UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NEBRASKA, Defendant.	Case No. 26-cv-172 Hon. Brian C. Buescher

BRIEF OF AMICI CURIAE TRUE POTENTIAL SCHOLARSHIP AND OREL ALLIANCE IN OPPOSITION TO JOINT MOTION FOR CONSENT DECREE

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INTRODUCTION

The Nebraska Attorney General is actively collaborating with the United States Department of Justice to circumvent the will of Nebraskans as expressed by their democratically enacted representatives. The challenged statutes have been a feature of Nebraska law for two decades and the Legislature has repeatedly rejected proposals to repeal them. To the extent the Governor and Attorney General disagree with the Legislature's decision to facilitate wider access to higher education, it is the legislative process, not a collusive consent decree, that provides the proper vehicle for pursuing that policy agenda. Instead, the Nebraska Attorney General is abdicating his duty to "defend actions and claims against the state." Neb. Rev. Stat. § 84-205 (2025). This Court should not facilitate that abdication by approving a consent decree submitted by parties who are adversaries in name only and who are instead working together to achieve a shared policy goal.

The proposed consent judgment should be rejected for several independent reasons. As a threshold matter, there was never adversity between the Parties and, thus, there was no case-or-controversy that would supply this Court with Article III jurisdiction. As their joint briefing in this Court illustrates, the nominal opponents in this case are active partners in this litigation. For related reasons, the consent judgment is neither procedurally fair nor reasonable because it was not negotiated at arm's length. Moreover, it fails to include necessary terms and clarity required by the Eighth Circuit.

The proposed consent judgment also fails on the merits. The United States alleges that the challenged statutes are preempted by a federal law, 8 U.S.C. § 1623, which

purports to limit states' ability to determine who should be eligible to attend their own schools at in-state rates. But the Nebraska legislature was well aware of Section 1623 and specifically crafted the challenged statutes to comply with federal law as properly construed. The overly capacious reading given to Section 1623 by the United States is inconsistent with the statute's plain meaning in several respects. And it also raises grave constitutional concerns by infringing core state prerogatives in derogation of fundamental principles of federalism secured by the Tenth Amendment.

Finally, if nothing else, the injunctive relief sought in the proposed consent judgment is overly broad. The Parties do not even acknowledge the equitable requirements for injunctive relief and, as a result, overlook the substantial reliance interests of students who have already invested their time and money in Nebraska's public universities, colleges, and community colleges. Incoming freshman and rising seniors alike reasonably expect they would retain eligibility for in-state tuition for the duration of their education. Given that the United States waited twenty years to object to Nebraska's laws, the equities decisively favor limiting any injunction to students who are not already enrolled in Nebraska postsecondary schools.

BACKGROUND

As is true in many states, Nebraska public post-secondary schools charge substantially higher tuition to students who lack a connection to Nebraska than is charged to students who qualify for "in-state" tuition. For example, at the University of Nebraska at Omaha, in-state tuition costs $9,768 per year; out-of-state tuition costs $26,092. Filing No. 21, Ex. 3 (Univ. of Neb. Omaha, Cost of Attendance).

In 2006, the Nebraska legislature revised the statutory requirements governing how students may qualify for in-state tuition. *See* Filing No. 21, Ex. 4 (L.B. 239 Slip Law). L.B. 239 was introduced so that "anybody from Mexico to Minnesota" could attend a Nebraska post-secondary school at the resident tuition rate so long as they meet certain criteria. *See* Ex. 9, L.B. 239 hearing before the Education Committee, 99th Leg. 1st Sess. 12 (Neb. Mar. 15, 2005) (Introductory statement of bill sponsor). Codified at Neb. Rev. Stat. § 85-502, the bill authorized two new pathways for qualifying for in-state tuition. First, an immigrant student may qualify for in-state tuition if they have an immigration "petition pending … to attain lawful status," have lived in Nebraska for at least 180 days, are habitually present in the state, and intend to remain. Neb. Rev. Stat. § 85-502(5). Second, and most relevantly, any student, regardless of immigration status, who lives in Nebraska for three years and graduates from a Nebraska high school while living with a parent or guardian may qualify for in-state tuition so long as they aver that will apply for "permanent residen[ce]" at the "earliest opportunity." Neb. Rev. Stat. § 85-502(9).

The new subsection (9) enabled a wide array of both citizens and non-citizens to qualify for in-state tuition. It covers an undocumented child who moves to Nebraska, grows up in the state, and then attends, while living with their parents and later graduating from, a Nebraska high school. The same rule also applies to a U.S. citizen who lives in Nebraska for three years, graduates from a Nebraska high school, moves to Council Bluffs, Iowa and then establishes Iowa residency. Under subsection (9), the Iowan may commute to the University of Nebraska at Omaha ("UNO") and take

classes while paying in-state tuition. If either the undocumented student or the Iowan moved to Alaska, Hawaii, or any other state in the country, they could continue to take online classes at UNO while paying in-state tuition.

Subsection (9)'s equal treatment of immigrants and non-resident citizens was no accident. The Legislature was cognizant of 8 U.S.C. § 1623 and drafted L.B. 239 to be compliant with federal law. *See* Ex. 9, L.B. 239 hearing before the Education Committee, 99th Leg. 1st Sess. 3 (Neb. Mar. 15, 2005) (introductory statement of bill sponsor). Thus, while an impetus for the bill was to promote Nebraska's interest in making educational and economic opportunities available to immigrants who could contribute to Nebraska's future workforce, the bill was designed so that "any citizen" who meets the bill's criteria would be eligible for in-state tuition "as required under [8 U.S.C. § 1623]." *Id*. The bill's sponsor emphasized this point at numerous points during legislative debate:

> [T]hat's a critical point, because this bill does not prevent any other citizen of the United States, if they live in Iowa or Montana or Missouri, they can come over here and establish residence by graduating from one of our high schools and for ... and living here three years with a parent or guardian. It does not discriminate against out-of-state students.

