SUPREME COURT OF ARIZONA

MIKAYLA FOSS, et al., Plaintiffs/Appellants, v. ARIZONA BOARD OF REGENTS, Defendant/Appellee.	Arizona Supreme Court No. CV-19-0299-PR Court of Appeals Division One No. 1 CA-CV 18-0781 Maricopa County Superior Court No. CV2018-006692

RESPONSE TO PETITION FOR REVIEW

Lynne C. Adams, 011367
Mary R. O'Grady, 011434
Emma Cone-Roddy, 034285
OSBORN MALEDON, P.A.
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012
(602) 640-9000
ladams@omlaw.com
mogrady@omlaw.com
econe-roddy@omlaw.com

Attorneys for Defendant/Appellee
Arizona Board of Regents

TABLE OF CONTENTS

Page

INTRODUCTION 3

ISSUES PRESENTED FOR REVIEW 7

REASONS TO DENY THE PETITION 8

I. The Court of Appeals correctly concluded that Petitioners are not entitled to in-state tuition under Arizona or federal law. 8

A. Section 1623 does not entitle out-of-state students to pay in-state tuition, nor does it require states to offer in-state tuition to out-of-state students. 10

B. Arizona law requires Arizona's public universities to charge non-resident students out-of-state tuition, and Arizona law does not conflict with Section 1623. 14

II. The Court of Appeals correctly concluded that Petitioners' cannot state a claim for unjust enrichment. 16

A. Well-established Arizona law bars Petitioners' unjust enrichment claim. 16

B. To the extent *Brooks v. National Bank* should be revisited, Petitioners' case is a poor vehicle. 17

III. The Court of Appeals correctly concluded that Petitioners' breach of contract claim fails. 18

A. Petitioners' tuition was not illegal. 18

B. The Court of Appeals did not otherwise err. 21

CONCLUSION 21

APPENDIX APP024

TABLE OF AUTHORITIES

Page(s)

Cases

Bank One, Arizona v. Rouse,
181 Ariz. 36 (App. 1994) 20

State ex. rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.,
243 Ariz. 539 (2018) 5, 9, 13, 14, 18

Brooks v. Valley Nat. Bank,
113 Ariz. 169 (1976) 16

Day v. Bond,
500 F.3d 1127 (10th Cir. 2007) 10, 11, 12

Equal Access Educ. v. Merten,
305 F. Supp. 2d 585 (E.D. Va. 2004) 13

Fain Land & Cattle Co. v. Hassell,
163 Ariz. 587 (1990) 15

Landi v. Arkules,
172 Ariz. 126 (App. 1992) 20

Lingel v. Olbin,
198 Ariz. 249 (App. 2000) 20

Mousa v. Saba,
222 Ariz. 581 (App. 2009) 20

Schabel v. Deer Valley Unified Sch. Dist. No. 97,
186 Ariz. 161 (App. 1996) 15

Thomas v. Montelucia Villas, LLC,
232 Ariz. 92 (2013) 18

USLife Title Co. of Ariz. v. Gutkin,
152 Ariz. 349 (App. 1986) 17

Statutes

A.R.S. § 15-1626 14

A.R.S. § 15-1802 14

8 U.S.C. § 1623 .... 6, 7, 8, 10, 16

INTRODUCTION

Although Petitioners have attempted to characterize this matter as a sequel to *State ex. rel. Brnovich v. Maricopa County Community College District Board*, 243 Ariz. 539 (2018), it is nothing of the sort. As Petitioners' list of the "issues presented" (at 7) makes clear, this case raises only routine breach of contract and unjust enrichment claims. Those claims arise in the context of DACA student tuition issues, but that factual overlay does not change the fact that the relevant and governing legal concepts are neither novel nor in doubt.

Petitioners are non-Arizona residents who agreed to pay out-of-state tuition in order to receive the privilege of receiving an education at Arizona's public universities. Arizona law required that they pay out-of-state tuition because they were not Arizona residents, and they have never claimed to have been improperly classified as out-of-state students. Nor do they allege that Arizona's public universities failed in any way to provide them an education. Nonetheless, they filed a putative class action lawsuit seeking a refund of the difference between out-of-state and in-state tuition rates for the 2017-2018 academic year.

Their claim rests solely on their contention that because the Arizona Board of Regents ("ABOR") allowed certain Arizona residents who participated in the federal Deferred Action for Childhood Arrivals ("DACA") to pay resident tuition rates to attend Arizona's public universities,[1] federal law required ABOR to allow Petitioners and all other non-residents to pay in-state tuition as well. However, and as both the trial court and the Court of Appeals held, the federal statute on which Petitioners rely, 8 U.S.C. § 1623, contains no such requirement. Instead, Section 1623 is a prohibitory statute that limits when public universities can offer residency-based tuition rates to undocumented students. It does not grant rights to Petitioners or any other individuals.

