IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

KRISTEN DAY, et al., **Plaintiffs,** **vs.** **KATHLEEN SEBELIUS, et al.,** **Defendants.**	**CIVIL ACTION** **CASE NO. 5:04-4085-RDR** **MOTION FOR PRELIMINARY INJUNCTION**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this memorandum of points and authorities in support of their motion for a preliminary injunction.

The Nature of the Case

1. Kansas House Bill 2145 ("H.B. 2145") was enacted by the Kansas Legislature and became effective on July 1, 2004. Amended Complaint, at ¶¶ 31-33.

2. Plaintiffs, who are United States citizen students at Kansas public universities who have been classified as non-residents for purposes of payment of tuition and fees and their parents

filed suit on July 19, 2004 against Defendant state officials, seeking prospective declaratory and injunctive relief under 28 U.S.C. §§ 1331, 1343, and 2201. Plaintiffs seek preliminary protection against irreparable financial harm and impairment of their constitutional rights and federal statutory rights. This harm is ongoing, and is a direct and foreseeable consequence of the implementation by Defendants of H.B. 2145.

3. Plaintiffs now seek a preliminary injunction that will return the situation at Kansas post-secondary educational institutions to the *status quo ante,* existing as of the end of the 2003-2004 academic year, prior to July 1, 2004.

4. Under the *status quo ante,* existing prior to July 1, 2004, illegal aliens could not be deemed to be residents of Kansas for purposes of eligibility for post-secondary educational benefits, in particular in-state tuition. Amended Complaint, at ¶ 82.

5. At all times since July 1, 1998, Congress has, "notwithstanding any other provision of law," prohibited the state of Kansas and all political subdivisions therein from offering any postsecondary educational benefit to an illegal alien unless all United States citizens are also eligible for the same benefit in no less an amount, duration, and scope, without regard to whether the citizen is a resident of Kansas. 8 U.S.C. 1623(a); Amended Complaint, at ¶ 51.

6. There is no dispute that the Defendants are now offering certain illegal aliens postsecondary education benefits, for which illegal aliens would have been ineligible prior to July 1, 2004, the effective date of H.B. 2145. There is also no dispute that, but for the claim by Defendants that H.B. 2145 utilizes a purported semantic loophole in federal law to circumvent the mandate of 8 U.S.C. 1623, Plaintiffs would be entitled to treatment as residents of Kansas for purposes of eligibility for postsecondary educational benefits, including payment of tuition and fees at state resident rates, pursuant to that federal law.

Argument

6. The injuries claimed by Plaintiffs in this case arise from a fact pattern that is straightforward, although somewhat novel to this Court, in the sense that Defendants' actions constitute an impermissible attempt to grant privileges to a class of illegal aliens while denying them to U.S. citizen Plaintiffs. The Plaintiffs' legal and factual claims clearly meet the well-established standard for issuance of a preliminary injunction in this Judicial District.

7. A central question in this litigation is the legal domicile of the illegal alien beneficiaries of H.B. 2145. It is important to point out that, regardless of the position taken on this point by Defendants, Plaintiffs can show *prima facie* constitutional injuries arising from implementation of H.B. 2145 that justify the granting of preliminary injunctive relief. Only the granting of a preliminary injunction will maintain the *status quo ante,* existing prior to enactment of H.B. 2145.

Standard of Review

8. A plaintiff seeking a preliminary injunction in this Court bears the burden of showing: (1) irreparable harm unless the injunction is issued; (2) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; (3) that the injunction, if issued, will not adversely affect the public interest; and (4) a substantial likelihood of prevailing on the merits. *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, at 1194 (10th Cir. 1999); *Kiowa Indian Tribe of Oklahoma v. Hoover,* 150 F.3d 1163, at 1171 (10th Cir. 1998). If the plaintiff can establish that the first three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the

merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.

9. When a constitutional question is raised for preliminary injunction**,** the Tenth Circuit applies a decreased burden within the four factors. If a plaintiff can meet the first three factors, then the fourth factor is met if the plaintiff raises "questions so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate inquiry." *Neal v. Lewis*, 259 F. Supp. 2d 1178 (D.C. KS 2003), citing *Longstreth v. Maynard*, 961 F.2d 895, at 903 (10th Cir. 1992) and *Lundgrin v. Claytor*, 619 F.2d 61, at 63 (10th Cir. 1980); see also *Davis v. Mineta*, 302 F.3d 1104, at 1111 (10th Cir. 2002).

