Case No. 26-5303

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENTUCKY COUNCIL ON POSTSECONDARY EDUCATION, et al.,

Defendants-Appellees,

and

KENTUCKY STUDENTS FOR AFFORDABLE TUITION,

Intervenor-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:25-cv-00028

BRIEF OF THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTERESTS OF THE COMMONWEALTH

The Commonwealth of Kentucky, through Attorney General Russell Coleman, files this amicus brief to defend the consent decree adopted by the district court. The Attorney General is the Commonwealth's "chief law officer." Ky. Rev. Stat. § 15.020(1). His job is to represent the Commonwealth whenever it "has an interest" in a lawsuit. Ky. Rev. Stat. § 15.020(3). Attorney General Coleman did so below when he informed Kentucky's Council on Postsecondary Education of his conclusion that its regulation providing in-state college tuition to unlawful aliens conflicted with federal law. The Council agreed, and the parties jointly asked the district court to declare that regulation unlawful and enjoin its enforcement. The Commonwealth's interest here is in ensuring that Kentucky's administrative regulations remain compliant with federal immigration law.

INTRODUCTION

The federal government "has broad, undoubted power" to set immigration policy. *Arizona v. United States*, 567 U.S. 387, 394–95 (2012). When it does so, it can "withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.* at 399. That preemption authority is the nub of the issue here. Under federal law, an unlawful alien "is not eligible for any State or local public benefit," including a "postsecondary education" benefit. 8 U.S.C. §§ 1621(a), (c)(1)(B). Federal law also bars "an alien who is not lawfully present in the United States" from

eligibility "on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit." 8 U.S.C. § 1623(a).

An administrative regulation issued by Kentucky's Council on Postsecondary Education was out of step with those federal statutes. It made unlawful aliens eligible for in-state tuition "if the person graduated from a Kentucky high school." 13 Ky. Admin. Regs. 2:045 § 8(4)(a). So the United States sued the Council, and other executive officials in Kentucky, seeking an order prohibiting enforcement of the Council's regulation as preempted by federal law. Attorney General Coleman urged the Council to accept the straightforward preemption arguments the United States put forth "rather than litigate . . . a losing fight." *See* Coleman Letter, R.11-2, PageID#77. The Council wisely did just that—agreeing to a consent judgment that proposed to declare the regulation unlawful and enjoin its enforcement. Motion, R.24, PageID#112–13. The district court entered the proposed consent judgment after holding that federal law preempted the Council's regulation. Opinion & Order, R.57, PageID#454.

The result below was a win for the rule of law and a win for Kentucky. Congress has decided to limit when unlawful aliens can enjoy the same public benefits—including the benefit of in-state tuition at a state school—as American citizens. Kentuckians should expect that the regulations governing public education benefits are consistent with that federal policy choice. And thanks to the parties' willingness to accept that

federal law controls here, Kentuckians' expectations have been met without time-consuming litigation or a lengthy regulatory process. This legal process worked, and it worked well.

Appellant Kentucky Students for Affordable Tuition (KSAT)—a group that intervened below and brought this appeal—now asks this Court to undo that result. But its reasons for doing so don't add up. It has no answer to the straightforward reasons the Council's regulation is preempted. Nor can it show that an exception for state-approved benefit extensions avoids that result. Even if the exception applies here, KSAT's argument depends on the promulgation of an administrative regulation being no different than the "enactment of a State law," 8 U.S.C. § 1621(d). But Congress offered flexibility to state *legislative* choices, which come with the heightened constraints (and public accountability) associated with passing and signing a legislative act. KSAT cannot circumvent the phrase "enactment of a State law" by resorting to administrative and judicial decisions that all agree carry the force of law. Finally, KSAT's concerns about Kentucky's internal governance are misplaced. The General Assembly has not delegated (and could not delegate) to the Council authority to flout federal immigration policy. So confirming the preemption problem here does not undermine Kentucky's ability to empower the Council to set lawful in-state tuition policies.

