ARIZONA COURT OF APPEALS

DIVISION ONE

Mikayla Foss, et al., Plaintiffs/Appellant, v. Arizona Board of Regents, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 18-0781 Maricopa County Superior Court No. CV2018-006692

DEFENDANT'S/APPELLEE'S COMBINED ANSWERING BRIEF AND APPENDIX

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Appellants are students at Arizona's public universities who are not Arizona residents. Because they are not Arizona residents, Arizona law prohibits them from paying in-state student tuition to attend Arizona universities. Appellants were offered admission and agreed to pay — and did pay — tuition based on their status as out-of-state students. Appellants have never claimed that they were promised anything else. They have not claimed that Arizona's public universities failed to live up to the promises made to them. Yet Appellants insist that the court should order Arizona's public universities to ignore Arizona law and treat them as in-state students, retroactively determine that Appellants were entitled to pay in-state tuition rates and order the Arizona Board of Regents ("ABOR") to refund them, at the public's expense, the difference between what they paid and the in-state tuition rate.

Appellants base their asserted right to pay resident tuition on a federal statute, 8 U.S.C. § 1623. But that statute provides Appellants no rights whatsoever and places no obligations on ABOR with respect to the tuition that it may assess to non-resident students attending Arizona universities.

Rather, 8 U.S.C. § 1623 governs tuition for a separate group of people — people who are not lawfully present in this country.

ABOR allowed students who were Arizona residents and were participants in the federal Deferred Action for Childhood Arrivals ("DACA") program to pay resident tuition while litigation was pending concerning whether DACA students were eligible for resident tuition. When the Arizona Supreme Court concluded that DACA students were not eligible for resident tuition, ABOR promptly complied with the Supreme Court's decision. Neither the Supreme Court's nor ABOR's determinations about DACA students' eligibility for resident tuition affect Appellants, who were correctly classified as out-of-state students. This lawsuit should be understood for what it is: an attempt by Appellants to secure a windfall based on a legal issue wholly unrelated to them.

Appellants' complaint failed to state any actionable claims, and the trial court correctly dismissed it. Despite Appellants' claims to the contrary, each of their causes of action was a thinly disguised attempt to vindicate alleged rights under 8 U.S.C. § 1623 — rights that the trial court correctly determined Appellants do not have. This Court should affirm the trial court's judgment.

STATEMENT OF FACTS AND CASE*

I. Appellants are not Arizona residents, and they agreed to pay out-of-state tuition to attend Arizona public universities.

Each Appellant is a student who was enrolled at a public university in Arizona during the 2017-18 academic school year. [IR-1 at 1, ¶ 1 (APP069).] Appellant Mikayla Foss is a United States citizen whose parents are California residents, and she was enrolled, full-time and not-online, at Arizona State University. [IR-1 at 2, ¶ 5 (APP070).] Appellant Eleanor Wiersma is a United States citizen whose parents are Maryland residents, and she was enrolled, full-time and not-online, at the University of Arizona. [IR-1 at 2, ¶ 6 (APP070).] Appellant Abigail Garbarino is a United States citizen whose parents are Michigan residents, and she was enrolled, full-time and not-online, at ASU. [IR-1 at 2, ¶ 7 (APP070).]

Arizona law prohibits individuals who are not Arizona residents from being classified as in-state students for tuition purposes, and it additionally specifies that individuals cannot be classified as in-state students until they

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* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP001), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

have been domiciled in Arizona for at least one year or meet one of the limited statutory exceptions. A.R.S. § 15-1802. Appellants were thus classified as out-of-state students for tuition purposes for the 2017-18 school year, as Arizona law requires. [IR-1 at 1, ¶ 1 (APP069).] Appellants did not, and do not, challenge their classification as out-of-state students — students who were not Arizona residents at the time of their enrollment. [IR-1 at 2, ¶¶ 5-7 (APP070); IR-19 at 4 (APP067).] Nor do Appellants claim they paid tuition in excess of what they agreed to pay when they enrolled. [*Id.* (APP067).]

II. The Arizona Supreme Court determined that DACA students were not lawfully present in the United States and therefore not allowed to pay in-state student tuition at Arizona public universities.

In 2012, the federal government created the DACA program, which protected undocumented young people who came to the United States as children and met the program's eligibility requirements from deportation and granted them eligibility for employment authorization documents. [IR-7, Ex. 1 (APP092); IR-8, Ex. 2 (APP094-95).] In 2015, the Maricopa County Superior Court determined that these students were lawfully present in the United States, and that the Maricopa County Community College District could therefore classify students who were in the DACA program and met

Arizona residency requirements as in-state students for tuition purposes. [IR-8, Ex. 2 (APP094-95).] Following this decision, ABOR determined that Arizona's public universities would similarly allow DACA recipients who otherwise met residency requirements to receive in-state status for tuition purposes. [*Id.* (APP094-95).]

On June 21, 2017 — after enrollment and tuition decisions were made for the 2017-18 Academic year — this Court reversed the Superior Court in the Maricopa County Community College District case. *See State ex. rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 242 Ariz. 325 (App. 2017); IR-1 at 3, ¶¶ 10-12 (APP071). ABOR was not a party to the case and determined (as did the Maricopa County Community College District) that it would maintain its tuition policy related to DACA students until the Arizona Supreme Court had made the final determination. [IR-1 at 4, ¶ 16 (APP072).]

On April 9, 2018, the Arizona Supreme Court determined that DACA recipients were not eligible for in-state tuition. *See State ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539 (2018) (hereinafter "*MCCCD*"). [IR-1 at 4, ¶ 16 (APP072); IR-8, Ex. 2 (APP094-95).] ABOR immediately stopped offering in-state tuition status to DACA students who

were Arizona residents, announcing the change of policy on the same day the Court issued its decision. [IR-8, Ex. 2 (APP094).]

III. Appellants sued ABOR, seeking to vindicate their alleged federal rights.

Fifteen days after the Arizona Supreme Court issued the *MCCCD* decision and ABOR announced it would no longer allow DACA students to receive in-state tuition, Appellants sued ABOR seeking declaratory relief, damages for breach of contract and unjust enrichment, and injunctive relief. [IR-1 at 2, ¶ 3 (APP070).] Appellants also sought to represent a class of all individuals who had attended U of A, ASU, or Northern Arizona University during the 2017-18 school year, who were United States citizens over the age of 18 when they paid their tuition, who were classified as out-of-state residents for tuition purposes, and who paid tuition higher than the tuition rate for in-state students. [IR-1 at 4, ¶ 18 (APP072).]

Appellants stated their claim for declaratory and injunctive relief in a single paragraph, which alleged that they were "entitled to in state tuition rates for the 2017-2018 school year under 8 U.S.C. § 1623(a)." [IR-1 at 7, ¶ 38 (APP075).] Likewise, they based their breach of contract claim solely on an allegation that ABOR "charged an amount they are specifically prohibited

from charging by federal law" and that "tuition must be charged subject to conditions described by 8 U.S.C. § 1623." [IR-1 at 8, ¶¶41, 42 (APP076).] Finally, their unjust enrichment claim was based on an allegation that ABOR's "improper collections [were] in violation of federal law" and that Appellants were "damaged in the amount of the sums collected from them in violation of federal law." [IR-1 at 8, ¶ 44 (APP076).] Appellants made no further allegations of wrongdoing against ABOR; their sole allegation was that ABOR had violated 8 U.S.C. § 1623.

Based on the alleged violation of 8 U.S.C. § 1623, Appellants asked the court to certify a class action, order disgorgement of sums illegally collected, award damages equal to the amount of tuition improperly collected, and enjoin ABOR from any further attempt to charge out-of-state students out-of-state tuition while allowing Arizona-resident DACA students to pay in-state tuition rates. [IR-1 at 8-9 (APP076-77).] Appellants' prayer for relief did not include a request for any declaration of the law or their rights from the trial court. [*Id.* (APP076-77).]

IV. The trial court dismissed the complaint for failure to state a claim.

ABOR moved to dismiss the complaint. In its motion, ABOR raised several arguments. First, ABOR noted that all of Appellants' claims were

dependent on, and derivative of, the assumption that 8 U.S.C. § 1623 conferred a statutory right on Appellants. [IR-6 at 3-4 (APP080-81).] Second, ABOR argued that this assumption was wrong — Section 1623 does not confer any rights on Appellants, but instead merely restricts the circumstances in which public universities may offer in-state tuition rates to individuals who are not lawfully present in the United States. [IR-6 at 4-6 (APP081-83).] Third, ABOR argued that Arizona law does not allow private parties to use declaratory judgment and breach of contract claims to enforce statutes that do not provide any private rights or private causes of action. [IR-6 at 7-9 (APP084-86).] Fourth, they argued that each of Appellants' claims were deficiently pled: they did not state a claim for a declaratory judgment action because they had no claim that their legal rights were affected; they did not state a claim for breach of contract because they had not alleged that ABOR had breached any contractual duty; and they did not state a claim for unjust enrichment because they had received exactly what they had bargained for. [IR-6 at 9-11 (APP086-88).] Finally, ABOR argued that the issue of injunctive relief was moot in light of its previous decision regarding tuition for DACA participants. [IR-6 at 11-12 (APP088-89).]

Appellants' response brief appeared to abandon their request for injunctive relief. [IR-10 (APP096).] Instead, they argued that whenever a party alleges that the other party violated federal law, the party can state claims for breach of contract (without identifying any particular breach) and declaratory judgment, even if the federal law does not intend to confer any rights on the party and does not contain a private cause of action. [IR-10 at 7 (APP102).] Finally, they argued that their unjust enrichment claim was properly plead. [IR-10 at 10-11 (APP105-06).]

In its reply, ABOR noted that even if ABOR *had* violated 8 U.S.C. § 1623 by offering a tuition rate to DACA students that was not authorized by the federal statute, Section 1623 does not require ABOR to offer Appellants resident tuition. [IR-11 at 8-10 (APP115-17).] Far from remedying an illegal contract, Appellants would have the court create one by allowing Appellants to be treated as in-state students in violation of A.R.S. § 15-1802. [*Id.* (APP115-17).]

Following briefing and oral argument, the trial court dismissed Appellants' complaint under Rule 12(b)(6). [IR-19 at 4 (APP067).] The trial court found that Appellants' "claims are based upon [ABOR]'s violation of 8 U.S.C. § 1623," but that 8 U.S.C. § 1623 did "not provide an entitlement to

U.S. citizens." [*Id.* (APP067).] The trial court further found that Appellants could not state a claim based solely on violations of a statute that provided them with no rights, no private cause of action, and no entitlements regardless of how they tried to plead it, holding "that because all of [Appellants'] claims are based solely upon a violation of [8 U.S.C. § 1623], [] they have failed to state a claim upon which relief can be granted." [*Id.* (APP067).]

V. The trial court denied reconsideration and entered a final judgment.

Appellants then moved for reconsideration, restating their rejected arguments. [IR-20.] The trial court ordered ABOR to respond (IR-21), and ABOR's response again emphasized the legal deficiencies in Appellants' attempt to state a claim. [IR-22.] The trial court denied reconsideration on October 24, 2018. [IR-23 (APP068).]

The trial court entered a signed final judgment on November 27, 2018. [IR-25 (APP119).] Appellants filed this appeal two days later. [IR-27 (APP120-21).]

STATEMENT OF THE ISSUES

1. Does 8 U.S.C. § 1623 provide properly classified out-of-state students a right to in-state tuition in contravention of A.R.S. § 15-1802?

2. Appellants seek a declaratory judgment that assessing them out-of-state tuition violated 8 U.S.C. § 1623, a statute that provides them with no rights and no cause of action. Does the Arizona Declaratory Judgment Act allow parties to state a claim solely by alleging violation of a federal statute that provides them no rights and does not authorize a private cause of action?

3. Appellants alleged a breach of contract, without alleging that ABOR has breached any contractual promise or duty, but only that their tuition agreement violated 8 U.S.C. § 1623, a statute that provides them with no rights and no cause of action. May private parties state a breach of contract claim solely by alleging violation of a federal statute that provides them no rights and does not authorize a private cause of action?

4. An unjust enrichment claim fails when a party pleads that they received what they bargained for under a contract. May parties that have received what they bargained for under a contract state a claim for unjust enrichment solely by alleging violation of a federal statute that provides them no rights and does not authorize a private cause of action?

STANDARD OF REVIEW

This Court reviews the dismissal of a complaint for failure to state a claim *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶ 8 (2012). For purposes of considering a motion to dismiss, the allegations of the complaint are assumed to be true. *See, e.g., Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008) (court must assume truth of factual allegations but should not give weight to mere conclusory statements, which "are insufficient to state a claim upon which relief can be granted").

The Court may affirm the judgment on any grounds presented in the record. ARCAP 13(b).

ARGUMENT SUMMARY

Arizona law requires ABOR to differentiate between in-state and out-of-state students with respect to tuition rates and provides the methodology for classifying students as such. (Argument § I.) Despite acknowledging their correct classification as out-of-state students, Appellants seek damages based entirely on a claim that they are entitled to in-state tuition under federal law. (Argument § II.A.) This argument fails, however, because the federal law in question, 8 U.S.C. § 1623, creates no rights for out-of-state students such as Appellants and does not authorize an express or implied

cause of action. (Argument § II.B.) Arizona law makes clear that private parties may not sue based solely on the violation of a statute that creates no rights for them and which has no private cause of action. The trial court correctly applied this precedent to dismiss Appellants' claims because Section 1623 did not grant them rights or create a private cause of action. (Argument § II.C.) Appellants' arguments to the contrary rely on inapposite, misapplied, and distinguishable case law. (Argument § II.D.) Additionally, Appellants failed to affirmatively plead the elements of any of their purported causes of action. (Argument § III.) Finally, Appellants have abandoned their claim for injunctive relief. (Argument § IV.)

The judgment should be affirmed.

ARGUMENT

I. Arizona law requires Appellants to be classified as out-of-state students and charged out-of-state tuition rates.

Arizona law establishes ABOR as a "body corporate" that has "jurisdiction and control over the [public] universities." A.R.S. § 15-1625(A). Pursuant to that role, ABOR is required to "[f]ix tuition and fees to be charged and differentiate the tuitions and fees . . . between residents [and] nonresidents." § 15-1626(A)(5); *see also Kromko v. Ariz. Bd. of Regents*, 216

Ariz. 190, 191, ¶ 3 (2007) (discussing ABOR's delegated power to set tuition and fees).

Related to ABOR's obligation to "differentiate" the tuition of Arizona residents and non-residents, the Legislature has adopted requirements for students to be classified as "in-state" students for tuition purposes. In particular, subject to certain exceptions not relevant to this case, "no person having a domicile elsewhere than in this state is eligible for classification as an in-state student for tuition purposes." A.R.S. § 15-1802(A). Further, "[a] person is not entitled to classification as an in-state student until the person is domiciled in this state for one year." *Id.* § 15-1802(B). As the Arizona Supreme Court has observed, this law contemplates "reduced tuition for 'in-state' university students." *MCCCD*, 243 Ariz. at 540, ¶ 3. In-state tuition is not "available to all U.S. citizens." *Id.* at 543, ¶ 17.

Pursuant to these laws, ABOR has set separate base tuition rates for students who meet the requirements for classification as an in-state student ("in-state students") and tuition rates for students who do not meet those classification requirements ("out-of-state students"). [IR-1 at 1 (APP069); IR-7, Ex. 1 (APP092); IR-8, Ex. 2 (APP094-95).] ABOR is required to (and does) differentiate between in-state and out-of-state students for tuition purposes,

offering in-state students a tuition rate that is less than the out-of-state tuition rate. Because they did not meet the in-state student classification requirements set forth in A.R.S. § 15-1802, Appellants were correctly classified as out-of-state students and charged the out-of-state student tuition rate. [IR-1 at 1 (APP069); IR-19 at 4 (APP067).]

II. Appellants have no claim under any theory that implicitly or explicitly depends on a violation of 8 U.S.C. § 1623.

A. A purported violation of 8 U.S.C. § 1623 is the sole basis for all of Appellants' claims.

The trial court was correct in its evaluation of Appellants' claims. Despite Appellants' protestations otherwise, each of their claims entirely depends on a purported right to pay the same tuition rate as do in-state students under 8 U.S.C. § 1623. Their complaint makes that clear.

For example, Appellants base their declaratory and injunctive relief claim on their assertion that they "are entitled to in state tuition rates for the 2017-18 school year under 8 U.S.C. § 1623(a)." [IR-1 at 7, ¶ 38 (APP075).] Similarly, again relying on 8 U.S.C. § 1623, they base their breach of contract claim on the allegation that Arizona universities "have charged an amount that they are specifically prohibited from charging *by federal law*." [*Id.* at 8, ¶ 41 (APP076) (emphasis added).] Finally, they base their unjust enrichment

claim on the premise that Arizona universities' "improper collections in violation *of federal law* has caused [the universities] to be enriched and plaintiffs . . . to be impoverished." [*Id.* at ¶ 44 (APP076) (emphasis added).] Appellants make no other allegations to support their claims — their entire position is that they are entitled to relief because the universities violated Section 1623.

B. 8 U.S.C. § 1623 confers no rights on Appellants or other out-of-state students.

As a matter of law, 8 U.S.C. § 1623 does not support Appellants' claim for resident tuition. Section 1623 addresses the circumstances under which public universities may grant residency-based tuition to "an alien who is not lawfully present in the United States." The statute 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 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.

