September 1, 2015 Edition

IN THE SUPREME COURT OF THE UNITED STATES

No. 2015-2016

Kedesh College and A.R.H., Petitioner

vs.

United States, Respondent

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit

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ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1. Whether the Fair Education Act violates the rights of Kedesh College under the Free Exercise Clause of the First Amendment of the United States Constitution.

2. Whether the Fair Education Act violates A.R.H.'s right to equal protection of the law as applied to the Congress of the United States through the Fifth Amendment of the Constitution.

Several of this year's Issue One cases are hybrid-rights exception cases. As such several quote or analyze 14th Amendment opinions. Advocates on Issue Two may reference these 14th Amendment opinions without penalty so long as they follow ACMA rules regulating the use of secondary cases.

PUBLISHED OPINION

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT No. 01–76326

KEDESH COLLEGE AND A.R.H., APPELLANTS

vs.

THE UNITED STATES, APPELLEE

United States Court of Appeals for the Fourteenth Circuit

Before, Chief Circuit Judge, K. MAURY, and J. MART, and J. C. ARVIN, Circuit Judges.

OPINION BY MAURY, Chief Judge

I

(A)

Factual Overview: Statutory Grounds for the Appeal

Kedesh College and A.R.H. appeal the decision of the District Court for Western Olympus, which AFFIRMED the constitutionality of the Fair Education Act ("the Act"). See Appendix I. The federal district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), and our jurisdiction rests on 28 U.S.C. § 1291. Because of the factual overlap, the district court consolidated the two cases. All parties have stipulated that they accept this consolidation. The facts are not in dispute.

(B)

Factual Overview: Undocumented Persons and Federal Higher Education Law in America

Both the Department of Homeland Security and the Pew Research Center estimate that nearly 4% of the population of the United States (between 11 and 12 million) is undocumented. The Pew Research Center estimates that every year, 65,000 undocumented persons graduate from high school in the United States. The National Immigration Law Center places the percentage of undocumented persons living in the United States who graduate high school and/or attend college in the United States between 5% and 10%, whereas the percentage of corresponding documented persons or citizens is about 75%. According to the Institute of International Education, there are nearly 900,000 nonimmigrant international college and graduate students who are legally enrolled in American colleges and universities. This represents about 5% of the 20 million students enrolled in colleges or universities in the United States. The nonimmigrant international college and graduate students contribute $24 billion to the United States' economy annually. Only 28% of these students qualify for any scholarships or financial aid in the United States. There are no requirements that these students stay in the United States after receiving their education and the majority, as required by federal law, return to their home countries after graduation.

(C)

Factual Overview: Undocumented Persons and the Labor Force

It is estimated that over 5% of the labor force in the United States is undocumented (about 8 million people) and that 30% of the immigrants in the United States are undocumented. According to the Congressional Budget Office ("CBO") and the Social Security Administration ("SSA"), undocumented persons pay billions of dollars in taxes every year. The SSA estimates that 10% ($300 billion) of the Social Security Trust Fund comes from undocumented persons. Yet, few are eligible to receive social security benefits. The CBO has stated that "[o]ver the past two decades, most efforts to estimate the fiscal impact of immigration in the United States have concluded that, in aggregate and over the long term, tax revenues of all types generated by immigrants—both legal and unauthorized—exceed the cost of the services they use." The fiscal impact of undocumented persons on the United States is inversely related to the level of education of each person. According to an estimate of the National Resource Council, immigrants—excluding children—without a high school diploma will cost the nation about $31,000 each, whereas more educated immigrants will produce a lifetime net fiscal gain of $105,000 each.

(D)

Factual Overview: The Enactment of the Act

In 2006, Congress enacted the Fair Education Act ("the Act"). It was signed into law by President George W. Bush. The Act, which forbids any public or private college or university operating in the United States to accept any undocumented person, took effect on January 1, 2015. Previously enrolled students were exempt provided that they graduate by December 2014.

The Act's sponsors, Senator Shelton Morgan (D) and Representative Kevin Poush (R), asserted that the Act is necessary to efforts to preserve the resources and the benefits associated with higher education for the children of documented persons and to ensure that those who benefit from higher education give back to the United States and that it would encourage and promote lawful residency.[1] The Act's stated goal is for there to be no undocumented persons enrolled in any public or private college or university by the end of 2014. The Act, which would disincentivize illegal immigration to the United States for educational purposes, does not forbid foreign students legally in the country from seeking degrees in the United States.

The Act set up an enforcement mechanism that required each college and university, private or public, to submit proof that its students are legal residents or citizens of the United States. Cognizant of the need for flexibility in enforcement, the Act requires the president of each university to execute the law in a manner that he or she deemed "reasonable and appropriate."

[1] Senator Morgan and Representative Poush's respective positions on religion are not part of the record.

(E)

Factual Overview: Deferred Action for Childhood Arrivals (DACA)

After his party lost control of the House of Representatives in 2011, President Barack Obama explored a strategy of using his executive authority to affect immigration and education policies without the need for new legislation. In June of 2012, the Obama Administration, in an effort to increase the number of undocumented persons attending college or university, announced a policy of Deferred Action for Childhood Arrivals ("DACA"). See Appendix II. Under DACA, which is administered by the Department of Homeland Security ("DHS") certain undocumented persons who came to the United States as children are eligible to attend college or universities without fear of deportation. The President and its supporters hailed DACA as "a sensible, compassionate, and fair alternative to the Act." DACA expressed sympathy for persons who did not intend to break the law, have known no other home, speak no other language and have been productive members of society. The deferred action designation does not change an immigrant's legal status; it creates guidelines for prosecutorial discretion that would apply to persons who qualify if they are in or not currently in removal proceedings. Critics of DACA, who favor more comprehensive immigration reform, have noted that DACA itself established certain criteria that may exclude specific individuals often for no fault of their own. For instance, applicants must maintain continuous residence in the United States, beginning June 2007. This means that a child of immigrant parents whose family left the country for any period of time can be deemed ineligible for protection under DACA. While there are exceptions to DACA, it precludes many undocumented persons from attending college or university in the United States. The President hailed the action as "a step away from the heartless one-size-fits-all approach to immigration and education reform embraced by so many on the other side of the Capitol." The White House stressed that the action, which was taken by the Secretary of the DHS, is constitutional.[2] The United States took the position that colleges and universities will be considered in compliance with the Act if they follow the criteria set forth in DACA.

(F)

Factual Overview: Federal Law and Paying for College Costs

Federal law places obstacles in the way of undocumented persons attending college or university in the United States. The 1965 Higher Education Act, while it allows the states to offer financial aid to undocumented persons, does not permit undocumented persons to receive federal financial aid. Some states forbid public colleges and universities to offer aid, grants, work study support, or scholarships to undocumented persons. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allows states to charge undocumented persons in-state tuition so long as the same opportunity is offered to legal residents. It also allows states to refuse to offer undocumented persons in-state tuition rates. Thirty-three states forbid state colleges and universities from offering undocumented persons in-state tuition rates, while eighteen states allow undocumented persons who attended primary and secondary schools in that state to pay in-state

[2] There is a challenge to this authority that has been brought by the Speaker of the House against the President. That challenge is separate from this lawsuit and issues related to executive power are not before this court.

tuition rates.[3] Such tuition is more affordable than out-of-state tuition rates. Several states have enacted legislation to limit the ability of undocumented persons to attend public universities and colleges. These efforts have ranged from total bans to policies that only allow undocumented persons to apply to lower-tier state colleges and universities.

