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INTRODUCTION

Mr. Chairman and Members of the Committee, it is an honor to appear before you today to discuss the issue of states offering in-state tuition rates to illegal aliens in violation of federal law, and the impact that Senate Bill 2611 would have in this area.

I come before you today in my capacity as a Professor of Constitutional Law and Immigration Law at the University of Missouri (Kansas City). My testimony should not be taken as the official position of my institution, which does not take positions on pending legislation.

I am also a practicing attorney who litigates regularly in the area of immigration and federal preemption on behalf of the Immigration and Reform Law Institute (IRLI). IRLI is a public interest litigation institute that represents the interests of U.S. citizens and supports the enforcement of immigration law in civil suits around the country. Often, IRLI is the only litigating entity with the resources and experience to explain the legal basis for the enforcement of this country's immigration laws.

Of particular relevance to this hearing is the fact IRLI is representing the plaintiff U.S. citizens in the case of *Day v. Bond*, a challenge to Kansas's provision of in-state tuition rates to illegal aliens. I am lead counsel in that case. IRLI is also representing the plaintiffs in the case of *Martinez v. Board of Regents*, a similar case in California.

Between 2001 and 2003, I served as White House Fellow and Counsel to the U.S. Attorney General at the Department of Justice. In that capacity, I was the Attorney General's chief adviser on immigration law.

THE HISTORY OF IN-STATE TUITION RATES FOR ILLEGAL ALIENS

In September 1996, Congress passed the landmark Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Legislators in some states—most notably California—had already raised the possibility of making in-state tuition rates available to illegal aliens who attend public universities. To prevent such a development, IIRIRA's drafters inserted a provision that prohibited any state from doing so, unless the state also provided the same discounted tuition to all U.S. citizens. It was written in plain language that any layman could understand:

> "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." 8 U.S.C. §1623

Obviously, no state in the union would be interested in giving up the extra revenue derived from out-of-state students, Members of Congress reasoned, so this provision

would ensure that illegal aliens would never be rewarded with a taxpayer-subsidized college education. What Congress did not foresee in 1996 was the willingness of some states to simply disobey federal law.

However, that is precisely what happened. In 1999, Members of the California legislature pushed ahead with their plan to have taxpayers subsidize the college education of illegal aliens. Assemblyman Marco Firebaugh sponsored a bill that would make illegal aliens who had resided in California for three years during high school eligible for in-state tuition at California community colleges and universities. The bill passed both houses of the California Legislature.

California Governor Gray Davis vetoed the bill in January 2000, stating clearly in his veto message that it would violate federal law: "Undocumented aliens are ineligible to receive postsecondary education benefits based on state residence…. IIRIRA would require that all out-of-state legal residents be eligible for this same benefit. Based on Fall 1998 enrollment figures… this legislation could result in a revenue loss of over $63.7 million to the state."

Undeterred, Representative Firebaugh introduced his bill again; and the California Legislature passed it again. In 2002, Governor Davis ignored his own veto message of 2000 and signed Firebaugh's bill offering in-state tuition rates to illegal aliens.

Meanwhile, legislators in Texas had succeeded in passing their own version of the same bill. Over the next four years, interest groups lobbying for illegal aliens introduced the same legislation in most of the other states. The majority of state legislatures rejected the idea.

However, eight more states followed the examples of California and Texas. Today, the ten states that offer in-state tuition to illegal aliens are: California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington.

In relatively small states like Kansas, the number of illegal aliens receiving this taxpayer-subsidized tuition is in the hundreds. However, in larger states where the benefit has been available for four years or more, the number is in the thousands. In Texas, approximately 5,935 illegal aliens were receiving in-state tuition benefits in 2005. And in California, with its massive system of universities and community colleges, more than 16,000 illegal aliens are now receiving a taxpayer-subsidized higher education.

WHY PROVIDING ACCESS TO IN-STATE TUITION FOR ILLEGAL ALIENS IS BAD POLICY

In all of the ten states that are violating federal law in this manner, the in-state tuition laws make for shockingly bad policy. There are many reasons that this is true, but three are particularly salient.