8 U.S.C. § 1623. This statute functions solely to *restrict* the circumstances under which certain non-citizens can qualify for residency-based tuition rates. *See MCCCD*, 243 Ariz. at 543, ¶ 17 (holding that Arizona has not met

the requirements under Section 1623 for providing in-state tuition to DACA recipients). It places no obligation on states regarding tuition rates for out-of-state students.

Section 1623 plainly has no express cause of action. And it also lacks an implied cause of action because it "entirely lacks the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007). The statute does not state that non-resident citizens may not be denied a benefit by the state, nor does it specify that non-resident citizens are entitled to pay the tuition rates that resident non-citizens pay. *Id.* It does not even address non-resident citizen students such as Appellants; rather, Section 1623 "addresses itself to the *institutions* affected and their authority to provide benefits to illegal aliens." *Id.* (emphasis added). Non-resident citizens at most "incidentally benefit from [Section 1623's] provisions." *Id.*

As the 10th Circuit Court of Appeals held in *Day*, Congress neither intended to create a benefit for non-resident citizens in Section 1623 nor a right for them to enforce Section 1623. Rather, Section 1623 was explicitly subject to an alternative enforcement mechanism — the federal immigration authorities. *See id.* (citing 8 U.S.C. § 1103(a)(1)). Federal law specifically vests

"[t]he Secretary of Homeland Security . . . with the administration and enforcement of this chapter [which includes 8 U.S.C. § 1623] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. §1103(a)(1). This enforcement mechanism confirms that Congress did not intend Section 1623 to create privately enforceable rights. *See Day*, 500 F.3d at 1139.

Appellants argue (at 21-23) that it is irrelevant that Section 1623 creates no private rights because they have pled state law causes of actions based solely on violations of Section 1623, and the *Day* plaintiffs did not. This contrived distinction does not matter. Although Appellants are correct that the specific claims brought in federal court by the *Day* plaintiffs do not mirror those brought here, all of the claims — those brought by the *Day* plaintiffs and those brought by Appellants — were based "*explicitly and entirely*" on "asserted rights under statutory law." *Day v. Bond*, 511 F.3d 1030, 1032 (10th Cir. 2007) ("*Day II*") (emphasis in original). Thus, in determining whether Appellants stated viable claims for relief, the first question must be whether Section 1623 provides Appellants any rights whatsoever. The trial court correctly held that it does not. [IR-19 at 4 (APP067).] As the 10th Circuit

Court held, the "text and structure of § 1623 do not manifest a congressional intent to create private rights." *Day*, 500 F.3d at 1139.

Given that Section 1623 is a federal statute, this Court should defer to the federal appellate court's determination that the statute provides no rights that can be privately enforced, regardless of how those rights are denominated. *See, e.g., First Nat'l Bank of Ariz. v. Carruth*, 116 Ariz. 482, 483 (App. 1977) ("We believe that we are bound by the decisions of the federal courts in their interpretations of a federal statute."). But even if this Court does not defer to the federal court's analysis, it should conclude that Section 1623 provides no rights, lacks an implied cause of action, and is not privately enforceable.

Arizona courts look to "statutory language, . . . its context, subject matter, effects and consequences, and spirit and purpose" in determining whether a statute creates a private right of enforcement. *Burns v. City of Tucson*, 245 Ariz. 594, 595, ¶ 7 (App. 2018). Some Arizona courts have also examined whether a plaintiff is a "member of a class . . . for whose 'especial benefit'" a statute was adopted. *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 195, ¶ 9 (App. 2014). Each of these factors indicate that 8 U.S.C. § 1623 is not privately enforceable:

- **Statutory language and subject matter.** Section 1623's language and subject matter are prohibitory, restricting the benefits available to people who are not lawfully present ("an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State"). The statute's language and subject matter do not create *rights* for anyone.
- **Context, spirit, and purpose.** Section 1623 is an immigration law enacted as part of Title V of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in the Omnibus Consolidated Act of 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-670-688 (Sept. 30, 1996), which was focused entirely on "restrictions on benefits for aliens," not granting benefits to citizens. (APP053-55, 58.)
- **Effects and consequences.** There are no negative effects and consequences from not allowing private citizens to enforce Section 1623. Instead, the federal Department of Homeland Security — the federal agency with authority over and expertise in national immigration matters — is explicitly given enforcement authority. In addition, Arizona courts permitted

the Attorney General to bring an action to determine whether DACA students were eligible for resident tuition under state and related federal laws. *State ex rel. Brnovich v. Marciopa Cty. Cmty. Coll. Dist. Bd.*, 242 Ariz. 325, 329-30, ¶¶ 9-11 (App. 2017), *vacated in part on other grounds by MCCCD*, 243 Ariz. at 543, ¶ 19.

- **Special Benefit.** Section 1623 was not enacted to provide benefits to out-of-state students. Instead, "§ 1623 addresses itself to the institutions affected and their authority to provide benefits to illegal aliens, not the class of nonresident citizens who incidentally benefit from its provisions." *Day*, 500 F.3d at 1139.

The Arizona Supreme Court's decision in *MCCCD* confirmed that under Arizona law, out-of-state students, like Appellants, are not eligible for resident tuition. As the Supreme Court noted, "Arizona has *not* made in-state tuition available to all U.S. citizens and nationals without regard to residence." *MCCCD*, 243 Ariz. at 543, ¶ 17 (emphasis added). The Court also rejected the argument that DACA recipients were lawfully present for the purposes of Section 1623. Because under Arizona law, citizens like Appellants were expressly *not* eligible for residency-based tuition rates and because DACA students were not lawfully present, Section 1623 prohibited

Arizona's public universities from offering in-state tuition to resident DACA recipients. *See id.* The court noted that "[Section 1623] allows a state to provide in-state tuition to students who are not 'lawfully present' only under certain conditions, and Arizona has not met those conditions." The Arizona Supreme Court's decision in *MCCCD* makes clear that Plaintiffs were charged the correct tuition rates, both under Section 1623 *and* Arizona law, A.R.S. § 15-1802.

In short, Section 1623 provides no individual rights or entitlement to a particular tuition rate for any person, including Appellants. By enacting Section 1623, Congress restricted the tuition options public higher education institutions can make available to certain non-citizens. At no point did Congress vest any private citizen with the right to enforce 8 U.S.C. § 1623 or to use the law to seek tuition refunds.

C. Arizona law confirms that the private enforcement of an alleged statutory right first requires that the statute confer a private right of action.

Although Section 1623 confers no enforceable rights upon the Appellants and itself contains no private cause of action, Appellants nonetheless claim that Arizona law, unlike federal law, allows them to pursue generic legal causes of action — breach of contract, the declaratory

judgment act, and unjust enrichment — when the sole basis of the claim is a purported violation of Section 1623. In other words, they claim that Arizona law does not permit a court to dismiss a lawsuit even if its claims are entirely based on a legal right that as a matter of law does not exist. Appellants are wrong. Arizona courts have repeatedly confirmed that Arizona law, like federal law, prohibits such claims from proceeding.

Lancaster v. Arizona Board of Regents, 143 Ariz. 451 (App. 1984), directly addressed this issue. In *Lancaster*, this Court considered a legislative directive that required ABOR to formulate a plan to establish uniform job classifications and equivalent salary scales within those job classifications. *Id.* at 455. ABOR formulated a plan but determined that only 45% of its employees would be entitled to classification and equivalent wages. A group of employees who were not entitled to classification and equivalent wages under the plan sued, seeking damages for a breach of their employment contracts and a declaratory judgment based on ABOR's failure to increase their pay to equivalency. *Id.* at 456-57.

This Court firmly rejected the argument that the legislation could be privately enforced on theories of breach of contract or declaratory judgment. In doing so, it examined whether the underlying legislation created any

private rights. The Court held that the legislation "confine[d] the duty imposed [on] the board to prepare a report by a certain date," and "precluded a private right of action for damages and other relief in the courts brought by third persons." *Id.* at 457. At most, employees of Arizona's universities had an "expectation under the act" that at some future point the legislature might mandate their pay. *Id.* "[I]ncidental beneficiaries," such as the employee plaintiffs, were thus "preclude[d]" from seeking "private judicial enforcement," regardless of how they styled their claims for relief. *Id.* Their claims for breach of contract and a declaratory judgment were dismissed because "[i]mplication of a private right of action [was] clearly inconsistent with the underlying purpose of the act." *Id.*

This unremarkable holding of *Lancaster* — that private parties cannot use creative pleading to enforce a statute that confers no private rights of action where their only alleged injury is a violation of the statute — has been repeatedly confirmed by Arizona's courts. *See, e.g., Zumar Indus., Inc. v. Caymus Corp.*, 244 Ariz. 163, 168-69, ¶ 20 (App. 2017) ("It is well settled that the [Federal Prompt Pay Act] does not contain an explicit or implied private cause of action in favor of an unpaid subcontractor. Although a subcontractor may sue for breach of contract under state law, it may not base

the claim on alleged violations of provisions read into the contract by operation of the [Federal Prompt Pay Act].") (internal citations and quotations omitted); *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 193, 195-96, ¶¶ 3, 8, 14 (2014) (affirming *Lancaster* and holding that private parties could not seek equitable relief based on an alleged violation of a statute to which they were at most incidental beneficiaries).

And even the cases that *have* allowed suits to proceed based on violations of statutes without *explicit* causes of action have recognized that parties relying on such statutes must be more than "incidental beneficiaries" of the statute to have valid and cognizable claims under state law. *See, e.g., Chavez v. Brewer*, 222 Ariz. 309, 318, ¶ 27 (App. 2009) (affirming *Lancaster*'s holding that parties who "were not members of 'the class for whose *especial* benefit' the enactment was intended, [ ] could not pursue any private rights under it) (quoting *Lancaster*, 143 Ariz. at 457). In *Chavez*, the legislature "enacted some statutes that clearly benefit individuals with disabilities," including a statute that "set[] forth voting systems criteria designed to guarantee blind and visually impaired voters the opportunity to vote." *Chavez*, 222 Ariz. at 318, ¶ 28. The "focus of these statutes [was] protecting

the rights of individuals," and thus the disabled plaintiffs were not *incidental* beneficiaries as in *Lancaster*. *Id.*

The decision in *McNamara*, which was decided after *Chavez*, highlights the limits of the *Chavez* decision. When this Court later examined a statute that was "not dealing [] with a special class of voters for whose specific benefit [the statute] was adopted," it refused to imply a private right of action to enforce campaign finance laws. *McNamara*, 236 Ariz. at 195, ¶¶ 9, 11.

As *Lancaster, Zumar Industries*, and *McNamara* confirm, the trial court was correct when it dismissed Appellants' claims because "[a]ll of Plaintiffs' claims are based upon 8 U.S.C. § 1623, and the argument that it confers upon them a private right of action." [IR-19 at 2 (APP065).] Absent a private right of action under Section 1623, Appellants' claims are devoid of any legal basis, regardless of the manner in which they are pled.

D. Appellants' authorities do not support their claim here.

Appellants argue (at 13-15) that the declaratory judgment statute provides a cause of action, contrary to *Lancaster*, whenever a party to a contract alleges that a contract violates a state statute. They rely on two insurance policy exclusion cases for this point, *Stevens v. State Farm Mutual*

Automobile Insurance Co., 21 Ariz. App. 392 (1974), and *Schwab v. State Farm Fire & Casualty Co.*, 27 Ariz. App. 747 (1976). Neither of those cases supports that proposition.

Appellants entirely misread *Stevens*. In that case, an insurer sued for a declaration that an injury fell within an insurance policy exclusion, and the insured raised as a defense that the exclusion was void because it contravened a state statute. *Stevens*, 21 Ariz. App. at 392-93. The court held that the policy exclusion was void and summarized the holding of the case (and of the Arizona Supreme Court in similar cases) as follows: "exclusions in automobile insurance policies which attempt to prohibit recovery under a policy to injured third parties are void." *Id.* at 394. *Stevens* has nothing to do with the correct analysis of Appellants' claims.

Nor does *Schwab*. In that case, the plaintiff sought coverage for a bodily injury that the plaintiff argued was within the policy and that the insurer disputed. *Schwab*, 27 Ariz. App. at 748. The insurer denied coverage, relying on an exclusion, and the insured's son filed a second suit seeking a declaration that the exclusion was invalid because it conflicted with a state statute and because the contract language was ambiguous. *Id.* In other words, the trial court was asked to provide a declaration regarding an

express contract term, not to read a new term into a contract. *Id.* The declaratory judgment claim in that case could proceed because an injury existed separate from an alleged violation of law — the insurer had denied coverage under the insurance contract.

Appellants also argue (at 15-16) that the declaratory judgment act can be used to litigate preemption claims when a party is either denying a purported federal right based on state law or denying a right under state law by claiming it is preempted. *See White Mountain v. Maricopa County*, 241 Ariz. 230 (App. 2016) (holding that Arizona Medical Marijuana Act was not preempted after county refused to comply with it on that ground); *Cimarron Foothills Comm. Assoc. v. Kippen*, 206 Ariz. 455 (App. 2003) (holding that federal disability rights law did not preempt covenants at issue in that case). While Appellants are correct that the declaratory judgment act can be used to litigate denials of statutory rights based on preemption, they do not assert any such claim here, and this line of cases does nothing to support their declaratory judgment claim based on 8 U.S.C. § 1623.

Appellants also rely on *Kerr v. Killian,* 197 Ariz. 213 (App. 2000), and *State ex rel. Ariz. Dep't. of Revenue v. Dillon*, 170 Ariz. 560 (App. 1991), for this proposition, but these were not declaratory judgment actions. Instead, they

were appeals of decisions from the Board of Tax Appeals on issues that are wholly unrelated to the issues raised here. *See Kerr*, 197 Ariz. at 216, ¶ 9 (appeal related to an award of attorneys' fees under the common fund doctrine); *Dillon*, 170 Ariz. at 561-62 (appeal related to validity of Arizona luxury privilege tax on business owned by federally licensed Indian trader).

Appellants (at 16-17) cite *White v. Mattox*, 127 Ariz. 181 (1980), for the proposition that a party can state a claim for breach of contract based on a charge in excess of what the law allows. *White* says nothing of this sort. Rather, in *White*, the parties contracted for the transfer of a liquor license, and the buyer made several earnest money payments. *Id.* at 182. The buyer later learned, however, that the liquor license could not be transferred and sued to rescind the contract. *Id.* The buyer argued that rescission was warranted, and the Supreme Court's holding was that earnest money paid could not be retained by the seller when the seller's consideration failed by operation of law. *Id.* at 184. Here, there was no failure of consideration — Appellants bargained for an education at an Arizona university as out-of-state students, and that is what they received. *White* does not help Appellants.

Finally, Appellants argue (at 17-19) that various federal cases hold that plaintiffs can state a claim for breach of contract solely by alleging that a term of the contract violates a statute. These cases, however, hold only that when a contract *expressly* incorporates as a contract provision an otherwise not-privately enforceable statutory standard, the breach of contract claim is not preempted. In other words, if a party to a contract decides to include a requirement in the contract that requires compliance with a federal statute, the party cannot later avoid a claim for a breach of that contractual provision by claiming that the statute does not provide a private right of action. The statutory right is transformed into a purely contractual right for purposes of a breach of contract claim. *See Delaware & Hudson Railway Co., Inc. v. Knoedler Mfrs.*, 781 F.3d 656, 660, 667 (3d Cir. 2015) (explaining that because supplier had "express contractual dut[y]" to provide seats to a railway that complied with the Federal Locomotive Inspection Act, the failure to do so "breached their contractual obligations" and was not preempted); *Wigod v. Wells Fargo Bank*, 673 F.3d 547, 561-62, 581-85 (7th Cir. 2012) (mortgage loan servicer could not evade obligations under terms explicitly included in contracts it entered because of reference to federal law that did not provide a private cause of action); *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*,

491 F.3d 638, 643-44 (7th Cir. 2007) (noting that federal savings and loan regulations that did not provide a private right of action would not allow a savings and loan association to defend a breach of a contractual agreement by arguing preemption); *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005) (holding that party was not "free to enter into a contract that invoked a federal standard as the indicator of compliance, then to proceed to breach its duties thereunder and to shield its breach by pleading preemption."). Of course, Appellants' contracts with the universities they attended did not even reference 8 U.S.C. § 1623, and these cases therefore have nothing to do with the propriety of Appellants' claims.

In short, none of the cases Appellants cite stand for the proposition, contrary to *Lancaster*, that Appellants can state a claim for breach of contract or for declaratory judgment or for anything else based solely on a violation of a statute that provides them with no rights, and of which they are, *at most*, incidental beneficiaries.

III. Appellants failed to plead the elements of their causes of action.

Even if Appellants could sue to enforce a statute that provided them with no rights and was not intended to be privately enforceable based solely on a purported violation of statute, this Court should affirm the trial court's

judgment on the alternative ground that Appellants failed to plead the elements of any of their causes of action.

A. Appellants did not state a claim for a declaratory judgment.

Appellants take the position (at 13) that whenever a contract exists between two parties, either party can state a claim for declaratory relief. Their contention — that parties to a contract could state claims for judicial relief at any time without regard to any facts — is not the law in Arizona, and they have cited nothing to support that contention. Instead, the existence of a contract, standing alone, is not sufficient to create a cause of action for declaratory judgment.