Ex. 10, L.B. 239 Floor Debate, General File, 99th Leg. 1st Sess. 12060 (Neb. March 29, 2006) (statement of bill sponsor). During a subsequent floor debate that culminated in a vote to override the governor's veto of L.B. 239, the sponsor again emphasized:

> This isn't anything that we're giving to [undocumented immigrants] as a special class. It's treating these students like all the other students who graduate from high school in Nebraska. They still have to come up with the tuition.

Ex. 10, L.B. 239 Floor Debate, Veto Override, 99th Leg. 1st Sess. 13572 (Neb. April 13, 2006) (Statement of bill sponsor).

For two decades, L.B. 239 has ensured Nebraska's post-secondary schools remain affordable for Nebraska's high school graduates no matter where they live. And while the policy it adopts has had its opponents, the Legislature has repeatedly declined to repeal it, rejecting two repeal bills in the most recent legislative session. Filing No. 21 at App. 27, 30, 35 (L.B.s 239, 870, & 1061).

Yet only three days after the 109th Legislature adjourned *sine die*, the United States sued Nebraska alleging that Neb. Rev. Stat. §§ 85-502, 85-1907(3), 85-3202(6), and 85-2102(6) (the "Nebraska Laws"), violate the federal constitution's Supremacy Clause on the theory that they are preempted by Section 1623. Filing No. 1. Before a summons was even issued, Nebraska jointly moved with the United States for a consent judgment invalidating and enjoining the challenged statutes. Filing Nos. 1–3. The Nebraska Attorney General waived service of process, consented to the Court's jurisdiction, and made no effort to defend the constitutionality of these statutes despite his duty to "defend actions and claims against the state," Neb. Rev. Stat. § 84-205 (2025), and the fact that the District of Minnesota recently upheld a similar statute against a similar challenge, *see United States v. Walz*, No. 0:25-cv-02668 (D. Minn. filed June 25, 2025).

Later that same day, the Parties celebrated their joint motion for a consent decree as a tool to advance their shared policy preference. U.S. Attorney Lesley Woods for the District of Nebraska explained:

> This proposed consent decree demonstrates the quality of partnership between Nebraska state leaders and the Department of Justice for the shared purpose of ensuring that federal tax dollars are not used to discriminate against Nebraska's lawful citizens.

Filing No. 21 at App. 42 (DOJ Press Release). Governor Pillen explained the suit resulted from "the combined efforts of President Trump's Department of Justice and Attorney General Hilgers . . . [and] is the latest example of the tremendous partnership between the State of Nebraska and the Trump Administration." *Id.* Governor Pillen also stated he was "grateful for the combined efforts of President Trump's Department of Justice and Attorney General Hilgers to deliver this long overdue correction." *Id.* Seeing the Attorney General's capitulation, Orel Alliance and True Potential moved to intervene. *See* Filing Nos. 18, 19. The Court denied intervention, Filing No. 43, but permitted Orel Alliance and True Potential to submit this brief for consideration as Amici Curiae.

ARGUMENT

This Court should deny the Joint Motion for a Consent Decree, Filing No. 2, for an array of independent reasons. This Court lacks jurisdiction; the consent decree is both procedurally unfair and unreasonable; and it is grounded in the mistaken proposition that the challenged Nebraska statutes are preempted by 8 U.S.C. § 1623. Even if the United States were entitled to some relief, a more narrowly tailored injunction would resolve any preemption concerns without invalidating the challenged statutes to the unnecessarily broad extent proposed in the consent judgment. And the equities weigh sharply against enjoining application of the challenged statutes to presently enrolled students.

I. This Court Lacks Jurisdiction to Enter the Consent Decree Because There is No Case or Controversy Here.

Entry of the consent decree is improper because the Parties' cooperation makes clear there is no case or controversy to which the judicial power may attach. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("[A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction."). A true case or controversy requires parties with adverse legal interests who pursue "an honest and actual antagonistic assertion of rights" against each other. *Muskrat v. United States*, 219 U.S. 346, 359 (1911); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). This controversy must be "real, earnest, and vital." *Id.* "[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." *Id.*

When "both litigants desire precisely the same result," there is no case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971); *see also United States v. Johnson*, 319 U.S. 302, 305 (1943) ("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.").

The Parties here do not deny their collaboration—they flaunt it; indeed, the Parties envision the consent decree as a tool to advance their mutual policy goals. *See* Filing No. 21 at App. 40–43 (DOJ Press Release). The near-simultaneous filing of the

complaint, Filing No. 1, and the Joint Motion for Consent Judgment, Filing No. 2, confirms the extent to which this suit was choreographed.

The Parties nonetheless argue that adversity exists because Nebraska continues to enforce the laws at issue. But this case differs markedly from *United States v. Windsor*, 570 U.S. 744 (2013), and *INS v. Chadha*, 462 U.S. 919 (1983). In those cases, a governmental entity "refus[ed] to give [] effect" to its agreement with the other side's legal position, as evidenced by a concrete adverse action against the opposing party in the litigation. *Windsor*, 570 U.S. at 756; *see also Chadha*, 462 U.S. at 939. In *Chadha* the Immigration and Naturalization Services was actively attempting to (and did in fact) deport Mr. Chadha, despite its ultimate agreement with his constitutional challenge to the statutory scheme under which he was deported. *Chadha*, 462 U.S. at 923–925. And the United States withheld Edith Windsor's tax refund in the face of her suit to recover it, only later announcing that it would enforce, but not defend, the constitutionality of the act Windsor challenged. *Windsor*, 570 U.S. at 753–54.

Here, by contrast, the State of Nebraska has not taken any analogous concrete action adverse to the United States. Nor does the United States allege that the Nebraska Attorney General is actively enforcing the challenged statutes against non-compliant educational institutions. Given that *Windsor* and *Chadha* stand at the outer perimeter of Article III jurisprudence, the unusual exception recognized there should not be extended to the novel scenario here, which involves even less adversity between the Parties.