Apparently in light of this fact, Petitioners have abandoned their claim for a declaration that they were entitled to in-state tuition rates. They ask this Court to revive only their breach of contract and unjust enrichment

[1] During the academic year at issue, litigation was pending in the Court of Appeals and this Court as to whether DACA participants who attended the Maricopa County Community College District schools could receive in-state tuition. After the superior court ruled that they could, ABOR authorized the state universities to offer in-state tuition to DACA participants. After this Court held that the DACA participants were ineligible, ABOR immediately discontinued the practice.

claims, despite being charged the tuition rate they agreed to pay and receiving educational services in exchange. Because both of these claims are premised solely on the false contention that 8 U.S.C. § 1623 gives Petitioners the right to pay only in-state tuition, the claims fail.

The Petition presents no legal issue that warrants this Court's review. The Court of Appeals' memorandum decision[2] correctly affirmed the superior court's decision dismissing Petitioners' lawsuit because, as non-resident students, Petitioners were not entitled to resident tuition. Moreover, the Petition raises no legal issue of importance. The legal obligation of non-residents to pay non-resident tuition to attend Arizona's state universities is clear. The Court should deny the petition for review.

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals, in accord with the United States Court of Appeals for the 10th Circuit, correctly determine that 8 U.S.C. § 1623 regulates only what tuition public universities can charge undocumented students, and offers no rights or entitlements to Petitioners?

[2] Because the Petitioners neglected to include the memorandum decision ("Mem."), Respondent includes a brief appendix attached to the end of this response, cited by page numbers (e.g., APP001), which also match the PDF page numbers and function as clickable links. The only documents included are the decision and the Complaint.

2. Did the Court of Appeals correctly determine that non-resident students who agreed to pay out-of-state tuition as required by Arizona law and who received the educational services they bargained for cannot state a claim for unjust enrichment based solely on the amount of tuition they were charged?

3. Did the Court of Appeals correctly determine that non-resident students who agreed to pay out-of-state tuition as required by Arizona law and who received the educational services they bargained for cannot state a claim for breach of contract based solely on the amount of tuition they were charged?

REASONS TO DENY THE PETITION

I. The Court of Appeals correctly concluded that Petitioners are not entitled to in-state tuition under Arizona or federal law.

The Court should deny review because the Court of Appeals decided the controlling legal issue in this case correctly: 8 U.S.C. § 1623 does not provide any person a right or entitlement to in-state tuition. Indeed, this Court previously recognized that Arizona has not made in-state tuition available to any non-resident American citizens, such as Petitioners, and, therefore, concluded that 8 U.S.C. § 1623 prohibited DACA students from

qualifying for resident tuition in Arizona. *See State ex. rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.* (“*MCCCD*”), 243 Ariz. 539, 543, ¶ 17 (2018). It was neither illegal nor improper for Petitioners—non-resident students who agreed to pay out-of-state tuition rates for the privilege of attending Arizona’s public universities—to be charged the tuition rate they agreed to pay.

Petitioners offer several rationales for why this fundamental failure of their complaint warrants review by this Court. First, they assert (at 12) that their unjust enrichment claim should be reviewed because they were “charged a sum that was illegal under the law.” Second, they assert (at 16) that they were not required to show that Section 1623 “confer[red] an entitlement” on them to prevail on their contract claim. Finally, they argue (at 19) that although they are not required to demonstrate that Section 1623 gave them a right to pay in-state tuition, it did confer such a right. Petitioners are incorrect that Section 1623 entitled them to pay-in-state tuition or made it illegal for them to be charged out-of-state tuition. The Court of Appeals correctly analyzed this issue of federal law and rejected Petitioners’ arguments.

A. Section 1623 does not entitle out-of-state students to pay in-state tuition, nor does it require states to offer in-state tuition to out-of-state students.

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.

Contrary to Petitioners' assertions, nothing in this language entitles non-resident United States citizens to receive in-state tuition. Rather, Section 1623 functions as a curb on the authority of public universities to set tuition rates for undocumented aliens. [Mem. ¶ 20 (APP030).] As the United States Court of Appeals for the Tenth Circuit determined when examining similar claims, Section 1623 prescribes public universities' "authority to provide benefits to illegal aliens" and is not addressed to "the class of nonresident citizens who incidentally benefit from its provisions." *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007). The language of Section

1623 is thus prohibitory—it tells public universities what they cannot do. Because Section 1623 provides Petitioners "no protectible interest," articulated "no entitlement" for Petitioners to "receive in-state tuition," and did not "create or confer any educational benefits" on Petitioners, the Court of Appeals correctly concluded that *all* of their claims (including their breach of contract and their unjust enrichment claims) failed as a matter of law. [Mem. ¶¶ 21, 25, 28 (APP030-31).]