Rather, to state a claim for declaratory relief, a party must plead a "protectible interest" and a "justiciable controversy." *Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557, ¶ 19 (App. 2002). This means that a "a complaint must assert a legal relationship, status, or right in which the party has a definite interest and *an assertion of the denial of it by the other party*." *Land Dep't. v. O'Toole*, 154 Ariz. 43, 47 (App. 1987) (emphasis in the original).

Appellants' declaratory judgment claim rests on their assertion that they are "entitled to in state tuition rates for the 2017-2018 school year under

8 U.S.C. § 1623(a)." [IR-1 at 7, ¶ 38 (APP075).] As a matter of law, they have no such entitlement — Section 1623(a) provides them no rights whatsoever. As discussed above, the statute is instead a restriction on when and whether ABOR could offer residency-based tuition to people not lawfully present in this country. *See Day*, 500 F.3d at 1139; *MCCCD*, 243 Ariz. at 543, ¶ 17. Section 1623 imposes no limitation on ABOR's authority to charge out-of-students out-of-state tuition, which is the basis for Appellants' claim.

Because Appellants have no rights under Section 1623, as a matter of law, they have failed to plead "a legal relationship, status, or right" that ABOR has denied. *O'Toole*, 154 Ariz. at 47. Without such a right "presently affected," they are "not in sufficiently direct relation with the allegedly offending statute to present [a court] with an existing controversy capable of judicial resolution." *Town of Wickenburg v. State*, 115 Ariz. 465, 468 (App. 1977). As such, Appellants have failed to state a claim for declaratory relief.

Appellants appear to believe that because they pled the existence of a right to in-state tuition under Section 1623, this must be taken as true for the purposes of a motion to dismiss. This argument confuses the distinction between factual allegations and legal conclusions. The Court must take Appellants' *factual* allegations as true: that they are students at Arizona's

public universities, that they are classified as out-of-state students, and that they paid out-of-state tuition rates. The Court must also take the *factual* allegations that ABOR offered in-state tuition to certain DACA recipients as true. But the Court need not, and cannot, take Appellants' *legal* allegation that a right under Section 1623 to in-state tuition exists as true, because it is a false legal conclusion. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005) ("[Courts] do not accept as true allegations consisting of conclusions of law, inferences, or deductions that are not necessarily implied by well-plead facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts.").

Because Appellants failed to allege (and could not have alleged) that ABOR has denied any rights that they actually, presently have, Appellants have failed to state a claim for declaratory relief.

B. Appellants did not state a claim for breach of contract.

Similarly, Appellants did not state a claim for breach of contract. A claim for breach of contract requires a plaintiff to prove "the existence of a contract, *breach of contract*, and resulting damages." *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30 (App. 2004) (emphasis added). A breach of contract is a "non-performance" of a contractual duty. Restatement (Second) of

Contracts § 235 ("When performance of a duty under a contract is due any non-performance is a breach."). Here, as ABOR argued in the trial court, Appellants have failed to allege any breach of contract occurred — they identify no duty that ABOR failed to perform. [IR-1 at 7-8, ¶¶ 40-42 (APP075-76).] Therefore, their claim was properly dismissed. *See Commercial Cornice & Millwork, Inc. v. Camel Const. Servs. Corp.*, 154 Ariz. 34, 38 (App. 1987) (failure to sufficiently allege any element of breach of contract requires a complaint to be dismissed).

Appellants' only response (at 7) is that they have alleged offer, acceptance, meeting of the minds, capacity to contract, and consideration. [IR-10 at 3 (APP098).] These are the elements of a *contract*. The alleged existence of a contract alone, however, is insufficient to state a claim for breach of contract, which requires a plaintiff to further allege a breach and damages. *Chartone, Inc.*, 207 Ariz. at 170, ¶ 30.

Indeed, Appellants' factual allegations demonstrate that ABOR *complied* with its contractual duties to Appellants. Appellants alleged that they agreed to and did pay a certain amount of tuition, and that ABOR agreed to and did provide them an education at one of Arizona's public

universities. [IR-1 at 2, ¶¶ 5-7 (APP070); *id.* at 7-8, ¶¶ 40-42 (APP075-76).] Thus, Appellants failed to allege a breach of contract.

Further, Appellants did not allege any damages, beyond their claim that Section 1623 entitled them to rescission and to lower tuition. [*Id.* at 8, ¶ 42 (APP076).] Because Section 1623 establishes no such entitlement, *see Day*, 500 F.3d at 1139, Appellants have no legal basis for the remedies they seek.

Appellants did not allege breach of a contract or that they were damaged as a result of a breach, and they therefore failed to state a claim for breach of contract.

C. Appellants did not state a claim for unjust enrichment.

Appellants also did not state a claim for unjust enrichment. Unjust enrichment requires the pleading of "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of a justification for the enrichment and the impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 226 Ariz. 242, 251, ¶ 27 (App. 2011). When "there is a specific contract which governs the relationship of the parties," a claim for unjust enrichment is precluded. *Brooks v. Valley Nat'l Bank*, 113 Ariz. 169, 174 (1976); *see also Johnson v. Am. Nat'l Ins. Co.*, 126 Ariz. 219, 223 (App. 1980) ("[T]he

quasi-contract principal of unjust enrichment does not apply to an agreement deliberately entered into by the parties.") (quoting *Durham Terrace, Inc. v. Hellertown Borough Auth.*, 148 A.2d 899, 904 (1959)).

Here, not only did a specific tuition agreement govern the relationship of the parties, Appellants received exactly what was agreed upon. The tuition agreement is thus the "justification for the enrichment and the impoverishment" to the extent paying the tuition one has agreed to be paid can be seen as an "impoverishment." *See Freeman*, 226 Ariz. at 251, ¶ 27. "A person is not entitled to compensation on the grounds of unjust enrichment if he receives from the other that which is agreed between them the other should give in return." *Brooks*, 113 Ariz. at 174 (citing Restatement of Restitution § 107, cmt. (1)(a)). That is precisely what happened here.

Appellants appear to believe that unjust enrichment exists as a catch-all when a contracting party has no other remedy. This turns the doctrine on its head. Rather, as the very cases the Appellants rely on make clear, "the doctrine of unjust enrichment or recovery in quasi-contract . . . applies to situations where as a matter of fact there is *no* legal contract." *San Manuel Copper Corp. v. Redmond*, 8 Ariz. App. 214, 218 (App. 1968) (emphasis added). The existence of a valid contract, such as Appellants' tuition agreement,

prevents them from stating any claim for recovery in quasi-contract for unjust enrichment.

Because unjust enrichment is not available when an actual contract governs a relationship, Appellants have failed to state a claim for unjust enrichment.

IV. Appellants have abandoned any claim for injunctive relief.

In their complaint, Appellants sought injunctive relief against ABOR. They do not even mention this issue in their opening brief, let alone "present significant arguments, supported by authority, setting forth the appellant[s'] position on the issues raised." *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶ 33 (App. 2011). Issues not raised on appeal are waived. *Jones v. Burk*, 164 Ariz. 595, 597 (App. 1990).

CONCLUSION

For the foregoing reasons, the trial court's judgment dismissing Appellants' lawsuit should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of May, 2019.

OSBORN MALEDON, P.A.

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APPENDIX TABLE OF CONTENTS*

* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this appendix using yellow highlighting to assist the Court with its review of the record. This appendix complies with the bookmarking requirements of ARCAP 13(d)(2).

INDEX OF RECORD #	DESCRIPTION	APPENDIX PAGE NOS.
8	Exhibit 2: Statement from ABOR Chair Bill Ridenour Regarding Arizona Supreme Court Decision in MCCCD Case Prohibiting In-State Tuition for DACA Students (dated Apr. 9, 2018)	APP093 – APP095
10	Plaintiffs' Response to Motion to Dismiss (filed July 5, 2018)	APP096– APP107
11	Defendants' Reply in Support of Motion to Dismiss (filed July 17, 2018)	APP108– APP118
25	Judgment (filed Nov. 27, 2018)	APP119
27	Plaintiffs' Notice of Appeal (filed Nov. 29, 2018)	APP120– APP121

DIVISION C—ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

SEC. 1. SHORT TITLE OF DIVISION; AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT; APPLICATION OF DEFINITIONS OF SUCH ACT; TABLE OF CONTENTS OF DIVISION; SEVERABILITY.

(a) SHORT TITLE.—This division may be cited as the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996". 8 USC 1101 note.

(b) AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT.—Except as otherwise specifically provided— 8 USC 1101 note.

(1) whenever in this division an amendment or repeal is expressed as the amendment or repeal of a section or other provision, the reference shall be considered to be made to that section or provision in the Immigration and Nationality Act; and

(2) amendments to a section or other provision are to such section or other provision before any amendment made to such section or other provision elsewhere in this division.

(c) APPLICATION OF CERTAIN DEFINITIONS.—Except as otherwise specifically provided in this division, for purposes of titles I and VI of this division, the terms "alien", "Attorney General", "border crossing identification card", "entry", "immigrant", "immigrant visa", "lawfully admitted for permanent residence", "national", "naturalization", "refugee", "State", and "United States" shall have the meaning given such terms in section 101(a) of the Immigration and Nationality Act. 8 USC 1101 note.

(d) TABLE OF CONTENTS OF DIVISION.—The table of contents of this division is as follows:

Subtitle C—Unfair Immigration-Related Employment Practices

SEC. 421. TREATMENT OF CERTAIN DOCUMENTARY PRACTICES AS UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 274B(a)(6) (8 U.S.C. 1324b(a)(6)) is amended—

(1) by striking "For purposes of paragraph (1), a" and inserting "A"; and

(2) by striking "relating to the hiring of individuals" and inserting the following: "if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to requests made on or after the date of the enactment of this Act. 8 USC 1324b note.

TITLE V—RESTRICTIONS ON BENEFITS FOR ALIENS

Subtitle A—Eligibility of Aliens for Public Assistance and Benefits

SEC. 501. EXCEPTION TO INELIGIBILITY FOR PUBLIC BENEFITS FOR CERTAIN BATTERED ALIENS.

Section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641) is amended by adding at the end the following new subsection:

"(c) TREATMENT OF CERTAIN BATTERED ALIENS AS QUALIFIED ALIENS.—For purposes of this title, the term 'qualified alien' includes—

"(1) an alien who—

"(A) has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the Attorney General, which opinion is not subject to review by any court) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

"(B) has been approved or has a petition pending which sets forth a prima facie case for—

"(i) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act,

"(ii) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) of the Act,

"(iii) suspension of deportation and adjustment of status pursuant to section 244(a)(3) of such Act, or

29–194 O – 96 – 27 : QL 3 Part 4

"(iv) status as a spouse or child of a United States citizen pursuant to clause (i) of section 204(a)(1)(A) of such Act, or classification pursuant to clause (i) of section 204(a)(1)(B) of such Act; or

"(2) an alien—

"(A) whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the Attorney General, which opinion is not subject to review by any court) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

"(B) who meets the requirement of clause (ii) of subparagraph (A).

This subsection shall not apply to an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual subjected to such battery or cruelty.".

8 USC 1621 note.

SEC. 502. PILOT PROGRAMS ON LIMITING ISSUANCE OF DRIVER'S LICENSES TO ILLEGAL ALIENS.

(a) IN GENERAL.—Pursuant to guidelines prescribed by the Attorney General not later than 6 months after the date of the enactment of this Act, all States may conduct pilot programs within their State to determine the viability, advisability, and cost-effectiveness of the State's denying driver's licenses to aliens who are not lawfully present in the United States. Under a pilot program a State may deny a driver's license to aliens who are not lawfully present in the United States. Such program shall be conducted in cooperation with relevant State and local authorities.

(b) REPORT.—Not later than 3 years after the date of the enactment of this Act, the Attorney General shall submit a report to the Judiciary Committees of the House of Representatives and of the Senate on the results of the pilot programs conducted under subsection (a).

SEC. 503. INELIGIBILITY OF ALIENS NOT LAWFULLY PRESENT FOR SOCIAL SECURITY BENEFITS.

(a) IN GENERAL.—Section 202 of the Social Security Act (42 U.S.C. 402) is amended by adding at the end the following new subsection:

"Limitation on Payments to Aliens

"(y) Notwithstanding any other provision of law, no monthly benefit under this title shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States as determined by the Attorney General.".

42 USC 402 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply with respect to benefits for which applications are filed on or after the first day of the first month that begins at least 60 days after the date of the enactment of this Act.

SEC. 504. PROCEDURES FOR REQUIRING PROOF OF CITIZENSHIP FOR FEDERAL PUBLIC BENEFITS.

Section 432(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1642) is amended—

(1) by inserting "(1)" after the dash, and

(2) by adding at the end the following:

"(2) Not later than 18 months after the date of the enactment of this Act, the Attorney General, in consultation with the Secretary of Health and Human Services, shall also establish procedures for a person applying for a Federal public benefit (as defined in section 401(c)) to provide proof of citizenship in a fair and nondiscriminatory manner.".

SEC. 505. LIMITATION ON ELIGIBILITY FOR PREFERENTIAL TREATMENT OF ALIENS NOT LAWFULLY PRESENT ON BASIS OF RESIDENCE FOR HIGHER EDUCATION BENEFITS. 8 USC 1623.

(a) IN GENERAL.—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.

(b) EFFECTIVE DATE.—This section shall apply to benefits provided on or after July 1, 1998.

SEC. 506. STUDY AND REPORT ON ALIEN STUDENT ELIGIBILITY FOR POSTSECONDARY FEDERAL STUDENT FINANCIAL ASSISTANCE. 8 USC 1611 note.

(a) GAO STUDY AND REPORT.—

(1) STUDY.—The Comptroller General shall conduct a study to determine the extent to which aliens who are not lawfully admitted for permanent residence are receiving postsecondary Federal student financial assistance.

(2) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit a report to the appropriate committees of the Congress on the study conducted under paragraph (1).

(b) REPORT ON COMPUTER MATCHING PROGRAM.—

(1) IN GENERAL.—Not later than one year after the date of the enactment of this Act, the Secretary of Education and the Commissioner of Social Security shall jointly submit to the appropriate committees of the Congress a report on the computer matching program of the Department of Education under section 484(p) of the Higher Education Act of 1965.

(2) REPORT ELEMENTS.—The report under paragraph (1) shall include the following:

(A) An assessment by the Secretary and the Commissioner of the effectiveness of the computer matching program, and a justification for such assessment.

(B) The ratio of successful matches under the program to inaccurate matches.

(C) Such other information as the Secretary and the Commissioner jointly consider appropriate.

(c) APPROPRIATE COMMITTEES OF THE CONGRESS.—For purposes of this section the term "appropriate committees of the Congress" means the Committee on Economic and Educational Opportunities

and the Committee on the Judiciary of the House of Representatives and the Committee on Labor and Human Resources and the Committee on the Judiciary of the Senate.

SEC. 507. VERIFICATION OF IMMIGRATION STATUS FOR PURPOSES OF SOCIAL SECURITY AND HIGHER EDUCATIONAL ASSISTANCE.

(a) SOCIAL SECURITY ACT STATE INCOME AND ELIGIBILITY VERIFICATION SYSTEMS.—Section 1137(d)(4)(B)(i)) of the Social Security Act (42 U.S.C. 1320b–7(d)(4)(B)(i)) is amended to read as follows:

"(i) the State shall transmit to the Immigration and Naturalization Service either photostatic or other similar copies of such documents, or information from such documents, as specified by the Immigration and Naturalization Service, for official verification,".

(b) ELIGIBILITY FOR ASSISTANCE UNDER HIGHER EDUCATION ACT OF 1965.—Section 484(g)(4)(B)(i) of the Higher Education Act of 1965 (20 U.S.C. 1091(g)(4)(B)(i)) is amended to read as follows:

"(i) the institution shall transmit to the Immigration and Naturalization Service either photostatic or other similar copies of such documents, or information from such documents, as specified by the Immigration and Naturalization Service, for official verification,".

SEC. 508. NO VERIFICATION REQUIREMENT FOR NONPROFIT CHARITABLE ORGANIZATIONS.

Section 432 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1642) is amended by adding at the end the following new subsection:

"(d) NO VERIFICATION REQUIREMENT FOR NONPROFIT CHARITABLE ORGANIZATIONS.—Subject to subsection (a), a nonprofit charitable organization, in providing any Federal public benefit (as defined in section 401(c)) or any State or local public benefit (as defined in section 411(c)), is not required under this title to determine, verify, or otherwise require proof of eligibility of any applicant for such benefits.".

SEC. 509. GAO STUDY OF PROVISION OF MEANS-TESTED PUBLIC BENEFITS TO ALIENS WHO ARE NOT QUALIFIED ALIENS ON BEHALF OF ELIGIBLE INDIVIDUALS.

Not later than 180 days after the date of the enactment of this Act, the Comptroller General shall submit to the Committees on the Judiciary of the House of Representatives and of the Senate and to the Inspector General of the Department of Justice a report on the extent to which means-tested public benefits are being paid or provided to aliens who are not qualified aliens (as defined in section 431(b) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) in order to provide such benefits to individuals who are United States citizens or qualified aliens (as so defined). Such report shall address the locations in which such benefits are provided and the incidence of fraud or misrepresentation in connection with the provision of such benefits.

SEC. 510. TRANSITION FOR ALIENS CURRENTLY RECEIVING BENEFITS UNDER THE FOOD STAMP PROGRAM.