Moreover, the courts in *Windsor* and *Chadha* issued final judgment only after the cases were vigorously litigated on the merits by intervenors—in *Chadha*, both houses of Congress, 462 U.S. at 930 n.5, and in *Windsor* the Bipartisan Legal Advisory Group of the House of Representative, 570 U.S. at 754. Even if this Court had jurisdiction, entry of the consent decree would be improper if adversely affected parties are not given the opportunity to defend the judgment in the Nebraska Attorney General's stead.[1]

II. The Consent Decree is Neither Procedurally Fair nor Reasonable.

The Court should also deny the Joint Motion for a Consent Decree because it is neither "procedurally fair" nor "reasonable." *Ctr. For Biological Diversity v. Strommen*, 114 F.4th 939, 942–43 (8th Cir. 2024). Importantly, "[f]ederal courts in adopting consent decrees are not mere recorders of contracts from whom parties can purchase injunctions." *Angela R. v. Clinton*, 999 F.2d 320, 324 (8th Cir. 1993) (cleaned up). The parties, in this case the United States and Nebraska, must demonstrate that "a court-approved consent judgment . . . is either necessary or legally authorized." *United States v. Hilger*, No. 16-cv-0060, 2017 U.S. Dist. LEXIS 166706 at *12 (D. Minn. 2017).

[1] Even if Amici had been permitted to intervene, their participation would not have cured this threshold defect because a court must have jurisdiction at the time the case is commenced: "since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) (collecting cases) (citing *Brictson Mfg. Co. v. Woodrough*, 284 F. 484, 487 (8th Cir. 1922)).

A. The Parties' collusion makes the consent decree procedurally unfair.

Procedural fairness is absent because the consent decree results from a collusive process in which individuals and organizations with substantial interests at stake, including Amici, have had no opportunity to be heard. Procedural fairness also requires negotiations to be "in good faith and at arm's length." *Ctr. For Biological Diversity*, 114 F.4th at 942. The process should be free of "improper collusion and corruption." *Brown v. Pfeiffer*, No. 19-cv-3132, 2021 LEXIS 205093 *7 (D. Minn 2021) (citing *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 294–95 (2d Cir. 2021)); *see also Carson v. Simon*, 978 F.3d 1051, 1066 (8th Cir. 2020). "A state official unhappy with the lawful decisions of the state legislature should not be able to round up an agreeable plaintiff who then uses collusive litigation to 'force' the state to do what the official wants." *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020) (cited by *Ctr. For Biological Diversity*, 114 F.4th at 942–43.)). In the context of intervention, an intervenor, is "entitled to present evidence and have its objections heard." *Local No. 93*, 478 U.S. at 529.

Here, rather than a showing of "arms' length negotiation," the Parties have announced their collaboration in working towards a shared objective. The timing of the lawsuit, the order of the filings, and statements of executive officers are unmistakable indications of impermissible collusion between the United States and Nebraska. The United States commenced this suit four days after the Nebraska Legislature adjourned *sine die* from a session where it twice declined to repeal Nebraska's in-state tuition law as it relates to unlawfully present non-citizens. *See*

supra at 5. The Joint Motion for a Consent Judgment was filed simultaneously with the complaint and before a summons was requested, implying significant pre-filing choreography. Filing Nos. 1–3. Affirming the collusive choreography, multiple state and federal officials described the consent judgement as a "partnership" and resulting from a "shared purpose" advancing aligned policy preferences. *See supra* at 6.

This pre-litigation coordination appears to have excluded anyone with an interest in defending the challenged statutes. That fact meaningfully distinguishes *Local No. 93* and *Ctr. For Biological Diversity v. Strommen*, where there were months of negotiations, hearings, and opportunities for all parties to participate in processes preceding approval of the consent judgments. 478 U.S. at 529; 114 F.4th at 942. Here, the proposed consent judgment will substantially injure both Orel Alliance and True Potential. *See* Filing No. 19; Filing No. 21, Ex. 2 ¶¶ 14, 24 (Declaration of Amanda Hall); Filing No. 21, Ex. 1 ¶¶ 3, 17–19 (Declaration of Ross Pesek). Yet their perspectives and interests were not considered.

Meaningful scrutiny of the agreement is particularly warranted because it invalidates democratically enacted state law. The Eight Circuit has recognized the need for rigorous review of consent decrees that risk "infring[ing] state sovereignty." *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 271 (8th Cir. 2011) (declining to order consent judgment that would have required the issuance of a permit in violation of state statute and regulation). And these considerations are amplified when politically aligned federal and state executive branch officials stipulate to the unconstitutionality of a state statute they mutually oppose on policy grounds.

"[D]istrict judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 340 (7th Cir. 1987).

This case is a paradigmatic illustration of these concerns. The proposed consent decree reflects the policy preferences of executive branch officers suffering legislative defeat and is merely an attempt to circumvent the Legislature and extinguish Nebraska's sovereign law.

B. Ambiguity in the scope and terms of the consent decree makes it unreasonable.

The proposed consent judgment is also "unreasonable." *Ctr. For Biological Diversity*, 114 F.4th at 943. Among its many other defects, the Parties' proposed judgment is not "sufficiently well-defined," which the Eighth Circuit has explained "is an essential predicate to the entry of an appropriate consent decree." *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320, 326 (8th Cir. 1993). The agreement is of uncertain scope and the terms and mechanism under which will be enforced are unspecified. Indeed, under *Angela R.*, a district court abuses its discretion if "the enforcement mechanism that makes the consent decree a judicial act" are ambiguous and unclear as to "who may bring an enforcement action [and] for what kinds of violations." *Id.* at 325.

One threshold defect is that the proposed injunction enjoins application of the challenged Nebraska laws to individuals who are "not lawfully present," but that phrase is not defined in either the consent decree or 8 U.S.C. § 1623. This is no small oversight because that phrase can have different meanings in different contexts and,

given the varieties in types of immigration status, the scope of the consent decree is uncertain and may well lead to arbitrary and inconsistent application or application against a broader universe of immigrants than might be required under federal law.