First, these laws discriminate against U.S. citizens. Neither an illegal alien nor a nonresident U.S. citizen is normally entitled to in-state tuition rates at a state's institutions of higher education. This is understandable, because in-state tuition eligibility is a valuable public benefit. It is a taxpayer-provided education subsidy that is worth well over $10,000 a year at most public universities. States accordingly reserve in-state tuition benefits for their own residents. However, if a state makes this benefit available to illegal aliens (whose legal residence is in another country), the state is discriminating against U.S. citizens (whose legal residence is in another state).

This is a slap in the face to the law-abiding American citizen from out of state. For example, consider a student from Missouri who attends Kansas University. That Missouri resident has always played by the rules and obeyed the law. Yet Kansas University charges him triple what it charges an alien whose very presence in the country is a violation of federal law. This discriminatory treatment is particularly harmful in a time when the price of a four-year college education is beyond the reach of many U.S. citizens. College costs rose 35% during 2002-2007, after adjusting for inflation. And this upward trend is nothing new; the cost of college tuition and fees has been rising faster than consumer prices and personal income for the past twenty-five years. Two-thirds of college students now graduate with debt, and the amount of debt has risen dramatically in recent years, to an average of $19,200. In such an environment, taxpayer-subsidized tuition is extremely valuable, reducing what could otherwise constitute crippling financial burdens. In an era of severely limited resources, U.S. citizens should be first in line to receive those resources; they should not stand behind aliens who are openly violating federal law.

Second, providing this subsidy for illegal aliens places a heavy burden on taxpayers. In contrast to out-of-state students who pay the full cost of their education, students eligible for in-state tuition receive a significant financial boost at taxpayer expense. When the number of illegal aliens taking advantage of this subsidy is significant, the costs become staggering. In Texas, for example, taxpayers pay an estimated 40 to 50 million dollars every year to subsidize the college education of illegal aliens. In California, the cost to taxpayers is much higher—well over $100 million a year.

Third, these ten states are now encouraging aliens to violate federal immigration law. Indeed, under the terms of each of the state statutes, breaking federal law is a prerequisite that must be satisfied before the illegal aliens can receive the benefit. Each of the ten state statutes includes a provision that expressly denies in-state tuition to aliens lawfully attending college in the United States on an appropriate student visa (typically, an F, J, or M visa). An alien is eligible for in-state tuition only if he is breaking federal law by remaining in the United States.

Aliens are sent this message: "We encourage you to violate the law. If you actually obtain a valid visa to study here, we will penalize you by making you pay out-of-state tuition." This creates a perverse incentive structure in which the states directly reward illegal behavior and significantly undermine federal law.

Imagine if a state enacted a law that rewarded state residents for cheating on their federal income taxes—by giving state tax credits to those who break federal tax laws. That is the equivalent of what these ten states have done. It is a direct financial subsidy to those who violate federal law.

THE LEGAL RIGHTS OF U.S. CITIZENS

In July 2004, a group of U.S. citizen students from out-of-state filed suit in federal district court in Kansas to enjoin the state from providing in-state tuition rates to illegal aliens, on the grounds that Kansas is clearly violating federal law. Not only that, Kansas is violating the Equal Protection Clause of the U.S. Constitution by discriminating against them and in favor of illegal aliens. I am the lead attorney representing those U.S. citizens.

The district judge did not render any decision on the central questions of the Kansas case. Instead, he avoided the merits of the issue entirely by ruling that the U.S. citizen plaintiffs lacked a private right of action to bring their statutory challenge and lacked standing to bring their Equal Protection challenge. That decision is currently being appealed in the U.S. Court of Appeals for the Tenth Circuit.

Meanwhile, in December 2005, another group of U.S. citizen students filed a class-action suit in California state court. They too maintain that the state is violating federal law and the U.S. Constitution. Pursuant to a California civil rights statute, they are also seeking damages to compensate them for the extra tuition they have paid, over and above that charged to illegal aliens. A Yolo County Court found that the U.S. citizen plaintiffs did have standing and a private right of action, but ruled against them with little explanation. That decision is currently before the California Court of Appeals.

