No. S167791
(Court of Appeal No. C054124)
(Yolo County Superior Court No. CV052064)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL.,

Plaintiffs - Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants - Respondents.

After a Decision by the Court of Appeal
Third Appellate District

APPELLANTS' ANSWER BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I. Whether California Education Code Section 68130.5 is expressly preempted by 8 U.S.C. Section 1623;

II. Whether Section 68130.5 is expressly preempted by 8 U.S.C. Section 1621;

III. Whether Section 68130.5 is impliedly preempted by federal immigration laws;

IV. Whether Section 68130.5 violates the Privileges and Immunities Clause of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which dramatically increased the legal penalties and disincentives against illegal immigration. Among its numerous provisions, the IIRIRA included a section that was specifically intended to prohibit states from offering resident (or "in-state") tuition rates to illegal aliens.[1] (Pub.L. No. 104-208, Div. C (Sept. 30, 1996)

[1] There are two legally-correct terms used in the United States Code to describe such individuals: "alien who is not lawfully present in the United States" and "illegal alien." *See, e.g.*, 8 U.S.C. §1357(g)(10) ("removal of aliens not lawfully present in the United States"); 8 U.S.C. §1229a(c)(2) ("the alien has the burden of establishing ...that the alien is lawfully present in the United States."); 8 U.S.C. §1623; 8 U.S.C.§1356(r)(3)(ii) ("expenses associated with the detention of illegal aliens"); 8 U.S.C. 1366(1)("the number of illegal aliens incarcerated"); 8 U.S.C. §1252c("to arrest and detain certain illegal aliens"); Because the shorter term, "illegal alien," is less cumbersome, Plaintiffs use it herein. The Court of Appeal did the same. Slip op. 3, n.2. In contrast, the legally-meaningless term used by Defendants—"undocumented immigrant"—does not appear anywhere in the immigration laws of the United States. 8 U.S.C. §1101, *et seq.*

§505, 110 Stat. 3009-672). That section is now codified at 8 U.S.C. §1623. The language of the section is straightforward:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. §1623. No state may provide any illegal alien the benefit of resident tuition rates, unless the benefit of resident tuition rates is made available to *all* U.S. citizens. Through this federal law, Congress intended to make it virtually impossible for states to offer resident tuition rates to illegal aliens, by requiring any state that does so to offer resident tuition to all U.S. citizens, regardless of where they reside.

A few weeks prior to enacting IIRIRA, Congress had also enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which included a provision intended to stop the flow of state and local public benefits to illegal aliens. Found at 8 U.S.C. §1621, that provision prohibits the offering of "State or local public benefit[s]" to aliens unlawfully present in the United States. 8 U.S.C. §1621(a). The proscribed "public benefits" include "any... postsecondary education... or any other similar benefit...." 8 U.S.C. §1621(c). Congress created a narrow safe harbor in this section, which §68130.5 fails to meet, as explained *infra*, in Section II.B.

In combination, 8 U.S.C. §§1623 and 1621 expressed an unmistakable congressional bar against providing resident tuition rates to illegal aliens, along with a general congressional policy restricting the flow of state and local benefits to illegal aliens.[2] Congress also took the unusual step of expressly codifying its objectives in passing these acts: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601. Congress made clear its belief that the breakdown of the rule of law in immigration had been exacerbated by the availability of public benefits for illegal aliens. Congress intended to cut off such benefits in order to increase compliance with federal immigration laws.

Such congressional enactments notwithstanding, the California Legislature enacted, and the Governor signed, §68130.5, which provides resident tuition rates at California postsecondary educational institutions to certain illegal aliens. Plaintiffs, U.S. citizens from states other than California who attend such institutions, or their tuition-paying parents who must pay nonresident tuition rates three to five times higher than that paid by illegal alien beneficiaries of §68130.5, brought this action.[3] Defendants

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[2] As the Court of Appeal correctly noted, "8 U.S.C. section 1623 narrowed the authorization previously conferred on states by the earlier statute to make exceptions to the federal restrictions." Slip op. 37, n.15.

[3] Plaintiffs' Complaint alleged upon information and belief that, during the Fall 2005 Term, undergraduate tuition and fees at the respective Defendant institutions were:

are members of the University of California ("UC") and California community college ("CCC") governing bodies that have implemented §68130.5.[4] Plaintiffs maintain that, in so doing, Defendants have violated 8 U.S.C. §§1623 and 1621 and violated Plaintiffs' federal statutory right not to be charged more in tuition and fees than any illegal alien. 1 CT 1-92. Plaintiffs also maintain that §68130.5 is impliedly preempted through both field preemption and conflict preemption, and that Defendants have violated Plaintiffs' rights under the Equal Protection Clause and Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.[5] *Ibid.*

On appeal to the Third District Court of Appeal following the trial court's sustaining of demurrer to all claims, the appellate court held that §68130.5 is expressly preempted by 8 U.S.C. §1623, expressly preempted by 8 U.S.C. §1621, and impliedly preempted by other provisions of federal immigration law. In reaching its implied preemption holding, the Court of Appeal applied the controlling precedent of *De Canas v. Bica* (1976), 424

• For UC, $6,769 for resident undergraduates, and $24,589 for nonresident undergraduates ($17,304 tuition plus other fees).
• For CSU, a campus average of $3,164 for resident undergraduates, and $13,334 for nonresident undergraduates.
• For CCC, $26 per unit for residents and $135 per unit for nonresidents, with the average student taking 15 units per semester. Slip op. 8.

[4] There is also a third group of defendants, the California State University defendants, ("CSU") who did not seek Supreme Court review and who have not appeared in this Court

[5] Plaintiffs also initially raised claims under California state law, on which the Court of Appeal sustained, in part, Defendants' demurrer.

U.S. 351, and held that §68130.5 was both field preempted and conflict preempted. The Court of Appeal also held that §68130.5 violated Plaintiffs' rights under the Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution. Finally, the Court of Appeal gave Plaintiffs leave to amend their Equal Protection Clause claim, which is not before this Court.[6] The Court of Appeal issued an 84-page opinion that painstakingly and correctly analyzed the preemption and other issues in this case.

Defendants U.C. and C.C.C. now appeal.[7] However, their briefs ignore whole sections of the Court of Appeal's analysis. More importantly, while Defendants concede that congressional intent controls any federal preemption challenge, they carefully avoid mentioning that every word of congressional intent supports the Court of Appeal's holding. The congressional record contains no support whatsoever for Defendants' contorted interpretation of 8 U.S.C. §1623, or for their assessment of congressional objectives in immigration law, as explained below. As a result, §68130.5 is preempted on *multiple, independent* grounds.

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[6] Defendants have not taken issue with the Court of Appeal's holding that Plaintiffs have leave to amend their Equal Protection claim. Thus, at stake in this Court is whether Plaintiffs can pursue claims *in addition* to those based on Equal Protection, i.e. claims based on preemption and based on the Privileges and Immunities Clause of the Fourteenth Amendment.

7 The CSU defendants have not appeared in this Court and apparently accede to the appellate court's decision.

STATEMENT OF FACTS

The legislative road to the enactment of §68130.5 (AB 540) was a long one. In 1999, Assemblyman Marco Firebaugh introduced the first version of the bill—AB 1197, which was virtually identical to AB 540—to provide resident tuition rates to illegal aliens who met certain criteria. AB 1197 was passed by the California legislature in August 2000, but vetoed by Governor Gray Davis on September 29, 2000.[8] In his veto message, Governor Davis correctly concluded that the bill would violate 8 U.S.C. §1623 and that the only way that California could comply with 8 U.S.C. §1623 would be by offering resident tuition rates to all U.S. citizens, at great cost to the state:

> Pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), undocumented aliens are ineligible to receive postsecondary education benefits based on state residence unless a citizen or national of the United States would be eligible for the same benefits without regard to their residence (Title VIII, Section 1623).
>
> In order for undocumented students to be exempt from paying non-resident tuition charges as called for in this legislation, IIRIRA would require that *all* out-of-state legal residents be eligible for this same benefit. Based on Fall 1998 enrollment figures at the University of California and the California State University alone, this legislation could result in a revenue loss of over $63.7 million to the State.

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[8] For a more complete account of the legislative history of §68130.5, see Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. OF LAW AND PUBLIC POL. 473, 478-82 (2007).

Governor's Veto Message, AB 1197 (emphasis added), Vol. 1 Clerk's Transcript ("CT") 59-60.

Undeterred, Assemblyman Firebaugh introduced his bill again. The Higher Education Committee Analysis of AB 540 stated: "Previous legislation: This Measure is similar to AB 1197 (Firebaugh) of 1999 which was passed by the Committee on Higher Education, Assembly, and Senate, but vetoed by the Governor." Concurrence in Senate Amendments of AB 540 (2001-2002 Reg. Sess.) as amended September 7, 2001, p.1. 1 CT 66; slip op. 59. Importantly, the Higher Education Committee Analysis explained that AB 540 was intended to help aliens who were deemed to be California "residents," summarizing the bill as follows: "Qualifies *long-term California residents*, as specified, regardless of citizenship status, for lower 'resident' fee payments at the [CCC] and the [CSU]." *Id.* (emphasis added); slip op. 57-58. In the words of the Court of Appeal:

> Thus, the bill which became section 68130.5 was a second attempt to overcome a perceived conflict with federal law. Yet the content of section 68130.5 is not significantly different from the content of Assembly Bill 1197, which would have granted in-state tuition if the student (1) attended a California high school for at least three years; (2) graduated from a California high school; (3) enrolled in college within one year of college graduation... and (4) initiate an application to legalize his or her immigration status.

Slip op. 60. Indeed, AB 540 was virtually identical, to its predecessor.[9] This time, however, facing the prospect of a recall that evidently emboldened him to rally what political support he could, Governor Davis signed the bill without comment. Nevertheless, his prior assessment of the bill's conflict with 8 U.S.C. §1623 was entirely correct.

Well aware of this conflict with federal law, the California Legislature attempted to reduce defendants' legal exposure by subsequently enacting §68130.7, which provides: "If a state court finds that Section 68130.5... is unlawful, the court may order, as equitable relief, that the administering entity that is the subject of the lawsuit terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or any other retroactive relief, may be awarded." §68130.7. If this Court affirms the decision below, that provision may come into play.

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[9] There were only two differences: (1) a beneficiary of AB 1197 had to enroll at a California postsecondary institution within one year of graduation from high school (whereas a beneficiary of AB 540 could enroll anytime from the fall semester of 2001-02 onward), and (2) in the case of an illegal alien, a beneficiary of AB 1197 had to present evidence that an "application" for lawful status had been initiated (whereas a beneficiary of AB 540 only had to sign an affidavit expressing an intent to apply for lawful status if and when such application ever becomes possible). U.C. Defendants claim that these differences are relevant, but fail to explain how they change the preemption analysis. U.C.O.B. 7. They do not. The preemption analysis is identical under all three preemption arguments, regardless of these minor variations.

Because the difference between resident and nonresident tuition rates at California postsecondary institutions is so great—over $19,000 per year in the UC system—and because California taxpayers make up the difference for resident tuition recipients, the cost of §68130.5 to California taxpayers is immense. It is estimated to cost California taxpayers more than $208 million per year.[10] This is an extraordinarily high price to pay to keep in place a statute that is expressly preempted by federal law.