STATEMENT OF THE CASE

The right starting point here is federal immigration law—in particular, two provisions that have been on the books since 1996. The first is 8 U.S.C. § 1621, part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In relevant part, it provides that any "alien who is not . . . a qualified alien . . . is not eligible for any State or local public benefit." 8 U.S.C. § 1621(a). And it defines those benefits to include "postsecondary education" benefits "for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(B). The statute closes the door on those public benefits for unlawful aliens, but it doesn't slam it shut. For the benefits listed in Section 1621, States "may provide that an alien who is not lawfully present in the United States is eligible," but "only through the enactment of a State law . . . which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

The second relevant federal statute is 8 U.S.C. § 1623, enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. It contains a more specific prohibition: "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to

whether the citizen or national is such a resident." 8 U.S.C. § 1623(a). Sections 1621 and 1623 both open with an express preemption provision: "Notwithstanding any other provision of law[.]" 8 U.S.C. §§ 1621(a), 1623(a). So to the extent that a state's laws or regulations conflict with them, these federal laws control.

Turn then to Kentucky's conflicting regulation. It was promulgated by the Council, which the General Assembly empowered to determine which students qualify as Kentucky residents. Ky. Rev. Stat. § 164.020(8)(a). The Council's regulations, in turn, make Kentucky residents eligible for in-state tuition at Kentucky's postsecondary institutions, defining a "Kentucky resident" as "a person determined by an institution for tuition purposes to be domiciled in, and a resident of, Kentucky as determined by" the regulation's other provisions. 13 Ky. Admin. Regs. 2:045 § 1(10). In July 2002, the Council approved new regulatory language that purported "to clarify issues related to . . . changes in the immigration law and its effect on the status of students." *See* Minutes at 7, Council on Postsecondary Education (July 22, 2002), available at https://perma.cc/NPM5-M9M8; *see also* 29 Ky. R. 749–53 (Sept. 1, 2002) (publishing proposed amendment). The regulation reads, in relevant part:

> A person shall be a Kentucky resident for the purpose of this administrative regulation if the person graduated from a Kentucky high school and:
>
> (a) Is an undocumented alien[.]

13 Ky. Admin. Regs. 2:045 § 8(4)(a). The regulation is tied to no specific policy choice of the Kentucky General Assembly—only its general delegation to the Council of the power to set residency requirements for Kentucky postsecondary schools.

Because that regulation conflicts with federal law, the United States sued the Council, along with Governor Andy Beshear[1] and other executive-branch officials, in the Eastern District of Kentucky. Complaint, R.1, PageID#1–2. It claimed that Kentucky's regulation is expressly preempted by both Sections 1621 and 1623 and thus violates the Constitution's Supremacy Clause. *Id.* at ¶43, PageID#13.

Kentucky's Attorney General is the "chief law officer" for the Commonwealth "and the legal adviser of all state officers, departments, commissions, and agencies." Ky. Rev. Stat. § 15.020(1). The Council is one such agency, so when the United States filed this lawsuit, the Attorney General offered the Council his legal conclusion to help "work towards quickly resolving the regulation's conflict with federal immigration law." R.11-2, PageID#76. In particular, he agreed with the "straightforward" argument that Sections 1623 "plainly prohibits" the Council's regulation because it offers unlawful aliens "a benefit unavailable to students lawfully present in other States." *Id.* PageID#77. He urged the Council to avoid litigating "a losing fight." *Id.*

The Council took that advice. Once Attorney General Coleman advised the Council that federal law preempted its regulation, the United States and the Council

[1] Governor Beshear was dismissed from the lawsuit. August 22, 2025 Order, R.23.

resolved the lawsuit with a proposed consent decree declaring the regulation unlawful and enjoining its enforcement. Motion, R.24, PageID#112–13; *see also* Oral Argument Tr., R.56, PageID#425 (explaining the settlement discussions); Opinion & Order, R.57, PageID#457. KSAT then sought to intervene, which the district court granted. Motion to Intervene, R.27-1, PageID#125–41. After the parties briefed and argued the issues, the district court adopted the proposed consent decree. Opinion & Order, R.57, PageID#454–75. This appeal followed.