Effective as if included in the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,

subclause (I) of section 402(a)(2)(D)(ii) (8 U.S.C. 1612(a)(2)(D)(ii)) is amended to read as follows:

"(I) IN GENERAL.—With respect to the specified Federal program described in paragraph (3)(B), ineligibility under paragraph (1) shall not apply until April 1, 1997, to an alien who received benefits under such program on the date of enactment of this Act, unless such alien is determined to be ineligible to receive such benefits under the Food Stamp Act of 1977. The State agency shall recertify the eligibility of all such aliens during the period beginning April 1, 1997, and ending August 22, 1997.".

Subtitle B—Public Charge Exclusion

SEC. 531. GROUND FOR EXCLUSION.

(a) IN GENERAL.—Paragraph (4) of section 212(a) (8 U.S.C. 1182(a)) is amended to read as follows:

"(4) PUBLIC CHARGE.—

"(A) IN GENERAL.—Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.

"(B) FACTORS TO BE TAKEN INTO ACCOUNT.—(i) In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

"(I) age;

"(II) health;

"(III) family status;

"(IV) assets, resources, and financial status; and

"(V) education and skills.

"(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A for purposes of exclusion under this paragraph.

"(C) FAMILY-SPONSORED IMMIGRANTS.—Any alien who seeks admission or adjustment of status under a visa number issued under section 201(b)(2) or 203(a) is excludable under this paragraph unless—

"(i) the alien has obtained—

"(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A), or

"(II) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B); or

"(ii) the person petitioning for the alien's admission (including any additional sponsor required under section 213A(f)) has executed an affidavit of support described in section 213A with respect to such alien.

"(D) CERTAIN EMPLOYMENT-BASED IMMIGRANTS.—Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) by virtue of a classification petition filed by a relative of the alien

1 CA-CV 18-0781
MIKAYLA FOSS VS. AZ BOARD OF REGENTS

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MAR Case # CV2018-006692

No.	Document Name	Filed Date
1.	COMPLAINT	Apr. 24, 2018
2.	PLAINTIFFS' CERTIFICATE OF COMPULSORY ARBITRATION	Apr. 24, 2018
3.	CIVIL COVERSHEET	Apr. 24, 2018
4.	AFFIDAVIT OF SERVICE OF PROCESS BY PRIVATE PERSON	May. 3, 2018
5.	SUMMONS	May. 3, 2018
6.	[PART 1 OF 3] MOTION TO DISMISS	Jun. 11, 2018
7.	[PART 2 OF 3] MOTION TO DISMISS	Jun. 11, 2018
8.	[PART 2 OF 3] MOTION TO DISMISS	Jun. 11, 2018
9.	CREDIT MEMO	Jun. 13, 2018
10.	RESPONSE TO MOTION TO DISMISS	Jul. 5, 2018
11.	REPLY IN SUPPORT OF MOTION TO DISMISS	Jul. 17, 2018
12.	**ME: ORAL ARGUMENT SET [07/25/2018]**	**Jul. 26, 2018**
13.	PLAINTIFFS' SUPPLEMENT TO RECORD	Sep. 4, 2018
14.	**ME: MATTER UNDER ADVISEMENT [09/04/2018]**	**Sep. 5, 2018**
15.	DEFENDANT'S REPLY TO PLAINTIFFS' SUPPLEMENT TO THE RECORD	Sep. 6, 2018
16.	DEFENDANT'S MOTION FOR LEAVE TO FILE REPLY TO PLAINTIFFS' SUPPLEMENT TO THE RECORD	Sep. 6, 2018
17.	ORDER	Sep. 14, 2018
18.	**ME: ORDER SIGNED [09/14/2018]**	**Sep. 18, 2018**
19.	**ME: UNDER ADVISEMENT RULING [09/24/2018]**	**Sep. 25, 2018**
20.	MOTION FOR RECONSIDERATION	Sep. 25, 2018
21.	**ME: ORDER ENTERED BY COURT [10/03/2018]**	**Oct. 5, 2018**
22.	DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION	Oct. 19, 2018

Electronic Index of Record
MAR Case # CV2018-006692

No.	Document Name	Filed Date
23.	**ME: ORDER ENTERED BY COURT [10/22/2018]**	**Oct. 24, 2018**
24.	NOTICE OF FILING PROPOSED FINAL JUDGMENT	Oct. 24, 2018
25.	FINAL JUDGMENT	Nov. 27, 2018
26.	**ME: JUDGMENT SIGNED [11/27/2018]**	**Nov. 29, 2018**
27.	NOTICE OF APPEAL	Nov. 29, 2018
28.	NOTICE OF ORDERING TRANSCRIPT	Nov. 30, 2018

APPEAL COUNT: 1

RE: CASE: 1 CA-CV 18-0781

DUE DATE: 12/27/2018

CAPTION: MIKAYLA FOSS VS. AZ BOARD OF REGENTS

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: grethe on January 4, 2019; [2.5-17026.63]
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CERTIFICATION: I, CHRIS DeROSE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

Electronic Index of Record
MAR Case # CV2018-006692

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

Chris DeRose, Clerk of Court
*** Electronically Filed ***
09/25/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-006692 09/24/2018

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

MIKAYLA FOSS, et al. B LANCE ENTREKIN

v.

ARIZONA BOARD OF REGENTS EMMA J CONE-RODDY

JUDGE SANDERS

RULING

The Court has read and considered Defendant's *Motion to Dismiss* filed April 16, 2018, Plaintiffs' response, and Defendant's reply. The Court has also considered the authorities cited by counsel as well as the arguments made on September 4, 2018.

In its motion, Defendant seeks dismissal of Plaintiffs' claims against it pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure. Specifically, it contends that Plaintiffs' Complaint fails to state a claim upon which relief can be granted because 8 U.S.C. § 1623 provides Plaintiffs with no legal rights or private right of action. Plaintiffs submit that they have properly pleaded a contract, and that a portion of it violates federal law, and, as a result, they are not required to show standing under 8 U.S.C. § 1623.

This lawsuit arises from Defendant extending in-state tuition rates to certain undocumented immigrants, on the basis of the immigrants' Arizona residency, during the 2017-2018 academic year. Plaintiffs are U.S. citizens, and non-residents of Arizona, who paid non-resident tuition rates during that same time.

Plaintiffs filed their Complaint on April 24, 2018, alleging that (1) they are entitled to in-state tuition rates for the 2017-18 school year pursuant to 8 U.S.C. § 1623, (2) pursuant to their

contract with Defendant, Defendant has "charged an amount that they are specifically prohibited from charging by federal law", and (3) Defendant has been unjustly enriched by its "improper collections in violation of federal law". All of Plaintiffs' claims are based upon 8 U.S.C. § 1623, and the argument that it confers upon them a private right of action. Thereafter, Defendant filed this *Motion to Dismiss* on June 11, 2018.

Arizona Rules of Civil Procedure Rule 12(b)(6) allows for the dismissal of a claim for "failure to state a claim upon which relief can be granted." Motions to dismiss for failure to state a claim are strongly disfavored. *Acker v. CSO Chevira*, 188 Ariz. 252, 934 P.2d 816 (Ariz. App. Div. 1 1997) (citing *Folk v. City of Phoenix*, 27 Ariz.App. 146, 151, 551 P.2d 595, 600 (1976)). In reviewing a Rule 12(b)(6) Motion, the "[c]ourts must . . . assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Rule 12(b)(6) requires that the Court look only to the complaint itself to determine whether or not a claim is stated upon which relief can be granted. The court must indulge all reasonable inferences in favor of Plaintiff.

8 U.S.C. § 1623 provides as follows:

> (a) In general
>
> 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 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.

A.R.S. § 15-1802(A) provides that "except as otherwise provided in this article, no person having a domicile elsewhere than in this state is eligible for classification as an in-state student for tuition purposes." There is no exception for the situation at issue here, specifically, a resident non-documented immigrant being afforded in-state tuition.

Defendant extended in-state tuition rates to undocumented immigrants who were participating in the Deferred Action for Childhood Arrivals program for the 2017-2018 academic year. Defendant did not extend in-state tuition to non-resident U.S. citizen students. The Arizona Supreme Court, in *Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.,* 243 Ariz. 539, 416 P.3d 803 (2018), ultimately determined that these non-citizen students were not eligible for in-state tuition, and entered an order enjoining the secondary educational institution from granting in-state tuition to DACA recipients. Defendant no longer offers in-state tuition to DACA students.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-006692 09/24/2018

As noted above, all of Plaintiffs' claims are premised on a statutory right of action pursuant to 8 U.S.C. § 1623. Defendant contends that 8 U.S.C. § 1623 does not confer a private right of action upon Plaintiffs. For the reasons set forth below, the Court agrees.

The 10th Circuit Court of Appeals considered this issue in *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). In *Day,* several non-resident students and their parents sued the Governor of Kansas, and other Kansas officials and state universities, challenging the constitutionality and legality under federal law of a Kansas statute that permitted undocumented or illegal immigrants to attend Kansas universities and pay resident tuition.

In affirming the dismissal of the non-resident students' claims, the 10th Circuit determined that they lacked standing to pursue a claim under Section 1623 because the statute did not create a private legal right for non-resident citizen students. In analyzing the issue, the Court noted as follows:

> The statute at issue in this case, 8 U.S.C. § 1623, has significant aspects of text and structure that foreclose the Plaintiffs' argument that it vests in them private rights. Its text "entirely lacks the sort of 'rights creating' language critical to showing the requisite congressional intent to create new rights". (citing *Gonzaga Univ. v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).
>
> Moreover, § 1623 addresses itself to the institutions affected and their authority to provide benefits to illegal aliens, not to the class of nonresident citizens who incidentally benefit from its provisions.

Although *Day* is a 10th Circuit case, it involves a federal court of appeals interpreting the precise federal statute in question, in a context very similar to our case.

The Arizona Supreme Court, in *Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, granted review "solely on the issue of whether DACA recipients are eligible for in-state tuition." The Court ultimately held as follows:

> Congress has the ultimate say in immigration matters and Arizona is bound under the Supremacy Clause of the United States Constitution to follow federal law. U.S. Const. art. VI. DACA recipients are not "lawfully present" for purposes of § 1623(a), which governs in-state tuition benefits. That section allows a state to provide in-state tuition to students who are not "lawfully present" only under certain conditions, and Arizona has not met those conditions. We therefore must conclude DACA recipients are not eligible for in-state tuition, even if we agree on

the desirability of affording them access to college education as a matter of public policy.

In their Complaint, Plaintiffs acknowledge that they were classified as non-residents for tuition purposes, and that they paid non-resident tuition. They do not claim that they were erroneously classified, or that their "contract" provided for them to pay in-state tuition. Their claims are based upon the rationale that because Defendant allowed undocumented immigrants to pay in-state tuition during the 2017-2018 academic year, they are required to do the same for Plaintiffs.

Each of Plaintiffs' claims are based upon Defendant's violation of 8 U.S.C. § 1623. 8 U.S.C. § 1623 specifically prohibits Defendant from extending educational benefits to undocumented immigrants that it does not extend to U.S. citizens. It does not provide an entitlement to U.S. citizens, nor does it prohibit educational institutions from classifying non-resident students as such, or from collecting non-resident tuition from them.

Based upon the matters presented, and for the reasons set forth above, the Court finds that 8 U.S.C. § 1623 does not confer upon Plaintiffs a private cause of action. The Court further finds that because all of Plaintiffs' claims are based solely upon a violation of that statute, that they have failed to state a claim upon which relief can be granted.

Pursuant to Rule 12(b)(6) it is ordered granting Defendant's *Motion to Dismiss* filed April 16, 2018.

Defendant is directed to submit a form of Order no later than 30 days from the date of this minute entry.

Chris DeRose, Clerk of Court
*** Electronically Filed ***
10/24/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-006692 10/22/2018

HON. TERESA SANDERS

CLERK OF THE COURT
A. Durda
Deputy

MIKAYLA FOSS, et al. B LANCE ENTREKIN

v.

ARIZONA BOARD OF REGENTS EMMA J CONE-RODDY

JUDGE SANDERS

MINUTE ENTRY

The Court has read and considered Plaintiffs' Motion for Reconsideration, filed September 25, 2018 and Defendant's response.

IT IS ORDERED denying Plaintiffs' Motion for Reconsideration.

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IN THE SUPERIOR COURT OF ARIZONA IN AND FOR

MARICOPA COUNTY

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO,

Plaintiffs,

v.

ARIZONA BOARD OF REGENTS,

Defendant.

NO. CV2018-006642

COMPLAINT
(Declaratory Judgment; Other Contract)

(Jury Trial Requested)

For their Complaint against Defendant, Plaintiffs allege as follows.

PARTIES

1. Mikayla Foss, Eleanor Wiersma and Abigail Garbarino are adults residing in Arizona as students at state universities, who have been classified as out of state students for tuition purposes. They submit to the jurisdiction of this Court for this matter. They bring this action on their own behalf and on behalf of a similarly situated class, as defined below.

2. Defendant Arizona Board of Regents ("ABOR") is the governing board for The University of Arizona ("U of A"), Arizona State University ("ASU"), and Northern Arizona University ("NAU") (collectively, the "Universities"). ABOR is a corporate body that may be sued.

JURISDICTION AND VENUE

3. This Court has jurisdiction over actions seeking declaratory and injunctive relief under Article VI, Section 14 of the Arizona Constitution and A.R.S. §§ 12-123, 12-1801, and 12-1831. The Court has jurisdiction over all other claims pursuant to A.R.S. § 12-123.

4. Venue is proper in Maricopa County under A.R.S. § 12-401.

FACT ALLEGATIONS

5. During the 2017-18 school year, Mikayla Foss was a full time, non on-line student at ASU majoring in Exercise and Wellness. She and her parents paid her tuition together and she is liable to them for their share and she is also taking out a student loan. She is a United States citizen and because her parents are California residents, she was classified as an out of state student.

6. During the 2017-18 school year, Eleanor Wiersma was a full time, non on line student at the U of A majoring in Criminal Justice. She and her parents paid her tuition together in 2017-18, she is liable to them for their share and she is also taking out a student loan. She has a $5,000 annual scholarship. She is a United States citizen and because her parents are Maryland residents, she was classified as an out of state student.

7. During the 2017-18 school year, Abigail Garbarino was a full time, non on-line student at ASU. She and her parents paid her tuition together, she is liable to them for their share and she also has a Dean's Scholarship that could be applied to either in state or out of state tuition. She is a United States citizen and because her parents are Michigan residents, she was classified as an out of state student.

8. Congress passed and President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the Welfare Reform Act. See 8 U.S.C. §§ 1601-1646. The Act, in part, is a comprehensive statutory scheme for determining aliens' eligibility for federal, state, and local benefits. Congress explicitly stated a national public immigration policy of removing the availability of public benefits as an incentive for immigration and of promoting the self-sufficiency of aliens.

9. 8 U.S.C. 1623(a), a part of the Act, states: "(n)otwithstanding 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."

10. On June 21, 2017, the Arizona Court of Appeals construed this statute in State Ex Rel. Brnovich v. Maricopa C.C.C.B.D., 395 P.3d 714 (Ariz. App. 2017).

11. In determining whether in state tuition was a "postsecondary education benefit" as defined in the statute, the Court held that in state tuition was "the quintessential residence-based, postsecondary education benefit..." Id. at 717; see also, Martinez v. Regents of the Univ. of Cal., 50 Cal.4th 1277, 117 Cal.Rptr.3d 359, 241 P.3d 855, 865 (Cal. 2010).

12. In determining whether DACA recipients were "not lawfully present in the United States" for purposes of receiving in state tuition, the Court held: "Congress has not defined DACA recipients as 'lawfully present' for purposes of eligibility for in-state tuition or other state or local public benefits. Congress has, conversely, authorized each state to determine whether aliens, otherwise non-qualified under federal law, should be granted state or local public benefits. Arizona's statutory scheme for postsecondary education benefits does not demonstrate an intent to create that eligibility for DACA recipients." Id. at 728.

13. Regarding "on the basis of residence within a State," the Board has clearly stated the in state tuition rate is only available to DACA recipients who "were able to establish in-state residency for tuition purposes..." See, https://www.azregents.edu/sites/default/files/news-releases/ABOR%20Statement%20on%20Court%20Decision%20Regarding%20DACA%20Students%20June%2029%202017_0.pdf

14. Regarding treatment of U.S. citizens who are paying out of state tuition at Arizona colleges, while DACA recipients receive in state tuition, the Court held: "(s)hould a state extend residence-based, in-state tuition benefits to non-qualified aliens, IIRIRA requires the benefit be extended to all U.S. citizens and nationals, including those residing out-of-state..." Id. at 722 n.5.

15. On June 29, 2017, the Arizona Board of Regents issued a statement indicating that it would ignore the Court's holding and extend in state tuition to DACA recipients who established state residency for 2017-18, while charging U.S. citizens from other states out of state tuition.

16. On April 9, 2018, the Arizona Supreme Court upheld the Court of Appeals' ruling by a vote of 7-0.

17. The filing is timely in that the students had no entitlement to in state tuition until the Board's announcement that it would extend in state tuition to DACA recipients who proved residency, on June 29, 2017.