(G)

Factual Overview: Undocumented Persons and Higher Education in the State of Olympus

Olympus is a state of one million legal residents (800,000 citizens and 200,000 non-citizens who are in the country legally) and an estimated 50,000 undocumented persons—10,000 of whom are under the age of 18. Of these 10,000 individuals, 8,500 attended public primary or secondary schools. The remainder attended private schools (1,000) or were home-schooled (500). Olympus includes five state universities, and ten state colleges that are scattered throughout the state. In-state tuition is anywhere from $5,000 to $10,000 cheaper per year, depending on whether a student attends a state university or state college and whether one seeks to obtain an undergraduate or graduate degree. All five of the public universities offer doctoral programs and each has a law and medical school. The state has a community college system, with one campus for each of its twenty counties, and ten private universities and twenty private colleges—half of which have a religious affiliation. Prior to 2014, all persons were eligible to attend college or university in Olympus. Between 2000 and 2014, about 10,000 undocumented persons attended both public and private colleges and universities. They were eligible for in-state-tuition rates, and private aid, work-study support, or scholarships. See Appendix III for a detailed summary of Olympus education laws.

The Olympus State Department of Education ("ODOE") estimates that half of undocumented persons who graduate from college in Olympus remain in the state immediately after graduation. The majority of those who stay in Olympus continue to work and pay taxes in the state. Very few end up in jail or on public assistance. The majority of undocumented persons who leave upon graduation return to Olympus in less than ten years. With respect to American citizens who attend a public college or university in Olympus, half remain in the State immediately after graduation. Very few nonimmigrant international college students remain in Olympus immediately after graduation. This is because most have to return to their country of citizenship as part of the condition of their visa to study in the United States. Of the legal residents who attend and graduate from a public college or university school in Olympus, three quarters return to the State in less than a decade.

According to Immigration and Customs Enforcement ("ICE"), Olympus's experience with undocumented college students is fairly typical. Simply put, while experiences may vary from state to state, in the United States overall about half of its citizens who graduate college stay in the state where they earned their degree immediately upon graduation, while about three-quarters leave and then return to that state within a decade. About half of the undocumented persons who attend college or university choose to stay or return to the state in which they earned their degree.

[3] According to the National Immigration Law Center, states allowing undocumented persons to pay in-state tuition include: California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Olympus, Texas, Utah, and Washington. Estimates show that the majority of undocumented persons living in the United States live in these states.

The number of documented and undocumented college students does tend to fluctuate by region with the largest numbers being in the largest cities.

(H)

Factual Overview: Kedesh College and the Fair Education Act

Kedesh College is a small, private, non-profit, nondenominational religious college located in central Olympus, in the City of Knerr. The College draws its name from the biblical city of Kedesh, which is known as a city of refuge or sanctuary. The school's motto "*But let all who take refuge in you be glad; let them ever sing for joy. Spread your protection over them that those who love your name may rejoice in you. For surely, O LORD, you bless the righteous; you surround them with your favor as with a shield*," is found in *Psalms 5:11 and 5:12*. Kedesh College was founded in the mid-twentieth century, and is especially known for assisting immigrant communities. This is due largely to the background of the school's founders, each of whom immigrated to the United States to avoid persecution.[4] Its faculty and students must sign a nondenominational statement of faith as a condition of their employment with or enrollment in Kedesh College. Students are also expected to perform a minimum of 512 hours of charitable work in their home and local communities as a condition of receiving their degrees.

Kedesh College receives about 5,000 applications annually.[5] It aggressively seeks applicants from all walks of life, both from America and around the world. As a part of their application, applicants are required to write separate essays on the significance of Kedesh College's statement of faith, and detailing how they envision carrying out the motto of the school upon graduation. Although Kedesh College considers other factors for admission, its President, Dr. Bobby Bronner, stated that these two student essays are the "most important part" of a prospective student's application.

Kedesh College symbolically accepts 511 or 512 students in each incoming freshman class. The average grade-point-average ("GPA") for the past four incoming classes has been 3.05, which is on par with the average GPA of public universities in the United States.[6] While Kedesh College receives a relatively small pool of applicants compared to top-tier private schools, its acceptance rate is similar to that of schools in the Ivy League,[7] and is much lower than the average acceptance

[4] The school was founded by Kris T. Bonillas, a Quaker who immigrated from Mexico; Mita Dezwall, a Hindu who immigrated from India; Bruno Merten, the son of Latter-Day-Saint missionaries, who emigrated from China after his parents were arrested for distributing religious materials to the masses; Yebby Ring, a Jewish immigrant from Poland whose ancestors had fled Communism and pogroms; and Janet Zahorsky, an immigrant from Czechoslovakia whose ancestors were Catholic and who had fled the Eastern Bloc before the Soviet Union was dissolved.

[5] Kedesh received 4,518 applications for the class of 2015, 4,987 applications for the class of 2016, 5,391 applications for the class of 2017, and 5,104 applications for the class of 2018.

[6] A study published in 2010 found that the average GPA of an incoming freshman attending a public university was 3.0 while incoming freshmen attending private universities had an average GPA of 3.3.

[7] Kedesh admitted 512 students to the class of 2018, out of an applicant pool of 5104 prospective students (10.0% acceptance rate). Kedesh's acceptance rate was higher than that of Ivy League powerhouses Harvard (5.9% of 34,295 applicants) and Yale (6.26% of 30,932 applicants), lower than Dartmouth (11.5% of 19,235 applicants) and Cornell (14% of 43,041 applicants), and on-par with the University of Pennsylvania (9.9% of 35,788 applicants), as well as other prestigious non-Ivy League schools such as Duke University (10.7% of 32,506 applicants).

rate of four-year universities overall.[8] Its graduation rate has risen over the past ten years from 68% in 2004 to just below 80% in 2014.[9] Each year, the College accepts a small number of new students to fill vacancies left by students who are unable to continue their education.

In addition to its roughly 2,000 students, Kedesh College also employs 42 part- and full-time faculty members, and about 200 administrators and staff. Although Kedesh College is a relatively new educational institution, it already has an endowment of more than $10 million, thanks to the contributions of its growing alumni population (approximately 20,000 graduates). Seventy percent of Kedesh College graduates report being "somewhat active" or "very active" in the College community during the first ten years after their graduation.

Kedesh College accepts undocumented persons, offers in-state tuition for qualified students who graduated from a primary or secondary school in Olympus, and offers several privately endowed scholarships which are awarded to non-citizens. Under the College's founding document, at least one scholarship is designated to a deserving undocumented person. Although Kedesh College is an independent institution, it works in partnership with organizations around the world to bring students from poor and often war-torn nations to study at Kedesh College for free. Kedesh College encourages all prospective students to visit campus during one of four "Exodus Weeks," held on campus twice in the fall semester, and twice in the spring. During this time prospective students and their families meet with faculty and staff, stay in the dorms, sit in on classes, and participate with current students in community service projects, often in local immigrant communities. Although prospective students may arrange independent visits outside of an "Exodus Week," the College has a strict no-outside visitors policy for the final eight weeks of each semester, so that students can focus on their academic and community service pursuits. Kedesh College does not allow outside groups to rent space on campus or use any of its facilities.

During his testimony at congressional hearings regarding the Fair Education Act, Kedesh College President Dr. Bobby Bronner asserted that the proposed changes were "unfair, unconstitutional, and un-American." He spoke at length about Kedesh College's religious mission, and argued that the law would inhibit it from acting upon its motto, and founding purpose, by preventing the College from expressing and demonstrating love and acceptance to students from undocumented families. After the Act was passed and signed, Kedesh College announced it would continue to accept and offer financial support, including in-state tuition rates, to qualified undocumented persons. Kedesh College filed a lawsuit in federal district court seeking a permanent injunction restraining the United States from enforcing the Act. In the suit, the College asserted that the Act violates its rights of free exercise and of freedom of association under the First Amendment. Kedesh College does not assert an independent free speech claim. Judge D.R. Fair disagreed, and denied the College's request. Kedesh College appealed to this Court.