The Court of Appeals' decision is consistent with the decision of United States Court of Appeals for the Tenth Circuit in *Day v. Bond*. In *Day*, the Tenth Circuit analyzed whether Section 1623 created "individual legal rights" that would support a viable cause of action. *Day*, 500 F.3d at 1139. The Tenth Circuit determined it did not, noting that Section 1623 "entirely lacks the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." (internal quotations omitted, alterations) *Id.* Instead, the Court noted that Section 1623 establishes the conditions for when a public university *can* offer residency-based tuition benefits to undocumented students. *See id.* ("§ 1623 addresses itself to the institutions affected and their authority to provide benefits to illegal

aliens."). The "text and structure of § 1623 do not manifest a congressional intent to create private rights." *Id.*

Petitioners' breach of contract and unjust enrichment claims were specifically based on the alleged violation of their claimed "right" to in-state tuition under Section 1623. Their breach of contract claim stated that ABOR had breached their contracts because the Arizona universities "charged an amount that they are specifically prohibited from charging by federal law." [IR-1 at 8, ¶ 41 (APP040).] The unjust enrichment claim was premised on the universities' allegedly "improper collections in violation of federal law." [*Id.* at ¶ 44 (APP040).] Each of their claims thus failed because they were based "explicitly and entirely" on "asserted rights under statutory law" that did not exist. *Day*, 511 F.3d at 1032 (denying reconsideration). The Court of Appeals' memorandum decision correctly confirmed that both claims failed for this reason. [Mem. ¶ 25, 28 (APP031-32).]

Petitioners contend (at 19) without citation to anything other than the statutory language quoted above that "Congress has clearly and unambiguously articulated that non-resident United States citizens are entitled to receive in state tuition if an undocumented alien receives that

tuition on the basis of residence." But Section 1623 does no such thing, much less "clearly and unambiguously," which is why no court has ever agreed with Petitioners' reading. Section 1623 is a federal immigration law that establishes undocumented students eligibility for residency-based tuition benefits; it does not confer rights on American citizens.

Petitioners also claim (at 20) that this Court's holding in *MCCCD* supports their argument. But that case held that undocumented students could not receive in-state tuition consistent with Section 1623 because "Arizona has not made in-state tuition available to all U.S. citizens and nationals." 243 Ariz. at 543, ¶ 17. *MCCCD*, consistent with *Day*, determined that Section 1623 is a restriction on whether public institutions can offer in-state tuition to undocumented aliens. *MCCCD* does not provide Petitioners any claim for resident tuition.

Nor is Petitioners' citation to *Equal Access Education v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004), availing. The issue in that case was whether Section 1623 "oust[ed] non-conflicting state laws or policies in the area of alien access to post-secondary education." *Id.* at 607. The opinion does not address or discuss whether Section 1623 creates a right for out-of-state

students to receive in-state tuition, and it is therefore inapplicable to the issues presented by Petitioners' complaint.

B. Arizona law requires Arizona's public universities to charge non-resident students out-of-state tuition, and Arizona law does not conflict with Section 1623.

Arizona law, not federal law, governs whether non-resident students can be charged the same tuition as residents. ABOR is statutorily required to "[f]ix tuition and fees to be charged and differentiate the tuitions and fees . . . between residents [and] nonresidents." § 15-1626(A)(5). To fulfill its obligation to "differentiate" tuition, ABOR must classify students as either in-state or out-of-state students. The Legislature mandates how this is to be done: 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). As this 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. Under Arizona law, Petitioners are required to pay the non-resident, out-of-state tuition rate to attend a public university.

Petitioners argue that Section 1623 preempts Arizona law from requiring out-of-state students to pay out-of-state tuition in the 2017-18 academic year because an alien who is not lawfully present was permitted to pay resident tuition in that academic year. Pet. at 15-16. This preemption argument is based on the same misreading of Section 1623 that is the premise for their entire lawsuit.[3] There is no conflict between Section 1623 and Arizona law. Arizona law requires non-resident students to pay higher tuition, and Section 1623 does not require anything different. Section 1623 sets limits on the eligibility of undocumented students for resident tuition and does nothing to limit the State's authority to assess non-resident tuition to non-residents. The lack of "direct, actual conflict" between Arizona and federal law dooms Petitioners' undeveloped preemption theory. *See Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 594-95 (1990) (there can be no preemption absent actual conflict between state and

[3] Petitioners did not raise a preemption issue in their complaint, their issues presented to the Court of Appeals, or their issues presented to this Court. Because Petitioners failed to assert directly a preemption claim at any phase of this lawsuit, it is waived. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167 (App. 1996) (noting issues not clearly raised and argued in appellate brief are waived).

federal law). The Court of Appeals correctly decided the straightforward legal issue about 8 U.S.C. § 1623 and Plaintiffs' claims.

