Case No. 22-40225

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YOUNG CONSERVATIVES OF TEXAS FOUNDATION,

Plaintiff - Appellee,

v.

NEAL SMATRESK, PRESIDENT OF THE UNIVERSITY OF NORTH TEXAS; SHANNON GOODMAN, VICE PRESIDENT FOR ENROLLMENT OF THE UNIVERSITY OF NORTH TEXAS,

Defendants - Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division
No. 4:20-CV-973-SDJ
The Honorable Sean D. Jordan, Judge Presiding

***AMICUS CURIAE* BRIEF OF THE ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME IN SUPPORT OF PLAINTIFF-APPELLEE, IN SUPPORT OF AFFIRMANCE**

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CERTIFICATE OF INTERESTED PERSONS

The case number here is No. 22-40225, *Young Conservatives of Texas Foundation v. Neal Smatresk, President of the University of North Texas, Shannon Goodman, Vice President for Enrollment of the University of North Texas.*

Amicus Curiae Advocates for Victims of Illegal Alien Crime is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Advocates for Victims of Illegal Alien Crime, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*

Attorneys United for a Secure America, a project of the Immigration Reform Law Institute

Lorraine G. Woodwark, counsel for *Amicus Curiae*

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
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Dated: August 31, 2022

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Advocates for Victims of Illegal Alien Crime ("AVIAC") is a 501(c)(3) non-profit organization that was founded in 2017. AVIAC is led by individuals who have lost family members because of crimes committed by illegal aliens.[2] AVIAC's mission includes being a source of support for such victims across the country and a resource for policies that will enforce the nation's immigration laws and prevent governmental incentives for illegal immigration.

AVIAC objects to providing illegal aliens special benefits that are not available to Americans, including out-of-state Americans. This case concerns providing the benefit of lower in-state tuition rates to illegal aliens by public universities, while simultaneously charging out-of-state Americans a far higher tuition rate.

AVIAC has a direct and valid interest in the case at bar with respect to actions by governmental entities that create incentives for illegal immigration by granting illegal aliens special benefits not available to all Americans. The decision

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[1] All parties have consented to the filing of this brief by *Amicus*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

[2] https://www.aviac.us/ (viewed Aug. 21, 2022).

in this case affects the issue of illegal immigration, and thus AVIAC has direct and vital interests in this appeal.

SUMMARY OF ARGUMENT

Illegal aliens are a source of increased crime in the United States. The Texas Department of Public Safety has posted its "Texas Criminal Illegal Alien Data," and it recently reported about the last twelve months:

> Between June 1, 2011, and July 31, 2022, these 259,000 illegal aliens were charged with more than 433,000 criminal offenses which included arrests for 800 homicide charges; 52,441 assault charges; 8,046 burglary charges; 52,864 drug charges; 822 kidnapping charges; 21,093 theft charges; 33,885 obstructing police charges; 2,400 robbery charges; 5,479 sexual assault charges; 6,485 sexual offense charges; and 4,945 weapon charges. DPS criminal history records reflect those criminal charges have thus far resulted in over 162,000 convictions including 374 homicide convictions; 19,715 assault convictions; 4,155 burglary convictions; 22,708 drug convictions; 265 kidnapping convictions; 8,668 theft convictions; 14,150 obstructing police convictions; 1,417 robbery convictions; 2,593 sexual assault convictions; 3,065 sexual offense convictions; and 1,723 weapon convictions.[3]

Data is similar nationwide as reported by the U.S. Department of Justice, which includes evidence of a vast diversion of law enforcement efforts to arresting and detaining illegal aliens. *See* Point I, *infra.* Taking action to eliminate incentives for illegal aliens to enter and remain in our country is good public policy, which Congress has embodied in multiple statutes, including the one at issue here.

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[3] https://www.dps.texas.gov/section/crime-records/texas-criminal-illegal-alien-data (viewed Aug. 25, 2022).

In 1996, Congress enacted and President Bill Clinton signed into federal law a statute to eliminate an incentive for illegal aliens to enter and remain in our country, by banning post-secondary educational institutions from giving a comparative advantage in tuition to illegal aliens. *See* 8 U.S.C. § 1623(a) ("Section 1623(a)") (anyone "not lawfully present in the United States shall not be eligible on the basis of residence" for lower post-secondary tuition than what is available to all Americans, including out-of-state residents). Federal law thereby prohibits encouraging illegal aliens to remain in the United States by offering them lower tuition than what many Americans are required to pay. Subsidizing an activity has the effect of encouraging more of it, and federal law prohibits encouraging illegal aliens to enter and stay in the United States by offering lower tuition to them. Bipartisan support for this legislation enabled it to become law, more than a quarter century ago.