[8] According to data published by the College Board in 2013, only 2% of four-year institutions with open admission had an acceptance rate of less than 25%. By contrast, 50% of four-year institutions with open admission issued acceptance letters to at least 75% of their applicant pool.

[9] The average graduation rate for four-year universities in the United States was just under 60%, according to statistics published by the National Center for Education Statistics in 2014.

(I)

Factual Overview: A.R.H. and the Fair Education Act

A.R.H. is a native of Japan who has lived in the United States since she was six-months-old. A.R.H., who is not an American citizen, is not currently in removal proceedings. She was born March 17, 1997. Her parents, whose names are being withheld, came to the United States prior to the birth of A.R.H. to study as international students at Olympus State University. After graduation, A.R.H.'s parents each obtained a work visa. Not before too long, A.R.H.'s mother discovered that she was pregnant. At her husband's insistence, A.R.H.'s mother traveled back to Japan to give birth to their daughter. An orphan with no living relatives, A.R.H.'s mother stayed with her husband's family until A.R.H. was six-months-old. A.R.H.'s mother did not like her in-laws, and as soon as her husband would consent and they could afford it, she returned to the United States to join him. The couple visited Japan twice with A.R.H. to visit her father's family. Each visit was in the summer and each lasted more than three months. Soon after their second visit, when their daughter was three years old, A.R.H.'s father died in an automobile accident. A.R.H.'s mother, who still had a work visa, stayed in the United States past the visa's expiration. When A.R.H. was ten, her mother married an American citizen. A.R.H.'s mother believed that as a result of her marriage, she and her daughter were American citizens. A.R.H.'s mother and her new husband paid all of the taxes that they owed. The couple spent their summers in Canada where they had a cabin on a lake. They often stayed for more than three months at a time when visiting Canada.

A.R.H. is a devoted daughter and a terrific student. She only speaks English, has no recollection of her grandparents (who spoke only Japanese) or her aunts and uncles (who speak limited English), and does not identify herself as Japanese. A.R.H. attended public school in Olympus and graduated from Knerr High School in June 2014. She planned to start college in the fall of 2014.

A.R.H. and her mother did not realize that A.R.H. is not an American citizen until she began applying to colleges. After discovering her status, A.R.H. applied for DACA. She also applied to Kedesh College because it accepted undocumented students. The College accepted A.R.H. and offered her a scholarship reserved for undocumented persons. A.R.H. was notified of her acceptance and scholarship in May 2014. In June 2014, DHS informed A.R.H. that her DACA application had been denied for two reasons: "(1) she had left the country on more than one occasion for more than ninety days at a time and thus failed to continuously reside in the United States, since at least June 15, 2007; and (2) she was convicted of multiple misdemeanor offenses for underage drinking and "cow-tipping."

On July 7, 2014, President Bronner notified A.R.H. that under the Act, and as a result of Judge Fair's ruling, the College could not honor its offer. A.R.H., who is not currently enrolled in any college or university, filed suit against the United States on the grounds that the Act violated her right to equal protection of the law under the Fifth Amendment. The case was assigned to Judge Fair who denied A.R.H.'s request for a permanent injunction. A.R.H. appealed.

(J)

Factual Overview: Consolidating the Lawsuits and Standard of Review

Kedesh College was joined in the instant appeal by A.R.H. We do not review the material facts. We review the substantive merits of the constitutional arguments raised below. The parties have stipulated to the aforementioned facts. All issues raised are questions of law, not fact. The standard of review on appeal is *de novo.* We AFFIRM the ruling of the district court.

II

KEDESH COLLEGE'S FIRST AMENDMENT CLAIM

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Kedesh College contends that the Fair Education Act unconstitutionally burdens its ability to exercise a religious practice at the heart of its institutional mission. Kedesh College also argues that its First Amendment right to association is implicated by the Act, but does not assert that this infringement rises to the level of an independent constitutional claim. The district court concluded that the Act was immune to a free exercise challenge under *Emploment Division. v. Smith*, 494 U.S. 872, 886 (1990), and that the "hybrid-rights" exception in *Smith*, *see id.* at 882, is illogical and mere dicta. Because we ultimately conclude that, post-*Smith*, the Act does not violate Kedesh College's Free Exercise rights—either standing alone, or in conjunction with another protected constitutional right—we affirm the judgment of the district court, but for very different reasons.

(A)

Level of Constitutional Scrutiny

The Act applies to all universities, sectarian or nonsectarian, and there is no scheme of exceptions or other evidence suggesting that the Act pre-textually targets religious universities. Neither party disputes that the Act applies to Kedesh College, or that some textual ambiguity or exception in the statute would permit Kedesh College to continue admitting undocumented students. The Act, although it is a neutral law of general application, requires that Kedesh College *must* change its current practices in a way that conflicts with the core religious and institutional mission of the College.

We are bound by *Employment Division v. Smith*.[10] In *Smith*, the U.S. Supreme Court reviewed an Oregon criminal statute, which at the time, attached criminal penalties to the sacramental use of

[10] Although *Smith* controls federal Free Exercise claims against federal and state action, it is possible that certain congressional actions may be subject to strict scrutiny under the Religious Freedom Restoration Act of 1993 (RFRA), or the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). See *Thomas v. Anchorage Equal Rights Comm'n,* 165 F.3d 692, 697 n.4 (9th Cir. 1999); *see Grace United Methodist Church v. Cheyenne,* 451 F.3d 643, 661 (10th Cir. 2006). The Supreme Courts of Mississippi and Tennessee held prior to *Smith* that free exercise claims brought under their state constitutions trigger strict scrutiny review, even if the law is neutral and generally applicable. Seven states—Alaska, Massachusetts, Minnesota, Olympus, Washington, Wisconsin, and Vermont—have followed suit since *Smith*. Four states—Kansas, Maine, Montana, and Nebraska—apply heightened scrutiny to free exercise claims arising under their state constitutions, while California and Michigan have hinted that they would reject *Smith* when reviewing state constitutional claims. Although the RFRA, the RLUIPA, and state precedent evince a deep-seated disagreement between Congress, the Supreme Court, and nearly one-third of the states over the proper

peyote by adherents of the Native American Church. *Id.* at 874. The Court declined to apply strict scrutiny, holding that the statute was a neutral law of general applicability, which was not directed at religious practices, and thus did not violate the Free Exercise Clause. *Id.* at 886 n. 3, 890.

Smith itself does not state the precise level of judicial scrutiny that attaches when a neutral law of general applicability is challenged on free exercise grounds. I*d.* at 886 n. 3. Our sister circuits are divided on that question, either employing rational basis review, *see Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006), or finding such laws immune to free exercise challenge *in toto*, *Parker v. Hurley*, 514 F.3d 87, 105–107 (1st Cir. 2008). Here, Kedesh College urges us to apply a different standard—strict scrutiny—because the Act implicates "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections[.]" *Smith*, 494 U.S. at 881. We address each point in turn.

(B)

Sincere Religious Belief and Substantial Burden

In order to prevail on its First Amendment claim, either an independent Free Exercise Clause claim or a hybrid claim, Kedesh College must first demonstrate that the Act substantially burdens its ability to act upon a sincere religious belief. Kedesh College more than meets this burden.

We must tread carefully when considering the sincerity of a plaintiff's religious belief. *See Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment). Fortunately, in this case, there is no question that Kedesh College's religious beliefs are sincere. While Kedesh College's founding documents and statement of faith are not part of the record before us, the parties agree that the College—although a self-identified "non-denominational" institution—was founded for religious purposes. These purposes include a core mission to express and demonstrate tangible acceptance, support, and identification with those who are unaccepted, downtrodden, and foreigners in an unfamiliar land. The school's motto, admission and scholarship policies, and its legacy of involvement in local immigrant communities for more than fifty years, only serves to confirm that these beliefs are sincerely held. *See Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 194 (3d Cir. 1990).