For example, under the Immigration and Nationality Act, "unlawfully present" is principally understood to refer to undocumented people; people, in other words, who are not admitted or paroled, or are residing in the United States "after the expiration of the period of stay authorized by the Attorney General." *See* 8 U.S.C. § 1182(a)(9)(B)(ii). Non-citizens who have been granted deferred action (including under Deferred Action for Childhood Arrivals (DACA) or Temporary Protected Status (TPS)), as well as non-citizens with pending applications for asylum, re-parole or adjustment of status, are lawfully present as they are usually authorized to live and work in the United States by the federal government. *See, e.g.* 8 C.F.R. §§ 236.21(c)(3), (4) (DACA recipients are considered "lawfully present" for purposes of Social Security and for purposes of inadmissibility under the INA). Additionally, certain Ukrainian parolees, including those with a pending application for re-parole, and their families, are eligible for public benefits to the same extent as refugees. Pub. L. No. 117-128 as amended by Pub. L. No 118-50; Ex. 12, ORR Policy Letter. In Amici's experience, however, Nebraska routinely uses the term "lawful presence" to exclude not just undocumented people, but other immigrant populations authorized to live in the country. Filing No. 21 Ex. 1 ¶¶ 13–15; Ex. 2 ¶¶ 15–16.

The rushed, non-adversarial process underlying the proposed consent judgment has produced other ambiguities as well. It is not clear how the consent decree will be

enforced if a Nebraska's post-secondary institutions violate the injunction or misunderstand its terms. Nor is it specified how the injunction will apply to currently enrolled students. Because the consent decree invites significant federal intrusion into Nebraska's post-secondary education system, this lack of clarity and potential for confusion is particularly intolerable. The proposed consent judgment can and should be rejected on reasonableness grounds alone.

III. Nebraska's Tuition Laws Do Not Conflict with Federal Law.

In any event, the consent judgment should be rejected because it rests on the erroneous premise that the challenged statutes are preempted by Section 1623(a). That is incorrect. Properly read, Section 1623 and Section 85-502 are entirely consistent. Principles of federalism and statutory construction confirm that harmonious reading. And even if such harmony was not the best reading of the text, any preempted portion of Nebraska's tuition eligibility provisions might be severed in a manner that would avoid encroaching on Nebraska's sovereignty and preserve the Legislature's design. The Court should not bless any attempt to use a "consent decrees . . . [to] agree to disregard valid state laws." *St. Charles Tower*, 643 F.3d at 268 (cleaned up).

A. The text of Section 1623 can and should be read to be consistent with Nebraska law.

The United States alleges that the Nebraska laws are preempted by Section 1623(a), which specifies that a person not lawfully present in the United States is ineligible "on the basis of residence within a State" for "any postsecondary education benefit" unless "a citizen or national" of the United States is eligible without regard

to whether that person is such a resident. 8 U.S.C. § 1623(a). The challenged provisions of Nebraska law share none, let alone all, of these features. The Nebraska laws do not provide in-state tuition "on the basis of residence" as that term is defined under federal law; in-state tuition is not a "postsecondary education benefit"; and "a citizen or national" can obtain in-state tuition in Nebraska without regard to residency.

1) In-state tuition does not hinge "on the basis of residence."

Nebraska law does not grant a person without lawful presence access to in-state tuition "on the basis of residence within" Nebraska. Under Section 1623(a), a "residence" is "the place of general abode," meaning "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). Neb. Rev. Stat. § 85-502, conversely, specifies that to establish residence in Nebraska for purposes of postsecondary education a person must either have intent and documentary proof, Neb. Rev. Stat. § 85-502(1)–(5); show they are, or depend on someone who is, a professor, (6), a member of the armed forces, (7), or a Nebraska national guardsman, (8) working in Nebraska; live with a parent and graduate from a Nebraska high school, (9); or qualify for a national service educational award or summer of service educational award from the National Service Trust, (10). That is not "residence" as defined under Section 1623(a). *See* 8 U.S.C. § 1641(a) (adopting "principal, actual dwelling place in fact, without regard to intent" as the standard for § 1623(a)). Nebraska law does not specify that "residence" must be a "principal, actual" dwelling "in fact." 8 U.S.C. § 1101(a)(33).

The Parties largely focus their attack on Neb. Rev. Stat. § 85-502(9), but that provision contains no residency requirement as the term is used in 8 U.S.C. § 1101(a)(33). That provision provides access to in-state tuition for students who: (1) resided with a parent or guardian while attending a Nebraska high school; (2) graduated from that high school; (3) resided in the state for three years before high school graduation; and (4) provided the school with an affidavit he or she will file an application to become a permanent resident at the earliest opportunity he or she is eligible to do so.[2] Thus—unlike several other provisions of Section 85-502—subsection (9) does not even require an incoming student to have habitual presence or an established home in Nebraska to qualify for in-state tuition (let alone a "residence" as that term is federally defined). *Compare, e.g.*, § 85-502(1)–(5), (7). A person may, in other words, qualify for in-state tuition under that provision while maintaining an 8 U.S.C. § 1101(a)(33)-style residency in another state. Indeed, the Legislature understood that § 85-502(9) would apply to "anybody from Mexico to Minnesota." *See infra* at pp. 20–23.

Even setting aside the differing state and federal definitions of "residence," Nebraska does not provide in-state tuition on "the basis" of residence. As noted, having "resided" in Nebraska during certain specified time periods is just one of several criteria that a student may satisfy to qualify for in-state tuition under Section 85-502(9). But even when residency is a requirement, it is in conjunction with

[2] The provision is also limited to those who registered with the post-secondary education institution no earlier than the fall 2006 semester.

additional requirements—for instance, a pending petition for immigration status, *id.* § 85-502(5), or graduation from a Nebraska high school, *id.* § 85-502(9). Therefore, residence under any definition is not "the basis"—rather than merely one of several criteria—for eligibility for in-state tuition under Section 85-502. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (holding that the "use of the definite article" indicates a single referent); *see also Martinez v. Regents of Univ. of California*, 50 Cal. 4th 1277, 1292 (2010) (upholding California analogue to Nebraska in-state tuition provisions and interpreting Section 1623(a) consistent with its plain language). Plaintiff's alternate reading impermissibly renders the phrase "on the basis of residence" superfluous—but it must be given its proper meaning. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (cleaned up).