Factor 1: Irreparable Injury Unless the Injunction Is Issued.

10. A plaintiff suffers irreparable injury when the Court would be unable to grant an effective monetary remedy after a full trial because damages would be inadequate or difficult to ascertain. *Tri-State Generation & Transmission Ass'n, Inc., v. Shoshone River Power, Inc.,* 874 F.2d 1346, 1354 (10th Cir. 1989). Plaintiffs may meet their burden under this factor by showing a strong threat of irreparable injury before trial, and need not establish an actual injury or the certainty of an injury occurring. *Hill's Pet Nutrition, Inc. v. Nutro Prods*., 258 F. Supp. 2d 1197, 1206 (D. Kan., 2003). The Tenth Circuit has stated that where constitutional rights are implicated, irreparable injury is shown because a monetary award after a trial would not adequately compensate for the denial of a constitutional right. *Neal v. Lewis*, *supra*, at 1181 (D. Kan., 2003), *citing* 11A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995), and *Kikumura v. Hurley*, 242 F.3d 950, at 963 (10th Cir. 2001). See also *Haynes v. Office of the AG*, 298 F. Supp. 2d 1154, at 1159 (D. Kan., 2003) (Plaintiff's harm from denial of

preliminary injunction is irreparable if it is not fully compensable by monetary damages. Irreparable harm is established when plaintiff's claim is based upon violation of plaintiff's constitutional rights.).

11. Defendants have violated and will continue to violate Plaintiffs' rights to equal protection of the laws under Section I of the Fourteenth Amendment to the U.S. Constitution. Implementation of a system of classification for eligibility for postsecondary educational benefits under color of state law that is conditioned on a durational residency requirement of attendance for three years at a Kansas high school and acceptance of a lifetime contractual agreement to retroactively seek lawful status. The provisions of H.B. 2145 are intended to and in fact do discriminate against U.S. citizens in favor of certain illegal aliens in the provision of postsecondary educational benefits. See Amended Complaint, at ¶ 58.

12. These injuries occur regardless of whether Defendants argue before this Court that the illegal alien beneficiaries of H.B. 2145 are—or are not—lawfully domiciled in Kansas. If the illegal alien beneficiaries are deemed residents of the state for benefits eligibility purposes, Kansas has violated 8 U.S.C. 1623 and treated Plaintiffs in an impermissibly discriminatory fashion by refusing to deem them residents of Kansas for such purposes as well, as required by 8 U.S.C. 1623. If, on the other hand, Defendants theorize that H.B. 2145 permits them to deem illegal aliens as eligible for postsecondary educational benefits *despite* their nonresident status, Kansas will have extended certain privileges of residents of Kansas to nonresident illegal aliens, but denied them to equally- or better-qualified nonresident U.S. citizens from other states on the

impermissible basis of a durational residence requirement during the Plaintiff's secondary education career.[1]

13. Discrimination against U.S. citizens in favor of illegal aliens in the provision of postsecondary education benefits—regardless of the period of time during which the aliens have been present in Kansas in violation of federal law of—does not serve any important government objective and therefore fails the heightened review of state law based on immigration classifications required by the Equal Protection Clause of the Fourteenth Amendment. See Amended Complaint at ¶¶ 99-100.

14. Plaintiffs further seek the protection of a preliminary injunction based on the duty of the federal courts to protect and defend Plaintiffs against failure by agencies of the state of Kansas to recognize and comply with federal immigration law. The obligations of the state of Kansas to defer to the plenary power of the federal government over immigration arise under multiple provisions of the federal Constitution: Article VI, Clause 2 (Supremacy Clause); Article I, Section 8, Clause 1 (general police power to provide for common defense and general welfare), Clause 3 (Interstate Commerce Clause), Clause 4 (naturalization), and Clause 10 (offenses against law of nations); and Section 10, Clause 1 (powers denied to States), Clause 2 (Imposts and Duties Clause), and Clause 3 (State compacts).