Likewise, we find that the Act burdens Kedesh College's ability to act upon this sincere religious belief. Although the record does not suggest that the Act was *intended* to stifle religious conduct, there is little doubt that under the plain language of Section 2 of the Act, Kedesh College is no longer free to act as it has for more than 50 years. Kedesh College may neither admit nor enroll undocumented persons into its student body, nor confer any degree or other student privileges upon such persons. The education of undocumented persons is a key aspect of Kedesh College's religious and educational mission. Thus this burden is not "incidental." *Cf. Smith*, 494 U.S. at 878. Kedesh College is not free to "operate its religious education program in another area" because the Act's prohibition applies to all colleges and universities, both public and private, under

protection appropriate for free exercise claims, we need not wade into this thicket because Kedesh College does not raise a free exercise challenge under the RFRA or RLUIPA, and state constitutional provisions have no effect on the force of federal laws.

the jurisdiction of the United States without exception. *See Grace United Methodist Church*, 451 F.3d at 655 (citation omitted). Kedesh College may keep its religious convictions, or its identity as a private, four-year, degree-granting American college. It cannot have both. ***(C)***

Free Exercise Analysis Post-Smith

Not all burdens on religion are unconstitutional. While the district court was of the opinion that a neutral law of general application cannot violate the Free Exercise Clause, citing to *Parker v. Hurley*, we agree with the Tenth Circuit that the better reading of *Smith* is that neutral and generally applicable congressional enactments may impose even substantial burdens on religious practice, so long as they are rationally related to a legitimate state interest. *Grace United Methodist Church*, 451 F.3d at 649.

The Act is a neutral and generally applicable law, and the interest behind it—conservation of scarce resources, as a matter of federal immigration policy, for the higher education of children of documented persons—is "so dominant[,]"that our inquiry into Congress's reasoning is necessarily a narrow one. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *see Mathews v. Diaz*, 426 U.S. 67, 82 (1976). Congress's stated intent reflects a political judgment that is not only well within the plenary power of Congress, but is neutral with respect to the religion of all affected undocumented persons and educational institutions. *Arizona*, 132 S. Ct. at 2501, 2511 n.1. It is not an "illegitimate" interest. *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013). Nor is it irrational for Congress to conclude that prohibiting the children of undocumented persons from attending public or private colleges or universities will conserve scarce resources. *See Mathews*, 426 U.S. at 82–83. Thus, the Act survives rational basis review under *Smith.*[11]

(D)

***"Hybrid-Right" Analysis post*-Smith**

The hybrid-rights exception finds its genesis in *Smith*, which distinguished the facts before it from prior cases where a neutral, generally applicable law implicated "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections[.]" *Smith*, 494 U.S. at 881.

While *Smith* suggested that the Supreme Court previously applied strict scrutiny to hybrid-rights claims, no currently published circuit court decision has applied strict scrutiny to a hybrid case post-*Smith*. *Parker v Hurley*, 514 F.3d 87, 98, (1st Cir. 2008). The Ninth Circuit decision in *Thomas v. Anchorage Equal Rights Comm'n,* is the closest to such a holding. *See* 165 F.3d 692, 714-17 (9th Cir. 1999). That ruling was subsequently withdrawn *en banc* and thus is not currently published. It was withdrawn *not* because the logic was flawed or disavowed, but because the underlying controversy in that case was not ripe. Thus, while it cannot be cited as precedent, we find *Thomas* instructive because the logic is persuasive, and our present issue is ripe. It is worth noting that the First, Third, Tenth, and D.C. Circuits have accepted the theoretical possibility of a hybrid violation of the Free Exercise Clause, although no plaintiff has successfully prevailed on a hybrid claim. *See Parker*, 514 F.3d at 98 & n.11; *Salvation Army*, 919 F.2d at 199; *Grace United*

[11] This opinion cites three cases found on the list of Issue 2 cases. Advocates for Issue 1 may cite these cases.

Methodist Church, 451 F.3d at 656. The Second and Sixth Circuits have dismissed the hybrid exception as "illogical" dicta. *See Thomas*, 165 F.3d at 704; *Grace United Methodist Church*, 451 F.3d at 656.

Kedesh College's hybrid-rights claim raises a question of first impression in this Circuit. While we have doubts about *Smith*, we are also not free to ignore its plain language. *See Thomas*, 165 F.3d at 704. *Smith* states that where religious free exercise is substantially burdened by state action, strict scrutiny is appropriate—even as applied to neutral laws of general application—if "other constitutional protections" are implicated. *See Smith*, 494 U.S. at 881. Here, Kedesh College argues that the Act implicates its protected right to free association.

The First Amendment protects the right to association in two distinct, yet occasionally convergent, ways: (1) the right to enter into and maintain "certain intimate human relationships," or private associations, and (2) "a right to associate for the purpose of engaging in those activities protected by the First Amendment[.]" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). Accordingly, we review the facts before us to determine if the Act implicates Kedesh College's right to free association in either sense. If either is the case, we will perform strict scrutiny review.

(1)

Kedesh College's "Intimate or Private" Association" Claim

The Bill of Rights preserves not only individual liberties, but also "certain kinds of highly personal relationships[.]" *Id*. at 618. Although familial relationships are the archetype of these associations, the First Amendment's scope also extends to other relationships which are "sufficiently private to warrant constitutional protection[.]" *La. Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1494 (5th Cir. 1995). In determining whether a given association is "private" in the constitutional sense, courts consider several factors, including the purported association's size, purpose, selectivity, congeniality, and exclusivity, as well as any other characteristics that may be pertinent. *See Roberts*, 468 U.S. at 620.

Kedesh College possesses several factors which support a finding that it is an intimate or private association. Kedesh College is a stand-alone institution, and its student body, faculty, and staff (less than 2,400 persons total) is a great deal smaller than the tens or hundreds of thousands of members of organizations previously before the Supreme Court such as the Jaycees or the Rotary Club. *See, e.g.*, *id.* at 613. The College's incoming class is hard-capped at 511 or 512 new students each year, and agreement with its religious motto and mission is a key component for both admission (student essays) as well as continued enrollment (statement of faith). *See La. Debating and Literary Ass'n*, 42 F.3d at 1497; c*f. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 146–47 (2d Cir. 2007). Finally, the College's high retention rate, coupled with the continued involvement of alumni for years after their graduation, demonstrates congeniality among the members of its community, both past and present.

Kedesh College also possesses characteristics that are not "intimate" in nature. Although agreement with its motto and mission are the most important part of its application, admission is theoretically available for any student who is willing to sign the school's nondenominational, albeit

religious, statement of faith. Instead of recruiting internally, Kedesh College actively recruits students from around the globe, in partnership with international organizations. *See Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 147. Although its graduation rate is impressive, the non-profit college still undergoes some attrition, and brings in new students each year to fill vacancies left by the students who inevitably leave. Finally, the record does not indicate that Kedesh College hides its existence, or prohibits nonmembers from attending any or all of its internal functions. *Cf. La. Debating and Literary Assn*, 42 F.3d at 1496–97. Rather, it advertises world-wide, encouraging prospective students across the globe to join its community, and hosts four publicly available functions each year with the express goal of bringing in new students.

After considering all these factors, we find that, on balance, the community at Kedesh College does not comprise an "intimate" or "private" association for First Amendment purposes. Notwithstanding the College's relatively small, preset size, and the shared purpose and congeniality among its members, we find Kedesh College's lack of exclusivity to ultimately be dispositive. Kedesh College cannot claim that it is an "intimate" or "private" group, while encouraging as many prospective students as possible to join its community. *See Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 147.