Furthermore, nothing in § 85-502 references unlawfully present non-citizens, let alone singles them out for preferential treatment on the basis of residency. While subsection (5) references "alien[s]" who have "a petition pending . . . to attain lawful status under federal immigration law," it is unclear whether the individuals covered by that provision fall within the scope of the undefined term "lawfully present."[3] *See*

[3] Indeed, the terms "lawfully present" and "lawful status" have distinct definitions. *See* REAL ID Act, Pub. L. No. 109-13, §§ 201–02, 119 Stat. 302, 311 (2005) (codified at 49 U.S.C. § 30301 note) (defining lawful status to include, among other categories, deferred action, pending or approved TPS, and pending asylum applications).

supra pp. 12–14. And subsection (9) merely provides that Nebraska's high school graduates, without regard to lawful presence in the United States, are eligible for in-state tuition in Nebraska if, after living in the state for three years during high school, they swear to "file an application to become a permanent resident at the earliest opportunity he or she is eligible to do so. Neb. Rev. Stat. § 85-502(9)(iv). No special benefits are extended to students without lawful presence.

2) U.S. citizens from other states are eligible for in-state tuition.

Nebraska law also comports with Section 1623 because "a" U.S. citizen may qualify for in-state tuition under Secction 85-502 "without regard to whether the citizen or national is such a resident" of Nebraska. 8 U.S.C. § 1623(a). The Parties argue that Nebraska's law conflicts with Section 1623 unless in-state tuition is "available to American citizens on the same terms, regardless of residency." *See* Filing No. 27 at 30. But that construction rewrites the statute, which says that "a" citizen or national—not "all" citizens and nationals—must be eligible for in-state tuition without regard to Nebraska residency. "[T]he indefinite article 'a' is" often "interpreted to carry the meaning of 'one or more.'" *WundaFormer, LLC v. Flex Studios, Inc.*, 680 F. App'x 925, 931 (Fed. Cir. 2017) (collecting cases). The Parties' insistence that every last American be eligible for in-state tuition has no basis in the plain wording of the statute.

As discussed above, Nebraska law creates multiple avenues by which an out-of-state U.S. citizens can be entitled to pay the in-state rate, regardless of their residency, consistent with section 1623(a). Under Neb. Rev. Stat. § 85-502(9), a U.S. citizen who lives in Nebraska for three years with her parents, graduates from a

Nebraska high school, and then moves to Council Bluffs, Iowa and then establishes Iowa residency can qualify for in-state Nebraska tuition notwithstanding her Iowa residency. Other provisions of the statute likewise provide pathways to in-state tuition for out-of-state residents. If, for example, the husband of a professor at UNO were living in Council Bluffs, he too would qualify for in-state tuition. Neb. Rev. Stat. § 85-502(6). Thus "a" (*i.e.*, one or more) U.S. citizen or national can qualify for in-state tuition in Nebraska without regard to residency. Section 1623 requires nothing more.

A court recently upheld Minnesota's analogue to the statutes challenged here based on this same reasoning. *See United States v. Walz*, No. 25-cv-2668, 2026 WL 851231, at *10–11 (D. Minn. Mar. 27, 2026) ("Reading 'a' in context of the whole clause also supports a singular designation, as that 'citizen or national' mentioned in the statute is later referred to as '*the* citizen or national,' rather than 'these citizens or nationals.'"). The court properly rejected the United States' effort, repeated here, to rewrite Section 1623.

The Parties acknowledge, Filing No. 27 at 24–26, that their position was expressly rejected in Walz, but argue that the case was wrongly decided. But their criticisms of the decision lack merit. *First*, they confusingly argue that their own reading follows from Section 1623's "parallel structure," under which "an alien" can only be eligible for in-state tuition if "a citizen or national" is eligible. Filing No. 27 at 25. But it is the Parties' approach that is asymmetrical. Under their reading, not even one "alien" without lawful presence can be eligible unless every citizen or national is as well. In other words, on their reading, "an alien" refers to even a single

"alien," whereas "a citizen" means every last citizen. That reading defies basic rules of statutory construction.

Second, the Parties invoke the presumption that the singular "a" also encompasses the plural. Filing No. 27 at 25–26. This is true, but irrelevant. Amici do not argue that "a citizen" means exactly one citizen and that the provision is unsatisfied if two or more non-resident citizens are eligible for in-state tuition. The point is merely that the "a citizen" requirement is satisfied when one or more citizens are eligible. It is the Parties' approach that contravenes the Dictionary Act by reading the singular not merely to also "include . . . several persons," 1 U.S.C. § 1, but to exclude the singular itself and to apply only when every last citizen is covered.

Third, the Parties also argue that the statute would be rendered "ineffectual" unless Section 1623's bar applies except where every citizen or national is eligible for in-state tuition. Filing No. 27 at 26–27. But that policy argument assumes its own conclusion. The statute is only ineffectual if Congress intended to impose a sweeping restriction that dramatically intrudes on state prerogatives, rather than a more modest measure consistent with traditional respect for state sovereignty. It is the more modest reading that has been widely understood over the past several decades as nearly two dozen states have adopted laws that have allowed undocumented students to qualify for in-state tuition, all without objection from the federal government.

Moreover, there is irony in the Parties' reliance on the principle that statutes should not be read to render entire clauses or words of statutes ineffectual because

their own reading renders the entire last clause of Section 1623 effectively meaningless. Congress expected that it would be possible under some circumstances for a non-citizen without lawful presence to be eligible for an education benefit "on the basis of residence within a State"—otherwise, the "unless" clause specifying the conditions when such eligibility would be allowed would be superfluous. Yet, on the Parties' telling, a person without lawful presence can only obtain a benefit based on state residence if the benefit is provided to all citizens and nationals without regard to state residence. However, a state that provides the same tuition to all citizens and nationals regardless of state residency definitionally does not provide in-state tuition at all, thereby stripping the "unless" clause of all potential applicability.

