UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. COMMONWEALTH OF VIRGINIA, Defendant.	Case No. 3:25-cv-01067 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Nearly five years ago, in accordance with federal law, Virginia sought to make higher education more affordable for non-domiciled students with significant ties to the Commonwealth, regardless of their immigration status. Virginia's efforts culminated in the enactment of the Dream Act, codified at Virginia Code § 23.1-505.1, which creates a pathway for students with substantial educational and economic ties to Virginia to access in-state tuition fees. Virginia's Dream Act does not confer benefits based on residence. Instead, it conditions eligibility based on other criteria, including payment of taxes, years of attendance in Virginia schools, and graduation from a Virginia high school or equivalent educational attainment. In a separate statutory scheme under Virginia Code § 23.1-502, Virginia provides in-state tuition based on "domicile," which precludes undocumented immigrants from eligibility.

The United States challenges both of these laws despite the fact that undocumented immigrants may only be eligible for in-state tuition under Virginia's Dream Act. This attack on Virginia's in-state tuition laws can be dispensed with on foundational principles of statutory interpretation and federalism. Although federal law purports to prohibit states from providing

postsecondary education benefits to undocumented immigrants "on the basis of residence" unless U.S. citizens are eligible for the same benefits without regard to residence, this law regulates states, not private actors, and therefore has no preemptive effect. And even if that were not so, eligibility under Virginia's Dream Act is not "on the basis of residence" but on other factors for which U.S. citizens *are* eligible equally, regardless of their residence. The United States' reading of the law not only contravenes the statutory language but also raises serious Tenth Amendment concerns.

Finally, the lawsuit itself represents not a true case or controversy, as required by Article III, but rather a collusive attempt between the United States and the Commonwealth to nullify a statute duly enacted by Virginia's legislature almost five years ago, without adversarial process. For these reasons, the Court should dismiss the complaint with prejudice.

BACKGROUND

I. SECTION 1623 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

In 1996, Congress enacted two statutes addressing the eligibility of noncitizens for public benefits: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996), and the Personal Responsibility Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). PRWORA and IIRIRA amended the Immigration and Nationality Act to add 8 U.S.C. § 1621 (Aliens Who Are Not Qualified Aliens or Nonimmigrants Ineligible for State and Local Public Benefits) and 8 U.S.C. § 1623 (Limitation on Eligibility for Preferential Treatment of Aliens Not Lawfully Present on Basis of Residence for Higher Education Benefits). PRWORA established a default rule that noncitizens who are not "qualified" are ineligible for state and local public benefits, *see* 8 U.S.C. § 1621(a); *see also* 8 U.S.C. § 1641(b) (defining "qualified [noncitizen]"), but expressly empowered states to extend such benefits through legislation that "affirmatively

provides for such eligibility." 8 U.S.C. § 1621(d). This provision preserved state discretion over whether and under what conditions to make state benefits available to noncitizens who would not otherwise be eligible.

Section 1623 addresses eligibility restrictions on postsecondary education benefits to unlawfully present noncitizens made "on the basis of residence." It allows those benefits only if citizens or nationals are also eligible without regard to residence. Section 1623 (a) states, in full:

> Notwithstanding any other provision of law, a [noncitizen] 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(a).

II. VIRGINIA DREAM ACT

The Commonwealth of Virginia provides "in-state," or lower tuition, for eligible students at public colleges and universities. *See* Va. Code §§ 23.1-500 *et seq*. In-state tuition is available to Virginia students through different pathways established under the Virginia Code. Under the primary method, students are eligible if they establish by clear and convincing evidence that they were domiciled in the Commonwealth in the year immediately preceding enrollment. Va. Code § 23.1-502. "Domicile" is defined as "the present, fixed home of an individual to which he returns following temporary absences and at which he intends to stay indefinitely." Va. Code § 23.1-500. In accordance with PRWORA, noncitizen students who are unlawfully present are not eligible for in-state tuition through Virginia's domicile pathway.[1]

[1] *See* State Council of Higher Education for Virginia, Guidelines for In-State Residency & Tuition ("Guidelines"), Part II, Art. 1, Sec. 3(A)(2) (Jan. 11, 2021), *available at* https://www.schev.edu/financial-aid/in-state-residency/guidelines-for-in-state-residency-tuition (accessed Jan. 9, 2026).

Virginia law directs institutions of higher education – the entities enforcing Virginia's in-state tuition eligibility criteria – on how to determine domiciliary intent, including, for example, that those institutions shall "consider the totality of the [student's] circumstances." Va. Code. § 23.1-502(B). Virginia law also sets out rules and presumptions for establishing domiciliary intent, Va. Code § 23.1-503, including that "No student shall be deemed ineligible to establish domicile and receive in-state tuition charges solely on the basis of the immigration status of his parent," Va. Code § 23.1-503(J).