(2)

Kedesh College's "Religious Association" Claim

Kedesh College argues that the Act interferes with its "right to associate for the purpose of engaging in those activities protected by the First Amendment." *Roberts*, 468 U.S. at 617. Although this right is most commonly conjoined with a group's free speech rights. Kedesh College does not assert an independent free speech claim. *See id.* at 623. It contends that the Act infringes on its right to associate with like-minded persons, to express and live out their shared religious convictions on the importance of demonstrating acceptance, support, and identification of immigrants in tangible ways.

As an initial matter, we find that Kedesh College is a "religious association," within the first sense of protected associations under the First Amendment. The College is private and religious in nature, and ministering to immigrant communities (specifically undocumented persons) has been a core mission of the College beginning with its founding more than half a century ago. Although academic achievement is clearly an important part of life at Kedesh College, it appears far more interested in its students' religious commitment and their investment in their local communities, rather than their academic performance.

Unfortunately for Kedesh College, its religious commitment is not enough to recognize the College as a "religious association." The Third Circuit previously considered a claim of "religious association," in *Salvation Army*. Ultimately, that court concluded that, because the right to association is a derivative right, "[it] would not expect a derivative right to receive greater protection than the right from which it was derived." *Salvation Army*, 919 F.2d at 199. Because the Free Exercise Clause—standing alone—only affords rational basis review post-*Smith*, a derivative "religious association" right can also be afforded no more than rational basis review. *See id.* at 197; *but see Parker*, 514 F.3d at 98–99.

We find ourselves in agreement with the reasoning of the Third Circuit. It would seem anomalous to us if "corporate exercise received greater protection than individual exercise[.]" *Salvation Army*, 919 F.2d at 199. Even finding, as we do, that Kedesh College is a "religious association," the Act need only pass rational basis review. *See id.* We find that it passes such review.

Because Kedesh College raises no viable companion right, which requires the application of anything other than rational basis scrutiny,[12] our holding today is controlled by *Smith*. Despite the fact that the Act places a substantial and inescapable burden on Kedesh College, the Act passes constitutional muster because it is rationally related to a legitimate state interest. *See Grace United Methodist Church*, 451 F.3d at 649. If the controlling test was different, or if the Court had more fully developed the hybrid-rights exception, Kedesh College might very well prevail on its Free Exercise Clause claim. Such, however, is not the current state of the law.

As an intermediate appellate court, we express no opinion on the wisdom of the Act itself, the correctness of *Smith*, or the legal morass that currently confronts practitioners who seek to raise constitutional claims in *Smith*'s wake. Absent further guidance from the Supreme Court, we are compelled to conclude that, under *Smith*, Kedesh College's Free Exercise Clause claim must yield to the will of Congress as expressed in the Act, draconian though it may be.

III

(A)

Federalism Analysis: Congressional Supremacy

A.R.H. challenges congressional action in an area in which Congress enjoys plenary power. The plenary authority of Congress is constitutionally provided for and is well established in the United States Constitution and in Supreme Court jurisprudence. We shall examine those foundations.

We start with the Constitution itself. Art. I. Section 8, cl. 4 provides: "The Congress shall have Power To . . . establish a uniform rule of naturalization[.]" U.S. Const. art. I, § 8, cl. 4. It is from this constitutional provision that Congress has long enjoyed the plenary authority to regulate in the area of immigration and naturalization. *See Arizona*, 132 S. Ct. at 2498. Many opinions of the Supreme Court further this same legal principle. In *Plyler v. Doe*, the Court asserted that all "courts must be attentive to congressional policy[]" when evaluating immigration matters. *Plyler v. Doe*, 457 U.S. 202, 224; 224-25 (1982); Further, the Court in *Mathews v. Diaz* held "judicial review of . . . decisions made by . . . Congress . . . in the area of immigration and naturalization[] . . . [is] narrow[.]" *Mathews*, 426 U.S. at 82. However, it is the Court's most recent pronouncement in *Arizona v. United States* that makes this point clear. There, the Court held that Congress has

[12] Although most hybrid claims involve the rights of association, *see Salvation Army*, 919 F.2d at 198–99, freedom of speech, *Grace United Methodist Church*, 451 F.3d at 656–57, or a core liberty interest protected by the Fourteenth Amendment, *Parker*, 514 F.3d at 94, 101, the Supreme Court in *Smith* did not explicitly define which "other constitutional protections" might trigger hybrid analysis. This led at least one of our sister circuits, in an opinion since withdrawn for ripeness, to apply the doctrine to a claim not rooted in the First or Fourteenth Amendment, *Thomas*, 165 F.3d at 701–02. For reasons discussed in the following section, we need not plumb the permissible depths of *Smith*'s hybrid-right exception because we find that the Act does not violate the Equal Protection Clause.

significant power to regulate immigration. *Arizona*, 132 S. Ct. at 2498. Such regulation depends on Congress's responsibility to create laws based upon "searching, thoughtful, rational civic discourse." *Id.* at 2510. This plenary power means that the states are precluded from enacting regulations in a field that Congress is constitutionally empowered to regulate on its own. *See id.* at 2498; 2501. This principle applies where Congress has provided a framework of regulation "'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. '" *Id.* at 2501 (internal citations omitted).

(B)

Federalism Analysis: The Constitutionality of the Fair Education Act

While the facts of the record indicate that deference to the states has created a scenario in which a host of different admittance policies dot the education landscape, it is clear that congressional regulation of immigration policy is so dominant as to preclude any other form of enforcement of those objectives. *Record at 3-4.* Congress has made its sole objective for the Act clear: there is to be "no undocumented person enrolled in any public or private college or university by the end of 2014." *Id.* at 2. Thus, the plenary power of Congress in this matter, while accepting its inconsistent application amongst the states, is unfettered. Congress clearly intended to play a role so dominant as to preclude any other regulation to exist in the same legislative sphere.

In conclusion, congressional superiority in this matter is made clear. The full force of Congress's plenary power stands firm in this case. Because of such power, the Act is a valid exercise of congressional authority and is constitutional, regulating in the realm of immigration and education in place of the states. Thus, A.R.H.'s petition hinges solely on her equal protection claim. In such an analysis, we shall not question the wisdom of the federal enactment, but whether A.R.H. and those similarly situated have been treated so differently as to warrant a ruling in their favor.

(C)

Equal Protection Analysis: An Overview

The aforementioned cases make it clear that in the world of immigration law and policy, it is the unique political prerogative of Congress, not the courts, to make legislative determinations. Therefore, where the court receives a challenge to such congressional regulation, the judicial inquiry into the reasoning of the Congress's decision must be narrow. *See Mathews*, 426 U.S. at 82. This narrow inquiry depends upon the claims of the challenging party. That means that the challenging party, here A.R.H., must challenge the constitutionality of the congressional act by asserting that the line of distinction that Congress has drawn with the Act is based upon reasoning that is invalid. *Id.* at 73–74, 82. But the burden upon the challenging party does not stop there; the party must also assert that the reasoning is not tolerable and that the congressional aim can be met by creating another distinction, or by creating a law with a different aim. *Id.* at 82 ("The party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.").

A.R.H. asserts that the enactment of the Act, and its application towards undocumented persons, violates her Equal Protection rights. We do not deny that A.R.H., an undocumented alien living

in the United States, is protected by the Equal Protection Clause of the Fourteenth Amendment. *See Plyler*, 457 U.S. at 211–12, 215–16; *see also id.* at 253 (Burger, C.J., dissenting). We affirm this right by reiterating the Supreme Court in *Plyler*, noting that the application of Equal Protection principles is not territorially limited. There, the Court stated "the phrase 'within our jurisdiction' [within the Fourteenth Amendment] was intended in a broad sense to offer the guarantee of equal protection to all within a State's Boundaries, and to all upon whom the State would impose obligations of its laws." *Id.* at 214; U.S. Const. amend. XIV, § 1. While the facts indicate that A.R.H. is an undocumented citizen, it is also made clear that the force of federal law has been exerted upon A.R.H. and her family. *Record 6-7.* She is thus protected by the Equal Protection guarantees inherent in the Fifth Amendment's guarantee of Due Process. See *Mathews v. Diaz*, (1976).