These U.S. citizens are simply suing to enforce their statutory right not to be treated less favorably than illegal aliens when it comes to tuition rates. Congress gave them this statutory right eleven years ago. However, just when it looks like U.S. citizens might vindicate their rights under federal law and hold the wayward states accountable, the DREAM offers the offending states a pardon. As I will explain, the DREAM Act would not only take away the U.S. citizens' right to equal treatment, it would effectively close the courthouse door and deny them the ability to vindicate their rights in court.

THE DREAM ACT

One of the proposals included in comprehensive immigration legislation in both Houses of Congress this session is the Development, Relief and Education for Alien Minors Act (DREAM Act). The DREAM Act repeals 8 U.S.C. § 1623—the 1996 federal law that prohibits any state from offering in-state tuition rates to illegal aliens, unless the state also offers in-state tuition rates to all U.S. citizens. On top of that, the DREAM Act offers a separate amnesty to illegal alien students. The DREAM Act provisions are not only bad policy, they are also profoundly unfair to U.S. citizens and lawful alien visitors who are

being discriminated against by a handful of states that provide preferential treatment to illegal aliens.

In addition to offering amnesty to aliens who have violated federal law, the DREAM act offers an amnesty to the state legislatures that have openly violated federal law. The DREAM act states, "The repeal… shall take effect as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." In other words, it is a retroactive repeal—as if the 1996 law never happened. In this way, the Senate bill expressly shields those states from liability for their past violations of federal law.

This is no accidental turn of phrase. This retroactive repeal was inserted as a direct response to the lawsuits challenging the states that violated the 1996 federal law. In the California case, the legal challenge is a class action lawsuit on behalf of all U.S. citizens whose federal statutory rights have been violated. Those U.S. citizens are suing to recover the extra tuition that they paid, over and above the tuition charged to illegal aliens. The DREAM Act provisions of the Senate Bill are specifically designed to take away this federal statutory right from U.S. citizens.

On top of this insult to the rule of law, the DREAM Act creates a massive independent amnesty in addition to the even larger amnesty that S.B. 2611 would confer. The amnesty presents a wide open path to citizenship for any alien who entered the country before the age of 16 and who has been in the country for at least five years. The guiding notion is: the longer you have violated federal law, the better.

Beyond that, all the alien needs is a high school diploma or a GED earned in the United States. Alternatively, he need only persuade an institution of higher education in the United States—any community college, technical school, or college—to admit him.

The DREAM Act abandons any pretense of "temporary status" for the illegal aliens who apply. Instead, all amnesty recipients are awarded lawful permanent resident (green card) status. The only caveat is that alien's status is considered "conditional" for the first six years. In order to move on to the normal green card, the alien need only obtain any degree from an institution of higher education, complete two years toward a bachelor's degree, or show that doing so would present a hardship to himself or his family members. And of course, the alien may thereafter use his lawful permanent resident status to bring in family members and may seek citizenship.

Furthermore, the DREAM Act makes it absurdly easy for just about any illegal—even one who does not qualify for the amnesty—to evade the law. Once an illegal alien files an application—any application, no matter how implausible—the federal government is prohibited from deporting him Moreover, with few exceptions, federal officers are prohibited from either using information from the application to deport the alien or sharing that information with another federal agency, under the threat of a fine of up to $10,000.

Thus, an alien's admission that he has violated federal immigration law cannot be used against him—even if he never had any chance of qualifying for the DREAM Act amnesty in the first place. The DREAM Act also makes illegal aliens eligible for various federal student loans and work-study programs.

The DREAM Act is a remarkably bad piece of legislation on many levels. But the most fundamental issue that it raises is the relation of the states to the federal government. Ten states have created a twenty-first century version of the nullification movement—defying federal law simply because they don't like what the majority in Congress decided. In so doing, they have challenged the basic structure of our Republic. The DREAM Act would pardon this offense and, in so doing, would encourage states to defy federal law in the future.

One thing that we have learned in the struggle to enforce our nation's immigration laws is that states cannot be allowed to undermine the efforts of the federal government to enforce the law. The rule of law can be restored only if all levels of government are working in concert to uphold it.