Washington Legal Foundation
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August 9, 2005

Daniel Sutherland
Officer for Civil Rights and Civil Liberties
Department of Homeland Security
Mail Stop #0800
Office for Civil Rights and Civil Liberties
Washington, DC 20528

Dear Mr. Sutherland,

The Washington Legal Foundation (WLF) hereby files a complaint against the State of Texas for violating the civil rights of WLF's members, in violation of federal law. WLF requests that the Office for Civil Rights and Civil Liberties investigate the complaint and initiate appropriate enforcement action -- including but not limited to issuing a directive to Texas to cease further civil rights violations, withholding funding until Texas brings itself into compliance, and referring this matter to the Department of Justice for appropriate enforcement action.

The civil rights statute at issue is 8 U.S.C. § 1623. Adopted as part of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3099 (1996), § 1623 is designed to ensure that any State that offers discounted, in-state postsecondary education tuition rates to aliens not lawfully present in the United States[1] must also offer those same discounted tuition rates to all United States citizens and nationals, regardless whether they are residents of the State. In violation of § 1623, Texas has adopted a statute that permits illegal aliens living in Texas and who graduate from Texas high schools to be deemed "residents" of Texas in order to qualify for discounted tuition rates, yet does not offer the same tuition rates to U.S. citizens and nationals who live outside Texas. As the arm of the federal government charged with enforcing IIRIRA, the Department of Homeland Security should take immediate action to end Texas's flagrant violation of the terms of the statute.

I. Interests of WLF

The Washington Legal Foundation is a public interest law and policy center based in

[1] Such aliens are referred to herein as "illegal aliens."

Washington, D.C., with members and supporters in all 50 States. WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully present in this country. *See, e.g., Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995) (successful challenge to university's denial of scholarship benefits to Hispanic student on account of race); *Washington Legal Found. v. Texas Equal Access to Justice Found.,* 270 F.3d 180 (5th Cir. 2001), *vacated and remanded*, 538 U.S. 942 (2003) (Fifth Amendment challenge to Texas's uncompensated confiscation of private property). WLF also regularly litigates in support of efforts to enforce the nation's immigration laws and to ensure that public funds are used solely for the benefit of those lawfully present in this country. *See, e.g., Ambros-Marcial v. United States*, ___ F. Supp. 2d ___, 2005 U.S. Dist. LEXIS 14742 (D. Ariz. 2005) (opposing efforts to impose tort liability on U.S. for failing to install water stations in Arizona desert for benefit of aliens crossing into this country); *Friendly House v. Napolitano,* No. 05-15005 (9th Cir., dec. pending) (representing intervenors seeking to uphold Arizona's Proposition 200).

WLF's members include many United States citizens who are not Texas residents and who attend or are interested in attending (or whose dependent children attend or are interested in attending) state-run postsecondary education institutions within the State of Texas. Those members have an interest in not being discriminated against, in violation of federal law, with respect to tuition charged by such institutions.

II. The Role of DHS and the Office for Civil Rights and Civil Liberties

The Department of Homeland Security (DHS) is charged with enforcing numerous federal laws relating to immigration, including IIRIRA. The DHS enabling statute includes a provision establishing an "Officer for Civil Rights and Civil Liberties," whose responsibilities include:

> [o]versee[ing] compliance with constitutional, statutory, regulatory, policy, and other requirements relating to civil rights and civil liberties of individuals affected by the programs and activities of the Department; . . . and investigat[ing] complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General.

6 U.S.C. § 345(a)(4) & (6).

That statutory mandate indicates that the Office for Civil Rights and Civil Liberties (the "Office") is the appropriate body within DHS to investigate WLF's complaint. The complaint

charges that the State of Texas is violating the civil rights of numerous individuals whose rights are protected by a statute (8 U.S.C. § 1623) that falls within DHS's purview. Also, WLF's complaint is not one that is more appropriately investigated by DHS's Inspector General, because it does not allege that anyone within DHS is violating § 1623.

If you and/or others within DHS nonetheless conclude that this complaint should be handled by some other entity within DHS, we ask that you transfer the complaint to that entity as soon as possible and *immediately* inform WLF of that transfer. The allegations contained in this complaint are serious and indicate widespread civil rights violations by the State of Texas; moreover, one federal court has indicated that only the federal government is empowered to remedy the violations. *Day v. Sebelius,* ___ F. Supp. 2d ___, 2005 U.S. Dist. LEXIS 15344 (D. Kan. July 5, 2005). Accordingly, it is crucial that the Office (or another appropriate body within DHS) undertake and complete an investigation of Texas's violations at the earliest possible time.

III. Section 1623

Section 1623 provides in pertinent part as follows:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The statute, adopted in 1996 as part of IIRIRA, could not be clearer that a State is not permitted to treat non-residents who are either United States citizens or nationals worse, with respect to postsecondary education benefits, than it treats illegal aliens who are physically present in the State. Section 1623 includes only one significant qualifier: the prohibition on discrimination against non-resident citizens and nationals is limited to discrimination "on the basis of residence." Section 1623 does not prohibit a State from awarding postsecondary education benefits to an illegal alien, while denying similar benefits to non-resident citizens and nationals, where the basis for doing so is *totally unrelated* to residency. Thus, for example, § 1623 does not prohibit the University of Texas from offering football scholarships to athletically talented illegal aliens without offering similar scholarships to less athletically talented non-resident citizens and nationals. But a State may not favor an illegal alien in the award of benefits if the favoritism is in any way related to the illegal alien's physical presence within the State.