15. By implementing H.B. 2145, Defendants' actions have contravened the comprehensive federal regulatory scheme in the area of immigration of foreign students, an area where federal power is plenary and preemptive, and where Congress has determined that there is a compelling

[1] In this circumstance, Defendants may *not* argue both that the illegal alien beneficiaries of H.B. 2145 are not residents of Kansas, *and* that granting the illegal aliens in-state tuition constitutes a legitimate and permissible state interest in protecting and preserving the quality of its colleges and universities and the right of its own *bona fide* residents to attend such institutions on a preferential tuition basis, as noted in *Vlandis v. Kline*, 412 U.S. 441, at 453 (1973).

national interest in removing benefits that constitute incentives for illegal immigration. These federal laws include: 8 U.S.C. 1601, 8 U.S.C. 1611, 8 U.S.C. 1621, and 8 U.S.C. 1623 (prohibiting the provision of postsecondary educational benefits to the illegal alien beneficiaries of H.B. 2145); 8 U.S.C. 1101(a)(15), P/L. 104-208 §641, 8 U.S.C. 1182(a)(6)(A), 8 U.S.C. 1182(a)(9)(B), 8 U.S.C. 1202(g), 8 U.S.C. 1227(a)(1)(C)(i) (regulating the lawful entry and presence of aliens for purposes of study at postsecondary educational institutions); 8 U.S.C. 1153(b)(3), 8 U.S.C. 1154(b), 8 U.S.C. 1182(a)(5), and 8 U.S.C. 1324a (protecting United States workers against employment of unauthorized aliens). In addition to violating federal law directly, H.B. 2145 expressly creates disparate state classifications based on immigration status and alienage that do not exist in federal immigration law. See Amended Complaint, at ¶¶ 68-73. These state classifications conflict with federal immigration law and cannot be reconciled with federal immigration classifications. Such state defiance of federal law contravenes the Supremacy Clause of the U.S. Constitution. U.S. Constitution, Art. VI, Cl.2.

16. Defendant Sebelius and her legal counsel have stated that the intent of H.B. 2145 is to improve the educational preparation of the Kansas workforce.[2] To assert that the illegal alien beneficiaries of H.B. 2145 are an important and legitimate component of that workforce is to suggest that the State of Kansas intends to train illegal aliens for future employment in Kansas, disregarding federal laws that prohibit such aliens from working or remaining in the United

[2] "'I just think we need all the talent that we should get from this growing part of our economy,' Sebelius said of the state's large immigrant Hispanic population." Chris Moon, "Governor Speaks to Hispanics: Sebelius Favors Immigrant Tuition Bill," TOPEKA CAPITAL-JOURNAL, March 19, 2003. "And it doesn't make a whole lot of sense when you have that young person who has worked hard to graduate from high school, who wants to contribute more to the economy, to say, 'No, you can't afford that.' We want to help them afford it, we want them to contribute more to our economy, and we think this law helps do that." Statement of Matt All, Counsel to Governor Kathleen Sebelius, "Immigration Watchdog Group Files Lawsuit Challenging Kansas College Tuition Provision Benefiting Illegal Immigrants," *All Things Considered*, NATIONAL PUBLIC RADIO, July 19, 2004.

States. These federal laws protect U.S. citizen workers and lawfully-admitted alien workers alike, from the adverse effect on wages and working conditions caused by employment of inadmissible aliens. Congress retains plenary power over immigration, with exclusive authority to set the standards by which aliens may enter or remain in the United States. Congress has prohibited and preempted state action in this area. See, *supra*, at ¶ 15. In this respect as well, Defendants' defiance of federal law contravenes the Supremacy Clause of the U.S. Constitution. U.S. Constitution, Art. VI, Cl.2.

17. Although the plaintiff bears the burden of persuasion, it is up to Defendants in this case, as the parties upholding the statute, to establish a strong basis in evidence showing that the statute meets the appropriate constitutional standard. *Concrete Works of Colorado v. City and County of Denver,* 36 F.3d 1513, at 1521-22 (10th Cir. 1994), *cert. denied,* 115 S. Ct. 1315 (1995).

18. The injuries to Plaintiffs by state resistance to federal immigration law are irreparable. Plaintiffs have no recourse other than injunctive relief to remedy these current and prospective constitutional injuries.