Under a separate statutory scheme, Virginia law provides a pathway to in-state tuition eligibility, exempting domicile as a requirement.[2] The "Dream Act," passed 24 years after IIRIRA, is available to students "regardless of citizenship or immigration status" who have demonstrated significant ties to the Commonwealth. Va. Code § 23.1-505.1. To qualify, students must meet several criteria:

> Notwithstanding § 23.1-502 or any other provision of law to the contrary, any student who (i) attended high school for at least two years in the Commonwealth and either (a) graduated on or after July 1, 2008, from a public or private high school or program of home instruction in the Commonwealth or (b) passed on or after July 1, 2008, a high school equivalency examination approved by the Secretary of Education; (ii) has submitted evidence that he or, in the case of a dependent student, at least one parent, guardian, or person standing in loco parentis has filed, unless exempted by state law, Virginia income tax returns for at least two years prior to the date of registration or enrollment; and (iii) registers as an entering student or is enrolled in a public institution of higher education or private institution of higher education in the Commonwealth, is eligible for in-state tuition regardless of citizenship or immigration status, except that students with currently valid visas issued under 8 U.S.C. § 1101(a)(15)(F), 1101(a)(15)(H)(iii), 1101(a)(15)(J) (including only students or trainees), or 1101(a)(15)(M) are not eligible.

Id.

[2] Another alternative to Section 23.1-502, not at issue in this case, waives the one-year residency requirement for certain military personnel and their children, Va. Code §§ 23.1-504-05.

Virginia law dictates that post-secondary schools are responsible for determining their students' eligibility for in-state tuition under the Guidelines for In-State Residency & Tuition (the "Guidelines") developed by the State Council of Higher Education for Virginia ("SCHEV" or the "Council"), the Commonwealth's coordinating body for higher education. *See* Va. Code § 23.1-510; *see also, e.g., Kinuani v. George Mason Univ*., No. 0042-22-4, 2023 WL 138332, at *5 (Va. Ct. App. Jan. 10, 2023). The Guidelines attaches addendums, including a twenty-page addendum ("Guidelines – Addendum A" or the "Addendum A")[3] outlining "Descriptions and Domicile Eligibility Status for Various Categories of Aliens Referenced in the Guidelines for Determining Domicile and Eligibility for In-State Tuition Rates" and another addendum ("Guidelines – Addendum C" or "Addendum C")[4] summarizing "In-State or Reduced Tuition Provisions Referenced in the Guidelines for Determining Domicile and Eligibility for In-State Tuition Rates."

The Guidelines make clear that a student claiming Virginia domicile for the purposes of in-state tuition bears the burden of establishing by clear and convincing evidence that they are an "eligible [noncitizen]," and that if a student "is neither a national nor an eligible [noncitizen], the student is not eligible for further domicile analysis."[5] The Guidelines define "eligible [noncitizen]" as "a Lawful Permanent Resident, applicant for Lawful Permanent Residence, or other [noncitizen] in a valid nonimmigrant or other status that provides the capacity to intend to remain in the Commonwealth indefinitely." *See* Guidelines, Part 1, Sec. 1. They define "ineligible [noncitizen]" as "a [noncitizen] who is not a Lawful Permanent Resident or an applicant for Lawful Permanent

[3] *See* Council, Guidelines – Addendum A (Jan. 7, 2020), available at https://www.schev.edu/home/showpublisheddocument/86/637800846458530000 (accessed Jan. 8, 2026)
[4] Council, Guidelines – Addendum C (July 2025), available at https://www.schev.edu/home/showpublisheddocument/4532/638912948812530000 (accessed January 13, 2026).
[5] *See* Council, Guidelines, Part II, Art. 1, Sec. 3(A)(2), 13(A) (Jan. 11, 2021), available at https://www.schev.edu/financial-aid/in-state-residency/guidelines-for-in-state-residency-tuition (accessed Jan. 9, 2026)

Residence and any other [noncitizen] who otherwise does not hold a valid nonimmigrant or other status that provides the capacity to intend to remain in the Commonwealth indefinitely." *Id*.

The Guidelines also refer to the addendums to specify what documentation would "demonstrate qualification as an eligible [noncitizen]" for determining domicile under Va. Code § 23.1-502. *Id*. Part II, Art. 1, Sec. 13(D). Addendum A outlines various federally conferred immigration classifications and whether and how – through proof of federally conferred documents – each classification would allow a person to establish domicile based on lawful presence. Addendum A. It explicitly states that an "undocumented [noncitizen]," which it describes as a person with the "absence of valid current legal status," *id*. p. 5, is "is not eligible for in-state tuition via domicile review and cannot assume the domicile of another person," *id*. p. 1. In contrast, Addendum C's section on "tuition Equity provision for high school completers," makes clear that eligibility under Va. Code § 23.1-505.1, "is not dependent upon a student's citizenship or immigration status, or the lack thereof," except for certain immigration status that are always ineligible. Addendum C, Section 11(IV)(A).

Thus, under Virginia's framework, unlawfully present students may not qualify for in-state tuition under Va. Code § 23.1-502; they may only do so under Va. Code § 23.1-505.1, which does not contain a residency or domicile requirement.

III. THE UNITED STATES' LAWSUIT.

Less than two weeks ago, the United States filed a Complaint seeking to invalidate the Dream Act and Va. Code § 23.1-502 based on IIRIRA.[6] ECF No. 1. The Complaint argues that "Virginia Code §§ 23.1-502 and 23.1-505.1 conflict with 8 U.S.C. § 1623(a) because they confer

[6] Though the United States challenges Va. Code § 23.1-502, its rationale for doing so rests solely on the presumption found in Va. Code § 23.1-503(J).

in-state tuition benefits on unlawfully present [noncitizens] that are not available to all United States citizens on the same terms, regardless of residency." *Id*. ¶ 41. The Complaint, however, does not allege any facts that would establish that Virginia's postsecondary institutions have or are conferring in-state tuition based on residence to undocumented students. *See* Complaint, *passim*. Nor does the complaint allege that U.S. citizens are not receiving in-state tuition under § 23.1-505.1, regardless of their residency. *Id*.