The *Walz* court thus got it right. Because there is no dispute that at least one citizen or national can access in-state tuition without regard to residency, Section 1623 is not implicated.[4]

3) In-state tuition is not a "postsecondary education benefit."

The Parties' preemption argument suffers from a third defect as well, because they fail to show that in-state tuition is a "postsecondary education benefit" within the meaning of Section 1623. Tuition is the rate a student pays to attend a college or university; it is money that flows from the student to the college. And a state's decision to offer in-state tuition to individuals with some connection to the state is not public largesse, but rather, a self-interested decision to invest in its own future

[4] The Parties emphasize that a handful of other courts have reached a different result, but each of those decisions adopted a consent decree and the courts did not have the benefit of full adversarial presentation.

workforce. Indeed, the L.B. 239 Fiscal Note confirmed that the bill would not fiscally impact the state or require it to expend money. *See* Ex. 11, L.B. 239 Fiscal Note (finding a fiscal impact of $0.00).

The Parties fail to explain why access to in-state tuition would qualify as a "benefit" when the flow of payments runs exclusively from the student to the institution. The Parties' implicit contention appears to be that in-state tuition must qualify as a "benefit" because it is advantageous to pay a rate below the level charged to some other students. But qualifying students without lawful presence are given no discount; they are charged the same rate that is charged to all other students who (by whatever mechanism) qualify for in-state tuition. And the fact that the state chooses to surcharge other students who have less of a connection to Nebraska and are less likely to contribute to the state in the future does not transform access to the base in-state rate into an impermissible "benefit."

While "postsecondary education benefit" is not defined in Section 1623(a), a neighboring provision of the United States Code defines a "State or local public benefit" as including "postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual . . . by an agency of a State." 8 U.S.C. § 1621(c)(1)(B). Properly construed, then, a "postsecondary education benefit" must involve "payments" or similar "assistance" by the State. *Cf.* 20 U.S.C. ch. 28, subch. IV (providing for "Student Assistance" in the form of grants and loans for postsecondary education). Section 1623(a)'s own text further supports this reading, as it indicates that postsecondary education benefits have "an amount,

duration, and scope." *Id.* § 1623(a). Those terms can only sensibly be applied to monetary and other similar forms of assistance.[5]

There is nothing unusual or unreasonable about construing the term "postsecondary education benefit" in this more limited manner. Indeed, on the Parties' own telling, "Nebraska defines public benefit in part as any "postsecondary education benefit involving *direct payment* of financial assistance." Filing No. 27 at 29 (quoting Neb. Rev. Stat. § 4-109).

Under this understanding of the statute, eligibility for in-state tuition does not qualify as a postsecondary education benefit, which is nothing more than a status that enables an individual who satisfies all other requirements for admission to a Nebraska college or university to pay a particular tuition rate. This does not fit the mold of other government "payments" or "assistance" in education. And Congress does not use such language when it intends to legislate regarding in-state tuition rates. *See, e.g.,* 20 U.S.C. § 1015d (providing for certain individuals in federal service to qualify for in-state tuition rates based on their federal duty station).

Furthermore, in-state tuition is not a form of public assistance: the interests and goals at issue differ. *See Grove City Coll. v. Bell*, 465 U.S. 555, 565 n.13 (1984) (distinguishing "general assistance programs" such as "food stamps, Social Security benefits, [and] welfare payments" from higher education "student aid programs," in

[5] Amici acknowledge that this argument may apply differently with regard to the challenged scholarship programs in §§ 85-1907(3), 85-3202(6), and 85-2102(6) of the Nebraska Revised Statutes. However, it bears note that, as the Parties acknowledge, Filing No. 27 at 29, the scholarships are paid to the schools and thus also do not involve direct payments to students.

part because student aid programs "assist colleges and universities") (overruled by statute on other grounds); *Spatt v. New York*, 361 F. Supp. 1048, 1054 (E.D.N.Y. 1973), *aff'd*, 414 U.S. 1058 (1973) ("reduced tuition systems, repeatedly withstanding equal protection attack by out-of-state students, have been upheld as contributing to the state's economy and as a means of reasonably attempting to achieve partial equalization of school financing costs between in-state students . . . and out-of-state students."); *Starns v. Malkerson*, 326 F. Supp. 234, 241 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (explaining that in-state tuition rates are justified by a state interest in furthering the education of students with an "intention of remaining" in the state and who "by reason of that education, will be prepared to make a greater contribution to the state's economy and future"). After all, "an educated and culturally aware society is increasingly important in an economy in which Nebraskans must compete on a global scale." Neb. Rev. Stat. § 51-201.02.

The Parties say Congress wants immigrants to be self-reliant. Filing No. 27 at 22. Amici want the same thing. *See* Filing No. 21, Ex. 1 ¶¶ 3–4, 7–8; Ex. 2 ¶¶ 6–8. Educational access is a key predicate for that independence by allowing immigrants to become financially self-sufficient, contributing members of the Nebraska economy. The Parties' unduly expansive definition of restricted "benefits" squarely undermines the purpose that they say Section 1623 was intended to serve.

B. Principles of federalism reinforce the textual limits of Section 1623(a).

Core principles of federalism and constitutional avoidance confirm the reading of Section 1623(a) outlined above. The preemptive effect of federal law is limited where

it encroaches on fields traditionally reserved to the states—especially where a limited reading better harmonizes the rest of the federal statute.

Here, the Parties claim that Section 1623 impinges upon Nebraska's authority to administer its educational system—a domain in which states have always been sovereign. *See United States v. Lopez*, 514 U.S. 549, 564 (1995). Traditional state prerogatives in this area include the setting of tuition prices for all students attending public universities. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973). This Court should not lightly assume that Congress intended for a statute that intrudes into this core area of state sovereignty to be given a maximalist reading.