Absent preemption, state law governed Petitioners' treatment for tuition purposes. The only aspect of their tuition agreements that Petitioners alleged violated any federal law was the requirement that they pay non-resident tuition, and A.R.S. § 15-1802(A) required that Petitioners be treated as non-resident students for tuition purposes. Since federal law did not make it illegal to assess Petitioners non-resident tuition (and in fact Arizona law required it), their claims fail, and the Court of Appeals appropriately affirmed the superior court's decision dismissing the lawsuit.

II. The Court of Appeals correctly concluded that Petitioners' cannot state a claim for unjust enrichment.

A. Well-established Arizona law bars Petitioners' unjust enrichment claim.

Forty-three years ago, this Court held that "[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." *Brooks v. Valley Nat. Bank*, 113 Ariz. 169, 174 (1976). Here, Petitioners "received the agreed-upon university education in return for the tuition amount" they agreed to pay. [Mem. ¶ 28 (APP031-32).] The

holding in *Brooks* squarely governs Petitioners' claims, and the Court of Appeals correctly applied it. Thus, Petitioners assertion (at 12) that "[n]o Arizona cases addresses th[is] situation" is plainly wrong. *Brooks* addresses their unjust enrichment claim and entirely resolves it on the merits. *See also USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 355 (App. 1986) (holding that after party "obtained that for which it bargained," it is "barred from further compensation under an unjust enrichment theory").

B. To the extent *Brooks v. National Bank* should be revisited, Petitioners' case is a poor vehicle.

Though *Brooks* plainly governs Petitioners' claim, Petitioners assert (at 12) that "[a]ll other states refuse to allow such a dismissal," citing decisions from Florida, Ohio, Missouri, and Michigan. Petitioners argue that Arizona should allow unjust enrichment claims if the price term in a contract is illegally high, but the wronged party does not want to rescind the entire contact.

Regardless of the merits of this proposed exception to *Brooks*, it would not benefit Petitioners here because Section 1623 did not render their higher, out-of-state tuition unlawful. Rather, it simply prevented public universities and colleges from offering other students in-state

tuition. *See MCCCD*, 243 Ariz. at 543, ¶ 17. As explained in Section I, 8 U.S.C. § 1623 does not entitle Petitioners to pay in-state tuition under any circumstances, and Arizona law requires them to pay a higher tuition rate as non-resident students.

This is not an appropriate case in which to consider whether to create a narrow exception to the holding in *Brooks* as Petitioners request. An exception for illegally high price terms would not change the outcome of this case because Petitioners' agreements with the universities were not "illegal" in any way. Thus, this case is not the right vehicle for Petitioners' requested change to long-standing Arizona law.

III. The Court of Appeals correctly concluded that Petitioners' breach of contract claim fails.

A. Petitioners' tuition was not illegal.

Petitioners' breach of contract claim failed for the simple reason that they did not allege that ABOR breached any contractual term. *See, e.g.*, *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 96, ¶ 16 (2013) (holding that a breach of contract claim requires "the existence of the contract, [and] its breach"). Rather, as the Court of Appeals correctly observed, Petitioners specifically pled that ABOR had *fulfilled* its contractual obligation to

provide educational services in exchange for their tuition payments. [Mem. ¶ 24 (APP030-31).] Without an alleged breach, there can be no breach of contract claim.

For that reason, Petitioners' breach of contract claim instead depends on an allegation that their tuition agreements were "illegal" because Section 1623 required that they be charged in-state rather than out-of-state tuition. [IR-1 at 8, ¶¶ 41-42 (APP040).] As explained above, that is simply not true as a matter of law. Section 1623 neither entitled Petitioners to pay in-state tuition nor required ABOR to offer in-state tuition to them. Their illegality-based contract claim thus failed. [Mem. ¶ 25 (APP031)] (holding that Petitioners' argument "fail[ed] because Section 1623 articulates no entitlement for all non-resident students to receive in-state tuition if an undocumented alien receives that tuition.").