Section 1623(a) thereby embodies a strong public policy against encouraging more illegal immigration, as do many other Acts of Congress and decisions by the Supreme Court. Despite how straightforward the 67 words of the substantive portion of Section 1623(a) is, decades after its enactment colleges in Texas including the University of North Texas ("UNT", abbreviated here to include all Appellants) have continued to charge comparatively lower tuition for illegal aliens, thereby condoning the illegality and violating this federal law.

There is no substantive argument against the plain meaning of this federal statute, and its supremacy over any conflicting state law. Nor is there any persuasive public policy argument against a federal law that prohibits discriminating against Americans and in favor of illegal aliens. At most, in the apt expression by the court below, "semantic" arguments can be raised in defense against enforcing it. "Because UNT's argument 'elevates semantics over substance,' it fails." *Young Conservatives of Tex. Found. v. Univ. of N. Tex*., No. 4:20-CV-973-SDJ, 2022 U.S. Dist. LEXIS 65795, at *30 (E.D. Tex. Apr. 8, 2022).

The arguments by UNT here on appeal are likewise "semantic" in nature, and mostly dodge the substance at the heart of this case: UNT should not continue to act contrary to Section 1623(a), by continuing to discriminate against out-of-state students by charging them more for tuition than their in-state rate for illegal aliens. None of UNT's arguments withstands scrutiny. UNT insists at length (UNT Br. 50-57) that there is a lack of standing to challenge its tuition discrimination, contrary to precedents on associational standing, which the district court correctly applied. Young Conservatives of Texas Foundation ("YCT"), which includes discriminated-against American students as members, is ideally situated to bring this case, and one can hardly expect an individual student himself to file and pursue multi-year litigation over this issue which, depending on his

future career, could subject him to some type of professional retaliation later for taking a public position adverse to benefits for illegal immigration.

In its appellate brief UNT further argues that Section 1623(a), despite being federal law, somehow does not preempt a state law that is contrary to it. (UNT Br. 27-35) It is difficult to imagine how Congress could have been clearer than it was, in prohibiting what UNT has been doing in discriminating in favor of illegal aliens compared with out-of-state students. To the extent the Tenth Circuit has ruled otherwise, this Court should decline to follow that and any other rulings which undermine, and essentially eviscerate, this federal law.

UNT repeatedly argues here that the plaintiffs are not complaining that the tuition for illegal aliens is too low, but that the tuition for the out-of-state students is comparatively too high. "Having disclaimed any challenge to alien eligibility–the only subject of Section 1623's preemptive scope–YCT cannot substantiate its preemption claim." (Appellants Br. 31) But a glass that is half-empty is likewise half-full. It is the comparative difference in tuition that is discriminatory and is thereby prohibited by Section 1623(a); a plaintiff can properly challenge that discrimination by arguing one is too high rather than the other being too low. They are simply two sides to the same coin, and there is no legal significance to the distinctions argued by UNT concerning how YCT presented its claim. If UNT wants to continue to advantage in-state students, it cannot give that same advantage

to illegal aliens at the expense of out-of-state residents. Federal law prohibits incentivizing illegal immigration in that manner.

The district court correctly ruled that defendants must comply with Section 1623(a), and its ruling should be affirmed.

ARGUMENT

Comparatively lower tuition for college is an incentive for attracting people into a state, and encouraging them to remain longer than they might otherwise. The benefits of lower in-state tuition are substantial. For example, at the University of Texas, which is the flagship of higher education for the State of Texas, the annual ***difference*** between in-state and out-of-state tuition is $25,044, which an independent college guide describes as "quite significant."[4] Over four years that exceeds a cumulative total difference of $100,000, and many students today take five or six years to graduate.