Principles of constitutional avoidance underscore this point because Section 1623(a) would also violate the Tenth Amendment if the Parties' interpretation were correct. The constitutional-avoidance canon therefore counsels against reading Section 1623(a) as preempting the challenged Nebraska laws. *See, e.g., United States v. Hansen*, 599 U.S. 762, 781 (2023). If this Court were to conclude otherwise, then that the statute, so construed, exceeds the Congress's authority in our federal system. *See Bond v. United States*, 564 U.S. 211, 220 (2011).

The Tenth Amendment prohibits Congress from limiting whom a state legislature may treat as an in-state resident for purposes of tuition at public colleges and universities. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471 (2018) (explaining that Congress may not "issue direct orders to the governments of the States"). As the Supreme Court has repeatedly explained, this anti-commandeering principle serves multiple purposes, including protecting individual liberty and

promoting political accountability. *Id.* at 473–74. Congress has no role "dictat[ing] what a state legislature may and may not do" in the formulation of state law. *Id.*at 474.

Reading Section 1623(a) to require States to charge particular tuitions would be particularly implausible because it is unclear what enumerated constitutional authority would permit Congress to dictate the tuition rates of public universities. After all, Congress has no freestanding authority to enact preemption laws absent an enumerated power. *Murphy*, 584 U.S.at 477 ("[T]he Supremacy Clause . . . is not an independent grant of legislative power to Congress."). As a result, federal statutes regarding public education typically have relied on Congress's spending powers. *See, e.g.*, 20 U.S.C. § 1015d(a). But Section 1623(a) lacks any nexus to federal education spending. And Congress could not premise a regulation of states on its immigration power, which permits it to regulate only immigrants themselves. *See Murphy*, 584 U.S. at 479 (explaining that *Arizona v. United States*, 567 U.S. 387 (2012), held preempted a state statute that conflicted with "a federal right" conferred on immigrants by federal law).

Yet, as the Parties interpret Section 1623(a), it regulates the states directly, not the non-citizen students. *See* Filing No. 41 at 4–5 (describing the Amici as challenging "unlawful regulation . . . of someone else—namely, the State of Nebraska") (cleaned up). If Section 1623(a) is understood as a direct regulation of the states themselves, it raises grave constitutional concerns under *Murphy*. If it can possibly survive

constitutional scrutiny, it can only be through an interpretation that minimizes the intrusion on state prerogatives.

Under these principles, a proper understanding of Section 1623(a) must be limited in at least one of the ways discussed above. For example, narrowly construing "postsecondary education benefit" as limited to monetary or similar payments to immigrants would avoid this Tenth Amendment defect. That is because such a prohibition could be understood to operate directly on immigrants over whom Congress may exercise authority—by regulating their receipt or acceptance of certain public benefits—rather dictating the permissible content of state law.

Indeed, interpreted properly, Section 1623(a) can advance the interest of federalism. For instance, Congress could have been concerned about a scenario in which students would sue a state that has chosen not to expand postsecondary education access in an effort to obtain such access. *Cf. Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004) (challenging a Virginia law denying undocumented students admission to public universities). In such a scenario, the state defendant could invoke Section 1623(a) as part of its defense that no federal law compels it to furnish such access. Section 1623(a) would thus promote federalism principles rather than derogate from them.

C. In the alternative, Section 85-502 is severable.

If the Court nonetheless finds some portion of Neb. Rev. Stat. § 85-502 preempted by federal law, it should excise the unconstitutional language, not strike down more of the statutory scheme than necessary. For example, if the Court concludes that Neb. Rev. Stat. § 85-502(9)(a)(ii), which requires three years of Nebraska residence

prior to high school graduation, is preempted by 8 U.S.C. § 1623, then it should strike only subsection (9)(a)(ii), and leave the remainder of subsection (9) intact.

"The cardinal principle of statutory construction is to save and not to destroy." *Ewing v. Scotts Bluff County Bd. of Equalization*, 227 Neb. 798, 808 (1988) (citing *Tilton v. Richardson*, 403 U.S. 672, 684 (1971)). In the preemption context, the Eighth Circuit provides that "remedies that override state law must be narrowly tailored so as to infringe state sovereignty as minimally as possible. Federal remedial powers . . . can extend no farther than required by the nature and the extent of that violation." *St. Charles Tower*, 643 F.3d at 268 (cleaned up). "Severability is a question of state law. [A federal court's] task is to predict how the [state supreme court] would rule if confronted with this issue." *See Styczinski v. Arnold*, 141 F.4th 950, 957 (8th Cir. 2025) (citation omitted) (applying Minnesota severability law to a state statute found to violate the Dormant Commerce Clause). The Nebraska Supreme Court uses a four-factor test to determine whether a statute is severable. Courts turn to the relevant legislative history to apply those factors. *See Big John's Billiards, Inc. v. State*, 288 Neb. 938, 952 (2014). The Court should consider:

> (1) Whether, when absent the invalid portions, a workable plan remains. (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. (3) Whether the severance will do violence to the intent of the Legislature. (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion.

Ewing, 227 Neb. At 806 (citation omitted). In *Ewing*, the Nebraska Supreme Court analyzed a statute that levied a high school tuition tax against property owners from counties with no high school. *Id.* at 803. The statute in question contained no severability clause and the Court reasoned that a single preposition in one subsection unconstitutionally delegated legislative power. *Id.* at 804. Applying the above-referenced test, and analyzing the relevant legislative history, the Court reasoned that the problematic preposition could be excised from the statute as that was consistent with the Legislature's overarching intent and left a workable plan in place. *Id.* at 806–08.