CLASS ACTION ALLEGATIONS

18. Plaintiffs bring this action under Rule 23 of the Arizona Rules of Civil Procedure ("ARCP"). Plaintiffs bring this action on their own behalf and on behalf of a putative class which consists of:

a) individuals who attended the U of A, ASU or NAU;

b) during the 2017-18 school year;

c) who are United States citizens and were over 18 years of age when they paid their tuition;

d) who were classified as out of state residents by either the U of A, ASU or NAU, for the 2017-18 school year; and

e) who paid tuition in a sum greater than they would have paid, had they received the in state tuition rate.

19. The requirements of Rule 23(a), Rule 23(b)(2) and Rule 23(b)(3) are met, as set forth below.

NUMEROSITY

20. Arizona published cases on numerosity are few and give little guidance. For that reason and other reasons, Arizona courts view federal cases construing Rule 23 as authoritative. *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98 fn.2, 50 P.3d 844 (App. 2002). Under federal law, more than forty class members satisfies the numerosity requirement. 1 Newberg on Class Actions, § 3.05 at 3-25 (3rd. Ed.

1992); Moore's Federal Practice, § 23.22(3)(a) (Bender 3rd. Ed. 1999); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3rd Cir. 2001); *Consolidated Rail v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999); *Perez v. First American Title Ins.*, 2009 WL 2486003, 2 (D.Ariz. 2009) ("Generally, 40 or more members will satisfy the numerosity requirement.")

21. The Court can take judicial notice that the proposed class has more than forty members, published data from authoritative sources establishes this.

COMMONALITY

22. The commonality requirement "requires simply that there exist questions of law or fact common to the class." *Lennon v. First National Bank of Arizona*, 21 Ariz.App. 306, 309, 518 P.2d 1230 (App. 1974). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Parra v. Bashas' Inc.*, 536 F.3d 975, 978 (9th Cir. 2008).

23. The legal and factual issues are not just shared, they are virtually identical. All events at issue occurred in Arizona. One state statute of limitation applies on each cause of action. Only Arizona affirmative defenses apply. There is a single legal issue and little factual variance of any relevance.

TYPICALITY

24. There is little Arizona case law discussing specific criteria regarding typicality. Federal law states: "(U)nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998); *Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003).

25. In this case, class representatives are in a factual and legal posture identical to the class members.

ADEQUACY

26. Under Arizona law, Plaintiffs' attorneys must be qualified, experienced and reasonably capable. Lead Plaintiffs must not collude with the Defendants and must not have

interests which are obviously antagonistic to the interests of the class they seek to represent. *Lennon, supra,* at p. 309. The burden of proving inadequacy is on the defendant. *Lewis v. Curtis*, 671 F.2d 779, 788 (3rd Cir. 1982).

27. In order to determine whether obvious antagonism of interests exists, federal courts have looked to whether a lead plaintiff is a spouse, family member or employee of counsel, if any counsel is a class member, if there are unusual bonus fees for lead plaintiffs which could create a conflict with class members and whether lead plaintiffs will promptly move for certification. *Lyon v. Ariz.*, 80 F.R.D. 665, 667-68 (D.Ariz. 1978).

28. Counsel are not members of the class and no lead plaintiff is a spouse, family member or employee of counsel. Lead Plaintiffs will promptly move for certification and no bonus fees have been promised to lead Plaintiffs.

29. Plaintiffs' counsel are also qualified, experienced and reasonably capable, having both litigated successfully in this area of the law for decades.

RULE 23(B)(2), ARCP

30. Rule 23(b)(2) certification is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"; Rule 23(b)(2), ARCP.

31. This criteria is clearly satisfied.

RULE 23(B)(3), ARCP

32. Rule 23(b)(3) certification is appropriate if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and...a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

33. Courts consider "predomination" factors and "superiority" factors. With regard to predomination, the Court should certify even in cases where there is large factual variance between class members if "questions of law common to all class members" lie at the heart of the case. *Godbey v. Roosevelt School Dist.*, 131 Ariz. 13, 17-18, 638 P.2d 235 (App. 1981).

This case fits that description perfectly.

34. With regard to superiority, Rule 23(b)(3) directs the Court to look at: a) the desirability of concentrating claims in this forum; b) difficulties of management; c) current claims by class members; and d) class members' interest in controlling their individual claims. Rule 23(b)(3), ARCP.

35. Addressing forum desirability first, this is the only feasible forum. Regarding difficulties of management, all Defendants and Plaintiffs are in one state, governed by the law of one state, the facts are fairly uniform and the case turns on a few issues of law. Regarding the final two factors, this case perfectly fits a description offered by the 9th Circuit: "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon, supra* at p. 1023.

CAUSES OF ACTION

A. DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO A.R.S. § 12-1831 ET. SEQ.

36. All Plaintiffs repeat all allegations as if fully set forth herein.

37. An actual controversy exists. All members of the class have legal rights, legal status and/or legal relationships that are affected by the construction of a statute and contracts. See, A.R.S. § 12-1832. The members of the class can seek injunctive and declaratory relief as to whether a breach has occurred or whether they are entitled to benefits under the statute. See, A.R.S. § 12-1832 and 1833. The provisions of A.R.S. § 12-1841 do not apply, because no municipal ordinance is at issue and no claim of unconstitutionality is asserted.

38. Plaintiffs are entitled to in state tuition rates for the 2017-18 school year under 8 U.S.C. 1623(a). They request the Court so declare, enjoin the continued violation of this statute and order the disgorgement of funds improperly collected from them in light of the statute.

B. BREACH OF CONTRACT

39. All Plaintiffs repeat all allegations as if fully set forth herein.

40. Plaintiffs and Defendants engaged in an offer, acceptance, an exchange of consideration in

the form of tuition monies and educational services and a meeting of the minds. As the class is defined, all have the capacity to contract and no portion of the statute of frauds (A.R.S. § 44-101) applies, but the contract was clearly evidenced by a writing in any event.

41. Defendants have charged an amount that they are specifically prohibited from charging by federal law. In White v. Mattox, 619 P.2d 9, 127 Ariz. 181, 184 (Ariz. 1980), the Court held: "In the instant case, the Legislature has not prohibited the transfer of liquor licenses. Transfers are not per se illegal. The transfer is made subject to conditions and must conform to the standards prescribed by the State. Hence, since the act of transfer is not forbidden as illegal or contrary to public policy, recovery of the purchase price for the license should not be withheld." The Court then ordered rescission.

42. Identically, Congress has not prohibited charging tuition to out of state students or stated that doing so is against public policy. This is not per se illegal. But the tuition charged must be subject to conditions described by 8 U.S.C. § 1623. A failure to do so is a basis for rescission and recovery of those funds illegally charged, as it was in White, supra.

C. UNJUST ENRICHMENT

43. All Plaintiffs repeat all allegations as if fully set forth herein.

44. Should the Court hold that the class lacks a remedy at law against the Defendants, Defendants' improper collections in violation of federal law has caused them to be enriched and plaintiffs in the class to be impoverished. The enrichment and impoverishment are connected and there is an absence of justification for the enrichment and the impoverishment.

45. Plaintiffs in the class have been damaged in the amount of the sums collected from them in violation of federal law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Certify this case as a class action, pursuant to Rule 23(a), 23(b)(2) and 23(b)(3), ARCP;

B. Order disgorgement of sums illegally collected;

C. Award damages in the amount of sums improperly collected;

D. Award pre and post judgment interest;

E. Enjoin Defendants from any further attempt to file or collect out of state tuition from a United States citizen who is classified as being subject to out of state tuition rates, while simultaneously granting in state tuition rates to students who come under DACA;

F. Award costs and attorneys fees under A.R.S. § 12-341.01, the private attorney general doctrine, the common fund doctrine and any and all other theories that have the potential to provide for an award of fees;

G. Provide such other relief as the Court deems just.

SIGNED THIS 24TH DAY OF April, 2018

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Attorneys for Arizona Board of Regents

Chris DeRose, Clerk of Court
*** Electronically Filed ***
T. Hays, Deputy
6/11/2018 3:00:00 PM
Filing ID 9421514

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO, Plaintiffs, vs. ARIZONA BOARD OF REGENTS, Defendant.	No. CV2018-006692 **MOTION TO DISMISS** (Assigned to the Hon. Teresa Sanders) (Oral Argument Requested)_

Defendant Arizona Board of Regents ("the Board") hereby moves to dismiss the complaint pursuant to Ariz. R. Civ. P. 12(b)(6).

Introduction

In this lawsuit, Plaintiffs claim that they were entitled to pay in-state/resident tuition to attend Arizona universities in the 2017-2018 academic year, even though they do not assert that they are Arizona residents or otherwise challenge their classification as out-of-state students. Instead, these out-of-state students claim they were entitled to pay resident tuition because the Board's policy permitted Arizona residents who were participating in the federal Deferred Action for Childhood Arrivals ("DACA recipients") program to pay resident tuition in the 2017-18 academic year. Plaintiffs' claim fails as a matter of law. Out-of-state students have no legal claim for resident

tuition based on the tuition rate assessed Arizona residents who are DACA recipients. Because all of Plaintiffs' causes of action are premised on the erroneous assertion that federal law grants them a right to resident tuition rates, the Complaint does not state a claim for relief and must be dismissed in its entirety.

Factual Background

Ms. Foss, Ms. Wiersma, and Ms. Garbarino ("Plaintiffs") were all students at either Arizona State University or the University of Arizona (the "Arizona universities") during the 2017-18 school year. Compl. ¶¶ 5-7.[1] They are United States citizens but are not Arizona residents, and they therefore paid tuition at the out-of-state rate. *Id.* Plaintiffs do not challenge this classification. Rather they argue that because some Arizona-resident non-citizens paid in-state/resident tuition rates, the Plaintiffs were entitled to pay in-state tuition rates as well. They have demanded that this Court require the Arizona universities to refund them the difference between the tuition they paid in 2017-18 and what they would have paid based on in-state tuition rates.

In 2015, the Board determined that it would offer in-state tuition rates to DACA recipients who had an Employment Authorization Document issued pursuant to the federal Deferred Action for Childhood Arrivals ("DACA") program and who met Arizona law residency requirements, consistent with a ruling from the Maricopa County Superior Court in a case involving the Maricopa County Community College District.[2]

---

[1] While the Board reserves the right to deny or disprove the allegations of the complaint, this motion assumes the truth of the allegations for the purpose of this motion to dismiss, as required under Rule 12(b)(6). *Cullen v. Auto-Owners, Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008).

[2] *See* Arizona Board of Regents, ABOR Statement on Court Decision Regarding DACA Students (2017), available online at https://www.azregents.edu/sites/default/files/news-releases/ABOR%20Statement%20on%20Court%20Decision%20Regarding%20DACA%20Students%20June%2029%202017_0.pdf. Plaintiffs rely on this statement in their Complaint at ¶¶ 13 and 15, and a copy is attached as Exhibit 1. The Board is providing the statement to provide appropriate context for the references to the statement in the

The Superior Court's decision was reversed on appeal on June 21, 2017. *See Arizona ex. rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 242 Ariz. 325 (App. 2017); *see also* Compl. ¶ 10. After the Court of Appeals' ruling, the Board determined that it would continue to offer in-state tuition to DACA recipients until the litigation ended and the matter was completely resolved. Compl. ¶ 10; *see also* Ex. 1. The Arizona Supreme Court accepted review of the case and concluded that DACA students were not eligible for resident tuition. *Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539 (2018). After the Court announced its decision, the Board promptly announced that DACA recipients who are Arizona residents are no longer eligible for resident tuition at the Arizona universities.[3]

Argument

I. All of Plaintiffs' claims are premised on a statutory right of action under 8 U.S.C. § 1623

Although Plaintiffs have pleaded causes of action for declaratory and injunctive relief, breach of contract, and unjust enrichment, each of those claims is premised on the assumption that 8 U.S.C. § 1623 confers a statutory right on them (and other similarly situated non-resident Arizona university students). Absent such a right, their claims fail

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Complaint. *See Strategic Dev. and Const. Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64 ¶¶ 12-15 (App. 2010) (holding that on a motion to dismiss, a court may consider matters "central to the complaint," including "[w]hen a complaint relies on a document") (internal citation and quotation omitted).

[3] Arizona Board of Regents, Statement from ABOR Chair Bill Ridenour Regarding Arizona Supreme Court Decision in MCCCD Case Prohibiting In-State Tuition for DACA Students (2018), available online at http://www.azregents.edu/sites/default/files/news-releases/Statement%20from%20ABOR%20Chair%20Bill%20Ridenour%20Regarding%20Arizona%20Supreme%20Court%20Decision%20in%20DACA%20Case_April%209%202018.pdf. A copy of this statement is as Exhibit 2. In connection with a motion to dismiss, this Court may consider matters of public record, such as this public statement of the Board. *See Strategic Dev. and Const., Inc.*, 224 Ariz. 60 at ¶ 13.

because they are merely derivative of—and wholly premised upon—their Section 1623 claim.

For example, the declaratory and injunctive relief claim is based on Plaintiffs' assertion that they "are entitled to in state tuition rates for the 2017-18 school year under 8 U.S.C. § 1623(a)." Compl. ¶ 38. Similarly, their breach of contract claim is based on a breach because the Arizona universities "have charged an amount that they are specifically prohibited from charging by federal law." *Id.* ¶ 41; *see also id.* ¶ 42 (citing 8 U.S.C. § 1623). Finally, the unjust enrichment claim is premised on the Arizona universities' "collections in violation of federal law." *Id.* ¶ 44. Thus, if Plaintiffs do not possess any legal rights under 8 U.S.C. § 1623, their Complaint must be dismissed.

II. 8 U.S.C. § 1623 provides Plaintiffs with no legal rights and no private right of action.

Plaintiffs believe that federal law provides them a legal right to resident tuition because the Board granted resident tuition to Arizona residents who were DACA recipients. However, the federal statute Plaintiffs rely on, 8 U.S.C. § 1623, neither creates a legal right for them or any other out-of-state students, nor provides any private citizens with a cause of action.

Section 1623(a) addresses the circumstances under which public postsecondary schools may grant resident tuition to "an alien who is not lawfully present in the United States." The statute 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 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 law is one of many in the chapter of federal immigration laws entitled "Restricting Welfare and Public Benefits for Aliens." *See generally* 8 U.S.C. §§ 1601 to 1646. In

other words, the statute speaks only to a non-citizen's eligibility (or lack thereof) for resident tuition at a public university or college. It does not address other individuals' eligibility for resident tuition, as Plaintiffs would have this Court believe.

The 10th Circuit Court of Appeals has considered and squarely rejected the contention that Section 1623 confers private rights of action. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). In *Day*, several non-resident students of Kansas state public universities filed suit to prevent the implementation of a Kansas law allowing undocumented immigrants to pay resident tuition rates on several theories, including a claim under 8 U.S.C. § 1623. *Day*, 500 F.3d at 1131. In affirming the dismissal of the non-residents' claims, the 10th Circuit held that the challengers lacked standing to pursue a claim under Section 1623 because the statute did not create a private legal right for non-resident citizen students, and therefore it did not provide them with a private cause of action. *Id.* at 1138-39.

The court first observed that Section 1623 "entirely lacks the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Id.* at 1139 (internal citation and quotation omitted). In particular, the court noted that the statute does not state that "no nonresident citizen shall be denied a benefit," nor does it state that non-resident citizens are entitled to pay the tuition rate resident that non-citizens pay. *Id.* Indeed, Section 1623 does not even address non-resident citizen students such as Plaintiffs; rather, Section 1623 "addresses itself to the institutions affected and *their* authority to provide benefits to illegal aliens." *Id.* (emphasis added). Non-resident citizens at most "incidentally benefit from [Section 1623's] provisions." *Id.* In sum, the court found that the statute did not contain the type of clear language that gives rise to individual rights. *Id.*

Further, the court noted that the context of the statute—within the federal

immigration statutes—clearly contemplates enforcement by the federal immigration authorities. *See id.* (citing 8 U.S.C. § 1103(a)(1), which states, in relevant part, that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens"). Thus, the 10th Circuit held that Congress neither intended to create a benefit for non-resident citizens nor a right for them to enforce Section 1623. Rather, Congress intended that the federal government could enforce Section 1623. *See Day*, 500 F.3d at 1139. Without a legal right or cause of action under Section 1623—without any cognizable injury—the non-resident citizen plaintiffs in *Day* lacked standing to pursue a Section 1623 claim. *See id.* (holding that "Plaintiffs lack standing to assert a preemption claim based on such a supposed individual right").

One other court—the California superior court—has undertaken a substantive analysis of whether Section 1623 creates private rights in individual non-resident citizen students. In *Martinez v. Regents of Univ. of Cal.*, 2006 WL 2974303, at *5 (Cal. Superior Ct. Oct. 4, 2006), the trial court, like the 10th Circuit, concluded that "Congress intended the Secretary of Homeland Security, not private citizens, as the person in charge of enforcing immigration laws," and thus held that there was no private right of action under the statute.[4]

The Arizona Supreme Court's decision in the Maricopa County Community College District litigation further clarifies that Plaintiffs have no private right to in-state tuition under Section 1623. As the Supreme Court noted, "Arizona has *not made in-state tuition available to all U.S. citizens and nationals* without regard to residence." *Arizona*, 243 Ariz. 543 at ¶ 17 (emphasis added). Because the requirements of Section

[4] The issue was not addressed on appeal by either the California Court of Appeals or the California Supreme Court. *See Martinez v. The Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010) (explaining reason issue not addressed).