ARGUMENT

The United States and Kentucky agree: a Council regulation making unlawful aliens eligible for in-state tuition at Kentucky postsecondary schools violates federal law. At their request, a federal court adopted a consent judgment declaring that regulation unlawful and enjoining the Council from enforcing it. KSAT opposed the consent judgment below and now appeals its adoption. But it does not dispute the preemption problem that the consent judgment remedied. Both statutes contain express preemption provisions, so Kentucky (like every State) must conform its eligibility requirements for in-state tuition to those federal prohibitions. To resist that conclusion, KSAT points to an inapplicable statutory exception and mistaken constitutional arguments. Neither approach has merit. This Court has no reason to disturb the consent decree the district court adopted.

1. Start with the bottom-line conclusion that federal law preempts the Council's regulation. Again, these basic preemption principles are not in dispute here. KSAT merely disputes whether these preemption provisions make the regulation unlawful, so it has forfeited any objection to the consent judgment's main substance. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("'Time, time, and time again, we have reminded litigants that we will treat an 'argument' as 'forfeited when it was not raised in the opening brief.'" (citation omitted)).

The Supremacy Clause "instructs that federal law is 'the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 720 (6th Cir. 2021) (quoting U.S. Const. art. VI, cl. 2). "This unequivocal command affords Congress the power to preempt state law." *Id.* A statute can preempt a State law with express terms, or it can do so implicitly when "its structure and purpose" makes clear an intent to displace the State laws. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Both statutes here contain an express preemption clause.

In an express preemption case, the question is whether Congress has "explicitly indicate[d] in a statute's text that it is displacing or prohibiting enactment of state legislation in a particular area." *Matthews*, 15 F.4th at 720. The provisions at issue here do so. Both apply "[n]otwithstanding any other provision of law." *See* 8 U.S.C. §§ 1621(a), 1623(a). In general, courts "have interpreted similar notwithstanding

language . . . to supersede all other laws, stating that a clearer statement is difficult to imagine." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (citation omitted) (cleaned up); *accord In re Robinson*, 764 F.3d 554, 560 (6th Cir. 2014).

Both express preemption clauses mean that the Council's regulation conflicts with federal law. The regulation provides residency status, and the benefit of in-state tuition, to any "undocumented alien" who "graduated from a Kentucky high school." 13 Ky. Admin. Regs. 2:045 § 8(4)(a). Section 1621 makes an unlawful alien ineligible for a "postsecondary education" benefit, subject to some exceptions. 8 U.S.C. §§ 1621(a), (c). The Council's regulation plainly does the opposite by offering eligibility. Section 1623 likewise preempts the Council's regulation. It prohibits a State from offering an unlawful alien education benefits based on residency status that are unavailable to "a citizen or national" elsewhere in the United States. 8 U.S.C. § 1623(a). But that's exactly what the Council's regulation does.

When parties request a consent decree "to enforce a statute," it "must be consistent with the public objectives sought to be attained by Congress." *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983). Here, the district court asked whether "the consent judgment's 'remedy is *necessary* to rectify a *violation of federal law*.'" *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995). Either of the conflicts described above was sufficient to create the Supremacy Clause problem that the consent judgment remedies. *Accord* Opinion & Order, R.57, PageID#470 ("[A] finding that Section 8(4)(a)

conflicts with either § 1623(a) or § 1621(d) would permit entry of the proposed consent decree."). The district court was right to adopt it.

2. KSAT resists that conclusion first by pointing to an exception to Section 1621's eligibility prohibition. As explained above, the statute allows States to "provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible," but "only through the enactment of a State law." 8 U.S.C. § 1621(d). In KSAT's view, the Council's regulation triggers that exception, so the district court had no violation of federal law to remedy. That's wrong for several reasons.

For one, it's not clear on the face of the statutes that Section 1621(d)'s exception could cure a Section 1623 violation. *Cf. United States v. Texas*, 181 F.4th 548, 557 (5th Cir. 2026) (expressing skepticism that a provision in Section 1621 applies to Section 1623). Section 1623 assumes that a State has already made an unlawful alien eligible for a "postsecondary education benefit," presumably via a Section 1621(d) enactment. 8 U.S.C. § 1623(a). It simply prohibits a State from extending a residency-based benefit to an unlawful alien without making "a citizen or national of the United States" eligible for the same benefit. A benefits extension like the one Section 1621(d) contemplates must have already happened for Section 1623's limitation to apply. In other words,

there is no mechanism for a State to avoid Section 1623's eligibility restrictions.[2] That conflict, on its own, creates the type of Supremacy Clause violation that the consent judgment remedied.