Petitioners complain (at 16-19) that the Court of Appeals erred by requiring them to show an entitlement under Section 1623 in order to proceed under an illegality theory, and they cite as support for that contention several inapposite cases. Petitioners state (at 18) that by purportedly requiring an entitlement, the Court of Appeals "would greatly

expand the opportunity for unscrupulous actors to enforce illegal contracts."

Petitioners' circular argument entirely misses the point. Their breach of contract claim failed because Section 1623 clearly did *not* render their tuition agreements illegal. Petitioners are out-of-state students who agreed to pay out-of-state tuition, as required by Arizona law. Section 1623 did not entitle them to pay in-state tuition, and their contract was therefore not "illegal." They were not required to demonstrate an "entitlement," but instead were required to demonstrate a viable legal theory to support their breach of contract claim. Because each of the cases cited by Petitioners in support of their argument involved a contract with a clearly illegal term, those cases have no bearing here, where the contract terms complied fully with Arizona and federal law.[4]

[4] *See Bank One, Arizona v. Rouse*, 181 Ariz. 36, 39-40 (App. 1994) (refusing to enforce loan agreement pursuant to national bank's participation in speculative real estate venture contrary to federal law); *Lingel v. Olbin*, 198 Ariz. 249, 256, ¶ 20 (App. 2000) (refusing to enforce illegal agreement to assign wrongful death action and proceeds); *Landi v. Arkules*, 172 Ariz. 126, 135 (App. 1992) (refusing to enforce heir locator agreement because investigators were not licensed private investigators); *Mousa v. Saba*, 222 Ariz. 581, 586, ¶ 21 (App. 2009) (unlicensed real estate broker could not recover compensation for commercial activities which required a real estate license).

B. The Court of Appeals did not otherwise err.

Petitioners also claim (at 18) that the Court of Appeals erred by holding that "ABOR's contract does not 'incorporate all federal statutes.'" No such holding appears in the memorandum disposition, and this issue was not briefed before the Court of Appeals. Rather, the Court of Appeals expressed uncertainty over whether one case stood for the proposition that "all federal statutes" were incorporated into ABOR's tuition agreements, before making clear that the issue did not matter to the disposition because "Plaintiffs' argument would still fail" even assuming Section 1623 was incorporated into their tuition agreements. [Mem. ¶ 25 (APP031).] There is no need for this Court to grant review to clarify an irrelevant uncertainty in a non-precedential disposition.

CONCLUSION

The Court should deny the petition for review.

RESPECTFULLY SUBMITTED this 17th day of January, 2020.

OSBORN MALEDON, P.A.

By /s/ Mary O'Grady
Lynne C. Adams
Mary R. O'Grady
Emma Cone-Roddy

2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012

Attorneys for Defendant/Appellee

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX TABLE OF CONTENTS*

INDEX OF RECORD #	DESCRIPTION	APPENDIX PAGE NOS.
COURT ISSUED ORDERS/DECISIONS		
	Memorandum Decision (filed Nov. 7, 2019)	APP025 – APP032
COURT RECORDS		
1	Complaint (filed Apr. 24, 2018)	APP033 – APP041

* The appendix page number matches the electronic PDF page number. This appendix complies with the bookmarking requirements of ARCAP 13(d)(2).

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MIKAYLA FOSS, et al., *Plaintiffs/Appellants*,

v.

ARIZONA BOARD OF REGENTS, *Defendant/Appellee*.

No. 1 CA-CV 18-0781
FILED 11-7-2019

Appeal from the Superior Court in Maricopa County
No. CV2018-006692
The Honorable Teresa A. Sanders, Judge

AFFIRMED

COUNSEL

The Entrekin Law Firm, Phoenix
By B. Lance Entrekin
Co-Counsel for Plaintiffs/Appellants

Tucker & Miller, LLLP, Phoenix
By Daniel P. J. Miller
Co-Counsel for Plaintiffs/Appellants

Osborn Maledon, PA, Phoenix
By Lynne C. Adams, Mary R. O'Grady, Emma Cone-Roddy
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Chief Judge Peter B. Swann joined.

W E I N Z W E I G, Judge:

¶1 Arizona law directs that Arizona residents are entitled to reduced in-state tuition rates at Arizona's public universities. Meanwhile, federal immigration law prohibits undocumented aliens from receiving in-state tuition benefits unless the same benefits are provided to all United States citizens and nationals. At issue here is whether three non-resident students are entitled to recoup the cash difference between in-state and out-of-state tuition for the 2017-2018 academic year because a discrete group of undocumented aliens received in-state tuition rates to attend Arizona's public universities during that period. The superior court dismissed the lawsuit for failure to state a claim because the non-resident students had no contract or entitlement to receive the reduced tuition rates provided to Arizona residents. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On appeal from a motion to dismiss, this court "assume[s] the truth of [all] well-pled factual allegations and indulge[s] all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008).