STANDARD OF REVIEW

As this Court recently stated, when reviewing a dismissal on demurrer, "The only record we have, and all we have to go by in deciding this case, is the complaint. In this procedural posture, we must assume that all of the facts alleged in the complaint are true. Moreover, we may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible legal theory." *Sheehan v. San Francisco 49ers* (2009) 45 Cal. 4th 992, 998 (internal citations omitted).

[10] See Section IV.F.1., *infra*.

ARGUMENT

I.

SECTION 68130.5 IS EXPRESSLY PREEMPTED BY 8 U.S.C. SECTION 1623

As noted above, 8 U.S.C. §1623 sets forth the federal policy making it all but impossible to offer resident tuition rates to illegal aliens:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. §1623. No state may provide any illegal alien the benefit of resident tuition rates, unless the benefit of resident tuition rates is made available to *all* U.S. citizens. Defendants' implementation of §68130.5 is expressly preempted by this federal statutory language.

Confronted with such a clear case of express preemption, Defendants attempt to inflate the judicial presumption against preemption. U.C.O.B. 12-14. It is of course correct that there is a presumption against preemption. However, as the U.S. Supreme Court recently explained, the presumption against preemption *varies* according to the field in which Congress is acting. It "applies with particular force" in cases where Congress has legislated in "a field traditionally occupied by the states," but applies with less force in a field where Congress has already acted. *Altria v. Good* (2008) 129 S. Ct. 538, 543.

Defendants go on at length describing how the California Legislature enacted §68130.5 in the field of postsecondary education. U.C.O.B. 12-14. However, the relevant question is whether "*Congress* has legislated in a field traditionally occupied by the States," *Altria*, 129 S. Ct. at 543 (emphasis added), not vice versa. In the case at bar, Congress's actions were the passage of the IIRIRA (which included 8 U.S.C. §1623) and PRWORA (which included 8 U.S.C. §1621). The IIRIRA was an omnibus immigration act that exercised the long-established plenary authority of Congress to regulate *all* aspects of immigration. *Fong Yue Ting v. United States* (1893) 149 U.S. 698, 706-07; *Hines v. Davidowitz* (1940) 312 U.S. 52, 62-63; Indeed, immigration is an area of uniquely federal responsibility. *Toll v. Moreno* (1982) 458 U.S. 1, 10; see also *Zadvydas v. Davis* (2001) 533 U.S. 678, 700 (recognizing "Nation's need 'to speak with one voice' in immigration matters"). The PRWORA provisions at issue in this case, 8 U.S.C. §§1601(6), 1621, were an exercise of the same power, in the specific context of defining what public benefits may be extended to aliens. The IIRIRA and the relevant provisions of the PRWORA were federal laws enacted in the field of immigration generally, and the provision of public benefits to aliens specifically. These are areas of long-established federal authority, not areas of traditional state authority.

Even if one were to ignore the demands of *Altria* and focus (as Defendants do) on the narrower portion of the field that §68130.5 acts

upon—the provision of *postsecondary educational benefits* to aliens—Defendants' argument still would be misplaced. Defendants are mistaken in claiming (without support) that the enactment of 8 U.S.C. §§1621 and 1623 represented "Congress legislating for the first time in a field traditionally regulated by the states...." U.C.O.B. 16. Congress had been legislating in the field of postsecondary education benefits for aliens for at least sixteen years prior to the enactment of the IIRIRA and the PRWORA. In 1980, Congress amended Title IV of the Higher Education Act of 1965 to impose a restriction that limited the award of a federally-funded postsecondary education grant, loan, or work assistance to persons other than citizens and permanent resident aliens. 20 U.S.C. 1091(a)(5), P.L. 89-329, title IV § 484 (eff. date Oct. 3, 1980). In 1992 and 1996 the Act was further amended to add requirements for verification of aliens' immigration status under 20 U.S.C. §§1091(g) and 1091(h). See *Taha v. INS* (E.D. Pa. 1993) 828 F. Supp. 362, 365.

In summary, the presumption against preemption is weak in this case, because Congress was exercising its plenary federal authority to regulate immigration generally, and because it had already acted in the specific field of postsecondary benefits for aliens. For the reasons described below, the Court of Appeal was correct in holding that Plaintiffs have overcome this presumption. "[W]e reject defendants' reliance on the presumption of constitutionality of legislation." Slip op. 54.

A. The Legislative History confirms Congress Intended to Prohibit Statutes Such as Section 68130.5

Congressional intent is the cornerstone of preemption analysis. The U.S. Supreme Court has consistently reiterated that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 (*quoting Retail Clerks v. Schermerhorn* (1963) 375 U.S. 96, 103); *Malone v. White Motor Corp.* (1978) 435 U.S. 497, 504. The intent of Congress is evident on the face of 8 U.S.C. §1623: to prohibit any state from offering resident tuition rates to any illegal alien unless the state also provides resident tuition rates to all U.S. citizens (regardless of their circumstances)—an option that no state would be likely to choose.

The Court of Appeal correctly held that §68130.5 is contrary to the plain meaning of 8 U.S.C. §1623. "Section 68130.5 manifestly thwarts the will of Congress expressed in title 8 U.S.C. section 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." Slip op. 54.

Plaintiffs and the Court of Appeal maintain that the text is unambiguous on this matter. Defendants, however, urge an implausible and radically different reading of the text, described below. Assuming *arguendo* that Defendants' reading was a plausible one, then ambiguity would exist because the statute could reasonably be read two different

ways; and it would be appropriate to consider the legislative history of the statute. "Concluding that the text is ambiguous ... we then seek guidance from legislative history ...." *Green v. Bock Laundry Mach. Co.* (1989) 490 U.S. 504, 508-09. And when a court considers legislative history, the primary source *must* be the committee report. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation.'" *Eldred v. Ashcroft* (2003) 537 U.S. 186, 210 n.16 (*quoting Garcia* v. *United States* (1984) 469 U.S. 70, 76 and *Zuber* v. *Allen* (1969) 396 U.S. 168, 186).

The Conference Committee Report accompanying Section 507 of H.R. 2202 (which would become 8 U.S.C. §1623) is unequivocal: "This section provides that illegal aliens *are not eligible for in-state tuition rates* at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996) (emphasis added), 6 CT 1412. Every document concerning the legislative history of 8 U.S.C. §1623 supports the congressional intention to make it effectively impossible for a state to offer in-state tuition rates to illegal aliens. *Defendants have not presented a shred of congressional legislative history to the contrary.* That is

understandable, because no legislative history exists that would support an alternative interpretation.

This Conference Committee Report is consistent with the recorded statements of *every* Member of Congress who addressed the issue. These recorded statements are as follows. Rep. Christopher Cox, one of the leading proponents of the measure, explained Congress's intent in unambiguous terms:

> What else does title V do? What else does he want dropped from the bill after it was passed by a historic bipartisan margin in this House of 305 to 123? The President wants to drop the provision that says that—now listen carefully to this because it is a shocker—that the President would be in favor of this kind of public benefit to illegal aliens, people who have broken the law here in this country. He wants to drop the part of the bill that says that when somebody comes from Thailand, when somebody comes from Russia, when somebody comes from you name it, it is a big world, into your State, they will not get in-State tuition benefits at your State college. Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition. *Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools.*

142 Cong. Rec. H 11376-77 (1996)(emphasis added), 6 CT 1429-30.

The legislative understanding of 8 U.S.C. §1623 in the U.S. Senate was the same. Senator Alan Simpson, principal sponsor of the Senate version of the bill, summarized the provision in the same way: "Illegal aliens will *no longer be eligible* for reduced in-State college tuition." 142

Cong. Rec. S11713 (1996)(emphasis added), 6 CT 1420. Senator Simpson reiterated this clear statement of legislative intent: "Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges. That is in Title V, together with all the stuff to clean up their use of unemployment compensation, their use of the Social Security system, and much, much more." 142 Cong Rec S11508 (1996), 6 CT 1425. The congressional intent of 8 U.S.C. §1623 was plainly to ensure that "illegal aliens will no longer be eligible" for in-state tuition.

Prior to this litigation, even the General Counsel of the U.C. Regents acknowledged that it was the intent of Congress to prevent states from enacting statutes like §68130.5. "*Given the apparent intent of Congress*, we believe there is a substantial risk that a court would conclude that AB 540 provides undocumented students eligibility for resident fees *on the basis of state residence* and that the effect of the IIRIRA is to require that *all* U.S. citizens must also be eligible for resident fees without regard to their state residence." James E. Holst, General Counsel, Letter to the U.C. Regents, Nov. 9, 2001, p. 4 (emphasis added), 6 CT 1586.

In the preceding paragraphs, Plaintiffs have presented every statement that exists on the congressional record concerning the meaning ascribed to 8 U.S.C. §1623 by Congress. There was no ambiguity in the

intent of Congress: "[I]llegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996), VI C.T. 1412. No evidence whatsoever exists on the congressional record to support Defendants' untenable interpretation of Congress's intent.[11] Moreover, Defendants offer no explanation that even attempts to reconcile their interpretation of 8 U.S.C. §1623 with the statement of congressional intent in the Conference Committee Report. See U.C.O.B. 36-37.

It is undisputable that Congress intended to stop states from offering in-state tuition rates to illegal aliens. That intent cannot possibly be squared with Defendants' contention that Congress was only worried about states using residence as a criterion when providing in-state tuition rates to illegal aliens. According to Defendants, Congress was perfectly willing to allow states to extend in-state tuition rates to illegal aliens using some other criterion. C.C.C.O.B. 9. This contention is nonsensical. Not surprisingly, Defendants cannot find any legislative history to support it.

Attempting to overcome such powerful statements of intent,

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[11] Section III of the U.C. Brief is entitled "The Court of Appeal's Holding That Section 68130.5 is Preempted by 8 U.S.C. §1623 is Inconsistent with its Plain Language and Legislative History." U.C.O.B. 25. However, the antecedent to "its" in their title is §68130.5, not 8 U.S.C. §1623. Defendants offer various snippets of legislative history concerning § 68130.5, U.C.O.B. 30-34, but *nothing* about the legislative history of 8 U.S.C. §1623. Defendants' analysis is largely irrelevant to the preemption question, which turns on the intent of *Congress*, not the intent of the state legislature. *Medtronic*, 518 U.S. at 485.