On December 30, 2025, the day after filing the present suit, the United States filed a Joint Motion with the Commonwealth seeking (1) a judicial determination that the Dream Act is preempted and (2) a permanent injunction prohibiting the Commonwealth from enforcing the Dream Act as applied to persons who are not lawfully present in the United States. Joint Motion, ECF No. 3 ¶¶ 5, 9. The next day, on December 31, 2025, the Dream Project moved to intervene in the suit to challenge the Joint Motion and defend the validity of the challenged Virginia statutes. ECF No. 4.[7] On January 7, 2026, the Court ordered a briefing schedule, directing the Dream Project to file "the pleading necessary to satisfy its Rule 24(c) Notice and Pleading Requirement." ECF No. 16. On January 9, 2026, the Commonwealth filed an Answer to the Complaint ECF No. 17.

LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(1) courts are to dismiss a complaint where "the jurisdictional allegations are 'clearly immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous."' *Kerns v. U.S.*, 585 F.3d 187, 193 (4th Cir. 2009) (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946)). A party invoking federal jurisdiction bears

[7] On January 6, 2026, the Dream Project re-filed its Motion to Intervene consistent with the Court's instructions. *See* ECF No. 9. It separately filed a motion to stay the Court's consideration of the Joint Motion, ECF No. 11, and a motion for more time to file this pleading, ECF No. 13.

the burden of proving subject matter jurisdiction. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430-31 (2021). In considering a factual challenge as opposed to a facial challenge, "the district court is entitled to decide disputed facts with respect to jurisdiction" *id*. at 192, by considering the pleadings and "evidence outside the pleadings." *Velasco v. Govt. Of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *see also U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009) ("Unless the jurisdictional facts are intertwined with the facts central to the merits of the dispute the district court may... resolve the jurisdictional facts in dispute by considering evidence...")

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint "must include 'sufficient factual matter, accepted as true to state a claim that is plausible on its face.'" *Langford v. Joyner*, 62 F.4th 122, 124 (4th Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the court "must accept all well-pleaded allegations in the complaint as true and draw reasonable inferences in the plaintiff's favor," it "need not accept legal conclusions, threadbare recitals of the elements of a cause of action, or conclusory statements." *Id*. (cleaned up). Nor must a court "accept as true a legal conclusion couched as a factual allegation." *SD3, LLC v. Black & Decker (U.S.) Inc*., 801 F.3d 412, 422 (4th Cir. 2015) (citation omitted). Additionally, when deciding a motion to dismiss a court may "consider matters of public record [and] items appearing in the record of the case[.]" *Norfolk Fed'n of Bus. Districts v. City of Norfolk*, 103 F.3d 119 (4th Cir. 1996) (citing Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1357 (1990)). For example, the Fourth Circuit, like other circuits, "routinely take[s] judicial notice of information contained on state and federal government websites." *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (citing cases).

ARGUMENT

The Court should dismiss the complaint in this case because: (1) as a collusive action, there is no actual case or controversy between the parties, and the court lacks subject matter jurisdiction; (2) Section 1623 attempts to regulate a state and not private individuals and thus has no preemptive effect; and (3) even if Section 1623 could preempt state law, it does not preempt the statutes challenged in this case, and the Plaintiff's claim is without merit.

I. THE COMPLAINT MUST BE DISMISSED UNDER FED. R. CIV. P. 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION.

The Court should dismiss this case because there is no "case or controversy" present between the parties, and thus the Court lacks subject matter jurisdiction. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); U.S. Const. Art. III, § 2. When "both litigants desire precisely the same result," there is no Article III case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 47, 48 (1971); *see also Muskrat v. United States*, 219 U.S. 346, 361–62 (1911); *Lord v. Veazie*, 49 U.S. 251, 255 (1850). "Such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *United States v. Johnson*, 319 U.S. 302, 305 (1943) (quotations omitted). "[B]y means of a friendly suit, a party beaten in the legislature [cannot] transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). "[A]n actual controversy must be extant at all stages of review, [including but not limited to] the time the complaint is filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732-733 (2008).

Plaintiff United States and Defendant Commonwealth of Virginia ignored these authorities when they hastily asked this Court to bar "enforcement" of Virginia's Dream Act – immediately impacting the core mission of Proposed Intervenor, the Dream Project, over 13,000 Virginia

students,[8] and every public higher education institution in Virginia. The United States and Virginia did not present this Court with a genuine dispute regarding the constitutionality of Virginia law. Instead, the sequence of events on December 29 and 30, 2025, compels the conclusion that no case or controversy was ever present. The Virginia Attorney General did not merely decline to oppose the United States's requested relief; he immediately moved jointly for it. The United States and Virginia's Joint Motion for Entry of Consent Judgment admits that "the Parties agree" on jurisdiction, venue, that "the Court has the authority to provide the requested relief," and that federal law "expressly preempts" Va. Code § 23.1-502 and Virginia's Dream Act, Va. Code § 23.1-505.1. ECF No. 3 ¶¶ 1, 2, 6. Virginia did not dispute any material allegations, assert any defense, or seek relief other than the exact declaratory and injunctive relief requested by the United States. The parties' rapid-fire filings would likely have been impossible without a preexisting agreement between the Parties.