The district court correctly held:

> The federal law at issue sets forth a straightforward rule: an alien unlawfully present in this country shall not be eligible based on residence within a State for any postsecondary education benefit unless a citizen of this country is eligible for that benefit regardless of whether the citizen is such a resident. 8 U.S.C. § 1623(a). Meanwhile, Texas law makes unlawfully present aliens who meet certain residency requirements eligible for in-state tuition while denying that benefit to United States citizens who do not meet those residency requirements and requiring such citizens to pay higher tuition rates. TEX.

[4] https://www.instateangels.com/university-of-texas-austin-tuition-overview/ (viewed Apr. 23, 2022).

> EDUC. CODE §§ 54.051(c), 54.051(d), 54.052. ***Because Texas's nonresident tuition scheme directly conflicts with Congress's express prohibition on providing eligibility for postsecondary education benefits, it is preempted and therefore unconstitutional under the Supremacy Clause***.

Young Conservatives of Tex. Found., 2022 U.S. Dist. LEXIS 65795, at *2-3 (emphasis added).

Section 1623(a) is clear, and strong public policy supports giving it full effect notwithstanding any state law to the contrary. Illegal aliens impose an immense burden on our criminal justice system, and in Texas alone are responsible for many heinous crimes. Rewarding illegal aliens for staying, by giving them lower in-state tuition, is contrary to the public interest as reflected in federal law. The district court correctly enjoined this ongoing violation of Section 1623(a).

UNT insists that the federal law "confers no positive entitlements on anyone, and certainly not on U.S. citizens" (UNT Br. 18), but Section 1623(a) does protect Americans against discrimination in favor of illegal aliens. To the extent any other Circuit has ruled otherwise, this Court should apply here the federal law that the other court failed to. *See Day v. Bond,* 500 F.3d 1127, 1139 (10th Cir. 2007) (declining to apply Section 1623(a), based on a selectively expansive view of standing) (cited by UNT Br. 7, 19, 24, 25, 30). Standing doctrine, on which the Tenth Circuit relied in dismissing the challenge to a similar Kansas law there, is

not properly invoked to perpetuate a state law that is inducive of illegal immigration contrary to a federal law expressly prohibiting the conduct.

I. Strong Public Policy Supports Affirming the Decision Below.

Public policy, which echoes the public interest, is a factor in deciding whether to enjoin conduct. *See Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 69 (1st Cir. 2008) (holding that "the injunction does not harm the public interest, but rather serves the public policy of the Commonwealth [of Puerto Rico]") (inner quotations omitted). As demonstrated below, this factor weighs heavily against allowing UNT to continue to grant special benefits to illegal aliens.

The U.S. Department of Justice officially reports a dramatic increase in crime due to illegal aliens:

> In 1998, 63% of all federal arrests were of U.S. citizens; in 2018, 64% of all federal arrests were of non-U.S. citizens.
>
> Non-U.S. citizens, who make up 7% of the U.S. population (per the U.S. Census Bureau for 2017), accounted for 15% of all federal arrests and 15% of prosecutions in U.S. district court for non-immigration crimes in 2018.
>
> The portion of total federal arrests that took place in the five judicial districts along the U.S.-Mexico border almost doubled from 1998 (33%) to 2018 (65%).
>
> Ninety-five percent of the increase in federal arrests across 20 years was due to immigration offenses.

Mark Motivans, "Immigration, Citizenship, and the Federal Justice System, 1998-2018," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice

Statistics 1 (Aug. 2019, as revised Jan. 27, 2021) (internal citations to tables omitted).[5] This data has not received the full publicity and attention that it deserves, and the credibility of this official report cannot be doubted.

Additional statistics about the rapid increase in crime caused by illegal aliens are set forth in that same report by the Bureau of Justice Statistics of the U.S. Department of Justice. For example, "[i]n 2018, the number of federal arrests of Mexican citizens (78,062) exceeded the number of federal arrests of U.S. citizens (70,542)," and "Federal arrests of Central Americans rose more than 30-fold over two decades, from 1,171 in 1998 to 39,858 in 2018." *Id.* at 2. Illegal drugs are pouring over the border with the surge in illegal immigration. "In 2018, a quarter of all federal drug arrests took place in the five judicial districts along the U.S.-Mexico border." *Id.* This data predates the surge in illegal crossings that began as welcomed by the Biden Administration, so the burdens caused by illegal alien activity are even greater today.