Defendants incorrectly claim that the Conference Report quoted above refers to a different, predecessor bill. U.C.O.B. 35-36. Defendants are evidently unfamiliar with the precise legislative history of 8 U.S.C. §1623. The House passed the Conference Report to IIRIRA on September 25, 1996, by a vote of 305-123.[12] The Conference Report included the tuition language in section 507—which would become the language of 8 U.S.C. §1623.[13] Then, a modified version of the Conference Report (including the same tuition language, but now designated as section 505) was included in the Conference Report to the omnibus spending bill (H.R. 3610).[14] The House passed the conference report to H.R. 3610 on September 28 by a vote of 370-37.[15] The Senate then passed the Conference Report to H.R. 3610 on September 30 by a voice vote.[16] On the same day, President Clinton signed the Conference Report (Pub. L. No. 104-208).[17] The tuition provisions were contained in division C of the Conference Report.[18]

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[12] H.R. Rep. No. 104-879 at 122 (1997).
[13] H.R. Rep. No. 104-828 at 134 (1996).
[14] H.R. Rep. No. 104-863 at 688 (1996).
[15] H.R. Rep. No. 104-879 at 122.
[16] *Id.*
[17] *Id.*
[18] The Conference Report to the IIRIRA of 1996 (H.R. Rep. No. 104-828 at 240) states that "Section 507 – House recedes to Senate amendment section 201(a)(2) with modifications. This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Section 507 became the identical section 505 in the enacted law (negotiations between the Clinton Administration and Congress after the Conference Report was passed resulted in modifications to other sections of the Conference Report). The parallel language of the Senate bill

B. The Defendants' Novel Interpretation of 8 U.S.C. Section 1623 is Contrary to the Intent of Congress

Faced with the plain language of 8 U.S.C. §1623 and the unmistakable intent of Congress that "illegal aliens are not eligible for in-state tuition rates at public institutions of higher education," Conference Report 104-828, H.R. 2202 (Sept. 24, 1996), 6 CT 1412, Defendants must ignore the legislative record in order to concoct an alternative reading of 8 U.S.C. §1623. According to Defendants, Congress was only interested in prohibiting states from using "residence"-based criteria to provide in-state tuition rates to illegal aliens, but was perfectly fine with providing in-state tuition rates to illegal aliens using any other criteria. See C.C.C.O.B. 9-10, U.C.O.B. 34, 37. This is an unsupportable reading of the statutory text, for three reasons.

First, Defendants' theory contradicts every statement in the legislative record of Congress. As recounted above, the uncontroverted record indicates that Congress was concerned with illegal aliens receiving

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(which was replaced by the House language in the final version) was as follows. Section 201(a)(2) of S. 1664 (the Senate bill) stated that "BENEFITS OF RESIDENCE- Notwithstanding any other provision of law, no State or local government entity shall consider any ineligible alien as a resident when to do so would place such alien in a more favorable position, regarding access to, or the cost of, any benefit or government service, than a United States citizen who is not regarded as such a resident." The Committee Report to S. 1664 (S. Rep. No. 104-249 at 22) states that "State and local governments may not treat an ineligible alien as a resident, if such action would treat the alien more favorably than a non-resident U.S. citizen."

in-state tuition rates, under *any* circumstances. "[I]llegal aliens *are not eligible for in-state tuition rates* at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996) (emphasis added), 6 CT 1412. Yet Defendants claim that Congress intended only to stop states from using "residence"-based criteria in giving in-state tuition rates to illegal aliens. Why would Congress be concerned about the particular criteria used by a state in deciding which illegal aliens could receive in-state tuition rates? Congress sought to prevent *any* illegal alien from receiving in-state tuition rates. There is no hint of support for Defendants' interpretation anywhere in the congressional record.

Second, Defendants' interpretation creates a semantic loophole so large that it swallows the rest of the statute. Under this strained reading of 8 U.S.C. §1623, Congress did not mind if a state statute afforded in-state tuition rates to illegal aliens, as long as the word "residence" was avoided. Under Defendants' theory, all a State needs to do in order to avoid liability under 8 U.S.C. §1623 when offering in-state tuition to illegal aliens is to use a phrase that equates to "residence" without actually saying it—such as "attendance at a high school in the state," or "graduation from a high school in the state," or "possession of a driver's license from the state," or "intent to work in the state." The Court of Appeal noted the absurdity of this interpretation, pointing out that under it, a state could evade 8 U.S.C. §1623 simply by "granting in-state tuition to every illegal alien whose parents

maintained a post office box in California." Slip op. 54 n.20. Under Defendants' theory, California has avoided Congress's demands by simply choosing a criterion synonymous with residing in California, namely graduating from a California high school after attending for three years. In other words, Defendants are asking this Court to believe that Congress created a massive loophole in federal immigration law for the convenience of any state willing to play semantic games.

This implausible reading of 8 U.S.C. §1623 violates one of the oldest canons of statutory construction—the whole act rule. Defendants interpret the words "on the basis of residence" extremely narrowly, to mean "by employing a specific requirement that the individual reside in the state for a designated period of time." However, this narrow definition ignores the context of the rest of the statute and the manifest intent of Congress, creating a semantic loophole that defeats the purpose of the act. The whole act rule demands a "holistic" approach when interpreting a statute, taking the entire statute into account, rather than focusing on terms in isolation. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.* (1988) 484 U.S. 365, 371. In addition, the interpreting court must keep the objectives of Congress in mind:

> When "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) *and the objects and policy of the law*, as indicated by its various provisions, and give to it such a

> construction as will carry into execution the will of the Legislature …."

Kokoszka v. Belford (1974) 417 U.S. 642, 650 (*citing Brown v. Duchesne* (1857) 19 How. 183, 194) (emphasis added). The U.S. Supreme Court has specifically cautioned that a court should not read a statute so as to "create a loophole in the statute that Congress simply did not intend to create." *United States v. Naftalin* (1979) 441 U.S. 768, 777. Defendants are asking this Court to do exactly that.

Third, Defendants' theory contradicts the most plausible explanation for the phrasing of 8 U.S.C. §1623. Clearly, Congress intended to prevent states from providing resident tuition rates to illegal aliens. Rather than using the shorter phrase "eligible for resident tuition rates," Congress chose a phrase that conveyed the same meaning, but was more encompassing, in order to prevent states from circumventing federal law by offering illegal aliens resident tuition rates using a different category of benefit (such as "grants" or "scholarships"). Accordingly, the drafters of the text chose the phrase "eligible on the basis of residence within a State … for any postsecondary education benefit." This phrasing was simply a broader way of saying "eligible for resident tuition rates," thereby preventing such evasion. It was broad enough to encompass resident tuition rates, resident fee rates, resident tuition discounts, and scholarships for state residents. In other words, 8 U.S.C. §1623 refers to "residence" in defining the benefit

because Congress was concerned about states offering illegal aliens a particular benefit—*resident* tuition rates. Congress chose the phrase "on the basis of residence within a State" to *define the benefit, not to define a mechanism through which the benefit could not be offered.* Ironically, Defendants now twist Congress's language—which was intended to defeat state evasion—to evade Congress's intent.

C. When a Court is Presented with Two Alternative Readings of a Statute, the Court Must Interpret the Statute so as to Effectuate Legislative Intent

If this Court finds any plausibility in the interpretation of 8 U.S.C. §1623 urged by Defendants, then the intent of Congress must control which interpretation of the statute is the correct one. "The rules of federal statutory interpretation are much the same as those used when construing California statutes. Our primary function is to give effect to Congress's intent." *Black v. Dep't of Mental Health* (2000) 83 Cal.App.4th 739, 747. "We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." *Hernandez v. Ashcroft* (9th Cir. 2003) 345 F.3d 824, 838 (*quoting Bedroc Ltd. v. United States* (9th Cir. 2002) 314 F.3d 1080, 1083). When the intent of Congress is clear, the statute must be interpreted to satisfy the congressional objective *unless the language of the statute absolutely precludes such an interpretation.* See *Johnson v. United States* (2000) 529 U.S. 694, 710 n.10 ("Our obligation is to give effect to congressional purpose so long as the congressional language does not itself

bar that result."). The language of 8 U.S.C. §1623 does not preclude Congress's stated intent: prohibiting states from offering in-state tuition rates to illegal aliens.

D. The Defendants' Interpretation of 8 U.S.C. Section 1623 Would Render it Mere Surplusage

It is a long-standing and fundamental principle of statutory interpretation that courts must not interpret statutes in a fashion that renders them redundant or duplicative—mere "surplusage." Words in a statute "cannot be regarded as mere surplusage." *Potter v. United States* (1894) 155 U.S. 438, 446. "We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." *Beisler v. Commissioner* (9th Cir. 1987) 814 F.2d 1304, 1307. "Such statutory construction is to be avoided." *People v. Hicks* (1993) 6 Cal. 4th 784, 794.

Defendants' interpretation of 8 U.S.C. §1623 would reduce it to a superfluous prohibition of something that was already illegal under federal immigration law. Defendants contend that Congress was only interested in prohibiting states from offering in-state tuition rates to illegal aliens based on the aliens' formal "residence" in the state. Accordingly, they base their defense on the fact that §68130.5 does not use the specific term "resident" when describing eligible aliens, and that California does not confer formal legal "residence" on illegal aliens. U.C.O.B. 26-29.

However, Defendants' reading of 8 U.S.C. §1623 would render that statute mere surplusage, because federal law already prohibited states from describing or acknowledging illegal aliens as "residents" under state law. An alien may establish his or her legal residence in a state only if not otherwise precluded by the Immigration and Nationality Act (INA) from establishing residence in the United States. 8 U.S.C. 1101, *et seq.*; *Elkins v. Moreno* (1978) 435 U.S. 647, 666. The INA expresses Congress's intent that any alien who is in an immigration classification that prohibits permanent residence, and who attempts to establish residence without an adjustment of status, should be deported. *Id.* at 664-65. The eligibility of an alien to establishment residence in the United States is exclusively a matter of federal law. *Martinez v. Bynum* (1983) 461 U.S. 321 (*citing Nyquist v. Mauclet* (1977) 432 U.S. 1); *Carlson v. Reed* (9th Cir. 2001) 249 F.3d 876 (resident tuition denied). Only the federal government may regulate and determine the authorized residence status of aliens. *Gonzales v. City of Peoria* (9th Cir. 1983) 722 F.2d 468, 475. As the California Court of Appeal has held, "We do not interpret the federal immigration statutes... as authorizing, or not precluding, the establishment of domicile here by those whose very presence is unlawful." *Regents of the University of California v. Superior Court* (1990) 225 Cal.App.3d 972, 979 (*Bradford*). In summary, long before 8 U.S.C. §1623 was enacted, it was already impermissible for a state to base a benefit for illegal aliens on their

"residence" in the state, because federal law did not allow a state to recognize an illegal alien's residency. Thus, any California law that referred to a "residency" qualification for illegal aliens was already preempted by federal law, long before Congress enacted 8 U.S.C. §1623 in 1996. Therefore, 8 U.S.C. §1623 would be redundant under the residence-focused interpretation suggested by Defendants.

E. California Education Code Section 68130.5 Makes an Illegal Alien "Eligible on the Basis of Residence Within a State"

Assuming, *arguendo*, that the untenable reading of 8 U.S.C. §1623 urged by Defendants is correct—that Congress was only concerned with prohibiting a state from using residency as a criterion when offering this benefit to illegal aliens—§68130.5 would still be preempted. According to the terms of §68130.5, an illegal alien must satisfy four requirements in order to receive resident tuition rates: (1) attendance at a California high school for three years, (2) graduation or a GED, (3) registration after a certain date, and (4) "the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so." §68130.5(a). For five reasons, it is clear that these requirements operate within California law to effectively afford in-state tuition rates to illegal aliens on the basis of the aliens' *residence* in the state.

First, California law explicitly links high school attendance and residence in the state. In this way, high school attendance in California serves as a de jure proxy for residence in California. As the Court of Appeal noted, California Education Code §48200 requires that a pupil attend school in the district wherein the parent resides. Slip op. 48. "Each person ... shall attend the public full-time day school or continuation school or classes ...of the school district in which the residency of either the parent or legal guardian is located...." § 48200. The courts of California have recognized this statutory relationship between residence and school attendance. "Section 48200 embodies the general rule that parental *residence* dictates a pupil's proper school district. ... Section 48200 'generally requires that children attend school in the district where the *residence* of either the parent or legal guardian is located.'" *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57 (emphasis added). As the Court of Appeal below summarized, "a school district is generally linked to residence." Slip op. 48.