The Commonwealth's Answer capitulated to the United States' ultimate conclusions that Virginia's statute is preempted by and violates Section 1623. *Id*. at ¶¶ 32, 43. The Commonwealth even provided an unnecessary introductory statement admitting the core elements of the Plaintiff's claim. ECF No. 17 p. 1. The timing and sequence of filings, and the reference to the prior-filed Joint Motion for Consent Judgment, only underscores the lack of a true controversy here.

"It is well settled that, where the parties agree on a constitutional question, there is no adversity and hence no Article III case or controversy." *Pool v. City of Houston*, 87 F.4th 733, 733–34 (5th Cir. 2023). That is why the Fourth Circuit has instructed courts to scrutinize consent decrees "to ensure that in approving and issuing consent judgment, that the court does not stamp its

[8] Higher Ed Immigration Portal, Virginia, https://www.higheredimmigrationportal.org/state/virginia/

imprimatur upon an agreement that is 'illegal, a product of collusion, or against the public interest.'" *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, 458 F. Supp. 3d 442, 448 (W.D. Va. 2020) (quoting *U.S. v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999)).

This case presents just such a scenario. Seemingly even before this case was filed, the parties agreed on the resolution of the constitutional question at issue, the desired result, and the appropriate remedy, and were prepared to obtain relief without any of the adversarial testing our legal system deems essential. There is no case or controversy for this Court to adjudicate, and it therefore lacks subject matter jurisdiction. The Court must dismiss the complaint on this basis.

II. SECTION 1623 DOES NOT PREEMPT THE VIRGINIA DREAM ACT.

If the Court finds it has subject matter jurisdiction, the Court must still dismiss the Complaint because it fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Plaintiff's sole claim that the Dream Act and Va. Code § 23.1- 502 are expressly preempted by federal law relies on an unreasonable reading of both federal and Virginia law and should be rejected based on the proper application of standard canons of statutory construction and the preemption doctrine. Such a reading also violates core principles of anti-commandeering under the Tenth Amendment.

Under the Supremacy Clause of the Constitution, "state laws that conflict with federal law are 'without effect.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment[.]" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (internal citations omitted). The Plaintiff's complaint raises a theory of express preemption. ECF No. 1 ¶ 45. However, constitutional principles of federalism do not allow state laws to be nullified lightly.

"When addressing express or implied preemption," the Court must "begin 'with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria*, 555 U.S. at 77. "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* Education falls within the states' core police powers. *See, e.g., United States v. Lopez*, 514 U.S. 549, 580-81 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States"); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (states have police power to adopt regulations to promote "education" of their citizens). As a result, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts 'accept the reading that disfavors pre-emption.'" *Altria*, 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 499 (2005).

A. The Plaintiff's interpretation of Section 1623 violates the Tenth Amendment.

The Plaintiff claims that 8 U.S.C. § 1623 expressly preempts the Dream Act. [T]o preempt state law," a federal law "must satisfy two requirements." *Murphy v. NCAA*, 584 U.S. 453, 477 (2018). "First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do." *Id*. "Second, since the Constitution 'confers upon Congress the power to regulate individuals, not States,'" the provision "must be best read as one that regulates private actors." *Id*. (*quoting New York v. United States*, 505 U.S. 144, 177 (1992)). This latter principle articulates the "anti-commandeering doctrine" as "the decision to withhold from Congress the power to issue orders directly to the States." *Id*. at 470.

Murphy concerned a federal statute that made it "unlawful for a state to 'authorize' sports gambling schemes." *Id*. at 458. The Court acknowledged that this provision "unequivocally dictate[d] what a state legislature may and may not do." *Id*. at 474. Accordingly, the Court held

that it was "clear" that the provision was "not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors." *Id*. at 479-80; *see also id*. at 480 ("[T]here is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States.").

The anticommandeering doctrine is fundamental to our federal system of shared power between the federal government and the states. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."). Preemption is "an extraordinary power in a federalist system," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and it is not unlimited. While the Constitution confers on Congress certain enumerated powers, the Tenth Amendment reserves "all other legislative power . . . for the States*." Murphy*, 584 U.S. at 471. "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id*.

Section 1623 does not regulate private actors. It imposes a limit on states and state laws by restricting how states may determine eligibility for in-state tuition. Even the Plaintiff recognizes that Section 1623 "does not allow anyone including states to provide illegal [noncitizens] with lower in-state tuition rates . . . based on residence within the state if that same tuition rate is not made available to all U.S. citizens without regard to their state residency." ECF No. 1 ¶ 16. Courts have also interpreted Section 1623 to be directed at the states. *See*, *e.g*., *Martinez v. Regents of Univ. of Calif*., 241 P.3d 855, 863 (Cal. 2010) ("Section 1623(a) prohibits a state from making unlawful [noncitizens] eligible 'on the basis of residence within a State' for a postsecondary education benefit." (emphasis added)).