1623 were not met—United States citizens like Plaintiffs were *not* eligible for resident tuition rates—Arizona public postsecondary institutions could not continue to offer in-state tuition to resident DACA recipients based on Section 1623. *See id.* ("[Section 1623] allows a state to provide in-state tuition to students who are not 'lawfully present' only under certain conditions, and Arizona has not met those conditions."). Plaintiffs' claim that Section 1623 granted them the right to in-state tuition is thus inconsistent with the Supreme Court's decision in *Arizona.* Section 1623 does not give Plaintiffs a right to resident tuition; it denies resident tuition to people not lawfully present in the United States under certain circumstances.

By enacting Section 1623, Congress restricted the tuition options public higher education institutions can make available to certain non-citizens. At no point did Congress vest any private citizen with the right to enforce 8 U.S.C. § 1623 or to use the law to seek tuition refunds. Plaintiffs' attempt to end run around Congress's legislative intent should be understood for what it is—a baseless effort to seek a financial windfall for out-of-state students who attended Arizona universities.

III. Because Section 1623 vests no rights in Plaintiffs, the Complaint must be dismissed.

As the 10th Circuit Court did in *Day*, the Arizona Court of Appeals has held that private plaintiffs may not recover on claims that are based on the alleged violations of statutes that incidentally benefit them but vest no rights in them. *Lancaster v. Arizona Bd. of Regents*, 143 Ariz. 451, 456-57 (App. 1984) (dismissing declaratory judgment and breach of contract claims). While *Day* discusses the issue in terms of standing and *Lancaster* discusses it as a lack of a valid cause of action, the deciding factor in both cases was that the allegedly violated statutes did not provide the private plaintiffs with a private right of action. *Compare Day*, 500 F.3d at 1138-39 (addressing the "pure

standing issue of whether § 1623 confers a private cause of action upon the Plaintiffs" and determining it did not), *with Lancaster*, 143 Ariz. at 457-58 (holding that since "no such implied right of action exist[ed]," the plaintiffs' declaratory judgment and contract claims were properly dismissed). A private plaintiff cannot maintain a claim based on a purported violation of a statute that does not provide the plaintiff with a cause of action.

In *Lancaster*, a putative class of the Board's employees sued for back wages, retirement benefits, and merits increases based on the passage of a bill, Senate Bill 1222. That bill stated that the "Board shall report to the legislature . . . on a plan to establish a system of equivalent wages and salaries for all employees and supervisory personnel. . . . The plan shall include the establishment of uniform job and position classifications, equivalent salary and wage scales within such classifications." *Lancaster*, 143 Ariz. at 455 (quoting S.B. 1222). The employees sought a declaratory judgment that the Board had failed to comply with S.B. 1222, that they needed to be "classified" pursuant to the report, and that they were entitled to equivalent wages. They also alleged that the Board had breached a contract by not paying the employees what they were entitled to under law. *Id.* at 454.

The Court of Appeals determined that the analysis of the legitimacy of all of the claims depended upon whether S.B. 1222 "gave an individual a right to an increase in pay." *Id.* at 457. The Court held that S.B. 1222, however, did no such thing: "[S.B. 1222] did not create in and of itself . . . a right to equal pay and provide a private cause of action to enforce such right." *Id.* Instead, S.B. 1222 was directed at the relationship between the Board and the legislature and thus "precluded private judicial enforcement by third persons who are incidental beneficiaries" such as the employees. *Id.* As such, the employees' derivative actions for declaratory judgment and breach of contract "were all properly dismissed because the [employees] have no claim upon which relief can be

granted." *Id.*

As with the statute examined in *Lancaster*, Section 1623 did not create any right to resident tuition for students who are not Arizona residents. *See Day*, 500 F.3d at 1139. Instead, Plaintiffs here, as in *Lancaster* and *Day*, at most could "incidentally benefit from [Section 1623's] provisions." *Id.*; *Lancaster*, 143 Ariz. at 457 (finding that S.B. 1222 did not create a private right of action for "individuals who might benefit incidentally" from its provisions). Because Plaintiffs have no enforceable rights or private cause of action under Section 1623, their complaint must be dismissed in its entirety. Examining each of the Plaintiffs' claims individually makes this point clear.

A. Declaratory judgment claim.

Plaintiffs' declaratory judgment action under A.R.S. § 12-1832 requires that Plaintiffs have "rights, status or other legal relations" that have been wrongly impacted. Plaintiffs' claim for declaratory relief is based entirely on Section 1623. Compl. ¶ 38 ("Plaintiffs are entitled to in state tuition rates for the 2017-18 school year under 8 U.S.C. 1623(a). They request the Court so declare . . . ."). Because Section 1623 vests no rights in Plaintiffs, they have no right to the declaratory relief that they seek. *See, e.g., Town of Wickenburg v. State*, 115 Ariz. 465, 468 (App. 1977) ("At the time they attempted to bring this lawsuit, the individual plaintiffs had no rights presently affected. They were, therefore, not in sufficiently direct relationship with the allegedly offending statute to present this Court with an existing controversy capable of judicial resolution.").

B. Breach of contract claim.

Similarly, Plaintiffs' breach of contract claim is based on the theory that they were entitled to lower tuition under Section 1623, and that the Board therefore breached the tuition agreement. Compl. ¶ 42. Plaintiffs concede that the Board is entitled to offer

out-of-state students, such as Plaintiffs, a higher base rate of tuition than in-state students. *Id.* But they claim that they became "entitle[d]" to in-state tuition when the Board announced that DACA recipients who were Arizona residents would be eligible for resident tuition. *Id.* ¶ 17. They have no other basis for challenging their tuition. The Supreme Court held in *Arizona* that DACA recipients are not eligible for resident tuition because they are not lawfully present in the United States under Section 1623. *Arizona*, 416 P.3d at 807 ¶ 18. Neither that decision nor Section 1623 provides any basis for Plaintiffs' claim that they were entitled to a lower tuition rate.

Thus, Plaintiffs have failed to plead that the Board has breached the term of any contract with them. In fact, they alleged the opposite—that the Board agreed to charge them out-of-state tuition, and that the Board did in fact charge them that amount. Compl. ¶¶ 5-7, 41-42.

Plaintiffs' Complaint (at ¶ 41) relies on *White v. Mattox*, 127 Ariz. 181 (1980), to support a breach of contract, but *White* does not support their claim. *White* involved a situation where there "was a total failure of consideration"—and therefore no contract. *Id.* at 184. Because there was no contract, the court held that as a matter of equity, moneys paid ought to be returned to their original holder. *Id.* The opinion in *White* has no relevance here because Plaintiffs do not allege "a total failure of consideration" or that the Board failed to perform a contractual obligation. Instead, they claim a right to lower tuition based on a federal law that gives them no such right. Plaintiffs' claim for breach of contract must be dismissed. *See Commercial Cornice & Millwork, Inc. v. Camel Const. Servs. Corp.*, 154 Ariz. 34, 38 (App. 1987) (failure to sufficiently allege any element of breach of contract requires a complaint to be dismissed).

C. Unjust enrichment claim.

A claim for unjust enrichment requires "(1) an enrichment, (2) an

impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of a justification for the enrichment and the impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 226 Ariz. 242, 251 ¶ 27 (App. 2011). The Board was not enriched and Plaintiffs were not impoverished because Plaintiffs received the university education that the Board agreed to provide in return for the amount of tuition that Plaintiffs agreed to pay. *Brooks v. Valley National* Bank, 113 Ariz. 169, 174 (1976) ("A person is not entitled to compensation on the grounds of unjust enrichment if he receives from the other that which it was agreed between them the other should give in return." (citing Restatement of Restitution § 107, cmt. 1(a))). And even if the Board's collection of the agreed-upon tuition could be characterized as "enrichment" of the Board by Plaintiffs, it was justified by the fact that Plaintiffs are out-of-state students who are required to pay out-of-state tuition. Section 1623 does not change that.

IV. Plaintiffs' request for injunctive relief is moot.

Plaintiffs also claim to seek an injunction to "[e]njoin Defendants from any further attempt to file or collect out of state tuition from a United States citizen who is classified as being subject to out of state tuition rates, while simultaneously granting in state tuition rates to students who come under DACA." Compl. ¶ 38. But there is nothing to enjoin.

The Board ceased offering DACA recipients resident tuition rates in order to comply with the Supreme Court's decision in *Arizona*. *See* Ex. 2.[5] The Board took this action promptly after learning of the Court's decision and well before this lawsuit was filed.

[5] In connection with a motion to dismiss, this Court may consider matters of public record. *See Strategic Dev. and Const., Inc.*, 224 Ariz. 60 at ¶ 13.

"The issue of injunctive relief is moot when the events make it absolutely clear the allegedly wrongful behavior could not be reasonably expected to recur." *SAL Leasing, Inc. v. State ex. rel. Napolitano*, 198 Ariz. 434 ¶ 39, (App. 2000) (internal citation and quotations omitted). Once the challenged action has ceased, plaintiffs have the burden "to show a likelihood that the defendant will in the future engage in the conduct sought to be enjoined." *State ex. rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 487 (1981). Based on the current state of the law, there is no likelihood that the Board will resume offering DACA students in-state tuition after the Supreme Court's decision in *Arizona*. As such, there is nothing for this Court to enjoin, and the Plaintiffs' claim for injunctive relief should be dismissed as moot.

Conclusion

Plaintiffs have attempted to jerry-rig a path to recovery on theories of declaratory judgment, breach of contract, and unjust enrichment, but each of these retain the same fatal flaw: 8 U.S.C. § 1623 creates no legal right for Plaintiffs and provides them no direct or derivative cause of action. They have no legal right to the windfall that they seek. This Court should dismiss their claims.

DATED June 11, 2018.

OSBORN MALEDON, P.A.

By /s/*Emma Cone-Roddy*

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EXHIBIT 1

BOARD OF Regents ARIZONA'S PUBLIC UNIVERSITIES

EDUCATE · DISCOVER · IMPACT

Statement

June 29, 2017

FOR IMMEDIATE RELEASE

Contact : **Sarah Harper,** 602-229-2542, 602-402-1341 Sarah.K.Harper@azregents.edu
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ABOR Statement on Court Decision Regarding DACA Students

(Phoenix, Ariz.) – At a special board meeting today, the Arizona Board of Regents announced it will continue to offer in-state tuition for eligible Deferred Action for Childhood Arrivals (DACA) students while the decision of the Arizona Court of Appeals regarding the State of Arizona v. Maricopa County Community College District is under review by the courts. Until a decision is reached by the Arizona Supreme Court, the board will continue to provide in-state tuition to these students.

Background information:

In May, 2015, Maricopa County Superior Court ruled that a DACA recipient who presents an Employment Authorization Document and who meets Arizona law residency requirements was eligible for resident tuition. (State of Arizona v. Maricopa County Community College District). At that time, in accordance with the law, DACA students with an EAD who met the statutory and policy requirements for residency were able to establish in-state residency for tuition purposes at Arizona's public universities.

In 2015, the board enacted a new policy to provide non-resident tuition at 150 percent of base tuition for graduates of Arizona high schools.

Last December, the board sent a letter to then President-elect Donald Trump, citing the board's concern for DACA students, requesting he and his administration work with Congress to design and provide relief for these students within the overall approach to immigration enforcement and reform.

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EXHIBIT 2

BOARD OF Regents ARIZONA'S PUBLIC UNIVERSITIES

EDUCATE · DISCOVER · IMPACT

Statement

April 9, 2018

FOR IMMEDIATE RELEASE

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Statement from ABOR Chair Bill Ridenour Regarding Arizona Supreme Court Decision in MCCCD Case Prohibiting In-State Tuition for DACA Students

With the Arizona Supreme Court decision today prohibiting Maricopa County Community College District from granting in-state tuition to Deferred Action for Childhood Arrivals (DACA) students, the Arizona Board of Regents, effective immediately, will no longer interpret its policies to offer in-state tuition to DACA students.

Last June, the board announced that until a decision was reached by the Supreme Court in the State of Arizona v. Maricopa County Community College District case, it would interpret its policies to allow eligible DACA students to pay in-state tuition.

Without a doubt, the Arizona Supreme Court's decision today is a setback for DACA students. The Arizona Board of Regents has consistently called on Congress and President Trump to work together to design and provide relief for these students within the overall approach to immigration enforcement and reform.

The board has a strong interest in facilitating access to higher education for all students, within the limits of applicable state and federal law. The board continues to hope that soon, a congressional enactment will establish the lawful status and presence of those who were brought to this country unlawfully as children and have remained here as law-abiding members of our communities. The board recognizes and appreciates the efforts of the Arizona congressional delegation to provide students with certainty regarding their immigration status.

Our universities will work with currently enrolled DACA students to help them understand the implications for tuition. DACA students enrolling for summer or fall who are eligible can take advantage of the board's Non-Resident Tuition Rate for Arizona High School Graduates. Students who attended an Arizona high school for at least three years, graduated from an Arizona high school and are lawfully present in Arizona, but are not currently eligible for in-state tuition could be eligible for the non-resident rate of 150 percent of resident undergraduate tuition.

Background information:

In May 2015, Maricopa County Superior Court ruled that a DACA recipient who presents an Employment Authorization Document and who meets Arizona law residency requirements was eligible for resident tuition. (State of Arizona v. Maricopa County Community College District).

At that time, in accordance with the law, DACA students with an EAD who met the statutory and policy requirements for residency were able to establish in-state residency for tuition purposes at Arizona's public universities.

In 2015, the board enacted a new policy to provide non-resident tuition at 150 percent of base tuition for graduates of Arizona high schools who otherwise are not eligible for resident tuition. The rate is open to all students, not just DACA students, who meet the eligibility requirements.

In December 2016, the board sent a letter to then President-elect Donald Trump, citing the board's concern for DACA students, requesting that he and his administration work with Congress to design and provide relief for these students within the overall approach to immigration enforcement and reform. Last September, following President Trump's action to rescind the executive order that established the DACA program, the board again sought the advocacy of Arizona's congressional delegation, urging their support of an immediate and practical solution for DACA students.

# # #

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IN THE SUPERIOR COURT OF ARIZONA IN AND FOR

MARICOPA COUNTY

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO, Plaintiffs, v. ARIZONA BOARD OF REGENTS, Defendant.	NO. CV2018-006692 **RESPONSE TO MOTION TO DISMISS** (Assigned to the Honorable Teresa Sanders) (Oral Argument Requested)

Plaintiffs respectfully respond to Defendant's Motion to Dismiss. This response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Background

All parties stipulate that during the 2017-18 school year, the Arizona Board of Regents ("Board") extended in-state tuition rates to certain undocumented immigrants, on the basis of the immigrants' Arizona residency.

8 U.S.C. § 1623 states unequivocally that states are free to do this, but if they choose to do so, states are absolutely required to extend in-state tuition rates "in no less an amount, duration and scope" to any "citizen or national of the United States."

Plaintiffs are United States citizens who paid out of state tuition during 2017-18. Under Arizona law, contracts were created between Plaintiffs and Defendant. The Board charged Plaintiffs a sum under the contracts that is illegal, under 8 U.S.C. § 1623. Plaintiffs demanded the Board voluntarily rescind only that portion of the total charges that was illegal. The Board refused. This suit followed.

B. Motion to Dismiss

Defendant argues at length:

a) Plaintiffs lack standing to bring a claim under 8 U.S.C. § 1623 (Motion at pp. 1-9);

b) that the breach of contract claim is an attempt to get around the standing problem and must be rejected (Id. at pp. 9-10); and

c) other arguments that flow from this premise. (Id. at pp. 10-12).

Defendant's motion must be denied because:

a) every case that has considered the issue holds that when a contract violates federal law, as Plaintiffs allege here, the party seeking relief has no obligation to establish standing under that federal law; and

b) even if the foregoing were not the case, Arizona case law is clear that these Plaintiffs have standing to seek declaratory and injunctive relief, pursuant to the state Declaratory Judgment Act.

II. STANDARD OF REVIEW

"Dismissals for failure to state a claim are disfavored and should not be granted unless it appears certain that a party would not be entitled to relief on its asserted claim under any state of facts susceptible of proof." *Arizona Soc. of Pathologists v. AHCCCS*, 38 P. 3d 1218, 1222 (Ariz. App. 2002).

III. EVERY CASE HOLDS THAT WHEN A PARTY ALLEGES A CONTRACT VIOLATES FEDERAL LAW, THE PARTY HAS NO OBLIGATION TO ESTABLISH STANDING UNDER THAT FEDERAL LAW

A. Plaintiffs Have Properly Pleaded a Contract and Pleaded That a

Portion of the Contract Violates Federal Law

In *Rutledge v. Arizona Bd. of Regents*, 711 P. 2d 1207 (Ariz. App. 1985), the Arizona Court of Appeals held that the relationship between a student and a state university in Arizona is contractual and awarded fees arising from a student's breach of contract claim against Arizona State University. (*Id.* at 539, 556-58). This holding is consistent with case law throughout the country. See, 15A Am.Jur.2d Colleges and Universities § 31 at 292-93 (1976); *Fellheimer v. Middlebury College*, 869 F.Supp. 238, 243 (D. Vt.1994); *Harwood v. Johns Hopkins Univ.*, 130 Md. App. 476, 483, 747 A.2d 205, 209 (Md. App. 2000); *Wilson v. Illinois Benedictine College*, 445 N.E.2d 901, 112 Ill. App.3d 932, 937 (Ill. App. 1983).