It is important to recognize that this is the "general rule." There may be some exceptional instances in which a person residing outside of California pays fees to a California public high school in order to send his child to school there. Defendants make a great deal about a relatively small number of students who reside in bordering U.S. states but attend California high schools under reciprocity agreements. C.C.C.O.B. 11.

However, such cases are infrequent and unusual deviations from the general rule recognized by California courts, that "residence dictates a pupil's proper school district." *Id.* As the Court of Appeal below noted, "[W]e suspect, and a liberal construction of plaintiffs' complaint is that plaintiffs allege, the vast majority of students attending California high schools for three years live in California." Slip op. 52. The Enrolled Bill Report of the Office of the Secretary of Education estimated that "the number of border area students in California who are expected to qualify for a nonresident tuition exemption under the provisions of this bill [AB 540] is expected to be less than 500." Slip op. at 52-53. Defendants agree with this estimate. C.C.C.O.B. 11.

Second, the structure of §68130.5 operates to make high school attendance a surrogate requirement for residence in the state. "The wording of the California statute, requiring attendance at a California high school for three or more years, creates a de facto residence requirement." Slip op. 53. Even if there were no de jure link between residence and high school attendance under California law, there is an undeniable de facto link. *Id.* *Physical presence in California* is necessary to satisfy §68130.5, which requires: "High school *attendance in California* ...." §68130.5(a)(1) (emphasis added). One cannot attend high school in California, i.e., be physically present in the classroom, unless one is physically present in California. For an illegal alien, physical presence is the *de facto* equivalent

to "residence" in California. As noted above, federal law prohibits a state from legally acknowledging an illegal alien's "residence" in the state. 8 U.S.C. 1101, *et seq.*; *Elkins v. Moreno* 435 at 666. However, if the State of California requires an illegal alien to be "in California" at any point in time, then the state has effectively established a surrogate criterion for residence. That is precisely what the physical presence requirements of §68130.5(a)(1) achieves.

Third, the stated intent of the California legislature was to provide in-state tuition rates to illegal aliens on the basis of their *residence* in California. "That section 68130.5 was intended to benefit illegal aliens living in California is also apparent in the cognizable legislative history of section 68130.5." Slip op. 57. The official Higher Education Committee Analysis of the bill described AB 540 (which would become §68130.5) as a measure that "[q]ualifies long term California *residents*, as specified, regardless of citizenship status, for lower 'resident' fee payments...." Concurrence in Senate Amendments of AB 540 (2001-2002 Reg. Sess.) as amended September 7, 2001, p. 1 (emphasis added), 1 CT 66. "According to the author, ...the majority of these students consider California their *home*...." *Id.* at 3. (emphasis added),1 CT 68. The same summary appeared elsewhere in the legislative history, as the Court of Appeal noted. Slip op. 58 (citing Sen. Rules Com., Off. of Sen. Floor Analyses, Assem. Bill No. 540 (2001-2002 Reg. Sess.) Sept. 7, 2001, p. 1). The Higher

Education Committee Analysis's reference to the fact that the bill "[q]ualifies long-term California residents" for in-state tuition rates is particularly salient. As the Court of Appeal put it, "This description, which admits an intent to benefit residents, is telling." Slip op. 58. Even the legislative findings accompanying AB 540 reflected this legislative intent to give benefits to aliens who are de facto residents of California. The bill's intended beneficiaries were "high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain." AB 540 (2001-2002 Reg. Sess.) §1(a)(1).

After §68130.5 was enacted, at the urging of the U.C. Regents, the California legislature began deliberating on AB 1543 (which would become §68130.7). §68130.7 attempts to shield Defendants from financial liability for violating federal law. Importantly, the official legislative report describing the California Legislature's understanding of the prior law, §68130.5, stated that California law was providing in-state tuition to illegal aliens on the basis of *residence* in the state: "Existing law qualifies specified *long-term California residents*, regardless of citizenship status, for lower 'resident' fees at CSU and CCC." Concurrence in Senate Amendments, AB 1543 (2001-2002 Reg. Sess.) as amended January 24, 2002, p. 1 (emphasis added); slip op. 60-61. Plainly, the legislative history of §68130.5, and its companion §68130.7, indicates that the law was understood to provide benefits to "long-term California residents." The

Court of Appeal reviewed these official legislative statements and properly held that "section 68130.5 does, and was intended to, benefit illegal aliens on the basis of residence in California." Slip. op. 61.

Fourth, Governor Gray Davis concluded that the precursor to §68130.5—AB 1197, which was identical to AB 540 in all relevant respects—operated on the basis of residence within the state, and was prohibited by 8 U.S.C. §1623. "Undocumented aliens are ineligible to receive postsecondary education benefits based on state *residence*.... IIRIRA would require that all out-of-state legal residents be eligible for this same benefit." Governor's Veto Message, AB 1197 (emphasis added), 1 CT 59-60. Clearly, Governor Davis regarded the criteria for receiving in-state tuition under AB 540 and AB 1197 as criteria that awarded benefits "based on state residence."

Fifth, prior to the commencement of this lawsuit, the General Counsel of the U.C. Regents opined that §68130.5 operated on the basis of residence. "Given the apparent intent of Congress, we believe there is a substantial risk that a court would conclude that AB 540 provides undocumented students eligibility for resident fees *on the basis of state residence* and that the effect of the IIRIRA is to require that *all* U.S. citizens must also be eligible for resident fees without regard to their state residence." James E. Holst, General Counsel, Letter to the U.C. Regents, Nov. 9, 2001, p. 4 (emphasis added), 6 CT 1586, fn. 3.

F. A State Cannot Sweep Aside Federal Preemption by Legislative Fiat

Ignoring this overwhelming evidence of the California Legislature's intent, Defendants insist that the California Legislature was not intending to confer "residence" on illegal aliens, when it enacted §68130.5. C.C.C.O.B. 14; U.C.O.B. 9-10. They argue that since the legislature issued a finding declaring that the bill "does not confer postsecondary education benefits on the basis of residence with the meaning of Section 1623," that settles the matter. C.C.C.O.B. 14 (quoting AB 540 (2001-2002 Reg. Sess.) § 1(a)(5). Defendants imagine that the state legislature has insulated itself against a federal preemption challenge by simply declaring that no conflict with federal law exists. This argument is so obviously incorrect that it almost needs no reply. A state legislature cannot simply make federal preemption go away through legislative fiat.

The Court of Appeal also addressed this point, correctly noting that "the Legislature's statement in this case was not a finding of fact, but a legal conclusion." Slip op. 54. When deciding matters of constitutional law, courts need not defer to such legislative legal assertions. *Id.* at 55 (*citing Professional Engineers v. Dept. of Transportation* (1997) 15 Cal.4th 543, 569). The Court of Appeal also noted that the Legislature undermined this legal assertion in the same findings. The Legislature stated that the beneficiaries of §68130.5 "have attended elementary and secondary schools

in this state and *are likely to remain.*" AB 540 §1(a)(1) (emphasis added). The Legislature also referred to the bill as a "fair tuition policy for all high school pupils *in California.*" *Id.* §1(a)(3) (emphasis added). As the Court of Appeal correctly surmised, this "reflects an intent to benefit illegal aliens living in California." Slip op. 55.

G. Under 8 U.S.C. Section 1623, "Residence" Means Physical Presence

It is to federal law, not state law, that this Court must look in interpreting the word "residence" in 8 U.S.C. §1623. As it happens, the term "residence" is precisely defined in the same title of federal law: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, *actual dwelling place in fact*, without regard to intent." 8 U.S.C. §1101(a)(33) (emphasis added). One's place of legal residence under California law (which is defined in part by intent, see slip op. 44) is irrelevant for the purposes of defining the terms of 8 U.S.C. §1623.[19] Under 8 U.S.C. §1101(a)(33), the term "residence" in 8 U.S.C. §1623 refers simply to the place where the alien "actually" is "in fact"—to his *physical presence*. Congress's use of the terms "actually" and

[19] Defendants argue at length that §68130.5 does not confer formal, legal "residence" on illegal aliens, U.C.O.B. 26-29. They also state that "physical presence within the state solely for educational purposes" does not suffice to establish residence under California regulations. C.C.C.O.B. 11-12 (quoting Cal. Code Regs., tit. 5, §54022). These arguments are largely beside the point. The relevant preemption question is not what California's legal definition of "residence" may be; but what Congress meant by the word "residence" in 8 U.S.C. §1623.

"in fact" leave no doubt as to the federal statute's emphasis on physical presence. Under federal, and particularly under 8 U.S.C. §1623, physical presence is determinative. "A resident is so determined from the physical fact of that person's living in a particular place." *Rosario v. INS* (2d Cir. 1992) 962 F.2d 220, 224(citing 8 U.S.C. §1101(a)(33).

Applying this definition to the case at bar, we see that *physical presence in California* is necessary to qualify for the benefits of section 68130.5, which requires: "High school attendance *in California* ...." §68130.5(a)(1). It is impossible to attend high school in California without being physically present in California. Therefore, §68130.5 does allocate benefits to illegal aliens on the basis of "residence," as that term is defined in Title 8 of the U.S. Code.

H. Offering In-State Tuition to a Small Group of U.S. Citizens Under Section 68130.5 Does not Satisfy 8 U.S.C. Section 1623

Finally, Defendants argue that because some postsecondary education institutions in California have applied §68130.5 to benefit a few narrow categories of U.S. citizens (while others have not), this suffices to satisfy the requirements of 8 U.S.C. §1623. U.C.O.B. 25-26, 34. The fatal flaw in Defendants' argument is that it ignores the phrasing of 8 U.S.C. §1623, which makes clear that *all* U.S. citizens must receive in-state tuition rates if a state confers that benefit on any illegal alien. Conferring the benefit on a few U.S. citizens who meet certain requirements is not enough.

8 U.S.C. §1623 bars states from offering in-state tuition rates to an illegal alien "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.

Two aspects of the statute's phrasing confirm that *all* U.S. citizens must be eligible for in-state tuition rates in order to satisfy 8 U.S.C. §1623. First, Congress made clear that a state would have to cease considering the state residency of U.S. citizens altogether when determining tuition rates. "Without regard to whether the citizen or national is such a resident" plainly conveys that condition. Second and more importantly, the text indicates that all U.S. citizens must be entitled to the "benefit" itself, not merely an opportunity to qualify for the benefit. *Only a benefit can have "an amount, duration, and scope."* An opportunity to meet certain criteria does not have "an amount, duration, and scope." In other words, Defendants cannot satisfy federal law by claiming that U.S. citizens also have the opportunity to meet the various requirements of §68130.5, and perhaps receive the benefit if they successfully jump through the requisite hoops. 8 U.S.C. §1623 requires that all U.S. citizens must be given the *benefit, itself.* As the General Counsel of the U.C. Regents himself correctly stated, prior to this litigation: "the effect of the IIRIRA is to require that *all* U.S. citizens must also be eligible for resident fees without

regard to their state residence." James E. Holst, Letter, *supra* (emphasis added).