IV. Texas Statute Discriminating Against Non-Resident Citizens and Nationals

Notwithstanding § 1623, the State of Texas in 2001 adopted a statute that has the intent and effect of discriminating against non-resident citizens and nationals in the award of postsecondary education benefits. The statute, entitled, "An act relating to the eligibility of certain persons to qualify as residents of this state for purposes of higher education tuition or to pay tuition at the rate provided residents of this state," was signed into law by the Governor of Texas on June 16, 2001. *See* Stats. 2001 77th Leg. Sess. Ch. 1392. The 2001 statute amended § 54.052 of the Education Code to add the following language:

> Notwithstanding any other provision of this subchapter, an individual shall be classified as a Texas resident until the individual establishes a residence outside this state if the individual resided with the individual's parent, guardian, or conservator while attending a public or private high school in this state and:
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> (1) graduated from a public high school or received the equivalent of a high school diploma in this state;
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> (2) resided in this state for at least three years as of the date the person graduated from high school or received the equivalent of a high school diploma;
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> (3) registers as an entering student in an institution of higher education not earlier than the 2001 fall semester; and
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> (4) provides to the institution an affidavit stating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so.

Texas Education Code § 54.052(j).

The intent and effect of § 54.052(j) was to declare illegal aliens living and being educated in Texas to be "residents" of the State, and thereby eligible for reduced in-state tuition rates at Texas postsecondary education institutions. At the same time, Texas law has continued to make it exceedingly difficult for citizens and nationals living outside the State to qualify as a "resident" of Texas and thus to qualify for the reduced in-state tuition rates. For example, § 54.052 also provides:

(c) An individual who is under 18 years of age or is a dependent and who is living

> away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student.
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> (d) An individual who is 18 years of age or under or is a dependent and whose family has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student, regardless of whether he has become the legal ward of residents of Texas or has been adopted by residents of Texas while he attending an educational institution in Texas, or within a 12-month period before his attendance, or under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student.
>
> . . .
>
> (f) An individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student.

Texas Education Code §§ 54.052(c), (d), and (f).

V. Texas Is Violating § 1623 By Discriminating Against Non-Resident Citizens and Nationals.

As a result of § 54.052(j), numerous illegal aliens are paying in-state rates to attend Texas postsecondary education institutions. As a result of other provisions of § 54.052, U.S. citizens and nationals who do not reside in Texas, or who are dependents of citizens or nationals who do not reside in Texas, are required to pay higher, out-of-state tuition rates in order to attend those same postsecondary education institutions. Accordingly, there can be no serious dispute that Texas, by enforcing the terms of § 54.052, is discriminating against non-resident citizens and nationals in violation of § 1623.

Section 1623 prohibits such discrimination whenever illegal aliens are made eligible for a "postsecondary education benefit" "on the basis of residence within a State." Reduced college tuition clearly qualifies as a "postsecondary education benefit." Moreover, Texas's discrimination is "on the basis of residence" within the State. Section 54.052(j) was added to Texas law in 2001 precisely so that there would be no question that illegal aliens present within the State would be deemed "residents" of the State for purposes of Texas's grant of lower

postsecondary education tuition rates to residents of Texas, while making clear that citizens and nationals living outside Texas would not so qualify. By framing an illegal alien's eligibility for reduced tuition rates in terms of his or her "classifi[cation] as a Texas resident," § 54.052(j) could not be clearer that Texas discriminates in favor of illegal aliens, in relation to non-resident citizens and nationals, "on the basis of residence within a State."

Nor could Texas avoid the strictures of § 1623 simply by amending the language of § 54.052(j) to eliminate all reference to the word "residence." For example, Texas might try to evade § 1623 by amending § 54.052 to offer lower in-state tuition rates to: (1) residents of Texas; or (2) those who graduate from a Texas high school. The argument would then go like this: Texas is not discriminating against non-resident citizens and nationals "on the basis of [non-]residence" but rather on the basis of not having graduated from a Texas high school.[2] That argument is without merit. Section 1623 prohibits a State from discriminating in favor of illegal aliens "on the basis of [their] residence within [the] State," and nothing in the statute suggests that the prohibition applies only if the State (as Texas does) uses the word "residence" in its discriminatory statute. Rather, the clear import of § 1623 is that it applies to *any* eligibility criterion that is based on residence – regardless of what verbal formulas the State may employ. Because, for example, graduation from a high school located within the State is a close proxy for physical presence within the State, § 1623 requires a State that offers in-state college tuition rates to illegal aliens that have graduated from a high school within the State to offer the same rates to non-resident citizens and nationals.[3]