Plaintiffs herein carefully pled each element of contract and provided factual support for the elements. (Complaint at Par. 40). Plaintiffs also pled that one provision of the contract, the amount of tuition charged, violated federal law 8 U.S.C. § 1623. (Id. at Pars. 8-16).

B. If a Contract Charges More than is Allowed by Law, Arizona Courts Will Order Partial Rescission

Arizona will not uphold a contractual provision that violates a state or federal statute: "[t]his activity is prohibited by federal regulation and is the type of activity which was specifically intended to be prohibited." *Bank One v. Rouse*, 887 P.2d 566, 181 Ariz. 36, 39 (Ariz. App. 1994) (striking down contractual provision); see also, *In re Estate of Riley*, 266 P.3d 1078, 1080, 228 Ariz. 382 (Ariz. App. 2011); *Mohave County v. Mohave Kingman Estates*, 120 Ariz. 417, 420, 586 P.2d 978 (Ariz. 1978).

If a contract is illegal and also something strongly prohibited by public policy (such as human trafficking), courts will not enforce it and leave the parties where they are. However, if the contract merely charges an excess sum that is illegal, courts will apply partial rescission to bring the contract into compliance with the law. *Grady v. Price*, 383 P.2d 173, 94 Ariz. 252, 258 (Ariz. 1963); *White v. Mattox*, 619 P.2d 9, 127 Ariz. 181, 184 (Ariz. 1980).[1]

[1] "Mattox urges that he was entitled to a judgment as a matter of law, arguing that this was an illegal contract and, therefore, the court should leave the parties where it found them. But not all contracts involving a

C. When a Party Alleges That a Contract Violates Federal Law, the Party Has No Obligation to Establish Standing Under That Federal Law

In *Wigod v. Wells Fargo Bank*, 673 F.3d 547 (7th Cir. 2012), Wigod alleged that Wells Fargo's performance under a contract violated the federal Home Affordable Mortgage Program ("HAMP") law. Wells Fargo argued the claim must be dismissed, because Wigod had no private right of action under HAMP and the contract claim was an "end run" to enforce HAMP. The Seventh Circuit completely rejected this reasoning: "[t]he end-run theory is built on the novel assumption that where Congress does not create a private right of action for violation of a federal law, no right of action may exist under state law, either." *Id.* at p. 581. The Seventh Circuit concluded: "**[t]he issue here, however, is not whether federal law itself provides private remedies, but whether it displaces remedies otherwise available under state law. The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law**." *Id.*

In *Delaware Hudson Ry. Co. v. Knoedler Mfrs.*, 781 F.3d 656 (3rd Cir. 2015), Canadian Pacific asserted a breach of contract theory, alleging that Knoedler Manufacturers' performance under the contract violated 49 U.S.C. § 20701 et. seq. The District Court dismissed, on the theory that the federal statute preempted the contract claim and Canadian Pacific had no standing to sue under 49 U.S.C. § 20701. The Third Circuit reversed, holding that enforcing a contract in a manner which requires compliance with federal law is to be encouraged, even when there is no standing to sue under the federal law itself, because "**the railroads and their**

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violation of a statute are void. Recovery will be denied if the acts to be performed under the contract are themselves illegal or contrary to public policy. (Cites omitted). In the instant case, the Legislature has not prohibited the transfer of liquor licenses. Transfers are not per se illegal. The transfer is made subject to conditions and must conform to the standards prescribed by the State. Hence, since the act of transfer is not forbidden as illegal or contrary to public policy, recovery of the purchase price for the license should not be withheld." *Id.* at 184.

suppliers will be fully motivated to ensure that all provisions regarding equipment design and manufacture are based on a uniform federal standard of care." *Id.* at 667-68.

In *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (4th Cir.2005), College Loan Corporation sued on a contract and argued that SLM Corporation's performance under the contract violated 20 U.S.C. § 1001. The trial court held that 20 U.S.C. § 1001 preempted the breach of contract claims and there was no standing to sue under 20 U.S.C. § 1001. The Fourth Circuit reversed, holding that College Loan could " utilize violations of federal law to establish its state law claims against (SLM)" (*Id.* at p. 589) and concluding "**the Supreme Court (and this Court as well) has recognized that the availability of a state law claim is even more important in an area where no federal private right of action exists.**" *Id.* at p. 598.

In *In re Ocwen Loan Servicing*, 491 F.3d 638 (7th Cir. 2007), the Court rejected the argument that 12 U.S.C. 1461 et. seq. preempted a state breach of contract claim and then set forth an example of Ocwen charging 10% interest when it was only allowed to charge 6% under federal law and stated that lack of standing under the federal law would not prevent the plaintiffs from suing under a state law breach of contract theory. *Id.* at pp. 643-44.

The Federal District Court for the Northern District of Illinois reached the same conclusion. *Fletcher v. OneWest Bank, FSB*, 798 F.Supp.2d 925, 930-31 (N.D. Ill. 2011).

D. Summary

All cases conclude that if performance under a contract violates federal law, the party is not required to show standing under the federal law allegedly violated in order to seek relief. *In re Ocwen, supra; Wigod, supra; Delaware Hudson, supra; College Loan, supra; Fletcher, supra.*

Plaintiffs, who seek partial rescission based on a violation of 8 U.S.C. § 1623, are not required to show standing under 8 U.S.C. § 1623. At this stage, they are only required to plead that there was a valid contract and that the sum charged under the contract violates the law. *Arizona Soc. of Pathologists, supra; Grady, supra; White, supra.*

IV. ARIZONA LAW IS CLEAR THAT PLAINTIFFS HAVE STANDING TO SEEK DECLARATORY AND INJUNCTIVE RELIEF REGARDING 8

U.S.C. § 1623

A. The Arizona Declaratory Judgment Act

Arizona law is clear that Plaintiffs have standing to seek declaratory and injunctive relief pursuant to 8 U.S.C. § 1623.

Plaintiffs have standing if they can show that they are a person interested under a contract or statute. A.R.S. § 12-1832. They have pled this at Paragraph 40 of the Complaint. Plaintiffs then may obtain a declaration of whether the contract violates federal law and their rights thereunder if it does. A.R.S. § 12-1832. Plaintiffs may obtain further relief after their rights have been declared, provided they request further relief by Complaint. A.R.S. § 12-1838. Plaintiffs have done this in their Prayer for Relief. Said relief can include a disgorgement of moneys, given that the state has abolished the distinction between legal and equitable pleading and has a policy of granting complete relief in the same action. *Starkovich v. Noye*, 529 P.2d 698, 111 Ariz. 347, 351 (Ariz. 1974).

B. Arizona Precedent Allows a Declaratory Judgment Act Claim on the Federal Law at Issue Here

Arizona precedent allows a Declaratory Judgment Act claim on the federal law at issue here. 8 U.S.C. § 1623 is just one part of the Welfare Reform Act (8 U.S.C. §§ 1601-1646). In *Kurti v. Maricopa County*, 33 P.3d 499, 201 Ariz. 165 (Ariz. App. 2001), the portion of the Welfare Reform Act[2] under consideration stated "a qualified alien . . . is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry into the United States . . ."

Arizona law at that time stated that qualified aliens could never be eligible for means tested health care. A pair of qualified aliens with severe health problems sued under the state Declaratory Judgment Act, claiming they were entitled to means tested health benefits under the federal Welfare Reform Act.

The Arizona Court of Appeals held that the language "not eligible for any Federal

[2] 8 U.S.C. § 1613(a).

means-tested public benefit for a period of 5 years" meant that qualified aliens present in the country for more than five years had a right to means tested health benefits under the Welfare Reform Act.

The Court then ordered further relief as follows: a) the Arizona statute stating the Kurtis had no right to means tested health care was declared preempted; b) the state was enjoined from withholding means tested health care from the Kurtis when they reached the five year mark; and c) the Kurtis were awarded attorneys fees on appeal. *Id.* at pp. 504-06.

Notice how much stronger these Plaintiffs' claims to declaratory and injunctive relief are under 8 U.S.C. § 1623 than the Kurtis' claim was under 8 U.S.C. § 1613. The Kurtis had contracted for nothing and paid for nothing, while these Plaintiffs have entered into a valid contract and paid valuable consideration.

Furthermore, under 8 U.S.C. § 1613, the class is only identified by implication (qualified aliens who have been present more than five years) and the the Kurtis "interest" under the statute is construed exclusively from a prohibition and requires a second inference (those qualified aliens present more than five years are eligible). In contrast, the class identified in 8 U.S.C. § 1623 is identified explicitly (any citizen or national of the United States) and the benefit is conferred explicitly (if certain conditions are met, the class shall receive the benefit in no less an amount, duration and scope than all undocumented aliens). Plaintiffs clearly have standing to seek declaratory and injunctive relief under 8 U.S.C. § 1623.

C. Arizona Plaintiffs Routinely Obtain Relief Under Federal Statutes Through the Declaratory Judgment Act, Even Though Those Federal Statutes Provide No Individual Cause of Action

Arizona plaintiffs routinely obtain a declaration that a practice violates federal law and injunctive relief pursuant thereto, through the Declaratory Judgment Act, even though those federal statutes provide no individual cause of action. See, e.g., *Estate of Bohn v. Scott*, 185 Ariz. 284, 287, 915 P.2d 1239 (App. 1996) (4 U.S.C. § 111); *Arizona Assoc. of Providers v. State*, 219 P. 3d 216, 223 Ariz. 6, 18 n.9 (App. 2009) (42 C.F.R. § 438.206(b)(1)); *White Mountain Health Center, Inc. v. Maricopa County*, 386 P.3d 416, 241 Ariz. 230 (Ariz. App.

2016) (21 U.S.C. § 801); *Ansley v. Banner Health Network*, No. 1 CA-CV 17-0075 (Ariz. App. 2018) (42 C.F.R. § 447.15). In *Ansley, supra*, the Court of Appeals declared that actions taken pursuant to contract violated 42 C.F.R. § 447.15, enjoined the practice and awarded fees.

D. Defendant's Argument

Defendant does not address the state Declaratory Judgment Act. Defendant cites a single out of state precedent, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) and argues that on this basis alone, dismissal is required. (Motion at pp. 5-6).

Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268 (U.S. 2002) held that when a party brings suit under 42 U.S.C. § 1983, claiming a violation of federal law entitles them to relief thereunder, the party must show the federal law clearly provides an identified benefit to a class which the party belongs to. The only basis for relief set forth in *Day, supra* was 42 U.S.C. § 1983.[3] The *Day* opinion:

a) held 8 U.S.C. § 1623 did not clearly provide an identified benefit to a particular class;

b) concluded on this basis alone that plaintiffs could not satisfy the *Gonzaga* test; and

c) therefore held plaintiffs were not entitled to their requested relief under 42 U.S.C. § 1983. *Id.* at pp. 1138-39.

First, Defendant does not tell this Court and does not seem to be aware that the Tenth Circuit filed a supplemental opinion narrowing its holding in *Day* to a single issue that is not applicable here. See, *Day v. Bond*, 511 F.3d 1130 (10th Cir. 2007).[4]

Second, Plaintiffs herein are not suing under 42 U.S.C. § 1983, they are seeking a declaration that a sum charged pursuant to contract violates the Welfare Reform Act. The authority is unanimous that Plaintiffs herein have standing to do this and are not required to

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[3] https://ecf.ksd.uscourts.gov/doc1/0791427321, Paragraph 102.

[4] The single issue is "Plaintiffs' only claimed injury relies explicitly and entirely on their asserted rights under statutory law." *Day, supra* at p. 1034. That is not the case here, Plaintiffs have claimed thousands of dollars of damages arising from an illegal contract. Complaint at Pars. 8-40.

satisfy the test in *Gonzaga, supra*. See, *Kurti, supra; Estate of Bohn, supra; Arizona Assoc. of Providers, supra; White Mountain, supra; Ansley, supra*. Three of those decisions came down years after *Gonzaga, supra* was published.

Finally, the entire opinion in *Day* was based on the Tenth Circuit's conclusion that 8 U.S.C. § 1623 did not clearly provide an identified benefit to a particular class. The Arizona Supreme Court just construed the same statute in exactly the opposite fashion: 8 U.S.C. § 1623 "permits states to offer in-state tuition to aliens such as DACA recipients who are not lawfully present, as long as the state makes 'a citizen or national of the United States. . . eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.'" *Brnovich v. MCCCD*, 243 Ariz. 539, Headnote 17 (Ariz. 2018). The Supreme Court clearly identified the benefit ("in-state tuition"), the recipient class ("a citizen or national of the United States") and the condition required to receive the benefit ("if "states. . . offer in-state tuition to aliens such as DACA recipients").

Plaintiffs are not required to prove standing under the Welfare Reform Act (see Section III herein) and are not suing under 42 U.S.C. § 1983, but if both conditions were present, the Court's construction of 8 U.S.C. § 1623 would clearly establish standing under *Gonzaga*. *Brnovich, supra.*

V. OTHER ARGUMENTS

A. Lancaster v. Arizona Board of Regents

At pp. 7-9, Defendant cites *Gonzaga, supra*, and argues *Lancaster v. Arizona Board of Regents*, 694 P.2d 281, 143 Ariz. 451 (Ariz. App. 1984) supports their argument that there is no standing to assert 8 U.S.C. § 1623.

Lancaster, supra, concerned a state statute. The Court of Appeals noted that the original draft of the statute identified a class ("employees and supervisory personnel"), a benefit ("equivalent salaries") and some language which could create rights ("shall be paid"). (*Id.* at p. 454). The original draft statute was very similar to 8 U.S.C. § 1623 and the Court of Appeals held that the original draft legislation could have constituted a basis for a cause of action. (*Id.*)

In its final enacted form, the statute was nothing like 8 U.S.C. 1623. It read that the Board of Regents "shall report to the legislature . . . on a plan to establish a system of equivalent wages and salaries." (*Id.* at pp. 454-55). Because this language did not confer a benefit on anyone, the Court held it could not be a basis for a cause of action. (*Id.*) *Lancaster, supra*, establishes that statutes structured like 8 U.S.C. § 1623 would provide a proper cause of action. As explained above, Plaintiffs are not pleading 8 U.S.C. § 1623 as a cause of action.

B. Standing Under the Declaratory Judgment Act

Defendant also argues at p. 9 that Plaintiffs have no standing to assert a claim under the state Declaratory Judgment Act.

Defendant's argument directly contradicts the Act itself, specifically A.R.S. § 12-1832: "[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of . . . validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder."

A party to a contract has standing to seek declaratory and injunctive relief that a contract is illegal and unenforceable and seeking such a declaration is not a proper basis for dismissal pursuant to Rule 12, ARCP. In *Stevens v. State Farm Mutual Automobile Ins. Co.*, 519 P. 2d 1157, 121 Ariz. App. 392 (Ariz. App. 1974), State Farm filed a declaratory judgment action seeking a ruling that a clause in its contract did not violate an Arizona statute. The Court of Appeals held that the clause did violate state law. (*Id.* at pp. 392-393).

It is unclear how Defendants believe *Town of Wickenburg v. State*, 115 Ariz. 465, 565 P.2d 1326 (Ariz. App. 1977) supports their argument. City officials sought a declaratory judgment that a statute which required financial disclosures by elected state officials was unconstitutional. Since the statute did not require disclosures by city officials and had nothing to do with them, the Court of Appeals held there was no standing. This case is completely inapposite.

C. Unjust Enrichment is Properly Pled

Defendant argues at pp. 10-11 that because the parties initially agreed to the sum at issue, there can be no unjust enrichment.

"Unjust enrichment occurs when one party has and retains money or benefits that in justice and equity belong to another." *Trustmark Ins. v. Bank One*, 48 P.3d 485, 491, 202 Ariz. 535 (Ariz. App. 2002). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" *Sperry v. Crompton Corp*., 863 N.E.2d 1012, 8 N.Y.3d 204, 215 (N.Y. 2007).

Charging a plaintiff a sum that is greater than that allowed by law is a proper basis for an unjust enrichment claim and alleging same defeats a motion to dismiss. *In re K-Dur Antitrust Litigation*, 338 F. Supp. 2d 517, 544 (D.N.J. 2004). In *In re K-Dur, supra*, a company allegedly violated the anti trust laws in order to overcharge users of a drug. This was held a proper basis for an unjust enrichment claim.

The court wholly rejected the argument Defendant makes here, essentially "we agreed on the price so there can be no unjust enrichment." "Defendants' argument fails because a benefit conferred need not mirror the actual loss of the plaintiff. . . The critical inquiry is whether the plaintiff's detriment and the defendant's benefit are related to, and flow from, the challenged conduct." *Id.* at 544. See also, *Durant v. Servicemaster Co.*, 147 F. Supp.2d 744, 749 (E.D. Mich. 2001).

Here, the pleaded facts are far more clear cut than in *In re K-Dur, supra*. 8 U.S.C. 1623 unambiguously states that if a particular condition is present, this particular class shall be entitled to particular educational benefits at a particular price. The condition was present, but the Board of Regents overcharged each Plaintiff by thousands of dollars, even after a Court of Appeals stated that what the Board was doing was illegal under Arizona law. Plaintiffs demanded reimbursement in their Notices of Claim and Defendants refused. The Board "has and retains money or benefits that in justice and equity belong to" Plaintiffs (*Trustmark, supra*) and therefore, unjust enrichment is properly pled.