¶3 The Arizona Board of Regents (ABOR) is the governing body for Arizona State University, the University of Arizona and Northern Arizona University. ABOR fixes student tuition rates under Arizona law, which directs that Arizona residents enjoy reduced in-state tuition rates at Arizona's public universities. A.R.S. §§ 15-1626(A)(5), -1802(A). To achieve resident status, a student must meet the requirements set forth in A.R.S. § 15-1802(B), including that "the person is domiciled in this state for one year."

¶4 Plaintiffs Mikayla Foss, Eleanor Wiersma and Abigail Garbarino were students at either Arizona State University or the University of Arizona during the 2017-2018 academic year. They are United States citizens, but not Arizona residents, and thus paid out-of-state tuition.

¶5 To understand their claims, we turn to the federal Illegal Immigration Reform Act and Immigrant Responsibility Act and the Deferred Action for Childhood Arrivals program.

Illegal Immigration Reform Act

¶6 In 1996, the federal government passed the Illegal Immigration Reform and Immigrant Responsibility Act. Pub. L. No. 104-208, 110 Stat. 3009 (1996). As relevant here, the Act provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623 ("Section 1623").

¶7 Section 1623's prohibition was incorporated into Arizona law at A.R.S. § 15-1803(B), which directs that "a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to § 15-1802."

Deferred Action for Childhood Arrivals

¶8 In 2012, the U.S. Department of Homeland Security recognized a Deferred Action for Childhood Arrivals ("DACA") program, exercising its prosecutorial discretion to defer deportation of certain undocumented aliens who entered the country as children.

¶9 Beginning in 2013, Arizona courts were asked to consider whether DACA recipients who otherwise met Arizona's statutory residency requirements could receive in-state tuition rates at Arizona's public universities. In 2015, a superior court held that DACA recipients were "lawfully present" and thus eligible for in-state tuition. Based on that decision, ABOR formally recognized that DACA students "were able to establish in-state residency for tuition purposes at Arizona's public universities." But in June 2017, the Arizona Court of Appeals reversed the superior court. *State ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 242 Ariz. 325 (App. 2017). The Arizona Supreme Court then agreed to hear the case. ABOR decided it would, in the interim, keep offering in-state tuition to DACA members who qualified as Arizona residents.

¶10 In May 2018, the Arizona Supreme Court reached the same conclusion as this court, holding that DACA students were not "lawfully present" under Section 1623, and therefore could not receive in-state tuition

unless made available to all non-resident students with U.S. citizenship. *State ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist.*, 243 Ariz. 539, 542, ¶ 16 (2018) ("*MCCCD*"). ABOR immediately complied and terminated in-state tuition for DACA members.

This Lawsuit

¶11 This lawsuit followed. Plaintiffs assert claims for declaratory judgment, breach of contract and unjust enrichment; each claim turns on the theory that ABOR overcharged the non-resident students for tuition under Section 1623. Plaintiffs' complaint alleges an "entitlement to in[-]state tuition" for the 2017-2018 academic year when ABOR charged in-state tuition to DACA members who satisfied Arizona's residency requirements.

¶12 ABOR moved to dismiss, arguing several grounds, including that Plaintiffs' claims all hinge on a federal statute (Section 1623) that confers no rights or entitlement upon Plaintiffs to receive in-state tuition, but instead prohibits undocumented aliens from receiving in-state tuition. The court heard oral argument and asked Plaintiffs' counsel if the issue was "just whether or not [Section 1623] gives you a cause of action," which Plaintiffs' counsel said was "primarily true."

¶13 The superior court then dismissed Plaintiffs' complaint for failure to state a claim under Rule 12(b)(6), Arizona Rules of Civil Procedure. The court interpreted Section 1623 as restricting the scope of permissible tuition benefits for undocumented aliens. It held the statute "does not provide an entitlement to [in-state tuition for all] U.S. citizens, nor does it prohibit educational institutions from classifying non-resident students as such, or from collecting non-resident tuition from them." Because Plaintiffs' claims were "based solely upon a violation of [this federal] statute," the court held that Plaintiffs failed to state a claim.

¶14 Plaintiffs timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶15 We review *de novo* the superior court's ruling on a Rule 12(b)(6) motion to dismiss. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶ 7 (2012). A Rule 12(b)(6) motion to dismiss should be granted if the complaint fails to state a claim upon which relief can be granted. On appeal, this court "must assume the truth of all of the complaint's material allegations [and] accord the plaintiffs the benefit of all inferences the

complaint can reasonably support," *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508 (App. 1987), but we do not accept as true "allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts," *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005).