19. The foreseeable harm to Plaintiffs is not fully compensable by monetary damages. The deprivation of a financial public benefit that represents a significant portion of a plaintiff's income also constitutes irreparable harm, where Plaintiffs have limited incomes or are otherwise impecunious. It is well established that the ongoing denial of benefits constitutes a judicially-cognizable injury. For example, numerous cases have held that reductions in AFDC benefits,

even relatively small reductions, impose irreparable harm on eligible beneficiaries. *Beno v. Shalala*, 30 F.3d 1057, at 1064 (9th Cir.1994).[3]

20. In this case, affidavits submitted by student Plaintiffs indicate that nearly all are young persons of limited means who are unable to finance the costs of a college education from their personal resources without reducing their current incomes below the poverty level. The difference between the expense of nonresident tuition demanded by Defendants of each student plaintiff and the amount they are lawfully entitled to pay pursuant to 8 U.S.C. 1623 is huge, ranging between 280 percent and 320 percent of the in-state rates in effect at the Kansas universities under the authority of Defendants. Amended Complaint, at ¶ 35. In both absolute and relative terms, the denial of eligibility for payment of tuition on the same basis as U.S. citizens who are legal domiciliaries of Kansas constitutes a financial injury. This financial injury has an immediate, significant, and harmful effect on Plaintiffs' lives.

21. Plaintiffs anticipate that final injunctive relief awarded at the conclusion of this litigation will enable them to seek reimbursement of excess tuition and fees paid during the course of the litigation. However, preliminary injunctive relief is especially appropriate in this case because it

[3] See, e.g., *Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982) ("We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes . . . [even if the 11th amendment would permit a court order requiring retroactive benefits payments, because] for people at the economic margin of existence, the loss of $ 172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment."), *mod. on other grounds*, 701 F.2d 750 (8th Cir. 1982); *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975), *cert. denied*, 424 U.S. 978, 47 L. Ed. 2d 748, 96 S. Ct. 1484 (1976); *Smith v. Babcock*, 748 F. Supp. 501, 508-09 (E.D. Mich. 1990), rev'd on other grounds, 19 F.3d 257 (6th Cir. 1994); *Gorrie v. Heckler*, 606 F. Supp. 368, 374 (D. Minn. 1985); *Moore v. Miller*, 579 F. Supp. 1188, 1191-92 (D. Ill. 1983) ("For those in the grip of poverty, living on the financial edge, even a small decrease in payments can cause irreparable harm."); *Williamson v. Gibbs*, 562 F. Supp. 687, 688 (D. Wash. 1983); *RAM v. Blum*, 533 F. Supp. 933, 940 (D.N.Y. 1982); *Crane v. Mathews*, 417 F. Supp. 532, 539-40 (N.D. Ga. 1976) (imposition of $ 2 co-payment for medical treatment is irreparable injury to welfare recipients living at subsistence level); *Nelson v. Likins*, 389 F. Supp. 1234, 1237, 1242 (D. Minn. 1974) (loss of $80 to $100 a month in AFDC benefits is sufficient irreparable injury to justify a preliminary injunction and a denial of a stay of preliminary injunction pending appeal because "while the

is the only means of protection available to Plaintiffs against ongoing financial losses, including interest, opportunity costs, and compensatory damages that cannot be fully recovered from Defendants due to Eleventh Amendment limitations.

Factor 2: Harm to Movant Outweighs Any Harm to Opposing Party

22. The second factor requires this Court to weigh the harm to Plaintiffs (students and parents) against any harm to the Defendants (the Governor, the Members of the Board of Regents, and the Registrars of the three named Kansas public universities) that is reasonably foreseeable should the motion for a preliminary injunction be granted by this Court.

23. The harm claimed by Plaintiffs is (1) the infringement of Plaintiff's constitutional rights and protections, (2) the immediate and irreparable harm to parent and student Plaintiffs of payment of tuition and other fees at nonresident rates, (3) the future injuries to student Plaintiffs who must endure the financial hardship of repaying burdensome student loans, and (4) the prospective injuries to the student Plaintiff's future economic earning power caused by state subsidy of post-secondary education and training for illegal aliens.