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[2] Advocates for granting reduced postsecondary education tuition rates to illegal aliens have regularly advanced arguments along those lines for allowing states to evade § 1623. *See, e.g.,* Jessica Salsbury, *Comment: Evading Residence: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 478-79 (2003). Nonetheless, such advocates generally have focused their energies on (to date, unsuccessful) efforts to repeal § 1623, thereby tacitly conceding that § 1623 does, indeed, prohibit states from extending in-state tuition rates to illegal aliens if they do not simultaneously extend those same benefits to all non-resident citizens and nationals. *Id.*

[3] Moreover, the language of § 54.052(j) makes clear that Texas, in adopting that statute, was not simply attempting to reward illegal aliens who graduate from Texas high schools, irrespective of their ties to the State. Rather, other provisions of the statute make clear that Texas was attempting to reward only those illegal aliens whose close ties to the State afforded them a status somewhat akin to bona fide residents. For example, § 54.052(j) limits in-state tuition rates to those illegal aliens who graduate from a Texas high school *and:* (1) resided in Texas for three years before graduating from high school; (2) resided with his/her parent, guardian, or conservator while attending high school; and (3) does not establish a residence outside Texas

In sum, by denying in-state college tuition rates to non-resident United States citizens and nationals, including many members of WLF, Texas is violating their civil rights, in clear violation of § 1623. WLF calls upon the Office for Civil Rights and Civil Liberties to take immediate action to bring an end to these violations.

VI. Immediate Action by This Office Is Particularly Warranted Due to the Absence of Other Remedies Available to Victims, and Because of the Widespread Violations of § 1623.

WLF is bringing this matter to the attention of the Office for Civil Rights and Civil Liberties because all other avenues for relief have been denied. In particular, an effort by private individuals to enforce § 1623 in the federal courts has been rebuffed on the grounds that § 1623 does not create a private right of action by individuals injured by violations of the statute. Accordingly, unless civil rights created by Congress are to go unenforced, it is crucial that DHS – the federal agency charged with enforcing IIRIRA[4] – exercise its authority to bring Texas and other states into compliance with the law.

The private suit to enforce § 1623 was filed in federal district court in Kansas by plaintiffs enrolled at one of the public universities in the State of Kansas and who were denied in-state tuition rates. *Day v. Sebelius,* No. 04-4085-JAR (D. Kan.). Kansas is one of eight states that grant in-state tuition rates to illegal aliens who graduated from high school within the State, yet deny similar rates to non-resident citizens and nationals. On July 5, 2005, the district court dismissed the plaintiffs' § 1623 claims against Kansas higher education officials, ruling that § 1623 does not create a private right of action by individuals injured as a result of violations of the statute. *Id.,* 2005 U.S. Dist. LEXIS 15344 at *30 - *38 (D. Kan. 2005). Rather, the court held, Congress intended § 1623 to be enforced solely by the Department of Homeland Security, noting that "Congress specifically designated the Secretary of Homeland Security as the

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while attending college.

[4] *See* 8 U.S.C. § 1103(a)(1):

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . .

individual in charge of enforcing immigration laws." *Id.* at *38.[5] Because the only court to address the issue has ruled that DHS alone is empowered to enforce § 1623, it is crucial that the Office step forward immediately to ensure that Texas does not continue to violate the civil rights of WLF's members and other U.S. citizens and nationals who are not residents of Texas.

Immediate action by the Office is also warranted because of the widespread nature of violations of § 1623. In addition to Texas, seven other States have adopted laws that discriminate in a similar fashion against non-resident citizens and nationals: California, New York, Utah, Illinois, Washington, Oklahoma, and most recently, Kansas. Unless DHS steps forward and adopts measures designed to enforce § 1623, immigration-rights groups may be emboldened to encourage yet other states to flout federal law. Reasonable people can disagree on the issue of whether States should favor illegal aliens over non-resident U.S. citizens in the award of in-state tuition rates. But Congress has already decided the issue: in adopting IIRIRA, it determined that no such favoritism is permissible. There can be no doubt that that decision preempts any contrary decisions at the State level. *See* Rebecca Rhymer, *Note: Taking Back the Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L.J. 603 (2005). It is incumbent upon DHS to take steps to ensure that the will of Congress is enforced.

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[5] The plaintiffs have appealed from dismissal of their § 1623 claims. That appeal is pending before the U.S. Court of Appeals for the Tenth Circuit.

VII. Conclusion

The Office for Civil Rights and Civil Liberties should issue a determination that Texas, by discriminating against nonresident citizens and nationals in the award of in-state tuition rates, is violating § 1623, and write to Texas education officials to demand that they bring their practices into compliance with federal law. Texas should be free to comply by either: (1) extending in-state tuition rates to all U.S. citizens and nationals, without regard to State of residence; or (2) ceasing to provide in-state tuition rates to illegal aliens on the basis of residency. If Texas does not agree to comply, the Office and DHS should take whatever additional steps are necessary to obtain such compliance – including withholding DHS funds otherwise payable to Texas and referring this matter to the U.S. Department of Justice to file suit seeking injunctive relief as well as monetary relief for all aggrieved nonresidents of Texas.

Respectfully submitted,

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Daniel J. Popeo
Chairman and General Counsel

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Richard A. Samp
Chief Counsel