Declaratory Judgment

¶16 Plaintiffs argue their complaint stated a Uniform Declaratory Judgments Act ("UDJA") claim upon which relief could be granted. A.R.S. § 12-1832. We disagree.

¶17 The UDJA generally provides that any person whose "rights, status, or other legal relations are affected by statute" may seek a judicial determination about the construction or validity of the statute. A.R.S. § 12–1832. On a motion to dismiss, Plaintiffs must allege sufficient facts to establish both (1) a protectible interest and (2) a justiciable controversy over the denial of that interest. *Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557, ¶ 19 (App. 2002). The "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). Arizona courts have determined that a statute's incidental beneficiaries have no declaratory judgment claim to enforce its terms. *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 457 (App. 1984) (dismissing declaratory judgment and contract claims for failure to state a claim for relief).

¶18 Plaintiffs did not allege sufficient facts in their complaint to establish a protectible interest and justiciable controversy. Although Plaintiffs allege that non-resident students "are entitled to in[-]state tuition rates for the 2017-18 school year under [Section 1623]," the statute's actual words neither create nor confer any entitlement upon them. "[T]he words of a statute are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *MCCCD*, 243 Ariz. at 541.

¶19 Section 1623 never mentions, much less creates and confers, any enforceable private right for individual, non-resident students. The Tenth Circuit captured the point in *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007), when it explained: "Section 1623 does not provide that 'No nonresident citizen shall be denied a benefit' afforded to an illegal alien, but

rather imposes a limit on the authority of postsecondary educational institutions." *Id.*

¶20 Section 1623 is directed at institutional practices, curtailing the authority of educational institutions to grant in-state tuition benefits to undocumented aliens, which explains why the statute is codified in a chapter of the federal immigration code entitled "*Restricting* Welfare and Public *Benefits for Aliens*." *See generally* 8 U.S.C. §§ 1601 to 1646 (emphasis added). "[Section] 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." *Day*, 500 F.3d at 1139. Plaintiffs' complaint likewise describes the statute as "a comprehensive statutory scheme *for determining aliens' eligibility* for federal, state, and local benefits," rather than as one for determining tuition benefits for non-resident students.

¶21 For their part, Plaintiffs argue the superior court erroneously concentrated on whether Section 1623 conferred a "private right of action" on non-resident students, insisting that "none of [Plaintiffs'] causes of action are in any way related to the theory that [Section] 1623 confers upon them a private right of action." But Plaintiffs miss the larger point. The UDJA claim fails because Plaintiffs have *no protectible interest* under Section 1623 in the first place.

¶22 Because Plaintiffs have not sufficiently alleged a protectible interest and justiciable controversy under Section 1623, the superior court properly dismissed their declaratory judgment claim. *See 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.").

Breach of Contract

¶23 Plaintiffs further contend the superior court erred in dismissing their breach of contract claim, alleging that ABOR breached its contracts with all non-resident students by charging them tuition rates "specifically prohibited" under Section 1623.

¶24 A breach of contract claim requires "the existence of the contract, its breach and the resulting damages." *Thomas v. Montelucia Villas, LLC*, 232 Ariz. 92, 96, ¶ 16 (2013). These minimum requirements are not alleged in the complaint. Plaintiffs never allege that ABOR breached an

actual contract term. In fact, their allegations point in the opposite direction: Plaintiffs describe the contract between ABOR and the non-resident students as "an exchange of consideration in the form of tuition monies and educational services," but never allege that ABOR failed to deliver on the promise of "educational services," and concede they paid non-resident tuition as non-resident students.

¶25 Rather than an express contract term, Plaintiffs contend that Section 1623 and all federal statutes are grafted into ABOR's contracts as independent, stand-alone terms, and ABOR breached that term, citing *Ansley v. Banner Health Network*, 246 Ariz. 240, ¶ 47 (App. 2019). We do not read *Ansley* to incorporate all federal statutes into ABOR's contracts, but Plaintiffs' argument would still fail because Section 1623 articulates no entitlement for all non-resident students to receive in-state tuition if an undocumented alien receives that tuition. *Day*, 500 F.3d at 1139.

¶26 Plaintiffs have also offered *White v. Mattox*, 127 Ariz. 181 (1980), for the point that ABOR's student contracts must be rescinded because ABOR "charged an amount that they [were] specifically prohibited from charging by federal law." But *White* neither stands for that proposition nor supports Plaintiffs' claims. In *White*, the court found "no contract result[ed]" based on a "total failure of consideration" when the parties agreed to transfer a non-transferable liquor license. *White,* 127 Ariz. at 184. Here, by contrast, Plaintiffs allege an enforceable contract that ABOR breached; and rather than "a total failure of consideration," Plaintiffs allege that "consideration" was "exchange[d]" as tuition for "educational services." Thus, we affirm the court's dismissal of Plaintiffs' breach of contract claim.