I. Defendants Find no Shelter in the Canons of Statutory Construction

As explained above in Sections I.B. and I.D., two canons of statutory construction, the whole act rule and the canon against the creation of surplusage, strongly support a reading of 8 U.S.C. §1623 that prohibits the enactment and implementation of §68130.5. Defendants offer no answer to either of these flaws in their suggested reading of 8 U.S.C. §1623. Instead, they feebly attempt to formulate a surplusage argument of their own. Their effort is unavailing.

Defendants claim that Plaintiffs' interpretation of 8 U.S.C. §1623 would render the phrase "on the basis of residence" meaningless. U.C.O.B. 34-35. The answer to this argument has already been stated above. See Section I.B., *supra*. Congress inserted those words to *define the benefit* that was being proscribed (*resident* tuition), not merely to define a criterion that states cannot use when offering the benefit. The phrase "eligible on the basis of residence within a State ... for any postsecondary education benefit" is simply a broader way of saying "eligible for resident tuition rates." The phrasing selected by Congress was broad enough to encompass resident tuition rates, resident fee rates, resident tuition discounts, and the like.

The Court of Appeal offered a second answer to Defendants strained surplusage argument: "To the contrary, our conclusion gives realistic effect to the phrase in the federal statute, resulting in preemption of the state statute which confers a benefit on the basis of residence." Slip op. 66. For both reasons, the words are not rendered surplusage. Defendants have offered no plausible interpretation of 8 U.S.C. §1623 that can be squared with the canons of statutory construction and with the evidence of congressional intent.

II.

SECTION 68130.5 IS EXPRESSLY PREEMPTED BY 8 U.S.C. SECTION 1621

There is an additional and independent source of express preemption of §68130.5 found in 8 U.S.C. §1621, which prohibits the offering of "State or local public benefit[s]" to aliens unlawfully present in the United States. 8 U.S.C. §1621(a). (Such aliens are not "qualified aliens," as the term is defined in 8 U.S.C. §1641.) The proscribed "public benefits" include "any... *postsecondary education*... or any other similar benefit 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) (emphasis added). 8 U.S.C. §1621 bars any state from making illegal aliens eligible for postsecondary education benefits unless the state meets the

specific conditions of the safe harbor provided by 8 U.S.C. §1621(d) and "affirmatively provides for such eligibility." As explained below, §68130.5 fails to meet those conditions.

A. Section 68130.5 Confers a Postsecondary Education Benefit within the Meaning of 8 U.S.C. Section 1621

In the Court of Appeal below, Defendants advanced the tenuous argument that taxpayer-subsidized resident tuition rates did not constitute a "postsecondary education ...benefit" within the meaning of 8 U.S.C. §1621. In four pages of analysis, the Court of Appeal thoroughly rejected this claim. Slip op. 39-42. Now Defendants offer only one footnote in defense of their position and say that they will "assume for the purposes of argument" that the Court of Appeal was correct. U.C.O.B. 17-18 n.8. They then presumptuously instruct this Court that it "should reserve the question of what types of benefits meet the definition set forth in Section 1621." *Id.* Plaintiffs respectfully suggest that to dissect the preemption challenge in this manner (and reserve such an easily-disposed-of argument) would waste the valuable time of this Court and all parties. It would also needlessly attenuate this litigation. Plaintiffs therefore will respond to Defendants' argument that "an exemption from nonresident tuition does not entail the provision of 'payments or assistance... to an individual.'" *Id.*; C.C.C.O.B. 24 n.13. Defendants' unsupported assertion is that only "direct income support payments or services" or "grant payments" qualify as

postsecondary education benefits under 8 U.S.C. §1621. C.C.C.O.B. 24 n. 13. They are wrong for four reasons.

First, as the Court of Appeal noted, there is an "or" between the phrases "postsecondary education" and "any other similar benefit for which payments or assistance are provided" in 8 U.S.C. §1621(c)(1)(B). Therefore, normal rules of English usage would prevent "for which payments or assistance are provided" from modifying "postsecondary education." As the Court of Appeal correctly observed, "defendant's modification theory is implausible." Slip op. 39. Defendants offer no response to this point.

Second, even if the "payments or assistance" phrase were read to modify "postsecondary education" the language of the federal statute would not support Defendants' argument. Congress barred "postsecondary education ... payments or assistance." 8 U.S.C. §1621(c). If Defendants were correct, Congress simply would have said "payments." Respondents' interpretation once again runs into a surplusage problem; the words "or assistance" become meaningless. Defendants ask this Court to read the words "or assistance" out of federal law. The only interpretation that gives meaning to "or assistance" in 8 U.S.C. §1621(c) is a definition of postsecondary education benefits that includes assistance that is *not in the form of payments*. Reduced resident tuition rates are the paradigmatic form of such "assistance."

Third, Defendants fail to address the only federal judicial decision rendered in the State of California that has interpreted 8 U.S.C. §1621, *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1997), 997 F.Supp. 1244 (*LULAC II*). In that case, the court interpreted the scope of 8 U.S.C. §1621 in sweeping terms, holding that it extended to "*substantially all* public benefits." *Id.* at 1261. (emphasis added). Indeed, the court interpreted the term "benefits" to include many things beyond the narrow category of "payments" to which Defendants would limit it. For example, the court noted that "basic public education clearly must be classified as a government benefit, just as health care is...." *Id.* at 1255. The cramped and narrow definition that Defendants suggest simply cannot be reconciled with *LULAC II.*

Fourth and finally, where Congress uses the same term in two statutes in the same substantive area, courts must assume that the term means the same thing in both statutes. *Sullivan v. Stroop* (1990) 496 U.S. 478, 484. Because there the legislative record establishes unequivocally that Congress was referring to resident tuition rates when it used the term "benefit" in 8 U.S.C. §1623, the same meaning must be ascribed to "benefit" in 8 U.S.C. §1621. As noted above, the Conference Report accompanying the former made clear that in-state tuition was the benefit at issue: "This section provides that illegal aliens are not eligible for *in-state tuition rates* at public institutions of higher education." Conference Report

104-828, H.R. 2202 (emphasis added). Defendants have provided no legislative history whatsoever suggesting that Congress was concerned about some other benefit.[20]

B. Section 68130.5 Does not Meet the Safe Harbor Requirements of 8 U.S.C. Section 1621(d)

When it enacted 8 U.S.C. §1621, Congress created a narrow safe harbor, allowing a state to provide a public benefit to illegal aliens only if the state meets the conditions of 8 U.S.C. §1621(d) and "affirmatively provides" for such eligibility. However, the phrase "affirmatively provides" is subject to different interpretations. When ambiguity exists, a Conference Report is the most authoritative type of legislative history available. "[C]onference reports are the most persuasive evidence of legislative intent, after the statute itself." *Austin v. Owens-Brockway Glass Container, Inc.* (4th Cir. 1996) 78 F.3d 875, 881 (4th Cir. 1996); *INS v. Phinpathya* (1984) 464 U.S. 183, 204. Fortunately, the Conference Report accompanying the PRWORA explained precisely what this term means:

> Only the affirmative enactment of a law by a state legislature and signed by the Governor after the date of enactment of this Act, that *references this provision* [8 U.S.C. §1621], will meet the requirements of this section. The phrase 'affirmatively provides for such eligibility' means that the State law enacted *must* specify that *illegal aliens* are eligible for State or local benefits.

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20 The trial court specifically found that in-state tuition was a public benefit. (23 CT 6540

Conference Report 104-725 on H.R. 3734, at 383 (July 31, 1996); slip op. 69 (emphasis added).

Thus, the phrase "affirmatively provides" entails two requirements: the state law must makes specific reference to §1621(d) and must specify that "illegal aliens" are eligible for the benefit. §68130.5 meets neither of these requirements. The Court of Appeal correctly held that "the California Legislature has not met the requirements of title 8 U.S.C. section 1621's 'safe harbor' or 'savings clause.'" Slip. op. 71.

1. Defendants' Interpretation Renders "Affirmatively" Meaningless

Defendants would have this Court ignore the Conference Report entirely. They claim, implausibly, that "affirmatively provides" simply means "expressly states." U.C.O.B. 19. In other words, according to Defendants, the state law must express what it intends to do, rather than imply what it intends to do. Evidently, Defendants think Congress was worried about states offering public benefits by mistake. Defendants offer no applicable case support for this novel theory. Instead, they offer a preposterous "see" citation to *Mora v. Hollywood Bed & Spring* (2008) 164 Cal.App.4th 1061, 1069. U.C.O.B. 19. *Mora* did not concern what it means for a *state legislature* to "affirmatively provide." Rather it was a case concerning "affirmative instruction issued by [an] *employer* prior to the time of the employee's physical injury or death." *Id.* at 1068 (emphasis

added). Affirmative instructions by private employers bear little relevance to what it means for a legislature to "affirmatively provide" benefits. The case is completely inapposite.

Under Defendants' interpretation, "affirmatively provides" would mean the same thing as "provides." This violates the rules of statutory construction by rendering the term "affirmatively" mere surplusage. As the Court of Appeal correctly held, "[S]omething more is required." Slip. op 69.

Defendants also suggest that Congress wished to prevent states from providing benefits to illegal aliens through "a law of general application." U.C.O.B. 19. However, if that were the case, Congress would have said "specifically provides" rather than "affirmatively provides." Here, *Defendants confuse specificity with the affirmations*. Congress chose the unusual phrase "affirmatively provides," for a reason. Congress sought to create a general statutory prohibition against offering public benefits to illegal aliens. To get around this prohibition, a state would not only have to acknowledge the controlling federal statute, it would have to use the federal statutory term "illegal alien" in its legislation—a term that would clearly put the public on notice.

Clearly, Defendants' theory that "affirmatively provides" means nothing more than "expressly states" is far from airtight. Plaintiffs concede that the language is subject to multiple interpretations. Yet Defendants

repeatedly and implausibly insist that their theory reflects the statute's "plain meaning," because they do not wish to address the Conference Report. U.C.O.B. 22. The Conference Report explained what the meaning of "affirmatively" is; and that meaning does not support §68130.5.

2. Defendants Trivialize the References Demanded by Congress

Defendants deride the Conference Report's explanation of Congressional intent, comparing the explicit references demanded by Congress to "magic words." U.C.O.B. 22. What Defendants fail to recognize is that these requirements are not trivial formalities. As the Court of Appeal held:

> The federal law forces any state that is contemplating the provision of benefits to illegal aliens to spell out that intent publicly and explicitly. Doing so places the public on notice that their tax dollars are being used to support illegal aliens. It is a matter of democratic accountability, forcing state legislators to take public responsibility for their actions.

Slip op. 70. Any state law providing public benefits to illegal aliens must explicitly spell out that intent, in terms that voters will understand. As the Court of Appeal correctly observed, §68130.5 attempts to defeat this congressional objective and "does its best to conceal the benefit to illegal aliens." Slip op. 70. The Court of Appeal went through §68130.5 section by section and explained how a member of the public might conclude that it either benefits no aliens at all, or that it only benefits those who are in the process of becoming legalized. *Id.* Defendants offer no response.

