statutes whose "focus" was inconsistent with an intent to create a private right of action. The plaintiffs in *Sierra Club* sought to state a claim under § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403, which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." In determining that Congress had not intended to permit private enforcement of § 10, the Court stated:

> In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose

Perhaps the strongest indication that Congress intended to permit private enforcement of § 1623 is its *express* indication of such an intent in 42 U.S.C. § 1983. Section 1983 provides a right of action against any person who, under color of State law, deprives others of any "rights, privileges, or immunities secured by the Constitution and laws." There can be no dispute that Kansas officials, when adopting and enforcing the policies underlying K.S.A. § 76-731a, were acting under color of state law. Furthermore, the Supreme Court has made clear that the phrase "Constitution and laws," as used in § 1983, encompasses *all* federal statutes, including 8 U.S.C. § 1623. *Maine v. Thiboutot*, 448 U.S. 1, 4, 8 (1980).

Moreover, there is little doubt that § 1623 creates the kinds of "rights, privileges, or immunities" enforceable under § 1983. The Supreme Court has identified three factors to be examined in determining whether a particular statutory provision gives rise to such federal "rights":

> welfare Congress intended to further. . . . Section 10 . . . is the kind of a general ban which carries with it no implication of an intent to confer rights on a particular class of persons.

Sierra Club, 451 U.S. at 294 (emphasis added). In sharp contrast to Section 10 (which imposes a prohibition without mentioning by name any intended beneficiaries), § 1623 explicitly names its intended beneficiaries: nonresident U.S. citizens seeking eligibility for discounted tuition rates.

> 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.

Blessing v. Freestone, 520 U.S. 329, 340-41 (1997).

All three factors indicate that § 1623 creates "rights" enforceable under § 1983. First, as explained above, the language of § 1623 indicates that Congress adopted the statute for the purpose of benefitting those (such as Appellants) who are U.S. citizens wishing to enroll in a public university outside their State of residence. Second, there is nothing "vague and amorphous" about § 1623's requirements: it proscribes any discrimination against such U.S. citizens *vis-a-vis* illegal aliens with respect to granting in-state tuition rates at colleges and universities. Third, the *binding* nature of the obligation imposed by Congress on the States is unambiguous: States are required to comply with § 1623 "[n]otwithstanding any other provision of law."

The district court also concluded that no private right of action exists because the Department of Homeland Security, by virtue of its power to enforce the immigration laws generally (*see* 8 U.S.C. § 1103(a)(1)), is empowered to enforce § 1623. Slip Op. 28. The Court concluded that because Congress

authorized a federal agency to enforce § 1623, it was unlikely that Congress also intended to permit private enforcement. *Id.* at 29.

The district court cited no case authority for that proposition, and *amici* are aware of none. It is hardly surprising that DHS is authorized to enforce § 1623; indeed, *amici* are hard-pressed to think of *any* federal statute that is not enforceable by at least one federal agency. Accordingly, if the district court's rule of statutory construction were adopted, *all* implied private rights of action would be eliminated. Such a rule would be wholly inconsistent with existing case law, under which the federal courts have recognized scores of implied private rights of action to enforce federal statutes.

This Court has held that when Congress provides a detailed method by which claimants can seek administrative adjudication of rights asserted under a federal statute, there is some reason to conclude that Congress did not also intend to permit private enforcement in federal courts. Thus, for example, the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, prohibits airlines from discriminating against individuals with mental or physical impairments. The ACAA provides a detailed mechanism by which those who believe their rights under the ACAA have been violated can obtain an administrative adjudication of

their claims, including the filing of formal complaints with the Department of Transportation followed by a hearing. *See Boswell v. Skywest Airlines, Inc.,* 361 F.3d 1263, 1269-70 (10th Cir. 2004). This Court concluded that because Congress included a detailed method by which claimants can obtain an administrative adjudication of ACAA claims, Congress did not also intend to permit private enforcement of the ACAA in federal court. *Id.* at 1270-71.

Section 1623 contains no administrative enforcement mechanism that is even remotely equivalent to the enforcement mechanism established under the ACAA. Section 1623 specifies no mechanism by which those claiming to have been injured by violations of § 1623 can complain to DHS, no right to a hearing before DHS, and no requirement that DHS even investigate such complaints. Nor has DHS adopted or even proposed regulations for implementing § 1623. Nor does the statute (in contrast to the ACAA) authorize DHS to file suits against States that fail to comply with § 1623 or authorize other sanctions such as a cut-off of DHS funding. Accordingly, there is no evidence to suggest that Congress intended that administrative enforcement of § 1623 was to take the place of private enforcement in the federal courts.

Moreover, at a practical level, a private suit appears to be the *only* method

by which Appellants can redress the injury they suffered as a result of Kansas's alleged violations of § 1623. As noted above, DHS has not issued any regulations implementing § 1623 or taken any other steps indicating an intent to enforce § 1623. Furthermore, DHS has provided no response whatsoever to petitions filed earlier this year with DHS by WLF, seeking enforcement of § 1623 against the States of Texas and New York. Indeed, if a newspaper account is to be believed, DHS has no intention of ever responding.[11] Unless the decision below is overturned and Appellants are permitted to proceed with private enforcement of their § 1623 claims, they likely will be left with *no* remedy for what appears to be a clear-cut violation of their rights under federal law.

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[11] A September 5, 2005 article in the *San Antonio Express-News* quoted an unnamed DHS official as stating that DHS is unlikely to respond to WLF's complaint against Texas because WLF did not first exhaust "all other legal avenues" – apparently meaning that WLF had not first filed suit against Texas in federal court. *See* Karen Adler and Hernan Rozemberg, "Migrant Tuition Break Blasted," *San Antonio Express-News* (Sept. 5, 2005). In other words, DHS apparently takes the position that § 1623 *does* create a private right of action and that claimants should pursue that remedy before coming to DHS.

CONCLUSION

Amici curiae respectfully request that the judgment below be reversed and that the case be remanded to the district court.

Respectfully submitted,

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Dated: October 26, 2005

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.* (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 6.0), the word count of the brief is 6,982, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2005, two copies of the brief of *amici curiae* WLF, *et al.,* in support of Defendant-Appellee were placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Also this day, all counsel were provided by email an electronic copy of the brief, identical to the copy submitted by email to the court.

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