Our reasoning turns on two seminal decisions of the Supreme Court: *Plyler v. Doe* and *Mathews v. Diaz*. These decisions are controlling on the matter of federal regulation of immigration matters and the rights of undocumented persons under the Fourteenth Amendment. Additionally, they are the most relevant to petitioner's case as presented before us. We shall address each in turn.

(D)

Equal Protection Analysis: Plyler and the Right to Higher Education

Echoing the federalism analysis provided, Congress enjoys substantial latitude in creating classifications that "roughly approximate the nature of the problem perceived," and "that [also] accommodate competing concerns both public and private." *Plyler*, 457 U.S. at 216. This substantial latitude affords Congress the ability to legislate, bearing in mind the inability of the state or federal government to remedy every ill presented. *Id.*. at 221 n.1 (Powell, J., concurring). With this authority, the Court has repeatedly held that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* (alteration in original) (internal quotation marks omitted) (citation omitted). Additionally, *Plyler* noted that that there is no fundamental right to education. *Id.* at 221, 223 *(majority opinion*). Because of "doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies," it has "articulate[d] a firm rule: fundamental rights are those that 'explicitly or implicitly [are] guaranteed by the Constitution.'" *Plyler*, 457 U.S. at 232 (Blackmun, J., concurring) (second alteration in original) (citation omitted). Congress has preserved this reasoning, as it does not provide undocumented persons with a constitutional right to postsecondary education. *Record at 1*.

Plyler recognized a right of undocumented minors to receive an education. But therein lay the distinction: *minor children*. *Id.* at 220. The right of these children to receive an education was recognized because of the vital importance of a primary education. *Id.* at 221, 223 *(majority opinion).* Such an education furthers primary understanding of our democratic government and is necessary to prepare young citizens to participate effectively and intelligently within that democratic government. *Id.* Without a primary and secondary education, state law created a shadow class of citizens, specifically the minor children of undocumented persons. *Id.* at 218–20.

The interests that preserved the right of minor children to receive primary and secondary education are not applicable to the case at bar. Here, A.R.H. is an eighteen-year-old college applicant. The equal protection analysis conducted in *Plyler* concluded that denial of education to a group of

children was an affront to their rights, but again, the emphasis is placed upon the rights of minor children. *Id.* at 220–22. In this case, we can conduct a speculative analysis of the maturity or awareness of A.R.H. in considering whether she should be treated like the minor children of *Plyler*. But again, we reiterate the guiding principle in judicial review of immigration challenges: the judiciary is not equipped to make the necessary "fine distinctions" in order to correct the wisdom of federal law. *Id.* at 232 (Blackmun, J., concurring).

Neither the federal nor the state constitution in this case provides a fundamental right to postsecondary education. *Id.* at 221, 223 *(majority opinion).* The Court has continuously held that the right of education for undocumented persons is limited to minor children. *Id.* at 220. Thus, we conclude that A.R.H. does not have a viable equal protection claim under the *Plyler* analysis.

(E)

Equal Protection Analysis: Mathews v. Diaz and Residency Requirements

A.R.H. also argues that the residency requirements, including continuous duration of residency, are impermissible under the Equal Protection clause, in line with arguments proffered in *Mathews v. Diaz*. There the question presented to the Court was "whether the statutory discrimination *within* the class of aliens is permissible." *Mathews*, 426 U.S. at 80.

Mathews made clear "Congress has no constitutional duty to provide all [undocumented persons] with [certain] benefits. *Id.* at 82; at 77–80. The fact that all undocumented persons are protected by the Due Process Clause (and the Equal Protection Clause) does not summarily lead "to the conclusion that all [undocumented persons are to be treated] in a single, homogeneous legal classification." *Id.* at 78. Many laws and provisions are premised upon distinctions between citizens and aliens that are legitimate. Within a class of undocumented persons, there may be a wide-ranging variety of reasons why rights may be contingent upon the strength of ties between undocumented persons and this country. *Id.* at 78–79. That differentiation in treatment, on its face, does not lead to the conclusion that the distinction is "invidious." *Id.* at 80. The *Mathews* Court stated:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of the munificence. *Id.*

In *Mathews*, appellees challenged two residency requirements that served as prerequisites to receiving welfare benefits. *Id.* at 82. Recipients had to be a permanent resident or must have continuous residence for a period of at least five years. *Id.* The Court responded by noting that if these requirements were not imposed, then Congress would look to at least limiting the benefits to those who lawfully entered the United States. *Id.* In such a case, unless welfare benefits would be given to "mere transients[,]" Congress would impose *some* durational requirement and such a requirement would be appropriate. *Id.* The distinctions are fine, highlighting the fact that the

reasonableness of durational requirements is interchangeable. *See id.* at 82–83. Thus, it is "unquestionably reasonable" for Congress to make eligibility to receive any benefit from the state or federal government contingent upon residency and duration of residency. *Id.* at 83. *Mathews* held that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." *Id.* at 84; *see Graham v. Richardson*, 403 U.S. 365 (1971)). Further, *Graham*, a case favorable to A.R.H., is distinguishable as the current analysis involves the relationship between undocumented persons and the federal government, not their relationship with the state, as was the case in *Graham*. *See Graham*, 403 U.S. at 366–67.

III

Conclusion

Kedesh College and A.R.H. have challenged Congress at its highest ebb of constitutional authority. Because this authority is well-established within the text of the Constitution, and within the jurisprudence of the Supreme Court, their A.R.H.'s challenge fails.

The decision of the lower court is *AFFIRMED.*

DISSENT by J. MART, Circuit Judge

I

Freedom of Religion and of Association

I agree with parts of the opinion of the majority. It is well written and often well-reasoned. Unfortunately, for reasons upon which I will expand, I find myself unable to join with my brethren in their opinion and judgment.

A key reason for my decision to dissent from the holding of this court's opinion is that I fear that its ruling does damage, however unintended, to one of our important and traditional values: freedom of religion. It is a freedom we all share, perhaps one we take for granted, and it was the desire for that freedom that led so many of our forefathers to our shores and, so long as we remain a nation of free religion, one that will continue to beckon others to emigrate to our land.

In my view, the majority misapplies *Employment Division v. Smith*, 494 U.S. 872 (1990). It errs when it opts to apply a standard other than strict scrutiny. The Free Exercise Clause promulgates one of our most basic and cherished freedoms—that of religious choice—one that calls forth for heightened judicial protection and scrutiny. The appropriate test, therefore, is strict scrutiny. Any application of a lower-level scrutiny to laws such as the one before us today does not award freedom of religion its proper due and results in erroneous rulings such as the one issued today.

Smith noted that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877. Kedesh College was founded under the religious doctrine to assist all people regardless of citizenship by providing them with an education. Everything associated with the school's history, its founding, the number of students it admits, and the selection of its name, and hold religious significance. Kedesh College is even named after the biblical city of refuge or sanctuary.