"In the last 17 months, the volume of unlawful immigration has soared to levels unseen in the United States in decades – and, quite likely, ever. So too have the resulting burdens placed on the States," wrote Attorneys General from Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Indiana,

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[5] https://bjs.ojp.gov/content/pub/pdf/icfjs9818.pdf (viewed Aug. 26, 2022).

Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming, in their amicus brief in support of Texas and Louisiana in the Supreme Court in *Texas and Louisiana v. United States*, dated July 13, 2022 (Sup. Ct. No. 22A17) (amicus brief at p. 1).[6] This near-majority of the States added to their persuasive brief as filed in the Supreme Court: "the current situation at the U.S.-Mexico border is an unmitigated disaster. The number of illegal crossings per month is at levels unseen in at least a generation." *Id.* at 2.

Heritage Foundation Senior Legal Fellow and former U.S. Department of Justice official Hans A. von Spakovsky has done a thorough analysis of crime by illegal aliens, and he has disproven the claims by some that an increase in crime is somehow not associated with an increase in illegal immigration. Public policy is strongly against creating incentives that result in an increase in crime, as special benefits for illegal aliens motivate their remaining here rather than returning home. Mr. von Spakovsky dispelled the misperception by some that illegal aliens do not commit more crimes than American citizens, by explaining that:

> the issue isn't non-citizens who are in this country legally, and who must abide by the law to avoid having their visas revoked or their application for citizenship refused. The real issue is the crimes committed by illegal aliens.

[6] https://law.georgia.gov/document/document/final-memo-state-amicus-brief-file-versionpdf/download (viewed Aug. 26, 2022).

Hans von Spakovsky, "Crimes by Illegal Aliens, Not Legal Immigrants, are the Real Problem," Heritage Foundation (June 4, 2017).[7] He elaborated that:

> criminal aliens, both legal and illegal, make up 27 percent of all federal prisoners. Yet non-citizens are only about nine percent of the nation's adult population. Thus, judging by the numbers in federal prisons alone, ***non-citizens commit federal crimes at three times the rate of citizens***.

Id. (emphasis added).

Thus there is a strong, undeniable public interest against encouraging or incentivizing illegal aliens to enter and remain in the United States. The above demonstrates that there is a compelling rationale against them: illegal migration breeds crime.

Congress has repeatedly embodied into federal law this public policy against incentivizing illegal aliens with privileges or special benefits not available to all other Americans. Federal statutes reflect the public policy of the Nation. *See, e.g.*, *Tademy v. Scott*, 157 F.2d 826, 827 (5th Cir. 1946) ("Certainly, the statutes of Georgia reflect the public policy of the state."); *see also Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 819 n.17 (5th Cir. 2002) ("In Louisiana, UM coverage is provided for by statute and embodies a strong public policy.") (quoting *Roger v. Estate of Moulton*, 513 So. 2d 1126, 1130 (La. 1987)).

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[7] https://www.heritage.org/immigration/commentary/crimes-illegal-aliens-not-legal-immigrants-are-the-real-problem (viewed Aug. 25, 2022).

As an example of Congress expressing the strong national policy against illegal immigration, illegal aliens are prohibited from engaging in certain interstate-commerce-related conduct involving firearms. *See Rehaif v. United States*, 139 S. Ct. 2191, 2202 (2019) (Alito, J., dissenting, citing 18 U.S.C. § 922(g)). Another federal law, 8 U.S.C. § 1324, renders it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv). That law imposes an enhanced penalty if "done for the purpose of commercial advantage or private financial gain." *Id.* § 1324(a)(1)(B)(i).

This Court itself has rejected the argument that illegal aliens are "people" covered by the guarantees of the Second Amendment, in "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. "The [Supreme] Court held the Second Amendment 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (quoting *D.C. v. Heller*, 554 U.S. 570, 635 (2008)). "Illegal aliens are not 'law-abiding, responsible citizens' or 'members of the political community,' and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood." *Portillo-Munoz*, 643 F.3d

at 440. Section 1623(a) properly eliminates the incentive of low tuition for those who "are not Americans as that word is commonly understood" to remain here rather than return to their homeland, and become productive citizens there.