24. Plaintiff's economic injuries during the litigation of this issue are substantial. Plaintiffs have detailed in their affidavits the activities or opportunities that they have foregone, and the debt they have incurred, in order to pay the non-resident tuition and fees unlawfully demanded by Defendants. See Affidavits of student and parent Plaintiffs Kristen M. Day, Cody R. Echols, David C. Eichman, Brandi P. Gillette, Christopher J. Heath, Amy E. Hughes, Heidi L. Landherr, Karla A. Manzel and Robert R. Manzel, Kayla L. Manzel, Jonathan D. Miller, Michelle K. Prahl,

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loss of money is normally not considered irreparable, . . . in this case those affected are not the average citizens but those in the grip of poverty."), *aff'd per curiam*, 510 F.2d 414 (8th Cir. 1975).

Kyle M. Rohde, Jamie L. Whittenburg, Lindsey D. Whittington, attached to this memorandum as Exhibit A.

25. Both the Defendants and the illegal alien beneficiaries of H.B. 2145 intend that the illegal aliens will use their postsecondary education benefits to compete for employment and work in Kansas without federal employment work authorization. See supra, at ¶ 16. Every week and month that illegal aliens continue to receive these unlawful benefits improves their ability to compete for employment that by law is reserved for United States workers and lawfully present alien workers with employment authorization.

26. Plaintiffs' constitutional injuries are twofold. First, H.B. 2145 infringes upon Plaintiffs' right to equal protection of the laws as a consequence of the discriminatory and unlawful classification scheme enacted by the states of Kansas, which grants publicly-funded post-secondary education benefits to certain illegal aliens, based on an arbitrary state immigration classification, while at the same time denying U.S. citizen Plaintiffs the same benefits. H.B. 2145, by its definitions and terms, does not make such benefits available to U.S. citizens. However, even if one were to suppose that H.B. 2145 could somehow be applied to U.S. citizens, the statutory exclusions of H.B. 2145 operate to exclude virtually every U.S. citizen who might seek its benefits. In one of the most common circumstances, a U.S. citizen who graduates from a Kansas high school and then resides in another state for several years loses his eligibility for in-state tuition at a Kansas university under H.B. 2145, Section 1(c)(2) because he has established residency qualifying him for in-state tuition in another state. In contrast, an illegal alien may graduate from a Kansas high school and then move to the same state. But the illegal alien will still qualify for in-state tuition at a Kansas University, because the second state does not attempt to unlawfully make the illegal alien eligible for in-state tuition.

27. Second, H.B. 2145 violates the Supremacy Clause of the U.S. Constitution in numerous ways. See supra, at ¶¶ 14-16. In this case, the Supremacy Clause serves as a constitutional protection of the Plaintiffs' rights that are defined by federal statute. Most importantly, Plaintiffs enjoy the federal statutory right to the same postsecondary education benefits provided to any illegal alien by a State, "in no less an amount, duration, and scope." 8 U.S.C. 1623(a). The defiance of federal law by Defendants results in a constitutional violation with direct and injurious consequences for Plaintiffs.

28. In contrast, it is difficult to identify any measurable harm to any of the Defendants should the *status quo ante* be retained until this litigation runs its course.

Factor 3: Injunction Will Not Adversely Affect the Public Interest

29. The "public interest" has been defined as meaning the consequences to non-parties of granting or denying the injunction. *Abbott Laboratories v. Mead Johnson & Co*., 971 F.2d 6, at 12 (7th Cir. 1992). In this case, the interests of the Plaintiffs and those members of the public who are not parties to this lawsuit, in Kansas as well as in other States whose citizens attend Kansas postsecondary educational institutions in significant numbers, are closely aligned.

30. At the broadest level, the public as a whole has an interest in protecting constitutional rights. *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996).