Because Section 1623 does not regulate private actors, it does not have preemptive effect. Other courts have relied on *Murphy* to reject arguments that another provision of federal immigration law, 8 U.S.C § 1373 – which bars state and local governments from "prohibit[ing]" or "restrict[ing]" their officials from sending immigration-related information to the federal government – preempts state laws imposing restrictions on information sharing. *See, e.g., Ocean Cnty. Bd. of Comm'rs v. Attorney Gen*. of N.J., 8 F.4th 176, 182 (3d Cir. 2021) ("A federal statute that does not regulate private actors cannot serve as a basis for preemption."); *Colorado v. U.S. Dep't of Justice*, 455 F. Supp. 3d 1034, 1059 (D. Colo. 2020) ("By their plain terms, the provisions affect state and local government entities and officials; they do not regulate private actors as *Murphy* requires for preemption."). Because there is no way to understand Section 1623 "as anything other than a direct command to the States," the statute is not a valid preemption provision, and the Court should dismiss the complaint. *Murphy*, 584 U.S. at 480.

Under the Plaintiff's interpretation of Section 1623, the Commonwealth has only two choices: it must either exclude undocumented students from its in-state tuition and financial aid programs entirely or subsidize the costs of all nonresidents at public higher education institutions. *See* ECF No. 1, ¶¶ 16, 40. This all-or-nothing directive would constitute unconstitutional commandeering by depriving the state of any discretion to determine which students are eligible for its in-state tuition and financial aid programs based on criteria other than residency. *See Murphy*, 584 U.S. at 474 ("It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.").

Section 1623 does not conflict with either the Dream Act or Va. Code § 23.1-502. However, even if it did, resolving such a conflict in favor of the Plaintiff in this case would raise serious anticommandeering concerns about the federal government's authority to directly regulate the

actions of a state. As explained in the next section, the Court should reject the Plaintiff's interpretation of these statutes and interpret them in a way that avoids this constitutional problem. *See Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018).

B. The Dream Act is not preempted because it does not confer benefits "on the basis of residence" and because U.S. citizens are equally eligible.

Even if Section 1623 were a valid preemption provision, that "does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 555 U.S. at 76; *see also PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009). Courts "focus first on the statutory language, 'which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

When interpreting a statute, a court's first step is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *U.S. v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003) (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997)). "In determining whether the meaning of the statutory language is plain or ambiguous, courts look 'to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *U.S. v. Williams*, 216 F. Supp. 2d 568, 571 (E.D. Va. 2002) (quoting *Robinson*, 519 U.S. at 342). "Generally, when examining statutory language, words are given their common usage." *Id*.

Section 1623 does not preempt the Virginia Dream Act under its plain language. Section 1623 does not categorically prohibit postsecondary education benefits for undocumented students. *See Martinez*, 241 P.3d at 864 ("[S]ection 1623 does not impose an absolute ban" on education benefits to undocumented students). Instead, it provides that undocumented students "shall not be eligible" for such benefits "on the basis of residence within a State (or a political subdivision)"

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(a) (emphasis added); *see also Martinez*, 241 P.3d at 864 ("The reference to the benefit being on the basis of residence must have some meaning. It can only qualify, and thus limit, the prohibition's reach.").

Assessing whether the challenged Virginia laws are within the scope of Section 1623's purported preemption is therefore a two-step process: First, this Court must determine if undocumented students receive benefits "on the basis of residence." If not, there is no preemption. If so, the Court must also determine whether a U.S. citizen or national is eligible for the same benefits without regard to whether he or she is such a resident. If so, there is likewise no preemption.

i. *Virginia Code § 23.1-502 does not conflict with 8. U.S.C. §1623*

As previously discussed, the primary pathway toward eligibility for in-state tuition is by proving domicile by clear and convincing evidence. The Complaint alleges that Va. Code § 23.1-502 violates Section 1623. But Va. Code § 23.1-502, which spells out eligibility criteria for in-state tuition based on domicile, is completely silent about immigration status. *See* Va. Code § 23.1-502. The Complaint does not allege that any undocumented student has ever been granted in-state tuition under this provision. Nor could they, given Va. Code § 23.1-502's plain language and the Guidelines incorporated by all public institutions of higher education in assessing eligibility for in-state tuition based on domicile. *See* Va. Code § 23.1-510.

The Guidelines make clear that a student claiming Virginia domicile for the purposes of in-state tuition bears the burden of establishing by clear and convincing evidence that they are an "eligible [noncitizen]." Guidelines, Part II, Art. 1, Sec. 3(A)(2), 13(A). If a student "is neither a national nor an eligible [noncitizen], the student is not eligible for further domicile analysis." Id.

And Addendum A explicitly states that an "undocumented [noncitizen]," – a person with the "absence of valid current legal status" – "is not eligible for in-state tuition via domicile review and cannot assume the domicile of another person." Addendum A, p. 1.

To support its argument, the Complaint avers that, read together, Va. Code §§ 23.1-502 and 23.1-503(J) conflict with Section 1623 because Va. Code § 23.1-503(J) states that a student may not be disqualified from establishing domicile based on the immigration status of the student's parent. *See* Va. Code § 23.1-503(J) ("No student shall be deemed ineligible to establish domicile and receive in-state tuition charges solely on the basis of the immigration status of his parent."). This reading ignores the plain language of 8 U.S.C. § 1623, which is concerned with the citizenship status of the person seeking a post-secondary education benefit, not that person's *parent*. "[A]s a settled principle, unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *In re Sunterra Corp*., 361 F.3d 257, 265 (4th Cir. 2004) (internal citations omitted).