By enacting Section 1623(a), Congress did not discourage anyone, including illegal aliens, from attending college. There are many superb colleges south of the border, to which illegal aliens could return or pay full freight here without preferential subsidies unavailable to all Americans. While Pope Francis of the Roman Catholic Church is controversial on some political topics, no one doubts that he received a fantastic education in Argentina. Neither an Argentinian nor any other citizen of Central or South America need receive a subsidized education in the United States without being here lawfully. Nothing is insensitive about Section 1623(a) in ensuring that Americans get the best tuition rates at American colleges which are available to illegals.

Public policy and the public interest point entirely in only one direction here: towards ending incentives for illegal aliens to enter and remain in the United States.

II. Standing Exists for YCT to Challenge UNT's Tuition Discrimination, and UNT Errs in Not Increasing Tuition for Illegal Aliens.

UNT objects at length to the standing by YCT to challenge the lack of compliance with the federal law. But the harm of the higher tuition to the out-of-

state students cannot be doubted. It is real, substantial, and direct. It can be measured by the amount the tuition charged to the out-of-state residents exceeds that charged of the illegal aliens. Moreover, it cannot be credibly doubted that YCT has associational standing under the clear precedent of this Court. *See Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 504 (5th Cir. 2021) (associational standing exists on behalf of members even where the association itself has not suffered any injury). Associational standing exists when (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). YCT has members who are being subjected to, and are paying, the higher out-of-state tuition. Thus associational standing plainly exists for YCT to challenge this violation of federal law by UNT.

The district court thoroughly and conclusively rejected the arguments against standing by UNT below. *Young Conservatives of Tex. Found.*, 2022 U.S. Dist. LEXIS 65795, at *7 - *14 ("In sum, Young Conservatives has associational standing to challenge Section 54.051(d) as preempted."). Despite this, UNT takes another long run to contest standing here on this appeal. (UNT Br. 50-57) UNT

does not propose a plaintiff who would have stronger standing, but instead implicitly argues that no one should have standing to challenge its discriminatory tuition fees, because everyone pays them voluntarily. If that were dispositive, then many legitimate cases would be unjustifiably dismissed by courts because a plaintiff voluntarily took action that ultimately subjected him to wrongful discrimination and harm.

UNT insists that the "YCT students' obligation to pay tuition at the out-of-state rate derives from their voluntary decision to attend UNT and the Texas Legislature's decision decades ago to charge out-of-state students at a higher rate." (UNT Br. 19) Of course the YCT students voluntarily attend UNT, just as nearly all victims of discrimination voluntarily chose to take an action, whether it be boarding a bus or applying for a job. UNT must still comply with applicable federal law and not discriminate against American students compared with illegal aliens, which UNT has failed to do.

"In truth, YCT's obligation to pay the out-of-state tuition rate exists independently of any application of Section 1623(a)," UNT argues here. (UNT Br. 51-52) But UNT's post-decision conduct proves precisely the opposite. By virtue of the district court ruling, UNT lowered its tuition for out-of-state residents to the in-state rate that it charges illegal aliens. "In the interest of obedience to a federal-court order, the UNT Officials have billed out-of-state U.S. citizens at the in-state

tuition rate since the injunction was issued." (UNT Br. 55 n.22) That very conduct by UNT in complying with the ruling below demonstrates both standing and redressability for YCT. YCT members receive a quantifiable monetary benefit: the elimination of the discriminatory charge.

UNT oddly adds, "[a] practical result cannot substitute for the necessary showing for redressability." (UNT Br. 56 n.22) This practical result itself demonstrates the available, and indeed achieved, redressability. A practical result proven to have occurred is far better than a merely hypothetical form of relief that can be rejected as speculative.

UNT is likely incorrect in arguing that it could not increase the tuition for illegal aliens to an out-of-state rate, and this Court might clarify the availability of that option to universities affected by this ruling. The district court held that "Section 54.051(d) of the Texas Education Code is expressly preempted by Section 1623(a) of IIRIRA." *Young Conservatives of Tex. Found.*, 2022 U.S. Dist. LEXIS 65795, at *30. Once a state law is found to be "expressly preempted," then it and its fee-setting framework are void on this issue, thereby leaving UNT to redo its tuition fee schedule accordingly. *Cf. Tex. Midstream Gas Servs. LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010) ("If a statute is expressly preempted, a finding with regard to likelihood of success fulfills the remaining requirements.").