It is indisputable that the Fair Education Act substantially burdens Kedesh College's ability to act upon a sincere religious belief. *Majority opinion, at 9.* Short of compelling Kedesh College to select one specific denomination, there is no greater infringement on Free Exercise than to bar Kedesh College from accepting undocumented students based upon an asserted interest of saving resources when the facts show the opposite. International students are not a drain on the national economy. In fact, as the facts establish, these students annually contribute $24 billion to the national economy. *Record, at 1.*

The majority concludes that *Smith* is the controlling case. Yet, *Smith* is distinguishable from the facts here. In *Smith*, the Court considered whether a state law criminalizing the use of peyote violated Respondents' rights to free exercise when they were fired and later denied unemployment benefits for their use of peyote during a religious ceremony held at their church. *Smith*, 494 U.S. at 874. Deviating from long-standing precedent, the Court set forth a new rule holding neutral laws that are generally applicable do not rise to the level of strict scrutiny even if they have an incidental effect on a First Amendment right. *See generally Smith*, 494 U.S. at 878. The Court explained that a hybrid right may exist if another right, independent of free exercise, was also implicated. *Id.* at 882. However, such a right was lacking in *Smith*. *Id.* at 881–82.

Here, unlike *Smith*, we address a federal law with no criminal sanctions. In refusing to apply strict scrutiny in *Smith*, the Court distinguished its prior precedent by explaining the cases "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. On this point, I find Justice O'Connor's concurring opinion in *Smith* to be of significance. "The First Amendment," she wrote, "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Id.* at 894 (O'Connor, J., concurring).

I turn now to the "hybrid-rights" issue. The Ninth and Tenth Circuits correctly interpret the hybrid right discussed in *Smith*. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 703 (9th Cir. 1999); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006). In adopting the Tenth Circuit's approach that the companion claim under the hybrid right must be "colorable," the Ninth Circuit, in a ruling since withdrawn *en banc* because the issue was not ripe, explained, "In order to trigger strict scrutiny, a hybrid[-]rights plaintiff must show a 'fair probability'—a 'likelihood'-of success on the merits of his companion claim." *Thomas*, 165 F.3d at 703. Applying that logic to the present case, it is evident that Kedesh College presents a "colorable claim." The majority holds that Kedesh College is not an intimate or private association. *Majority opinion, at 12.* Yet, the facts show, and my Brethren concede, that Kedesh College possesses several factors indicating it is just that. In *Roberts v. United States Jaycees*, the Court noted factors that may be relevant in determining whether an association is an intimate or private including "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). I agree with the majority's analysis as it relates to the College's size, purpose, and congeniality. *Majority opinion, at 12.* However, I am unable to agree with the majority's conclusion that Kedesh College is not "intimate" in nature because of its recruitment procedures. *Id.* All intimate or private associations must recruit externally otherwise the association itself would cease to exist. Recruitment is not the same as acceptance. Kedesh College still remains a private association

because it controls who it lets in and students are required to agree and act in accordance with its founding principles.

Whether Kedesh College's claim is evaluated under solely Free Expression or under the hybrid right, the appropriate test to be applied is strict scrutiny. The Act places a substantial burden on the College's central religious belief. *Id.* The United States fails to show that they have a compelling state interest in barring undocumented students from attending college. In addition, the Act, and the decision to affirm it, "trench on the prerogatives of . . . educational institutions" to make decisions for themselves about who to admit into their student bodies. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Such is their right under the doctrine of academic freedom. *Id. At 226.*

II

The Fair Education Act

(A)

Federalism

The majority holds that preemption principles counsel us to defer to congressional action in this case, because of Congress's plenary power in the area of immigration. *Majority opinion at 13-14.* I respectfully dissent from that conclusion. The Act, however, does not regulate immigration; it regulates education. Education policy is traditionally performed by the states. Of the nation's 7,021 Title VI postsecondary institutions, 2,015 are public. Of these public institutions, the federal government is responsible only for the five service academies.[13] So long as there are no violations of federal constitutional provisions, education is a matter properly left to the states. Here, Congress remedies no such violation.

While it is the prerogative of the federal government to regulate what kinds of students receive *federal* student aid, it is not the domain of the federal government to forbid the states from spending their own education dollars on particular groups of students. Nor is it the domain of the federal government to forbid private, nongovernmental institutions from assisting certain kinds of students. As the majority notes, the facts of the record indicate that prior deference to the states "has created a scenario in which a host of different admittance policies dot the education landscape." *Majority opinion at 14.* This is as it should be. States function as laboratories for democracy. Within the realm of education, as it intersects with citizenship, state policies have run the gamut from laws limiting the ability of undocumented persons to attend public institutions of higher education to laws enabling undocumented students to pay in-state tuition. The federal government should not be interfering in this traditional state

[13] There are 7,021 Title VI institutions. They include: 2,422 two-year-non-degree-awarding colleges or universities; 2,870 four-year-degree-awarding colleges or universities; and 1,729 degree-awarding colleges or universities. Of the 2,422 non-degree-granting two-year Title VI institutions, 359 are public and 2,063 are private (182 of which are non-profit and 1881 are for-profit.) Of the 2,870 four-year Title VI degree-granting postsecondary institutions, 678 are public and 2,192 are private (1,543 are non-profit and 649 of which are for-profit.) Of the 1729 degree-granting two-year Title VI non-degree-granting postsecondary institutions, 978 are public and 751 are private (87 are non-profit and 664 of which are for-profit.) U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Common Core of Data (CCD)*, "Public Elementary/Secondary School Universe Survey," 1989–90 through 2010–11.

dominion. While Congress may arguably have plenary power in the realm of immigration, *see Arizona v. United States*, 132 S. Ct. 2492, 2501, 2511 n.1 (2012), this grant does not allow it to take over a state domain only tangentially related to immigration. The Act is not a valid exercise of congressional authority, but rather unconstitutionally intrudes upon a matter left to the states.

(B)

The Fifth Amendment and Equal Protection

Another reason for my decision to dissent is that I fear that its ruling also does damage to another of our important constitutional values: equal protection under the law.

Because the Act involves congressional, rather than state, action, we look to the Fifth Amendment. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The Supreme Court has held that the Fifth Amendment is applicable to the federal government in much the same way that the Fourteenth Amendment's Equal Protection Clause is applicable to state governments. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). This is the doctrine of reverse incorporation. Under this doctrine, equal protection principles bind the federal government even though the Fourteenth Amendment's equal protection clause, by its terms, only applies to states. *Id.* This is because "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id*. at 499. In practice, it means that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (citation omitted).

The majority, relying upon *Mathews v. Diaz*, 426 U.S. 67 (1976), applies the rational basis test. This application is inconsistent with precedent and fails to account for factual differences between *Mathews* and the controlling lines of precedent. The Act is subject to strict scrutiny, which it fails.

In 1954, in a Fifth Amendment case, the Court held that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling*, 347 U.S. at 497 (footnote omitted). Subsequently, the Court, in several Fourteenth Amendment cases, has held that classifications based on alienage and classifications based on race are to be judged according to the same standard. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)); *In re Griffiths*, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities."); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny." (footnote omitted)). This is the case because "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372 (internal citations omitted).

It is important to note that the [Supreme] "Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth

Amendment." *Weinberger*, 420 U.S. at 638 n.2 (citations omitted). In light of case law, the Act should be analyzed under strict scrutiny, as this is the level of scrutiny generally applied in cases regarding discrimination on the basis of alienage. *See, e.g.*, *Bernal*, 467 U.S. at 219; *In re Griffiths*, 413 U.S. at 722; *Graham*, 403 U.S. at 372. For a law to pass strict scrutiny, it "must advance a compelling state interest by the least restrictive means available." *Bernal*, 467 U.S. at 219 (footnote omitted). In the instant case, the government asserts that the Act is "needed to reserve the resources and benefits for the children of documented persons," and that the primary goal of the Act "is for there to be no undocumented persons enrolled in any public or private college or university by the end of 2014." *Record at 2.* Arguably, the government may have an interest in preserving the resources of its programs, and in limiting its expenditures in the furtherance of such preservation. *See, e.g.*, *Graham*, 403 U.S. at 372–73, 374–75. "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 374–75. This is true even in the case of undocumented persons rather than citizens: "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is not . . . [a] compelling . . . justification[.]" *Id.* at 375.