The Complaint also misconstrues the Virginia statute. Section 23.1-503(J) does not require a school to give in-state tuition to a person who is unlawfully present. Indeed, it does not speak to who is or is not eligible for in-state tuition at all. Rather, it restricts *ineligibility* in a manner consistent with 8 U.S.C. § 1623. For example, a resident of Virginia who is also a U.S. citizen might have parents who are not legally present in the United States. Birthright citizenship remains the law of this country, *see*, *e.g.*, U.S. Const. amend. XIV, § 1; *Barbara v. Trump*, 790 F. Supp. 3d 80 (D.N.H. 2025), and countless U.S. citizens born to noncitizen parents attend higher education institutions in Virginia and across the country. Va. Code § 23.1-503(J) simply ensures that the parents' immigration status does not interfere with the U.S. citizen student's eligibility. Indeed, even the Commonwealth denies that Section 23.1-503(J) "affirmatively removes immigration

status as a barrier to establishing domicile and obtaining in-state tuition benefits." ECF No. 17 ¶ 23.

The Council's publicly available guidance is consistent with the plain reading of the statute and makes clear that (1) a parent's unlawful presence will not disqualify an otherwise qualified student from establishing domicile and (2) undocumented students may not establish eligibility for in-state tuition via the domicile pathway. The Council warns on its website:

> [I]nstitutions are required by law to presume that dependent applicants and students have the domicile of their supporting parent. Therefore, the in-state tuition review for such individuals always begins with the parent's domicile, and requires inquiry as to the basis for residing in the country (legal status), however, if a parent is not a citizen, is not a permanent resident, or otherwise does not have a visa permitting domicile, then an applicant or student may still be eligible for in-state tuition through his or her own domicile.

Under Virginia's domicile framework a parent's immigration status may not impact eligibility, but a student's status absolutely does. Addendum A clearly prohibits students without lawful presence from eligibility via the domiciliary pathway. *See* Addendum A. Those students are *ineligible*, not because of their parent's status but because of their own status. *See id*.; *see also* Va. Code § 23.1-503(J). As such, Section 23.1-503(J) does not mean that immigration status "is removed as a barrier" under Va. Code § 23.1-502 in any way that violates Section 1623. By operation, no undocumented student may be eligible under this provision. The Complaint's challenge to Va. Code § 23.1-502 must therefore be dismissed.

ii. *Section 23.1-505.1 does not provide postsecondary education benefits "on the basis of residence."*

Virginia's Dream Act is consistent with Section 1623 because it does not provide eligibility for any postsecondary education benefit "on the basis of residence." The Complaint alleges that Virginia's Dream Act, Va. Code 23.1-505.1 is a de facto residency-based eligibility scheme. But Section 23.1-505.1 "appears to create a pathway to in-state tuition eligibility separate from

traditional domicile requirements" because that is exactly what it does. *See* Complaint ¶ 25. The criteria for establishing eligibility for in-state tuition under Va. Code § 23.1-505.1 consider whether the student has significant ties to Virginia, such as payment of Virginia income taxes for two years, attendance for two years at a Virginia public or private high school, and enrollment in a Virginia postsecondary institution. *See* Va. Code § 23.1-505.1. These criteria do not include residence.

Section 1623 is clear on its face. Under the statute, undocumented students – those who lack lawful presence – "shall not be eligible" for post-secondary education benefits "on the basis of residence within a State." 8 U.S.C. § 1623(a). Under this section, Congress specified "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. §§ 1101(a)(33), 1641(a).[9] Residence under Section 1623 has a specific meaning; it does *not* mean presence at some point in the past, educational attendance, or any characteristic correlated with residence. Thus, Section 1623 contains a limited prohibition on making an undocumented student's current place of dwelling the determinative factor for their eligibility for tuition benefits. And nothing in the text of Section 1623 or any other federal statute prohibits states from using other eligibility criteria, including those evincing a close connection to the state – such as years of school attendance or graduation – to determine who may receive a tuition exemption or financial aid. Va Code § 23.1-505.1 does not confer benefits "on the basis of residence" because its eligibility provisions are not limited to individuals who have their "principal, actual dwelling place" in Virginia. Indeed, many citizens and nationals who are not Virginia residents meet the Dream Act's predicate eligibility

[9] Section 1641 defines terms used in Title 8, Chapter 14 of the U.S. Code, which includes Section 1623. Section 1641 states that, unless provided otherwise, "the terms used in this chapter have the same meaning given such terms in section 101(a) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)]." 8 U.S.C. § 1641(a).

requirements, which include two years of public or private high school attendance in Virginia, payment of income taxes, and graduation from a Virginia school with a diploma or GED. Va. Code. § 23.1-505.1. For example, assuming the student met the income tax payment requirement,[10] all of the following hypothetical students who reside outside of Virgina would qualify for in-state educational benefits under the Dream Act:

- A West Virginia resident who commuted daily to a private school in Virginia for all four years of high school.
- A West Virginia resident living a mile across the border who paid tuition to attend and graduate from a Virginia public high school.
- A Georgia resident who attended and graduated from a boarding school in Virginia.
- A student who resided in Virginia, attended a public high school for three years, moved to Maryland, and completed their senior year at the same Virginia high school as a Maryland resident.
- A person who grew up in Virginia, was home-schooled in Virginia all four years of high school, moved to North Carolina and entered the workforce after graduation, then decided to go to college in Virginia.
- A person who attended freshman and sophomore years in Virginia as a Virginia resident, then dropped out and later got their GED in Virginia, while living across the border in the District of Columbia.