It is thus probably wrong for UNT to conclude that:

> Under state law, a public university cannot assess a charge unless authorized by law, giving UNT no choice but to assess to out-of-state U.S. citizens the only tuition rate that was not enjoined: the in-state tuition rate. *See* TEX. EDUC. CODE § 54.003.

(UNT Br. 56 n.22) Instead, UNT should comply with the federal law that the court found to expressly preempt the state law, and not present this as some kind of intractable "Hobson's choice." (UNT Br. 55 n.22)

Of course the lower in-state tuition for out-of-state residents is welcomed by out-of-state students, and may be good for the state of Texas as it attracts even more American migration to the Lone Star state. But this particular result is not compelled by a holding that Section 1623(a) preempts state law. To the extent that other colleges and universities in Texas face this same issue, this Court could clarify that they may charge illegal aliens the higher tuition fee in order to fully comply with applicable federal law that preempts the state law. It should not be necessary to await action by the biennial Texas state legislature, although universities are listened to without opposition in state legislatures and could receive any relief they desire as long as it complies with Section 1623(a).

Section 1623(a) codifies that American citizens not be discriminated against compared with those who are in this country unlawfully. As a group, illegal aliens already receive far more benefits than they contribute, and indeed many are

attracted to migrate to our country for that very reason. Congress properly draws the line with respect to college tuition, and says that at least American citizens should not be placed at a disadvantage compared with those here illegally. State universities need to comply with what Congress has enacted.

III. To the Extent the Tenth Circuit Ruled Otherwise, Its Holding Should Not Be Followed Here.

Appellants argue at length that the decision below is contrary to the Tenth Circuit decision in *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (declining to apply Section 1623(a)) (cited by Appellants Br. 7, 19, 24, 25, 30). But to the extent that Tenth Circuit decision is contrary to the decision on appeal here, that ruling by the different circuit is in error.

In *Day*, the Tenth Circuit found a lack of standing to assert a constitutional claim under the equal protection clause, and even a lack of standing to assert federal preemption. Plaintiffs were compelled by the State of Kansas to pay higher out-of-state tuition, while illegal aliens were paying lower, in-state tuition rate. There, as here, this result was required by a state law, contrary to the federal provision, Section 1623(a), which prohibits such favoritism for illegal aliens in the tuition rates.

The Tenth Circuit never reached the merits, because it concluded as a threshold matter that it lacked jurisdiction due to its finding of a lack of standing. Specifically, the Tenth Circuit held that:

> The Plaintiffs have failed to bring forward evidence supporting their theories of injury based upon the subsidization of resident tuition for illegal aliens. Thus, these theories of injury are too conjectural and speculative to support standing. And because the Plaintiffs cannot show that they could have qualified for the benefits of [the Kansas statute discriminating in tuition against out-of-state residents] even were the allegedly discriminatory provision excised, they are unable to show that their other theories of injury are traceable to the discriminatory conduct alleged or that the injuries would be redressed by a decision in the Plaintiffs' favor. They thus lack standing to bring their equal protection claim.
>
> The Plaintiffs similarly lack standing to raise their preemption claim under 8 U.S.C. § 1623. The text and structure of § 1623 do not manifest a congressional intent to create private rights, and the Plaintiffs thus have not claimed any cognizable and individualized injury stemming from the implementation of [the Kansas tuition statute].

Day v. Bond, 500 F.3d 1127, 1139-40 (10th Cir. 2007).

There the finding of a lack of standing was because:

> None of these Plaintiffs would be eligible to pay resident tuition under [K.S.A.] § 76-731a even if the allegedly discriminatory test of § 76-731a(c)(2) favoring illegal aliens were stricken, because none attended Kansas high schools for at least three years and either graduated from a Kansas high school or received a Kansas GED certificate.

Day, 500 F.3d at 1135. But as the result here below demonstrates, an available remedy for discrimination is to enable plaintiffs to pay the lower tuition rate. The

availability of that option, which was realized for the YCT student members after the decision below, is enough to establish standing.

"As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970)." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973). Plaintiffs can qualify for the lower rate by virtue of the federal ban on discrimination against them, relative to illegal aliens. The underlying reasoning by the Tenth Circuit on this is in error.

Recently this Court properly rejected objections based on standing doctrine to a challenge by the State of Texas and others to a Covid vaccine mandate:

> Their standing to sue is obvious—the Mandate imposes a financial burden upon them by deputizing their participation in OSHA's regulatory scheme, exposes them to severe financial risk if they refuse or fail to comply, and threatens to decimate their workforces (and business prospects) by forcing unwilling employees to take their shots, take their tests, or hit the road.