Defendants also assert that the term "illegal alien" means nothing special, and that it is the equivalent of "undocumented immigrant." U.C.O.B. 23. Defendants would do well to familiarize themselves with the details of federal immigration law. "Illegal alien" is a term used repeatedly throughout Title 8. *See, e.g.*, 8 U.S.C. §1252(c); 8 U.S.C. §1356(r)(3)(ii); 8 U.S.C. § 1366. The term "undocumented immigrant" is found *nowhere* in federal law. Contrary to Defendants' assertion, Congress does attach significance to the term. Moreover, as the Court of Appeal noted, "defendants do not cite any authoritative definition of the term and do not support their assertion that the terms 'undocumented immigrant' and 'illegal alien' are interchangeable." Slip op. 3, n.2. Defendants still have not done so.

The meaning of 8 U.S.C. §1621(d) was recently addressed by the Florida Court of Appeals. That Court came to the conclusion that it requires a state legislature to use the term "illegal alien":

> Having determined that BSCI Program services constitute state public benefits under PRWORA, the question becomes whether the Florida Legislature, pursuant to section 1621(d) of the Act, has affirmatively provided that illegal aliens are eligible for such services. We conclude that it has not. The Legislature created the BSCI Program in 1994. ...At no time since August 22, 1996, the date provided for in section 1621(d), has the Legislature enacted a law specifying that *illegal aliens* are eligible for the BSCI Program. While the Legislature is certainly free to do so in the future, the law as it currently stands does not affirmatively provide for such eligibility.

Dep't of Health v. Rodriguez (Fla. App. 2009), 5 So. 3d 22, 26 (emphasis added). Defendants fail to mention this recent case law.

3. *Kimbrough* and *Vasquez* Offer No Support for Defendants

Defendants cite the case of *Kimbrough v. United States* (2007) 128 S. Ct. 558 to suggest a court should never interpret ambiguous statutory text to impose requirements. U.C.O.B. 20. Defendants misapply *Kimbrough*, however. In that case, "[t]he statute, by its terms, mandates only maximum and minimum sentences" and said nothing about the appropriate sentence within those limits. 128 S. Ct. at 571. The Court declined to read into this statutory *silence* requirements that were not present. *Id.* In contrast, the case at bar does not involve the imposition of "extra" requirements upon legislative silence. The question is how to give meaning to Congress's phrase "affirmatively provides." The *Kimbrough* Court was not attempting to interpret an ambiguous phrase; it was simply declining to read a requirement into a statute where there were *no statutory words whatsoever* to support the existence of a requirement. *Id.* at 570-72.

Defendants' attempt to find support in *Vasquez v. State* (2008) 45 Cal.4th 243, is equally flawed. U.C.O.B. 20. The *Vasquez* case did not involve the interpretation of any words in the statute. *Id.* at 251-53. The defendants in *Vasquez* asked this Court to create a pre-litigation settlement attempt requirement for an award of attorney's fees when *nothing* in the state statute indicated that there should be one. *Id.* at 251. In addition,

nothing in the *legislative history* of the statute indicated that such a requirement was intended. *Id.* In contrast, the case at bar involves the meaning of words that actually appear in a federal statute, in light of a Conference Report that undeniably seeks to impose two requirements upon state legislatures.

III.

SECTION 68130.5 IS UNCONSTITUTIONAL THROUGH IMPLIED PREEMPTION UNDER *DE CANAS V. BICA*

In addition to the express preemption claims discussed above, §68130.5 is displaced through implied preemption. This claim is in no way dependent upon the outcome of the express preemption claims. And, contrary to Defendants' assertion, U.C.O.B. 38, the U.S. Supreme Court has made clear that the existence of express preemption language in federal law does not diminish the application of conflict preemption principles. *Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 869.

The U.S. Supreme Court laid out a three-part test for implied preemption in immigration law in the landmark case of *De Canas v. Bica* (1976) 424 U.S. 351. Under the *De Canas* test a state law is preempted (1) if it constitutes a "regulation of immigration," *id.* at 355, (2) if the federal government has completely occupied the field so as to complete displace state activity in the area, *id.* at 357, or (3) if the "state legislation ... burdens or conflicts in any manner with any federal laws or treaties." *Id.* at 358.

The Court of Appeal correctly held that §68130.5 is impliedly preempted under the second and third prongs of the *De Canas* test: through field preemption and conflict preemption. Slip op. 62-67.

A. Field Preemption Has Occurred

The Court of Appeal observed that "Congress manifested a clear purpose to oust state power with respect to the subject matter which [§68130.5] attempts to regulate." Slip op. 62. The Court drew support from the U.S. District Court for the Central District of California—the only federal court to have addressed whether or not the PRWORA constitutes field preemption in the field of postsecondary educational benefits for illegal aliens. *LULAC II*, 997 F.Supp. 1244. Such federal court decisions guide the interpretation of federal law in California state courts. "[S]tate courts are to be guided by existing federal interpretations [of federal law]...." *In re Jose C.* (2009) 45 Cal. 4th 534, 548 (*citing Tafflin v. Levitt* (1990) 493 U.S. 455, 464). See also *Etcheverry v. Tri-Ag Serv.* (2000) 22 Cal. 4th 316, 320-321 ("While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight.").

As the *LULAC II* Court held, California's Proposition 187 was preempted because "[t]he intention of Congress to occupy the field of regulation of government benefits to aliens is declared throughout Title IV of the [PRWORA]." 997 F.Supp. at 1253. "Because the [PRWORA] is a

comprehensive scheme that restricts alien eligibility for all public benefits, however funded, the states have *no power to legislate in this area.*" *Id.* at 1255 (emphasis added). §68130.5 plainly operates on the field of alien eligibility for public postsecondary education benefits, and is therefore field preempted.

Defendants' only response to the field preemption holding of the Court of Appeal is to note that Congress "granted the states some discretion" in the safe harbor provision of 8 U.S.C. §1621(d). Therefore, they declare, field preemption is "meaningless." C.C.C.O.B. 23. What Defendants fail to recognize is that in the specific field of alien eligibility for public postsecondary education benefits, Congress has imposed multiple statutory layers, over and above 8 U.S.C. §1621(d). Congress also enacted the prohibition of 8 U.S.C. §1623, specifically adding that it was binding on states "[n]otwithstanding any other provision of law." In other words, in the specific field of alien eligibility for public postsecondary benefits, Congress has said that meeting the safe harbor of 8 U.S.C. §1621(d) is not enough. "Congress has occupied the field of regulation of public postsecondary education benefits to aliens. ...Because the [IIRIRA] defines alien eligibility for postsecondary education, it also manifests Congress' intent to occupy this field." *LULAC II*, 997 F.Supp. at 1256 (*citing* 8 U.S.C. §1623). Therefore, §68130.5 is field preempted.

B. Section 68130.5 is Conflict Preempted in Four Ways

The third form of implied preemption under *De Canas*—"conflict preemption"—occurs where the state law is "unconstitutional because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA." *De Canas*, 424 U.S. at 363 (*quoting Hines*, 312 U.S. at 67). In addition, "[c]onflict preemption occurs when ... it is not 'possible to comply with the state law without triggering federal enforcement action.'" *Incalza v. Fendi* (9th Cir. 2007) 479 F.3d 1005, 1009-10 (*quoting Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 540). §68130.5 is conflict preempted in four distinct ways.

1. Conflict with the Alien's Unlawful Presence

Section 68130.5 is a textbook case of conflict preemption, from the perspective of its illegal alien beneficiaries. By its own terms, §68130.5 makes it impossible for an illegal alien to enjoy its benefits while complying with federal law. See slip op. 63-64. The first clause of § 68130.5 *excludes* from the benefits of the law any "nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code." Cal. Ed. Code. §68130.5(a). This "paragraph" consists of fifteen dense pages of the U.S. Code defining every class of temporary visa holder that can be lawfully present in the United States. In other words, a holder of any lawful student visa is expressly excluded from the benefits of §68130.5. *See, e.g.*, 8 U.S.C.

§§1101(a)(15)(F,J,M). Therefore, only an *illegal* alien can enjoy in-state tuition rates under §68130.5. Moreover, the alien must continue to remain in the United States and attend a California public postsecondary institution in violation of federal law in order to receive those benefits. Attending classes at a California university requires the illegal alien to be physically present at the university, and therefore physically present in the United States.[21] Receiving benefits under §68130.5 and following federal law is therefore an "impossibility" for an alien. This is, *ipso jure*, conflict preemption.

"[S]tates cannot, inconsistently with the purpose of Congress, conflict or interfere with ... the federal law." *Hines*, 312 U.S. at 66. Because §68130.5 creates a powerful financial incentive for illegal aliens to remain in California in violation of federal law, it is conflict preempted. "[C]onflict preemption occurs 'where the state law mandates or places irresistible pressure on the subject of the regulation to violate federal law....'" *Planned Parenthood v. Sanchez* (5th Cir. 2005) 403 F.3d 324, 336 n.57 (*quoting Wells Fargo Bank of Tex. v. James* (5th Cir. 2003) 321 F.3d 488, 491 n.3). California's law undermines federal law by giving the

[21] Although a student might be permitted to take some courses remotely or to spend a semester abroad, a minimum period of physical presence at the institution is generally required for degree candidates. In any event, Defendants do not claim that the more than 25,000 alien beneficiaries of §68130.5 are not present in California.

illegal alien recipient of resident tuition rates a powerful financial incentive to continue remaining unlawfully present in the United States.

The Ninth Circuit has explained the operation of implied conflict preemption in the immigration context, in a cases assessing whether a California fair employment statute conflicted with federal immigration laws. *Incalza v. Fendi, supra* 479 F.3d 1005. If adhering to state law places the alien in a position that is likely to "trigger[] federal enforcement action," then conflict preemption occurs. *Id.* at 1009-10. In the present case, for an illegal alien, simultaneous compliance with the INA and receiving benefits under §68130.5 is an impossibility. If he attends a California post-secondary institution, then he remains unlawfully present in the United States in violation of federal immigration law. His continuing unlawful presence is sufficient to trigger federal enforcement action. If, on the other hand, he obeys federal immigration laws and returns to his country of origin, then he cannot avail himself of the benefit of §68130.5. Thus, it is impossible for an illegal alien to receive the benefits of the statute while complying with federal law—a clear case of implied conflict preemption. *Incalza*, 479 F.3d at 1009-10.

Defendants offer no answer whatsoever to this particular conflict preemption problem. See U.C.O.B. 37-39; C.C.C.O.B. 16-21. Indeed, C.C.C. Defendants seem oblivious to the issue, and their own arguments reinforce Plaintiffs' position. C.C.C. Defendants declare that it is their

intention to cause illegal alien beneficiaries of §68130.5 to *remain in the United States*. In their words, "From the State's perspective, it is important to realize that illegal immigration is simply a reality. ...[T]he statute is designed to make those already present productive members of society." C.C.C.O.B. 19-20. They also declare the state's desire to "encourage[e] the undocumented immigrants who have already immigrated here to become self-reliant through education and by requiring them to legalize their status." C.C.C.O.B. 21. This statement reflects Defendants' ignorance of immigration law. As explained below, under current federal law there is no such path for these beneficiaries to "legalize their status."[22] More importantly, the state of California cannot unilaterally declare that "illegal immigration is simply a reality" and that it desires illegal aliens to remain in the United States. Federal law requires aliens who are unlawfully present in the United States to depart the United States. Thus, §68130.5 undermines congressional objectives and "frustrate[s] the express public policy against an alien's unregistered presence in this country." *Immigration & Naturalization Service v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1047.