31. Congress has specifically defined the public interest this area by statute. It is the national policy of the United States that aliens within the United States shall not depend on public resources to meet their needs, and "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. 1601(6). See Amended Complaint, at ¶¶ 37-38. Congress has firmly established that there is a

substantial public interest in the effective enforcement of immigration law. *U.S. v. Brignoni-Ponce*, 422 U.S. 873, at 878 (1975); *INS v. Miranda*, 459 U.S. 14, at 19 (1982). Accordingly, a wealth of federal case law recognizes the substantial public interest in the enforcement of immigration laws and the effective removal of illegal aliens. See *Lucacela v. Reno*, 161 F. 3d 1055, 1059 (7th Cir. 1998) (recognizing "the clear public interest (as expressed by Congress) in deporting illegal aliens without delay"); *Odon Pereira do Vale v. INS*, 2002 U.S. Dist. LEXIS 12595, 27 (D. R.I. 2002) ("[T]here is a strong public interest in removing illegal aliens from the country, particularly those who have been deemed removable."); *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981) (congressional deliberation "attests to the seriousness of the public interest in enforcement of the immigration laws"). Although immigration is a federal matter, local and state government agencies may not turn a blind eye to any illegal activity – including violations of immigration law. *U.S. v. Ontoniel Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir.1999).[4]

32. Although Defendants may assert a policy interest in subsidizing the higher education of illegal aliens pursuant to H.B. 2145, the express statement of public policy and national interest by Congress which has been affirmed by numerous federal courts renders Defendants' asserted policy interest irrelevant for the purposes of this Court's inquiry.

33. The California Court of Appeals has described a state's public interest in denying in-state tuition to undocumented aliens as "manifest and important." *Regents of the University of California v. Superior Ct. of Los Angeles County*, 225 Cal. App. 3d 972, at 982 (1990). That Court articulated nine important public interests at stake that are also implicated by this complaint:

[4] C*ert. denied*, SC 99-5643, WL 624389 (Oct. 4, 1999).

1. Interest in not subsidizing violations of law.
2. Interest in preferring to educate the states' own lawful residents.
3. Interest in avoiding enhancement of the employment prospects of those to whom employment is forbidden by law.
4. Interest in conserving state fiscal resources for the benefit of its lawful residents.
5. Interest in avoiding accusations that it unlawfully harbors illegal aliens in its classrooms and dormitories.
6. Interest in not subsidizing the university education of those who may be deported.
7. Interest in avoiding discrimination against citizens of sister states and aliens lawfully present.
8. Interest in maintaining respect for government by not subsidizing those who break the law.
9. Interest in not subsidizing the university education of students whose parents, because of the risk of deportation if detected, are less likely to pay taxes.[5]

34. Congress has prohibited States from providing any federal post-secondary educational benefit to an illegal alien. 8 U.S.C. 1611; 8 U.S.C. 1641. See Amended Complaint, at ¶¶ 39-41.

35. Although this suit is not filed as a class action, the consequences of preliminary and permanent injunctive relief will only be beneficial for both United States citizens and lawfully admitted alien students seeking to attend Kansas institutions of higher education. Whether or not they are domiciled in Kansas, U.S. citizens, legal permanent resident aliens, and nonresident aliens admitted to the United States in an appropriate visa status for university study will benefit by not being obliged to compete for limited state postsecondary educational resources with persons who are not authorized or entitled to consume such public resources. The scarcity of postsecondary education resources in Kansas is pervasive and significant. It is manifest in the dramatic increases in tuition rates at Kansas postsecondary institutions in recent years.[6] U.S. citizens will benefit by reduced competition for employment from illegal aliens, who are more likely to accept inferior wages and working conditions.

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[5] *Id*., also cited in Virginia Office of the Attorney General, *Immigration Law Compliance Update*, Sept. 5, 2002.

[6] In 2004, the Kansas Board of Regents voted to raise tuition rates 18 percent at Kansas University and 17 percent at Kansas State University; university officials complained of inadequate financial support from the state legislature. Chris Moon, "Regents Raise Cost of College," TOPEKA CAPITAL-JOURNAL, June 25, 2004.

36. In contrast, the language of H.B. 2145 contains no express statement of any public interest to be protected by enactment of this measure, and fails to identify non-party beneficiaries of the legislation other than certain illegal aliens who have been unlawfully present in Kansas for extended periods of time.