Even under rational basis review, the government's reasoning for discriminating against students like A.R.H. is unpersuasive. Rational basis review is not toothless. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *see also id.* at 2706 (Scalia, J., dissenting); *Plyler*, 457 U.S. at 216. The Act fails for the same reasons that the laws in *Windsor* and *Plyler* failed—the lack of a legitimate interest. *See Windsor*, 133 S. Ct. at 2696; *Plyler*, 457 U.S. at 216. The record illustrates that the United States has no reason to discriminate against undocumented persons other than animus toward such individuals or some desire to earn political points with the voters. Neither qualifies as a legitimate interest weighty enough to deny a person equal protection or due process of the law. *See Windsor*, 133 S. Ct. at 2696. *Windsor* advised that "[i]n determining whether a law is motivated by an improper purpose or animus, '[d]iscriminations of an unusual character' especially require a careful consideration." *Id*. at 2693 (citation omitted). *Windsor* is especially instructive in that it was a Fifth Amendment case that applied equal protection considerations to the Congress. *Id.* at 2696.

(C)

Conclusion

While the majority may be correct in its analysis that neither the federal nor a state constitution provides a fundamental right to postsecondary education, this does not abrogate A.R.H.'s rights to equal protection of the law in a broader sense. Just because she is not guaranteed a postsecondary education does not mean that the government can discriminate against her in the provision of it. "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling*, 347 U.S. at 499–500. There is no proper governmental objective here, and thus the Act violates the Fifth Amendment.

I respectfully dissent from the decision of this court.

Issue One Cases

1. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)
   https://supreme.justia.com/cases/federal/us/468/609/case.html

2. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985)
   https://supreme.justia.com/cases/federal/us/474/214/case.html

3. *Employment Division v. Smith*, 494 U.S. 872 (1990)
   https://supreme.justia.com/cases/federal/us/494/872/case.html

4. *Salvation Army v. Department of Comm'y Affairs*, 919 F.2d 183 (3d Cir. 1990)
   http://www.acmamootcourt.org/uploads/3/0/1/9/3019175/salvation_army_v_department_of_community_affairs_of_state_of_nj.pdf

5. *La. Debating and Literary Assn. v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995)
   http://law.justia.com/cases/federal/appellate-courts/F3/42/1483/604698/

6. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999)
   http://www.acmamootcourt.org/uploads/3/0/1/9/3019175/thomas_v_anchorage_equal_rights_comn.pdf

7. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006)
   http://law.justia.com/cases/federal/appellate-courts/F3/451/643/627360/

8. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007)
   http://law.justia.com/cases/federal/appellate-courts/ca2/06-4111/06-4111-cv_opn-2011-03-27.html

9. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008)
   http://www.acmamootcourt.org/links-to-broken-pdf-case-files.html

Issue Two Cases

1. *Bolling v. Sharpe*, 347 U.S. 497 (1954)
   https://supreme.justia.com/cases/federal/us/347/497/case.html

2. *Graham v. Richardson*, 403 U.S. 365 (1971)
   http://www.acmamootcourt.org/uploads/3/0/1/9/3019175/graham_v_richardson.pdf

3. *In re Griffiths*, 413 U.S. 717 (1973)
   https://supreme.justia.com/cases/federal/us/413/717/case.html

4. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)
   https://supreme.justia.com/cases/federal/us/420/636/case.html

5. *Mathews v. Diaz*, 426 U.S. 67 (1976)
   https://supreme.justia.com/cases/federal/us/426/67/case.html

6. *Plyler v. Doe*, 457 U.S. 202 (1982)
   https://supreme.justia.com/cases/federal/us/457/202/case.html

7. *Bernal v. Fainter*, 467 U.S. 216 (1984) https://supreme.justia.com/cases/federal/us/467/216/case.html

8. *Arizona v. United States*, 132 S. Ct. 2492 (2012)
   https://supreme.justia.com/cases/federal/us/567/11-182/opinion3.html

9. *United States v. Windsor*, 133 S. Ct. 2675 (2013)
   https://supreme.justia.com/cases/federal/us/570/12-307/opinion3.html

Appendix I

The Fair Education Act of 2006

The Congress of the United States does hereby enact the following public act:

Section 1: DEFINITIONS. In this act the following terms are employed:

(1) "Undocumented person" refers to a person who lacks the proper legal right to be in the United States of America or any of its territories. Such a person can include a born or naturalized citizen who has renounced his or her citizenship.
(2) "Postsecondary education" refers to the formal education that follows elementary and secondary schooling.
(3) "Postsecondary school" refers to an institute of education, including private or public and for-profit or non-profit, that provides students with a postsecondary education.

Section 2: No postsecondary school shall permit any undocumented person to enroll in, audit, or attend classes after December 31, 2014.

Section 3: Undocumented persons enrolled in, attending, or auditing classes in postsecondary schools prior to December 31, 2014 shall be allowed to enroll in, audit, or attend classes if such is allowed under the laws of the state or territory where the postsecondary school is located. Such persons shall be eligible to receive any postsecondary degree for which they qualify provided that such award occur before January 1, 2015.

Section 4: The president, or equivalent thereof, of every postsecondary school shall be responsible for ensuring that the postsecondary school that he or she serves is in compliance with this law. This includes adopting procedures and mechanisms that he or she deems reasonable and appropriate.

Section 5: Every postsecondary school shall submit proof to the United States Department of Homeland Security that its students are legally entitled to pursue a postsecondary education in the United States and its territories.

Section 6: Nothing in this law shall be construed to authorize a postsecondary school to violate any state, local, or federal law.

Section 7: The Act shall take effect on January 1, 2015.

Appendix II

Summary, with selected excerpts, from the June 15, 2012 Memorandum issued by DHS Secretary Janet Napalitano re: Deferred Action for Childhood Arrivals ("DACA")

A) DACA applies to persons both in removal proceedings and not currently in removal proceedings.

B) To be considered for prosecutorial discretion resulting in deferred action, subject to renewal after two years, an applicant must provide documentary evidence that he or she:

(1) Came to the United States under the age of sixteen;
(2) Has continuously resided in the United States, since at least June 15, 2007 and is physically present in the United States on June 15, 2015;
(3) Is currently in school, has graduated from high school, has obtained a general education development certificate (GED), or is an honorably discharged veteran of the United States Armed Forces or Coast Guard;
(4) Has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
(5) Was under the age of 31 as of June 15, 2012.

C) No individual should receive deferred action unless they first pass a background check.

Appendix III

Selected Sections of Olympus Education Law

Section 1: DEFINITIONS. In this act the following terms are employed:

(1) "Postsecondary school" refers to an institute of education, including private or public and for-profit or non-profit, that provides students with a postsecondary education.
(2) "Postsecondary education" refers to the formal education that follows elementary and secondary schooling.

Section 2: Any person residing in the State of Olympus shall be eligible to enroll as a degree-seeking student in any postsecondary school offering two-year or four-year associate's or bachelor's degrees or in any postsecondary school offering graduate degrees.

Section 3: Any person attending postsecondary school in Olympus shall be eligible for any public or private financial support including, but not limited to, scholarships, loans, grants, and work study.

Section 4: Any person who graduated secondary school in Olympus shall be eligible to pay in-state tuition at any postsecondary public school in Olympus. Private postsecondary schools in Olympus shall decide for themselves if they will offer an in-state tuition rate. No public or private postsecondary public school in Olympus shall charge undocumented persons in-state tuition unless it charges legal residents, citizens and non-citizens alike, the same exact discounted rate of tuition.