Defendants also make an erroneous reference to federal law in support of their claim that §68130.5 encourages self-sufficiency. They claim that it is Congress's objective to make aliens self-sufficient, referring

[22] See full analysis at Section IV.F.2., *infra*.

to 8 U.S.C. §1601(1)-(2). C.C.C.O.B. 16-18. However in reading this statutory language, they confuse illegal aliens with aliens who are lawfully present in the United State. The self-sufficiency language of 8 U.S.C. §1601(1)-(2) refers not to illegal aliens, but to aliens who are lawfully present in the United States. Illegal aliens are discussed in 8 U.S.C. §1601(6)-(7). By definition, aliens unlawfully present in the United States are not supposed to remain in the United States, regardless of whether they are self sufficient or not.

2. Conflict with 8 U.S.C. Section 1324(a)(1)(A)(iv)

Under 8 U.S.C. §1324(a)(1)(A)(iv), it is a crime for any person to "encourage... an alien to ... reside in the United States, knowing or in reckless disregard of the fact that such ... residence is or will be in violation of law." See slip op. 64. When Defendants and other officials at California universities and community colleges either passively or actively encourage illegal aliens to seek admission, they violate this federal law. Nonresident tuition eligibility is an extremely valuable financial incentive. In the U.C. system, it is currently worth more than $19,000 per year (and climbing).[23] Thus, Defendants are offering illegal aliens a reward worth more than $75,000 (over the course of a four year degree) to continue violating federal immigration laws. This behavior constitutes strong *encouragement* to

[23] See http://registrar.berkeley.edu/Registration/feesched.html#undergrad.

remain in the United States illegally, in potential violation of 8 U.S.C. §1324(a)(1)(A)(iv).

The federal courts have interpreted 8 U.S.C. §1324(a)(1)(A)(iv) broadly. In *U.S. v.* (4th Cir. 1993), 982 F.2d 133, the Fourth Circuit concluded that it was a crime under that provision of law to take any actions that "convince the illegal alien to … stay in this country." *Id.* at 137. The offer of more than $75,000 in taxpayer-subsidized tuition is certainly an action that might convince an illegal alien to stay in this country to attend a California postsecondary institution. Defendants will argue that they must implement §68130.5 because of their official positions in the California postsecondary educational systems. However, by encouraging illegal aliens to remain unlawfully present in the United States, Defendants potentially violate 8 U.S.C. §1324(a)(1)(A)(iv).

Regardless of whether Defendants are actually in direct violation of the statute, under preemption analysis there is an obvious conflict between the implementation of §68130.5 and the congressional objective underlying 8 U.S.C. §1324(a)(1)(A)(iv). Accordingly, §68130.5 is preempted. Any state law that presents an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. 424 U.S. at 363 (emphasis added). "Obstacle pre-emption turns on whether the goals of the federal statute are frustrated by the effect of the state law." *Pharm. Research & Mfrs. of Am. v. Walsh* (2003) 538 U.S. 644, 679. It is the

general objective of Congress to prohibit activities that encourage or induce illegal aliens to remain in the United States. Defendants' offer of valuable in-state tuition rates to illegal aliens who qualify under §68130.5 plainly frustrates that congressional objective.

3. Conflict with 8 U.S.C. Section 1601(6)

The Court of Appeal also held that §68130.5 is impliedly preempted because of its conflict with 8 U.S.C. §1601(6). It "falls within the principle of implied preemption in that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress... in title 8 U.S.C. section 1601." Slip op. 64 (*citing De Canas*, 424 U.S. at 357). In 1996, when enacting the PRWORA, Congress took the unusual step of spelling out its objectives in the text of federal law: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). As the Court of Appeal correctly recognized, eligibility for in-state tuition rates is a "public benefit" under federal law. Slip op. 38-42. By making this public benefit available to illegal aliens and denying it to aliens who hold student visas, Defendants frustrate the congressional objective identified in 8 U.S.C. §1601(6). When Congress spells out its objective in such unequivocal terms, it is difficult to conclude otherwise. Moreover, the only federal court ever to adjudicate the merits of 8 U.S.C. §1623 held:

> [I]n enacting PWRORA and IIRIRA, Congress made clear statements of national policy concerning welfare and immigration, affirmatively stating that there is a "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601. It is clear that denying illegal aliens admission to public colleges and universities simply removes another public incentive for illegal immigration....

Equal Access Educ. v. Merten (D.Va. 2004) 305 F. Supp. 2d 585, 607-08. Conversely, giving illegal aliens a financial incentive to attend public colleges and universities conflicts with these "clear statements of national policy." *Id.*

Defendants respond first by denigrating 8 U.S.C. §1601(6) as "nothing more than a general statement of policy." U.C.O.B. 39. Then they claim that if Congress really wanted illegal aliens to be denied public benefits, Congress would not have created the safe harbor of 8 U.S.C. §1621(d). U.C.O.B. 39. Defendants' argument suffers from two flaws. First, it ignores the controlling question in any conflict preemption challenge—whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *De Canas*, 424 U.S. at 363. In this case, the objective of encouraging illegal aliens to depart from the United States is plainly burdened by Defendants' offering of a valuable benefit that can only be enjoyed if the illegal alien remains in the United States. Second, §68130.5 contains an extraneous provision that is conflict preempted. Even if it were

to satisfy the safe harbor requirements of 8 U.S.C. §1621(d) (which it does not), §68130.5 contains an additional, unnecessary provision that operates to encourage illegal immigration—§68130.5(a), which excludes any alien who holds a student visa and is therefore attending college lawfully in California. This provision penalizes the alien who complies with federal law, while rewarding the alien who violates federal law. Take the example of the Mexican resident who commutes to a California high school daily, and wishes to attend college in California. When he graduates, he has two choices: either obtain an F-1 student visa and pay nonresident tuition rates, or break federal immigration law and receive the benefits of §68130.5. Any state law that otherwise complies with 1621(d), but contains this unnecessary disqualification of aliens who are lawfully present, is conflict preempted.

Finally Defendants cast doubt on Congress's objective of discouraging continued illegal immigration through the denial of public benefits. Defendants express their personal belief the possibility of receiving public benefits such as resident tuition rates does not motivate aliens to enter the United States illegally. C.C.C.O.B. 17. However, Defendants' personal views on this matter are irrelevant for preemption purposes. "[I]t is reasonable for Congress to believe that some aliens would be less likely to hazard the trip to this country if they understood that they would not receive government benefits upon arrival." *Lewis v.*

Thompson (2d Cir. 2001) 252 F.3d 567, 583-584. Congress has the authority to enact laws to realize its objectives, Defendants' contrary views notwithstanding.[24] Finally, Defendants ignore the incentives created for the illegal aliens who are already in the state of California. The availability of a valuable postsecondary education benefit worth thousands of dollars creates a powerful incentive to remain unlawfully present in the United States.

4. Conflict with the Classifications of Federal Immigration Law

A state law is also conflict preempted if it uses immigration classifications that are in any way inconsistent with the classifications of federal immigration law. The consistency that is demanded is exceedingly strict; it is impermissible for a state to use terms to describe aliens that differ *in any way* from the terms of federal immigration law. *LULAC v. Wilson* (C.D. Ca. 1995) 908 F. Supp. 755, 772 (*LULAC I*). As noted above, federal immigration law uses the terms "illegal alien" and "alien who is not lawfully present in the United States."[25] In contrast, §68130.5 uses the undefined term "person without lawful immigration status."

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[24] Defendants later state that aliens come to the United States primarily for jobs. C.C.C.O.B. 21 (*citing Plyler v. Doe* (1982) 457 U.S. 202, 228. It is certainly true that jobs constitute an incentive for illegal immigration. But that in no way contradicts Congress's view that public benefits constitute an additional incentive for illegal immigration. 8 U.S.C. §1601(6).

[25] See *supra*, note 2.

An earlier California law dealing with the extension of benefits to illegal aliens—Proposition 187—was held to be unconstitutional through implied preemption *for precisely this reason.* The Court found that the term "alien in the United States in violation of federal law" was not in "harmony with federal law." *LULAC II,* 997 F.Supp. at 1257. Because §68130.5 also uses state-created immigration terms that do not precisely match the terms found in federal law, it, too, is conflict preempted. As was the case in *LULAC II*, the state law in the case at bar uses a term that is similar, but not identical, to the classifications of federal immigration law. This failure to adhere to the terms of federal immigration law results in conflict preemption. *Id.*

In addition to the state-created term "person without lawful immigration status," §68130.5 also uses the state-created term "application to legalize his or her immigration status," which does not match any terms found in federal law and cannot be construed to correspond to such terms. Furthermore, there is not one iota of guidance in the legislative history of §68130.5 as to the meaning of these phrases and words. In short, California once again "has created its own scheme" setting forth various immigration classifications that are preempted by federal law. *LULAC I*, 908 F. Supp. at 772. Accordingly, §68130.5 too is conflict preempted.

Moreover, in addition to creating state-created terms that are not tied to federal standards, §68130.5 relies on state officials' independent

judgments in assessing whether or not a student falls with the definition of "person without lawful immigration status." Not only must Defendants ascertain who is a "person without lawful immigration status," §68130.5(a)(4), they must also determine whether a student seeking benefits is someone "other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code." §68130.5(a). If the answer is yes, then the state official must deny him the benefits. This aspect of the state's implementation scheme also proved unconstitutional in the litigation of Proposition 187. A state must rely on the federal government's determination of any alien's immigration status; a state can avoid implied preemption only if "no independent determinations are made and no state-created criteria are applied." *LULAC I*, 908 F. Supp. at 770. The implementation of §68130.5 is therefore unconstitutional, because it creates new classifications and because it requires state officials to make independent judgments of immigration status.

IV.

SECTION 68130.5 VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

In addition to being preempted by federal law, §68130.5 contravenes the Privileges and Immunities Clause of the Fourteenth Amendment, which states: "No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States...." U.S. Const., Amend XIV, § 1. Unlike the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which apply to "persons," *the Privilege or Immunities Clause is the only provision that applies solely to "citizens."* *Id.* "The Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1...." *Mathews* v. *Diaz* (1976) 426 U.S. 67, 79, n.12. That distinction cannot be overstated, for it serves to illuminate what the protected privileges and immunities of U.S. citizenship are. Although the U.S. Supreme Court has never had occasion to enumerate a complete list of the privileges and immunities protected by this Clause, the Court has on a case by case basis provided some definition of these privileges of citizenship. One of the privileges that the Court has identified is the privilege of being treated no worse than an illegal alien under the laws of a state.

A. The Citizen's Privilege of Being Treated no Worse than an Illegal Alien in the Distribution of Public Benefits

In the landmark case of *Saenz v. Roe* (1999), 526 U.S. 489, the U.S. Supreme Court specifically recognized that the Privileges and Immunities Clause protects out-of-state U.S. citizens' "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe* 526 U.S. at 500 . This statement encompasses

the privilege that Plaintiffs are asserting: that of being treated no worse than an illegal alien in the distribution of public benefits.[26]

The U.S. Supreme Court has also stated that, "Neither the overnight visitor, the unfriendly agent of a hostile power, the resident diplomat, nor the illegal entrant, can advance even a colorable claim to a share in the bounty that a conscientious sovereign makes available to its own citizens." *Mathews* v. *Diaz* 426 U.S. 67, 80 (1976). The very earliest U.S. Supreme Court interpretation of the Privileges and Immunities Clause recognized that it serves to elevate U.S. citizens who enter a new state to a legal status above the status of aliens. "It relieves them from the disabilities of alienage in other States." *Paul v. Va.* (U.S. 1869) 75 U.S. 168, 180. By extending to certain illegal aliens a tuition rate more favorable than that charged to U.S. citizen Plaintiffs, Defendants have violated this core protection of the Privileges and Immunities Clause.