BST Holdings, L.L.C. v. OSHA, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *6-7 (5th Cir. Nov. 12, 2021) (footnote omitted).

The selective use of standing by other jurisdictions, in order to decline to reach the merits of a strong case, should be rejected by this Court. Instead,

standing doctrine should return to application of its narrow, principled foundation, which is to preserve the "case" or "controversy" requirement of Article III and to respect separation of powers. *See, e.g.*, Linda Simard, "Standing Alone: Do We Still Need the Political Question Doctrine?," 100 DICK. L. REV. 303, 318-23 (1996) (hereinafter, "*Simard, Standing Alone*"). Separation of powers is not an issue here, so the only question as to standing is whether there is a real "case" or "controversy" here. There plainly is.

This Court has recognized that "the Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination." *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 3324 (1984)). Accordingly, "Article III does not require intervenors to possess standing." *Ruiz*, 161 F.3d at 832 (citing, *inter alia*, *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989), and *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978)). YCT is a proper plaintiff, and there is a legitimate case or controversy before the Court in this case. Indeed, YCT members have already financially benefited from the ruling below, as explained in their appellate brief. (YCT Br. 8) That benefit proves the existence of standing.

Similarly, the Eighth Circuit has described standing doctrine in terms of the existence of a case or controversy:

> Article III limits the judicial power to resolving "Cases" or "Controversies," and the standing doctrine is "rooted in the traditional understanding of a case or controversy."

Enter. Fin. Grp., Inc. v. Podhorn, 930 F.3d 946, 949 (8th Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

This litigation was hard-fought below and on appeal as real cases or controversies are, and the outcome determines what tuition is paid by the out-of-state student members of YCT compared with illegal aliens. There is nothing hypothetical or speculative about this case, the opposing parties, or the outcome that has already been secured with concrete results. Nothing in Article III is an obstacle to the litigation of this matter to its conclusion, on its merits. Legal standing, when returned to its traditional purpose of ensuring the existence of a case or controversy, exists here. "The 'irreducible constitutional minimum' of standing consists of three elements. 'The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Podhorn*, 930 F.3d 946, 949 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1547).

Moreover, legal accountability for state universities that are, by definition, taxpayer-funded, is long overdue. A selectively expanded view of standing doctrine should not permit them to continue to defy federal law, as many have for decades on this issue while receiving immense amounts of funding from both

federal and state sources. In addition to billions of dollars in various forms of federal aid for colleges and universities, during the year between March of 2020 and 2021 colleges and universities received an additional $76 ***billion*** in federal aid.[8] This federal aid is, of course, funded by all American citizens, all of whom have the same equitable and federal statutory claim to the same discounted tuition.

The Tenth Circuit decision in *Day* renders it virtually impossible for any private party to challenge discrimination against him concerning tuition at higher education. Neither the reasoning nor the result in that case should be adopted by this Court.

IV. The District Court Correctly Applied 8 U.S.C. § 1623(a) to Prohibit the Tuition Preference for Illegal Aliens, and Correctly Found Irreparable Harm.

UNT argues for an overly narrow interpretation of the federal ban on preferences for illegal aliens set forth in Section 1623(a). UNT reasons that:

> The federal statute's prohibition is directed at alien eligibility, not citizen eligibility. And YCT has repeatedly insisted it does not challenge alien eligibility for in-state tuition. Having disclaimed any challenge to alien eligibility-the only subject of Section 1623's preemptive scope-YCT cannot substantiate its preemption claim.

But YCT need not directly challenge the lower tuition rates for illegal aliens in order to protest the discrimination against the out-of-state YCT students.

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[8] https://hechingerreport.org/federal-relief-money-boosted-community-colleges-but-now-its-going-away/ (viewed Aug. 26, 2022).

Contrary to the federal command in Section 1623(a), the UNT Defendants are providing a benefit to illegal aliens not available to "a citizen … of the United States," namely lower tuition fees for illegal aliens than for out-of-state students. UNT is unpersuasive in arguing that "the federal statute (prohibiting education benefits for aliens) and the state statute (requiring out-of-state tuition for out-of-state students) peacefully coexist." (UNT Br. 19) As UNT applies the state statute, it directly conflicts with the federal statute. There is no peaceful coexistence when illegal aliens are given a strong incentive to stay unlawfully in the United States, in order to benefit from low tuition not made available to out-of-state Americans.