VI. CONCLUSION

For the reasons stated, Plaintiffs respectfully move the Court to deny the Motion in its entirety.

SIGNED THIS 5th DAY OF July, 2018

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO, Plaintiffs, vs. ARIZONA BOARD OF REGENTS, Defendant.	No. CV2018-006692 **REPLY IN SUPPORT OF MOTION TO DISMISS** (Assigned to the Hon. Teresa Sanders) (Oral Argument Requested)

In this case, Plaintiffs, who are out-of-state students, assert that they were entitled to pay in-state tuition during the 2017-18 academic school year, despite the fact that they were not Arizona residents. They do not challenge their classification as out-of-state students or the operation of A.R.S. § 15-1802(A), which prohibits their classification as in-state students for tuition purposes. Instead, they base their alleged entitlement to in-state tuition on the claim that the Arizona universities overseen by Defendant Arizona Board of Regents charged *other* students, not involved in this case, in-state tuition. Specifically, the universities charged in-state tuition to Arizona residents who had been granted deferred action and work authorization under the Deferred Action for Childhood Arrivals ("DACA") program on the basis of an Arizona Superior Court

decision holding that the DACA students were lawfully present in the United States within the meaning of 8 U.S.C. § 1623. When the Arizona Supreme Court later reversed that decision, the Arizona universities immediately ceased charging DACA students in-state tuition rates.

In their complaint, Plaintiffs brought claims for injunctive relief, breach of contract, declaratory judgment, and unjust enrichment, all of which are premised on their incorrect and unsupported view that 8 U.S.C. § 1623 entitled *them* to pay in-state tuition. Because all of their claims—even their new, unpled partial rescission claim, which appears for the first time in their response brief—are premised on the assumption that 8 U.S.C. § 1623 provides them with rights, a proper analysis of all of their claims depends first on whether that assertion is true. If Section 1623 does not confer a private right of action on Plaintiffs, all of their claims fail under *Lancaster v. Arizona Board of Regents*, 143 Ariz. 451 (App. 1984).[1] Thus, we have organized our reply brief in this manner, instead of addressing each of their claims serially.

I. Plaintiffs have no private rights under 8 U.S.C. § 1623.

Plaintiffs' claims fail because they have no private rights under 8 U.S.C. § 1623, and all of their claims depend on the existence of such rights under the statute. *See Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) ("8 U.S.C. § 1623 has significant aspects of text and structure that foreclose the Plaintiffs' argument that it vests in them private rights."). The Tenth Circuit unequivocally determined that the out-of-state plaintiffs in that case "held no legal right under § 1623." *Id.*

Although Plaintiffs have attempted to undermine the holding in *Day* by asserting that the Tenth Circuit later issued a "supplemental opinion narrowing" this holding, that

[1] The only claim for which this may not be true is Plaintiffs' request for injunctive relief, but as noted in the Motion, there is nothing to enjoin. Likely for that reason, Plaintiffs do not address this claim in their response and appear to have abandoned it.

is simply not true. (Resp. at 8.) The Tenth Circuit denied a request for rehearing or rehearing en banc and issued an explanatory opinion regarding Supreme Court and other precedent related to the Court's standing analysis. *See generally Day v. Bond*, 511 F.3d 1030 (10th Cir. 2007) ("*Day II*"). The Tenth Circuit neither narrowed nor changed the original holding of *Day*, focusing instead on why the Court was required to analyze whether Section 1623 conferred a private right of action in order to determine whether the plaintiffs in that case had standing to challenge a state statute. *See id.* Indeed, as to the issue relevant to Plaintiffs' claims here, *Day II reaffirmed* that 8 U.S.C. § 1623 did not confer a private right of action. *See id.* at 1032.

Moreover, the *Day II* opinion further undermines Plaintiffs' claims here, explicitly stating that the Court's decision would not change even if the *Day* plaintiffs *had* asserted injuries related to actually paying higher tuition. *See id.* at 1034 n.5 (stating that such claims "would be subject to the same defects and insufficiencies" as noted in the *Day* decision); *Day*, 500 F.3d at 1133-34 (rejecting an equal protection claim based on paying higher tuition). In other words, regardless of the types of damages asserted or the claims pled, if a plaintiff's claims are wholly dependent upon an asserted private right of action under 8 U.S.C. § 1623, those claims are defective.

Plaintiffs also attempt to avoid the clear holding in *Day* by asserting that regardless of that decision, the Arizona Supreme Court "construed the same statute in exactly the opposite fashion," thus providing Plaintiffs with a right to in-state tuition. (Resp. at 9.) The Arizona Supreme Court did no such thing. Instead, the Arizona Supreme Court simply recited the language of the statute and pointed out when the statute permits states to offer in-state tuition to aliens who are not lawfully present. The Arizona Supreme Court made no determination regarding whether Section 1623 granted individuals private rights of action. Consistent with *Day*, it only considered the federal

issue in terms of institutional policy, not individual rights. *Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 543 ¶¶ 16-18 (2018).

Plaintiffs' final attempt to bolster their position relies on a misreading of *Kurti v. Maricopa County*, 201 Ariz. 165 (App. 2001). Plaintiffs assert that *Kurti* held that other provisions of the Welfare Reform Act of 1996 *did* confer private rights (Resp. at 6-7), but *Kurti* did not state any such thing. In *Kurti*, resident aliens alleged a violation of the Fourteenth Amendment's Equal Protection Clause because Arizona denied all resident aliens who arrived on or after August 22, 1996 access to non-emergency health benefits under the Arizona Health Care Cost Containment System. *Kurti*, 201 Ariz. at 167 ¶ 2. The parties asserted opposing views of the appropriate standard for review of the state's policy, with the defendants arguing for a rational basis standard, and plaintiffs arguing for a strict scrutiny standard. *Id.* at 170-71 ¶¶ 18-21. In determining that Arizona's statute violated the Equal Protection Clause, the Arizona Court of Appeals noted that the restriction on health benefits found in 8 U.S.C. § 1613, which was enacted as part of the same federal legislation as Section 1623, was different than Arizona's statutory restriction, and that Arizona's law must be reviewed under a strict scrutiny standard. *Id.* at 171 ¶ 21. Read correctly, *Kurti* has no bearing on the issues in this case—it is a case about the proper standard of review under the federal Equal Protection Clause, and says nothing about rights under any federal statute (let alone under 8 U.S.C. § 1623) or the ability to sue under federal statutes that do not provide private causes of action.

But even if *Kurti had* held that 8 U.S.C. § 1613 created enforceable private rights, which it did not, Congress is fully capable of creating private rights in one section of legislation but not in another, and the putative creation of private rights in Section 1613 would not create them in Section 1623. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-52 (1979) (rejecting an argument that a private right of

action should be implied in one statutory section because other sections of the same act explicitly granted private causes of action; "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").

Day was correctly decided, and its analysis regarding Section 1623 private rights has not been reversed or questioned by any other court. *See Day*, 500 F.3d at 1139. Section 1623 does not provide Plaintiffs a right to in-state tuition even though the Arizona Supreme Court held that the trial court ruling upon which the universities relied was wrongly decided. *Id*. As the Supreme Court held, Section 1623 instead functions to prohibit Arizona public universities and community colleges from offering in-state tuition to DACA recipients. *Arizona*, 243 Ariz. at 543 ¶ 17. Although the universities may have *undercharged* Arizona-resident DACA recipients in the past, they did not *overcharge* out-of-state students such as Plaintiffs; Plaintiffs were charged the correct tuition. Section 1623 provides no individual rights or entitlement to a particular tuition rate for any person, including Plaintiffs.

II. *Lancaster v. Arizona Board of Regents* requires dismissal of the Plaintiffs' complaint.

Plaintiffs attempt to distinguish *Lancaster v. Arizona Board of Regents*, 143 Ariz. 451 (App. 1984), by claiming that "the statute [in *Lancaster*] was nothing like 8 U.S.C. 1623." (Resp. at 10.) Plaintiffs' narrow focus on the substantive provisions of the statute at issue in *Lancaster* ignores that the legal principles upon which that decision was based are squarely applicable here. Essential to the *Lancaster* court's holding was that the statute in *Lancaster* did not "give an individual [employee] a right to an increase in pay." *Lancaster*, 143 Ariz. at 457. That is also true here, with Section 1623 providing Plaintiffs with no enforceable rights. And like Plaintiffs here, the employees in *Lancaster* attempted to avoid the statutory language by disguising their claims as

declaratory action and breach of contract claims, rather than pleading or relying on the statute as a cause of action. *Id.* at 453-54. Their derivative, dressed-up claims were properly dismissed because no rights were granted by the statute. *Id.* at 457 ("The *declaratory judgment*, the writ of mandamus, *and the contract count* were all properly dismissed because the [employees] have no claim upon which relief can be granted.") (emphasis added). Thus, as *Lancaster* makes clear, Plaintiffs cannot sue to enforce rights a statute does not grant them, no matter how they style their causes of action.

None of the federal cases Plaintiffs cite in their response suggest otherwise, as all are premised on a breach of an express contractual provision, not on a breach of a contractual term that is alleged to have been read into the contract by virtue of a federal statute, as is the case with Plaintiffs' claims.

- In *Wigod v. Wells Fargo Bank*, a homeowner sued their mortgage service, alleging that the mortgage servicer had agreed to modify their loan under a federal program if the homeowner satisfied certain conditions, and the homeowner satisfied those conditions. 673 F.3d 547, 561-62 (7th Cir. 2012). The servicer reneged, and the homeowner sued for breach of the contract. The court held that the fact that federal law did not provide a private cause of action did not allow the servicer to evade its obligations under terms explicitly included in contracts it had entered. *Id.* at 581-585.

- The other cases Plaintiffs cite also confirm that where parties explicitly contract to perform with reference to or in compliance with federal law, a lack of private cause of action under the federal law will not protect the party who breaches that promise. *See Delaware & Hudson Ry. Co., Inc. v. Knoedler Mfrs.*, 781 F.3d 656, 667-668 (3d Cir. 2015) (lack of private cause of action under federal railway seat requirements did not preempt breach of contract claim where

contract expressly called for seats compliant with federal requirements); *College Loan Corp. v SLM Corp.,* 396 F.3d 588, 597-98 (4th Cir. 2005) (lack of private cause of action under federal student loan laws did not preempt breach of contract claim where there was an express promise to administer loans in compliance with federal student loan laws); *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638, 643-44 (7th Cir. 2007) (noting that federal savings and loan regulations that did not provide a private right of action would not allow a savings and loan association to defend a breach of a contractual agreement by arguing preemption).

In contrast to these cases, Plaintiffs do not allege that the Arizona universities violated any express term of their tuition agreements; instead, the Plaintiffs' claims are entirely dependent on a purported violation of a federal law that does not provide a private right of action.

Finally, Plaintiffs cite *Stevens v. State Farm Mutual Auto Insurance Co.*, 21 Ariz. App. 392 (1974), in support of their declaratory judgment claim. But *Stevens* has no bearing on Plaintiffs' claims here. Instead, the case involved a dispute over whether a certain exclusion in an insurance policy was void under Arizona law, after an injury that fell within the exclusion occurred. *Id.* By contrast, Plaintiffs' sole purported injury here is an alleged violation of rights under Section 1623. But because they do not actually have any rights under Section 1623, they have not suffered an actual injury as the *Stevens* plaintiffs had. *Stevens* in no way changes the rule of law set out in *Lancaster:* a private plaintiff cannot maintain a declaratory action related to the meaning of a statute that provides no right to that plaintiff.

In short, Plaintiffs try to distinguish *Lancaster* by relying on inapposite cases and decisions from other jurisdictions. But Arizona law is clear—private plaintiffs may not

maintain claims that are derivative of purported violations of statutes that provide the plaintiffs with no rights. Because 8 U.S.C. § 1623 does not provide Plaintiffs with any private rights, their claims for breach of contract, declaratory judgment, and unjust enrichment must be dismissed under Arizona law.

III. Plaintiffs' arguments regarding partial rescission are improper and ultimately futile.

In its Motion to Dismiss, the Board noted that Plaintiffs did not plead a breach of a contract, which is, of course, an essential element of a claim for breach of contract. (Mot. at 10.) In their Response, Plaintiffs do not remedy that defect by identifying the asserted breach. Indeed, they do not even respond to this argument, and they therefore appear to have abandoned their breach of contract claim.

Instead, they argue a new claim based on the existence of a contract—a claim for partial rescission that is not included in their complaint. They assert that courts will order a partial rescission of a contract when a contract price term is illegal. (Resp. at 3.) To the extent that the Court considers this new claim—and it need not do so—it should be analyzed as a proposed amendment to the complaint under Rule 15 of the Arizona Rules of Civil Procedure and rejected as futile. In other words, this new claim, which appears to be a recognition of the fact that Plaintiffs' contract claim as pleaded is defective, does not save Plaintiffs' complaint.

Plaintiffs cite two cases, *Grady v. Price*, 94 Ariz. 252 (1963), and *White v. Mattox*, 127 Ariz. 181 (1980), for the proposition that courts will partially rescind contracts where terms violate the law in order to bring the contract in compliance with the law. In *Grady*, the Supreme Court ordered a usurious brokerage fee returned to the borrower. *Grady*, 94 Ariz. at 258. And in *White*, the Supreme Court ordered that

money paid for the transfer of a liquor license be returned to the payer because the liquor license was nontransferable by law. *White*, 127 Ariz. at 184.

In both of these cases, the transaction at issue—the payment of the brokerage fee and the transfer of the liquor license—clearly violated Arizona law. Here, however, charging Plaintiffs out-of-state tuition does not violate any law; rather, as found by the Supreme Court, charging *DACA recipients*, none of whom are Plaintiffs in this case, in-state tuition was prohibited by Arizona statute. *Arizona*, 243 Ariz. at 543 ¶ 17. The Arizona universities were entitled and remain entitled to charge Plaintiffs out-of-state tuition. The legal foundation for the *Grady* and *White* cases—a contract provision that violates the law—is absent here.

That flaw is highlighted by the fact that revising Plaintiffs' contracts with the Arizona universities *would* violate Arizona law, which specifically and unequivocally prohibits treating Plaintiffs as in-state students. A.R.S. § 15-1802(A) requires that "no person having a domicile elsewhere than in this state is eligible for classification as an in-state student for tuition purposes." Further, "[a] person is not entitled to classification as in-state student until the person is domiciled in this state for one year," subject to exceptions not alleged by Plaintiffs. *Id.* § 15-1802(B). Plaintiffs have not contested that they are not Arizona residents and that they therefore do not meet these requirements. A.R.S. § 15-1802(A) thus prohibits them from being charged in-state tuition. A partial rescission of Plaintiffs' tuition to purportedly reform an illegal contract would in fact create an illegal contract by treating Plaintiffs as in-state students for tuition purposes.

Plaintiffs have not pled a theory of partial rescission, and were they to plead such a theory in an amendment to their complaint, it would be futile. This Court should reject this new theory of recovery.

Conclusion

This Court must dismiss Plaintiffs' claims in their entirety. *Day* governs the analysis of 8 U.S.C. § 1623, and it held that the federal statute does not provide out-of-state students such as Plaintiffs any legal rights or any cause of action. *Lancaster* then specifically holds that derivative contract claims and declaratory actions cannot be brought under statutes that do not create legal rights or causes of action. Plaintiffs are attempting to enrich themselves by drumming up a lawsuit where none exists, without any support in law. This attempt should be rejected in its entirety.

DATED July 17, 2018.

OSBORN MALEDON, P.A.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO, Plaintiffs, vs. ARIZONA BOARD OF REGENTS, Defendant.	No. CV2018-006692 **FINAL JUDGMENT** (Assigned to the Hon. Teresa Sanders)

For the reasons stated in this Court's September 25, 2018 Order, and good cause appearing:

IT IS ORDERED that Judgment be entered in favor of Defendant and against Plaintiffs on all counts of Plaintiffs' Complaint.

IT IS FURTHER ORDERED that no further matters remain pending and that judgment is final and entered pursuant to Rule 54(c) of the Arizona Rules of Civil Procedure.

DATED: 11-26-18

Hon. Teresa Sanders
Maricopa County Superior Court

Chris DeRose, Clerk of Court
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IN THE SUPERIOR COURT OF ARIZONA IN AND FOR

MARICOPA COUNTY

MIKAYLA FOSS; ELEANOR WIERSMA; ABIGAIL GARBARINO, Plaintiffs, v. ARIZONA BOARD OF REGENTS, Defendant.	NO. CV2018-006692 **NOTICE OF APPEAL** (Assigned to the Honorable Teresa Sanders)

Notice is hereby given that Mikayla Foss, Eleanor Wiersma and Abigail Garbarino appeal to the Arizona Court of Appeals from the Judgment entered in this case on the 27th day of November, 2018.

SIGNED THIS 29th DAY OF NOVEMBER, 2018

By: /s/ Lance Entrekin
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ATTACHMENT COVER PAGE

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CASE NAME: **FOSS, et al. v. ABOR**

(ENDORSED)

ELECTRONICALLY FILED

Court of Appeals Division 1

on **May 08, 2019 11:10 AM MST**

CLERK OF THE COURT

Amy M. Wood, Clerk

By Deputy Clerk: *CR*

CASE NUMBER: CV-18-0781

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