37. The public policy rationales articulated by sponsoring legislator Representative Sue Storm in testimony before the Kansas Senate Education Committee fail to demonstrate that preferences to the illegal alien beneficiaries of H.B. 2145 will serve the public interest as a whole. Rep. Storm testified:

> "These students, most of them Hispanic, aren't going anywhere…. They are going to remain in Kansas. They will work in Kansas…. This is a workplace development issue. Regardless of what we might believe about their parent's reasons or methods of coming to the United States, the real question is: 'Will they be educated workers or uneducated ones?'"[7]

President of the Kansas Board of Regents Reginald L. Robinson offered essentially the same policy rationale in his testimony:

> "The Board supports the concept of expanded educational opportunity that Sub. H.B. 2145 represents…. Given the increasingly global and increasingly competitive economic environment that confronts us, the state truly needs a highly educated workforce if it is to remain competitive and reach its full potential. Measures such as this one, which remove barriers to access, are helpful and important in that regard."[8]

38. In summary, the public interests served by granting the preliminary injunction—(1) the protection of Plaintiffs' constitutional and statutory rights, (2) the congressionally- and judicially-recognized compelling interest in promoting the enforcement of immigration laws, and (3) the preservation of the state's limited educational, employment, and fiscal resources for the benefit of citizens and other lawful residents—far outweigh the single interest served by the denial of the requested injunction, as stated by Representative Storm: a better-trained state

[7] Written Testimony on House Bill 2145, Senate Education Committee, March 11, 2003.
[8] Testimony Regarding Substitute for House Bill 2145, Senate Education Committee, Feb. 11, 2004.

workforce of unauthorized alien workers. This workforce would be of little value to the state of Kansas, due to its illegal and evanescing nature. It would be composed of aliens who are subject to removal by federal immigration authorities at any time; and such aliens may become fugitive in order to evade enforcement of the law.

Factor 4: Substantial Likelihood of Success on The Merits.

39. Plaintiffs in this case have established the first three requirements for issuance of a preliminary injunction and have further established that multiple constitutional questions are raised by this case. Thus, Plaintiffs need only show that the issues presented are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation. *Zsamba ex rel. Zsamba v. Community Bank,* 56 F. Supp. 2d 1207, at 1210 (D. Kan. 1999) (quoting *Resolution Trust Corp. v. Cruce,* 972 F.2d 1195, at 1199 (10th Cir. 1992)).

40. Plaintiffs in their Amended Complaint seek declaratory and injunctive relief to restore the constitutional, statutory, and financial *status quo ante* that existed in Kansas prior to July 1, 2004, the effective date of H.B. 2145. Plaintiffs also seek injunctive relief compelling reimbursement of the excess tuition and fees charged to Plaintiffs since July 1, 2004, in violation of 8 U.S.C. 1623.

41. In this case of apparent first impression, the preliminary injunctive relief and permanent injunctive relief sought are substantially similar. The only reason to disfavor a preliminary injunction that grants substantially all the relief sought is if it would render a trial on the merits largely or completely meaningless. *Aid for Women v. Foulston*, 2004 U.S. Dist. LEXIS 14238 (D.Kan., July 26, 2004) *quoting Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, at 1247 (10th Cir. 2001). In this case, the questions raised by this litigation are clearly so serious, substantial, difficult, and doubtful that the creation of a full documentary record and a trial on the

merits are not only meaningful, but also imperative. Plaintiffs raise important questions about federalism and the respective authorities of the state and federal governments. The declaratory relief sought will have wide-ranging legal and practical consequences for similarly-situated United States citizens throughout the United States, including the States in which Plaintiffs in this matter who are non-residents of Kansas for purposes of post-secondary education benefits reside, and for agencies of the state and federal governments that encounter large numbers of illegal aliens within their jurisdictions.

Conclusion.

42. Plaintiffs have met their burden of demonstrating that irreparable harm will occur unless the injunction is granted, that the injury to Plaintiffs outweighs any harm the proposed preliminary injunction may impose on Defendants, and that preliminary relief for the Plaintiffs is not only not adverse to, but is in accord with, the public interest. Plaintiffs have further shown that the questions raised in this case, concerning the relative role of state and federal officials in protecting the public against the adverse effects of illegal immigration, are clearly so serious, substantial, difficult and doubtful as to merit further inquiry.

43. Having met their burden of persuasion, Plaintiffs respectfully request that the Court grant the preliminary injunction described in the motion supported by this memorandum.

Dated: February 21, 2005.

Respectfully submitted,

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