The district court properly found irreparable harm, as increasingly students are declining to attend college while other students have unbearable debt from the enormous expenses, debt that taints their career choices and future opportunities. UNT misconstrues recent rulings by this Court to try to narrow the scope of presumed irreparable harm. UNT argues argue that:

> This Court has invoked this presumption to recognize irreparable harm for First Amendment claims, but not for a structural constitutional violation. *See, e.g., Sambrano v. United Airlines, Inc.,* No. 21-11159, 2022 WL 486610, at *7-8 (5th Cir. Feb. 17, 2022) (per curiam); *U.S. Navy Seals 1-26 v. Biden,* 27 F.4th 336, 348 (5th Cir. 2022) (per curiam); *Opulent Life Church v. City of Holly Springs,* 697 F.3d 279, 295 (5th Cir. 2012).

(UNT Br. 40-41) But UNT construes those decisions too narrowly, as they do not limit the circumstances by which irreparable harm exists.

Here, YCT students' access to an affordable college education is a life-changing issue. A decision not to attend college because it is too expensive puts the student on a career track different from if he were to attend college. A student deterred by high tuition fees may never become a doctor, lawyer, or engineer as a result.

In addition to the irreparable harm to YCT members due to discrimination against them with higher tuition, there is harm to our society at large by continuing an incentive for illegal aliens to remain unlawfully in the United States. In recent weeks the problem of illegal aliens has become so severe that Texas Governor Greg Abbott is busing illegal aliens to Democrat-controlled cities, such as Washington, D.C., and New York City, so that the politicians there can appreciate the havoc caused by continuing to create incentives for the unlawful influx. "In addition to Washington, D.C., New York City is the ideal destination for these migrants, who can receive the abundance of city services and housing that Mayor Eric Adams has boasted about within the sanctuary city," Texas Gov. Abbott

stated. "I hope he follows through on his promise of welcoming all migrants with open arms so that our overrun and overwhelmed border towns can find relief."[9]

"Clearly, the main attraction to immigrants from Mexico and Central America are U.S. wages, which can be six to ten times higher than prevailing wages from these regions." Juan Carlos Linares, "Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States," 34 Denv. J. Int'l L. & Pol'y 321, 322 (Fall, 2006). But the population of Central America is more than half the population of the United States.[10] Daily there are new stories about an illegal influx, and both crime and tragedy associated with the unlawfulness. "The Border Patrol says one of its agents rescued an infant and a toddler who were left alone by migrant smugglers in western Arizona's Organ Pipe Cactus National Monument. … An 18-month-old was subsequently found crying and a 4-month-old was discovered face down and unresponsive." "U.S. Border Patrol rescues baby, toddler left in Arizona desert," CBS News (Aug.

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[9] Gabriel Poblete and Greg B. Smith, *The City*, and Sneha Dey, *The Texas Tribune*, "How Gov. Greg Abbott exported a border crisis to New York City" (Aug. 12, 2022). https://www.texastribune.org/2022/08/12/greg-abbott-eric-adams-migrants-bus/ (viewed Aug. 25, 2022).

[10] https://www.worldometers.info/world-population/central-america-population/ (viewed Aug. 27, 2022).

27, 2022) (fortunately, both were doing fine after medical treatment).[11] While no one wants such tragic results, they are a predictable outcome of providing incentives for illegal migration. There is a lawful process for new immigration that accommodated roughly a million annually prior to Covid,[12] without increasing crime, burdens on Americans, and other harm. Congress halted the incentive for illegals to enter and remain in the United States with respect to college tuition, and the district court was right to enjoin violations of that federal law.

CONCLUSION

For the foregoing reasons and those stated in the Appellees' brief, the decision below should be affirmed.

Respectfully submitted,

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[11] https://www.cbsnews.com/news/immigration-border-patrol-rescue-baby-toddler-arizona-desert/ (viewed Aug. 28, 2022).

[12] https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf (viewed Aug. 28, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 6,290 words, excluding material not counted under Rule 32(f).

Dated: August 31, 2022

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