Here, similarly, any deficiencies the Court finds with Neb. Rev. Stat. § 85-502, and with subsection (9) in particular, can be excised and still leave a workable statute. Where Section 85-502(9)(a)(ii) requires, as one condition of in-state tuition, that a graduating Nebraska high schooler have "resided" in the state for three years, the court can strike subsection (9)(a)(ii) without invalidating the remainder of subsection (9), or anything else in the statute. Indeed, under the first severability factor discussed in *Ewing*, that would leave Section 85-502 as "a workable plan" as it would simply align the operation of the Nebraska statute more closely with Minnesota's in-state tuition statute, which was recently upheld in *Walz*.

Likewise, the remaining portion of the statute could be "enforced independently," *Ewing*, 227 Neb. at 806 (quotation marks omitted), because postsecondary educational institutions could continue to offer in-state tuition to any student who

graduates from a Nebraska high school and meets the other criteria in subsections (9)(a)(i), (iii) & (iv).

Nor was Subsection (9)(a)(ii) such an "inducement" to the passage of L.B. 239 that the bill would not have passed without it. State and federal courts alike routinely turn to legislative history to determine whether a legislative act is severable. *See Alaska Airlines, Inc., v. Brock*, 480 U.S. 678, 686-687 (1987); *Christians v. Crystal Evangelical Free Church* (*In re Young*), 141 F.3d 854, 859 (8th Cir. 1998); *Big John's Billiards, Inc.*, 288 Neb. at 952. Here, the Legislature understood that L.B. 239 needed to adequately navigate 8 U.S.C. § 1623 and took into account that the bill would apply to both unlawfully present students and out-of-state students. *See* Ex. 10, L.B. 239 Veto Override, 99th Leg. 2nd Sess. 13581 (statement of bill sponsor); *and also id.* at 12026 & 12059-61 (statements of bill sponsor responding to concerns about 8 U.S.C. § 1623 on General File floor debate). *See* Ex. 10, L.B. 239 Veto Override, 99th Leg. 2nd Sess. 13581 (statement of bill sponsor); *and also id.* at 12026 & 12059-61 (statements of bill sponsor responding to concerns about 8 U.S.C. § 1623 on General File floor debate). *See also* Ex. 9, L.B. 239 hearing before Education Committee, 99th Leg. 1st Sess. 12 & 20 (Neb. Mar. 15, 2005) (introductory statement of bill sponsor acknowledging the bill applies to "anyone from Mexico to Minnesota"). Nothing in the relevant legislative history indicates the three-year period was even discussed during debate, much less that it was essential to the bill's passage. Maintaining the core of structure of Neb. Rev. Stat. § 85-502(9), rather than invalidating all of its applications to undocumented students, is more consistent with the Legislature's choice to enact

L.B. 239 over gubernatorial veto and rejecting opportunities to repeal its provisions this past year. *See supra* p. 5. Like the *Ewing* statute then, the absence of a severability clause here does not prevent the Court from severing Subsection (9)(a)(ii) as severability is consistent with the Legislature's intent.

This history makes clear that the Legislature's overarching intent was to ensure state law reflected an opportunity for all students, whether they be undocumented or natural born-citizens from Iowa, to attend Nebraska's post-secondary schools at in-state tuition rates as long as they graduated from a Nebraska high school or met another eligibility requirement in Neb. Rev. Stat. § 85-502. Thus, to the extent there is anything unconstitutional in Section 85-502, the Court should enjoin only the unconstitutional provisions and leave the remainder of the statute intact.

IV. The Proposed Consent Decree Is Inequitable, Particularly As Applied To Current Students

The Parties have asked the Court not only to declare certain Nebraska statutes unconstitutional, but also to permanently enjoin their enforcement. This appeal to the Court's equitable powers requires consideration of equitable factors that the Parties entirely overlook. And the Parties' failure to consider the impact of the proposed injunction on third parties and on the public interest has led them to propose an injunction that is grossly inequitable.

The individuals Nebraska has deemed eligible for in-state tuition have relied heavily on the availability of postsecondary education at in-state rates in planning their futures and structuring their present. The average graduating college student in Nebraska takes on $32,206 of debt (Ex. 13, EducationData.org, *Student Loan Debt*

by State: Nebraska (June 26, 2025), https://perma.cc/XGE8-CDYV). They assumed that debt in reliance on the expectation that educational attainment will enable them to secure better employment prospects: in Nebraska, people with a bachelor's degree have an employment rate of 83 percent, compared to 69 percent for those with a high school diploma. Ex. 14, Nebraska Statewide Workforce & Educational Reporting System, *Postsecondary graduation provides important individual and societal benefits*, Nswers.org, https://perma.cc/GE8V-XFE3. Those graduates make 74 percent more than their high school diploma-wielding counterparts. Ex. 15, Nebraska Statewide Workforce & Educational Reporting System, *Postsecondary Persistence,* Nswers.org, https://perma.cc/8J9B-FG6M.

The Parties' proposed injunction makes no effort to consider the reliance interests of students who have already invested time and money in educations that they could not afford to complete under the proposed injunction. Students would be forced to abandon courses of study in which they have invested thousands of hours; the financial investments they have made would be wasted; the debt they have taken on would be for nought. These substantial and legitimate reliance interests easily dwarf any countervailing interest in an injunction that takes immediate effect. Plaintiff United States alleges only an abstract sovereign interest and has waiting two decades to raise any objection to the challenged statutes.

Thus, at a minimum, any injunction against the Nebraska law should exempt current students who have already invested in their degrees in the expectation and reliance that they would remain eligible for in-state tuition.

CONCLUSION

For the foregoing reasons, this Court should deny the Joint Motion for a Consent Decree.

May 22, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d), the undersigned, attorney for Amici Curiae, hereby certifies that the above brief contains 8,864 words (including the caption, headings, footnotes, and quotations) in compliance with said rule. This Brief was prepared using Microsoft® Word (Version 16.108.3). The electronic version of this Brief was generated by converting to PDF from the original word processing file. No generative artificial intelligence was used in the drafting of this brief.

/s/ Orlando Economos
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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2026, a true and correct copy of the foregoing document was electronically filed via the Court's CM/ECF system which sends notice of electronic filing to all counsel of record.

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