See Va Code §23.1-505.1 (including in-state eligibility for those who "graduated on or after July 1, 2008, from a public or private high school..." and acknowledging that "non-Virginia student[s]" may be "granted in-state tuition pursuant to this section."). In other words, being a Virginia resident is neither necessary nor sufficient to establish eligibility for in-state tuition through the alternate path codified under Section 23.2-505.1. It is completely irrelevant. In upholding a similar statute against a Section 1623 preemption challenge, the California Supreme Court explained that

[10] Many nonresidents are required to pay Virginia income taxes. See https://www.tax.virginia.gov/residency-status#blocktabs-residency_status-3.

California's statute ("section 68130.5") did not provide benefits "based on residence for the simple reason that many *nonresidents* may qualify for it." *Martinez*, 241 P.3d at 864 (emphasis original).

Conversely, a significant number of Virginia residents would not qualify for in-state tuition eligibility under Virginia's Dream Act. For example, Virginia residents (both citizens and noncitizens) who completed less than two years of high school in Virginia, those who graduated from high school elsewhere, and students who attend high school in Virginia and pass a high school equivalency exam but are unable to show that they or their parents have paid income taxes in Virginia for two years prior to their enrollment would not qualify. Va. Code §23.1-505.1.

The Complaint attempts to escape this obvious logic by importing Virginia's eligibility requirements for elementary and secondary schools, but this allegation is a red herring that further illustrates how the Dream Act is *not* based on actual residency and why the Complaint should be dismissed. The argument fails for multiple independent reasons.

First, it ignores Section 1623's plain language, which is concerned with "whether the citizen or national *is* such a resident," not whether they *were* a resident. 8 U.S.C. § 1623(a). U.S. citizens who lose their Virginia residency status by moving away after two years of high school could obtain in-state tuition under a plain reading of the Dream Act. Indeed, a U.S. citizen who lived in Virginia for her freshman and sophomore years of high school, moved to Maryland for two years and obtained her GED,[11] and whose parent worked and filed income taxes in the Commonwealth is not a Commonwealth resident. She would not qualify for in-state tuition under the domiciliary requirements of Va. Code § 23.1-502. As a resident of Maryland, however, she

[11] Virginia High School Equivalency, or GED, "testing candidates are not required to be Virginia residents." Virginia Department of Education, Superintendent's Memo #010-17 (Jan. 13, 2017), available at https://www.doe.virginia.gov/home/showpublisheddocument/3974/638005119794770000 (accessed Jan. 13, 2026).

nonetheless qualifies for in-state tuition under the Dream Act if she registers for college at a Virginia public school. *See* Va. Code § 23.1-505.1.

Second, out-of-state U.S. citizen high-schoolers who attend *private* Virginia boarding schools, Va. Code § 21.1-505.1, which are not required to limit admissions based on residency,[12] can also qualify for in-state tuition under Virginia's Dream Act even without current residency.

Third, Va. Code. §§ 22.1-3 and 22.1-5 provide many options for students who are not residents of the Commonwealth to attend Virginia's public elementary and secondary schools and gives local school boards broad discretion to waive tuition. These options include those who attend public Virginia schools but live "beyond the boundaries of the Commonwealth but near thereto," Va. Code § 22.1-5(A)(4), and those who "are not residents of the Commonwealth but are living temporarily with persons residing within a school division," Va. Code 22.1-5(B). Accordingly, many non-residents who attended Virginia's elementary and secondary schools will meet the first predicate for eligibility for in-state tuition under Va. Code § 23.1-502, which does not distinguish between those who paid tuition and those who attended for free.

In sum, Section 1623 has nothing to do with a student's past residency, and eligibility for in-state tuition under the Dream Act does not reflect a "prior determination of residency" as the Complaint claims, a fact that the Commonwealth impliedly admits by denying that allegation in the Complaint. *See* Answer ¶ 25.

[12] For example, the public website for Madeira high school, an all-girls boarding school in McClean, Virginia, represents that students come from 20 states. See https://www.madeira.org/about-madeira/madeira-at-a-glance (accessed Jan. 7, 2026). The public website for Christchurch School, a private boarding high school in Christchurch, Virgina, represents that students hail from 15 states. See https://www.christchurchschool.org/at-a-glance/quick-facts (accessed Jan. 7, 2026). And the public website for Woodberry Forest School, an all-boys boarding school in Woodberry Forest, Virginia, represents that students come from 27 states. See https://www.woodberry.org/ (accessed Jan. 7, 2026).

The Supreme Court also distinguishes "residence" from other contacts with a state. *Vlandis*, 412 U.S. at 451-52 (residency cannot be inferred from mere attendance). Thus, Plaintiff's argument that school attendance or tax filing requirements are "*de facto* 'residency' requirement[s]" is improper because, if accepted, this Court would rewrite Section 1623 and disrupt the plain and longstanding definition of "residence." Congress could have used a broader term in Section 1623, such as "connection to the state," "presence," or "ties" (or it could have altogether omitted the qualifier of residence). Instead, it used the narrow, expressly defined term "residence." Courts may not expand a statute beyond its enacted terms. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress."); *id*. at 534 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 6 (2000) ("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'")); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted); *Martinez*, 50 Cal. 4th at 1291 ("The reference to the benefit being on the basis of residence must have some meaning. It can only qualify, and thus limit, the prohibition's reach.").