Even assuming that Section 1621(d)'s exception could spare the Council's regulation, KSAT is wrong that it applies here. Its argument hinges on an overbroad understanding of the words "State law." In KSAT's view, if any State action that carries the force of law extends a benefit to unlawful aliens, Section 1621(d)'s exception applies. But that misses key language in the text, which requires "the *enactment* of a State law." 8 U.S.C. § 1621(d) (emphasis added).

KSAT is of course right that, as a matter of Kentucky law, the Council's regulation carried the force of law before it was declared unlawful. But it was the product of an exercise of regulatory authority delegated to the Council by the General Assembly. Ky. Rev. Stat. § 164.020(8)(a). That authorizing statute was an "enactment of a State law," but the resulting regulation was not. Kentucky law allows its agencies to "*promulgate* administrative regulations to implement a statute only when the act of the General Assembly creating or amending the statute specifically authorizes the

[2] *See, e.g.*, J. Lee, Note, *In-State Tuition for Undocumented Students, Fueling the State-Federal Battleground*, 19 Va. J. Social Policy & L. 365, 382 (2012) ("§ 1623 was enacted after § 1621 and was designed to narrow the grant of authorization previously conferred on states by § 1621(d)."); R. Rhymer, Note, *Taking Back the Power: Federal Vs. State Regulation on Postsecondary Education*, 44 Washburn L.J. 603, 620 (2005) ("The plain language of § 1623(a), when examined in conjunction with § 1621(d), illustrates Congress' intent to close the loophole provided in § 1621(d).").

promulgation of administrative regulations or administrative regulations are required by federal law." Ky. Rev. Stat. § 13A.120(1)(a) (emphasis added). Enactment is up to the legislative branch—"making laws for the Commonwealth is the prerogative of the legislature." *Beshear v. Acree*, 615 S.W.3d 780, 809 (Ky. 2020); *accord Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021) ("[T]he General Assembly is the policy-making body for the Commonwealth, not the Governor or the courts."); Ky. Const. § 29 ("The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'"); Ky. Const. § 62 (requiring Kentucky law to be styled as "enacted by the General Assembly").

The narrower reading of Section 1621(d)'s exception adopted by the district court was thus the correct one. "[T]here are important distinctions between State laws and regulations." Opinion & Order, R.57, PageID#474. Congress offered States some flexibility in extending benefits to unlawful aliens, but it left that important policy decision to the branch of State government charged with enacting its laws. So even if Section 1621(d) could prevent a violation of Section 1623, the Council's regulation does not trigger its exception.

3. KSAT's last-ditch effort to support reversal is an argument that the district court's interpretation of Section 1621(d) violates the Tenth Amendment. In its view, if Section 1621(d)'s exception can only be triggered by a legislative enactment, rather than

by any decision with the force of law, the statute meddles with Kentucky's chosen government structure. Of course, this argument also depends on Section 1621(d)'s applicability to Section 1623, a questionable proposition for the reasons explained above. So the Court has no need to reach it. If the Court does reach the merits, KSAT misses the mark again.

The problem is that the Tenth Amendment protects States from "congressional action" that "require[s] that certain state actors engage in specific conduct in order to comply with the statute." *Ohio v. United States*, 849 F.3d 313, 322 (6th Cir. 2017). Section 1621(d) does not require a State to do anything. It *allows* States to avoid an express preemption clause if they so choose. It simply limits the type of State actions that qualify for that exception to the "enactment of a State law." 8 U.S.C. § 1621(d). In Kentucky's context, that requires an act of the General Assembly; an administrative promulgation does not suffice. Applying the text of the statute creates no constitutional problem.

CONCLUSION

The consent judgment brings Kentucky's in-state tuition policies back in line with the commonsense federal policies that limit when unlawful aliens may enjoy benefits reserved for American citizens. The district court's decision to enter it was the right one—indeed, it was the only correct choice under the circumstances. The Commonwealth thus asks this Court to affirm.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) because it contains 3,163 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond font using Microsoft Word.

s/ Jacob M. Abrahamson