Unjust Enrichment

¶27 Last, Plaintiffs claim that ABOR was unjustly enriched through its "improper collections in violation of federal law." A prima facie unjust enrichment claim requires an enrichment, an impoverishment, a connection between them, no justification for the same, and no remedy at law. *Freeman v. Sorchych*, 226 Ariz. 242, 251 (App. 2011).

¶28 Plaintiffs have not alleged the minimum requirements of an unjust enrichment claim, including an enrichment and impoverishment. To begin, Plaintiffs received the agreed-upon university education in return for the tuition amount that Plaintiffs agreed to pay. *Brooks v. Valley Nat'l 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))). Moreover, Section 1623 does not create or confer any educational benefits on non-resident students to receive postsecondary educational benefits. *Day*, 500 F.3d at 1139. Furthermore, ABOR's tuition rates were justified by Arizona law, which bars non-resident students from receiving in-state tuition. A.R.S. § 15-1802(A). The superior court properly dismissed the unjust enrichment claim.

CONCLUSION

¶29 We affirm the superior court's dismissal of Plaintiffs' claims under Rule 12(b)(6). And because Plaintiffs have not prevailed on appeal, we decline their request for attorney's fees.

AMY M. WOOD • Clerk of the Court
FILED: AA

B. Lance Entrekin (#016172)
The Entrekin Law Firm
5343 North 16th Street, Suite 200
Phoenix, Arizona 85016
(602) 954-1123
Fax: (602) 682-6455
E-mail: lance@entrekinlaw.com
Attorney for Plaintiff

Daniel P.J. Miller, Esq. (#09769)
Tucker & Miller
1440 East Missouri Avenue, Suite C150
Phoenix, Arizona 85014
(602) 714-9864
Fax: (602) 870-5255
E-mail: dmiller@tucker-miller.com
Attorney for Plaintiff

COPY

APR 24 2018

CHRIS DEROSE, CLERK
W. STEVENS
DEPUTY CLERK

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 **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

1 the form of tuition monies and educational services and a meeting of the minds. As the class is
2 defined, all have the capacity to contract and no portion of the statute of frauds (A.R.S. § 44-
3 101) applies, but the contract was clearly evidenced by a writing in any event.
4 41. Defendants have charged an amount that they are specifically prohibited from charging by
5 federal law. In White v. Mattox, 619 P.2d 9, 127 Ariz. 181, 184 (Ariz. 1980), the Court held:
6 "In the instant case, the Legislature has not prohibited the transfer of liquor licenses. Transfers
7 are not per se illegal. The transfer is made subject to conditions and must conform to the
8 standards prescribed by the State. Hence, since the act of transfer is not forbidden as illegal or
9 contrary to public policy, recovery of the purchase price for the license should not be
10 withheld." The Court then ordered rescission.
11 42. Identically, Congress has not prohibited charging tuition to out of state students or stated
12 that doing so is against public policy. This is not per se illegal. But the tuition charged must be
13 subject to conditions described by 8 U.S.C. § 1623. A failure to do so is a basis for rescission
14 and recovery of those funds illegally charged, as it was in White, supra.
15 **C. UNJUST ENRICHMENT**
16 43. All Plaintiffs repeat all allegations as if fully set forth herein.
17 44. Should the Court hold that the class lacks a remedy at law against the Defendants,
18 Defendants' improper collections in violation of federal law has caused them to be enriched
19 and plaintiffs in the class to be impoverished. The enrichment and impoverishment are
20 connected and there is an absence of justification for the enrichment and the impoverishment.
21 45. Plaintiffs in the class have been damaged in the amount of the sums collected from them in
22 violation of federal law.
23 **PRAYER FOR RELIEF**
24 WHEREFORE, Plaintiffs respectfully request that the Court:
25 A. Certify this case as a class action, pursuant to Rule 23(a), 23(b)(2) and 23(b)(3), ARCP;
26 B. Order disgorgement of sums illegally collected;
27 C. Award damages in the amount of sums improperly collected;
28 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

By: /s/ Lance Entrekin

B. Lance Entrekin, Esq.
The Entrekin Law Firm
5343 North 16th Street, #200
Phoenix, Arizona 85016

Daniel P.J. Miller, Esq.
Tucker & Miller
1440 East Missouri Avenue, C150
Phoenix, Arizona 85014