Virginia's Dream Act criteria are both broader and narrower than Virginia's domiciliary requirement, qualifying some nonresidents and excluding some residents. It therefore does not provide benefits to undocumented students "on the basis of residence" as defined by Section 1623. It is true that many students who qualify under Virginia's Dream Act will also be Virginia residents, but that is not prohibited by Section 1623. Congress did not regulate benefits provided to groups that include residents, so long as residency is not the basis for inclusion or exclusion. Any argument

that Virginia's Dream Act falls within Section 1623's scope impermissibly reads "on the basis of residence" out of Section 1623. *See Martinez*, 241 P.3d at 864 ("Congress specifically referred to residence—not some form of surrogate for residence—as the prohibited basis for granting unlawful [noncitizen] a postsecondary education benefit.").

Plaintiff's reliance on dicta in *Young Conservatives* is misplaced. *See* ECF No. 1 ¶38. In that case, the court found the Texas statute at issue was not preempted. *See Young Conservatives*, 73 F.4th at 313. The court suggested – in dicta – that "a different, unchallenged" Texas statute "seem[ed] to conflict with § 1623(a)." *Id*. at 314. However, unlike Virginia's Dream Act, the unchallenged Texas provision made undocumented students eligible for resident tuition rates based on their Texas residence. *See id*. at 308 ("So long as they satisfy the statute's residency requirements, illegal [noncitizens] are eligible for Texas resident tuition."); *see also* Tex. Educ. Code § 54.052. The Fifth Circuit's observations regarding the Texas tuition scheme, which provided benefits based on residence, are inapplicable to Virginia's Dream Act, which does not.

Likewise, *Equal Access Education v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004), another case relied on by the Plaintiff, is also inapposite. *See* ECF No. 1 ¶ 38. There, the alleged preemption of state law by Section 1623 was not at issue and was not reached by the court.

iii. *Under Virginia law, U.S. Citizens are eligible for postsecondary education benefits regardless of their residence in Virginia.*

Even assuming Virginia's Dream Act criteria are based on residence (which they are not), Section 1623 permits as much, provided that a U.S. citizen or national is eligible for the same benefit regardless of residence. *See* 8 U.S.C. § 1623(a); *Arizona ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd*., 416 P.3d 803, 807 (Ariz. 2018); *see also Young Conservatives*, 73 F.4th at 313 ("[I]f a state did not make U.S. citizens eligible, illegal [noncitizen] cannot be eligible."). Under Va Code §23.1-505.1, nonresidents—whether citizens, nationals, lawfully present

immigrants, or undocumented immigrants—are eligible for the postsecondary education benefits at issue here.

The complaint misconstrues the ordinary meaning of Section 1623 in another fundamental way. The United States alleges that "Virginia Code §§ 23.1-502 and 23.1-505.1 conflict with 8 U.S.C. §1623(a) because they confer in-state tuition benefits on unlawfully present [noncitizens] that are not available to *all* United States citizens on the same terms, regardless of residency. ECF No. 1 ¶ 41 (emphasis added). Despite the United States misreading of Section 1623, Congress used the phrase "a citizen or national," not "all citizens or nationals." "All" and "a" have different meanings. *Compare Edwards v. McMahon*, 834 F.2d 796, 799 (9th Cir. 1987) ("All means every") with *KCJ Corp. v. Kinetic Concepts, Inc*., 223 F.3d 1351, 1356 (Fed. Cir. 2000) ("a" means "one or more"). As "[c]ourts are not free to read into the language what is not there," they must "apply the statute as written[]" – not the complaint. *Williams*, 216 F. Supp. 2d at 571.

The Virginia laws at issue are clearly not in conflict with the plain meaning of Section 1623. Virginia's Dream Act allows U.S. citizens residing outside of Virginia to qualify for postsecondary education benefits as long as they meet certain criteria. It makes nonresident U.S. citizens eligible for in-state tuition on the same basis as everyone else by, *inter alia*, attending a Virginia high school and either graduating or obtaining their GED. Va. Code § 23.1-505.1. And as the Complaint acknowledges, ECF No. 1 ¶ 24, "the statute provides that a student qualifies for in-state tuition if the student satisfies three criteria, notwithstanding the domicile requirements of Virginia Code §23.1-502[]", thus permitting U.S. citizen nonresidents to qualify for in-state tuition in other ways. Virginia's Dream Act clearly does not deny benefits to U.S. citizens who are not Virginia residents. Therefore, if Virginia law provided in-state tuition benefits to undocumented

students based on residence, the United States still fails to state a claim because there is no conflict with federal law.

The fact that *some* undocumented immigrants would also qualify for in-state tuition under Va. Code § 23.1-505.1 does not put it in conflict with Section 1623. As much as the Plaintiff avers that Section 1623 contain a categorical prohibition against extending in-state tuition to people who are unlawfully present in the United States, that is not what it says. Section 1623 says that an unlawfully present immigrant cannot access a state benefit because of their residency in a state unless a nonresident U.S. citizen can access the benefit, too. States are, of course, free under the Tenth Amendment to decide who – regardless of immigration status or residency – they want to be eligible for in-state tuition benefits. Section 23.1-505.1 applies neutrally to U.S. citizens, non-U.S. citizens, Virginia residents, and non-Virginia residents.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint with prejudice for lack of subject matter jurisdiction, or in the alternative because it fails to state a claim on which relief can be granted.

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Respectfully submitted,

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