The denial of this privilege or immunity by Defendants occurs on two levels. First, thousands of illegal aliens are currently receiving resident tuition rates at California postsecondary institutions through the operation of §68130.5. At the same time, thousands of U.S. citizens at such institutions are being charged nonresident tuition rates that are three to five times higher. Any time a U.S. citizen is charged more to attend a public

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[26] Defendants incorrectly describe the asserted privilege too broadly. U.C.O.B. 4.

postsecondary institution in California than an illegal alien is (regardless of whether or not the U.S. citizen meets the requirements of §68130.5), he is being treated worse than an illegal alien in the distribution of public benefits, in violation of the Privileges and Immunities Clause.

Second, Plaintiffs alleged in the Superior Court that a number of public postsecondary institutions in the state of California have applied §68130.5 in *blanket fashion to completely exclude all U.S. citizens* from its benefits. See slip op. 74. At the same time, those institutions are offering the benefits of §68130.5 to illegal aliens. This is a factual showing that Plaintiffs intend to make at trial. "In ruling on a demurrer, the court must assume the truth of the factual allegations of the complaint." *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 17 .

Support for the specific privilege asserted by Plaintiffs may also be found in Justice Story's famed Commentaries on the Constitution of the United States.[27] As Justice Story explained in words that speak directly to

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[27] Joseph Story, COMMENTARIES ON THE CONSTITUTION (1833). This Court has frequently referred to Justice Story's analysis of the Constitution. See, e.g., *People v. Hovarter* (2008), 44 Cal. 4th 983, 1025 fn.18; *People v. Williams* (2001), 25 Cal. 4th 441, 452; *Powers v. City of Richmond* (1995), 10 Cal. 4th 85, 97; *Alfredo A. v. Superior Court* (1994) 6 Cal. 4th 1212, 1257. Story, of course, wrote his Commentaries before the ratification of the Fourteenth Amendment. However, it must be remembered that the privileges and immunities of citizenship were not created by the Fourteenth Amendment. They were recognized by the Framers of the original U.S. Constitution in 1787 and subsequently incorporated against the states by the Fourteenth Amendment in 1868. See *Van Valkenburg v. Brown* (1872) 43 Cal. 43, 48-49; *In re Kimler* (1890) 136 U.S. 436, 448.

the case at bar: "If aliens might be admitted indiscriminately to enjoy all the rights of citizens *at the will of a single state*, the Union might itself be endangered by an influx of foreigners, hostile to its institutions, ignorant of its powers, and incapable of a due estimate of its privileges."[28] Justice Story's statement is directly applicable to §68130.5, which confers upon illegal aliens a benefit normally reserved for U.S. citizens and which has contributed in no small part to the "influx of foreigners" into California in violation of federal immigration laws.

Interestingly, the California Supreme Court was one of the first state supreme courts to interpret the meaning of the Clause more than a century ago, in the wake of the ratification of the Fourteenth Amendment. *Van Valkenburg v. Brown* (1872) 43 Cal. 43, 48. This Court interpreted the Clause in terms that were remarkably similar to the U.S. Supreme Court's later iteration in *Saenz*:

> This phraseology was known in our history anterior to the formation of the present Federal Union. ...The words "privileges and immunities" had at that time acquired a distinctive meaning and a well-known signification. They comprehended the enjoyment of life and liberty, and the right to acquire and possess property, and to demand and receive the protection of the Government in aid of these. They included the right to sue and defend in the Courts, to have the benefit of the writ of habeas corpus, and *an exemption from higher taxes or heavier impositions* than were to be borne by other persons under like conditions and circumstances.

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[28] Story, COMMENTARIES, § 537 (emphasis added).

Id. at 48 (emphasis added). In other words, this Court recognized 137 years ago that the Privileges and Immunities Clause protected U.S. citizens against "higher taxes or heavier impositions" because of their U.S. citizenship. *Id.* The U.S. Supreme Court then adopted similar language in 1900. *Maxwell v. Dow* (1900) 176 U.S. 581, 594.[29] The same general privilege applies to the case at bar. U.S. citizen Plaintiffs cannot be charged more than illegal aliens for postsecondary education. The Plaintiffs in this case are similarly situated to the illegal alien beneficiaries of §68130.5—in that neither class is recognized as domiciled in the state of California. Yet Plaintiffs are forced to bear a "heavier imposition" than such an illegal alien, paying three to five times as much in tuition. *Van Valkenburg*, 43 Cal. at 48.

B. The Sources of the Protected Privileges and Immunities

As noted above, the Supreme Court has never made an exhaustive list of the privileges and immunities of citizenship. In the landmark *Slaughter-House Cases* (1873) 83 U.S. 36, the Court listed some of the protected privileges and immunities, but stopped short of enumerating them all. It refrained from "defining the privileges and immunities of the citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so." *Id.* at 78-79.

[29] The Court was quoting the eminent Nineteenth Century commentator, Thomas M. Cooley. Thomas M. Cooley, A Treatise on the Constitutional Limitations (4th ed., 1890) 497.

However, the *Slaughter-House* Court did offer guidance as to how such protected privileges and immunities should be identified in the future. First, the Court emphasized that a protected privilege "depends upon [the holder's] character as a citizen of the United States." *Id.* at 79. Second, it noted that there are several sources of the protected privileges and immunities. They "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* In other words, some come from the original Constitution of 1787, or come from the "National character" of the federal government. *Id.* These are the *inherent or organic* privileges and immunities of citizenship—"privileges and immunities arising out of the nature and essential character of the National government, and granted or secured by the Constitution of the United States." *In re Kemmler* (1890) 136 U.S. 436, 448; *Maxwell v. Dow* (1900), 176 U.S. 581, 593. Other privileges and immunities are statutorily created by "the Federal government... or its laws," *Slaughter-House*, 83 U.S. at 79. These are the *statutorily-created* privileges of citizenship.

1. An Inherent Privilege of Citizenship

The questions that must be asked when identifying the inherent privileges and immunities of citizenship were laid out in *United States v. Moore* (C.C.D. Ala. 1904), 129 F. 630, 632, one of which is:

> Is the right or privilege claimed granted in terms by any provision of the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the

Constitution does specify and confer upon citizens of the United States as to arise by necessary implication?

Id. at 632. The privilege of being treated as well or better than an illegal alien in the distribution of public benefits by a state satisfies the *Moore* and the *Slaughter-House* standards. Since the ratification of the U.S. Constitution, citizens of the United States could not be afforded privileges lesser than those granted to aliens. It is certainly "appropriate" that U.S. citizens always be treated as at least equal to illegal aliens in the bestowal of public benefits, considering that illegal aliens have no right to be present in the United States; such a privilege "arise[s] by necessary implication." *Id.* It arises "out of the nature and essential character of the Federal government, and granted or secured by the Constitution." *Duncan v. Missouri* (1894), 152 U.S. 377. It is inherent in the original U.S. Constitution, which was "ordain[ed] and establish[ed]" to protect "We the People of the United States." U.S. Const., Preamble.

2. Statutorily-Created Privilege Through the Naturalization Power

The citizen's privilege of being treated no worse than an alien in the distribution of public benefits by any state is also derived through Congress's exercise of its constitutional powers. Congress may utilize its naturalization power of Article I, Section 8, to define who is entitled to the privileges of citizenship, and what those privileges of citizenship are. Justice Story noted in general terms that statutorily-created privileges and

immunities may be created by Congress. Story stated that legislation "within the scope of [Congress's] constitutional authority" may confer a "right, or privilege, or claim, or protection, or defence...."[30] In other words, where the constitution grants a plenary power to Congress, legislation passed within the scope of that power may create a privilege or immunity of a citizen of the United States. Henry Brannon echoed Justice Story in 1901, noting that some privileges and immunities of U.S. citizenship were not yet in existence in 1868, but were "born of law afterwards."[31]

The U.S. citizen's privilege in the case at bar was created through the enactment of 8 U.S.C. §§1621 and 1623. Both of these statutes serve to prevent illegal aliens from enjoying greater privileges than the citizens of the United States. This statutorily-created privilege reflects the Framers' purposes in drafting the Naturalization Clause and in elevating citizens over aliens in the first place—(1) to prevent state variations of acquiring naturalized citizenship,[32] (2) to prevent aliens from obtaining greater

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[30] *Id.* at §857.

[31] Henry Brannon, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1901), at 47. Brannon's interpretation of the Fourteenth Amendment's Privileges and Immunities Clause was relied upon in *Boerne v. Flores* (1997), 521 U.S. 507, 522-23.

[32] James Madison, THE FEDERALIST, No. 42.

privileges than citizens,[33] and (3) to protect the "privilege of the American citizen."[34] As Roger Sherman stated in the Constitutional Convention of 1787, "The United States have not invited foreigners nor pledged their faith that they should enjoy equal privileges with native Citizens."[35] And as constitutional commentator William Rawle wrote in 1829, states cannot "increase or diminish the disadvantages to which aliens may, by such measures on the part of general government, be subjected."[36] That is precisely what §68130.5 attempts to do.

C. Defendants' Arguments Against the Asserted Privilege are Flawed

1. Defendants Attack the Wrong Privilege.

As explained above, Plaintiffs assert the privilege of being treated no worse than an illegal alien under the laws of a state in the distribution of public benefits. In their Briefs, Defendants initially ignore this privilege, and instead focus on entirely irrelevant "privileges." C.C.C. Defendants declare that "[t]he right to an education has not been protected under the

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[33] The debates in the First Congress over the 1790 Naturalization Act. 1 Stat. 103 (1790), reflect the Framers' concerns over giving aliens the "high and inestimable privileges of a citizen of America." 1 ANNALS OF CONGRESS 1114 (1790).

[34] 1 ANNALS OF CONGRESS 1117 (1790).

[35] Max Farrand (ed.), II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1966) 270.

[36] William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1829) 87. This Court has previously relied on Rawle's interpretation of the Constitution. See, e.g., *Warner v. S.S. Uncle Sam* (1857), 9 Cal. 697, 728.

Privileges and Immunities Clause." C.C.C.O.B. 28. Plaintiffs agree completely. However, Defendants' argument misses the point. The privilege at issue in this case is the U.S. citizen's privilege of being treated no worse than an illegal alien in the allocation of public benefits. The state has no obligation to provide any educational benefits to anyone, but if it does, it must ensure that all U.S. citizens receive at least as much as illegal aliens are provided.

Similarly, U.C. Defendants declare that "states have legitimate grounds for distinguishing between state residents and nonresidents in the fees charged to attend their public universities...." U.C.O.B. 40. In other words, there is no constitutional right to resident tuition. Again, Plaintiffs agree completely. However, the privilege asserted by Plaintiffs is not an absolute privilege to pay resident rates under any circumstances. The privilege asserted is a relative one: the privilege of being treated as well or better than an illegal alien under the laws of any state. It is this privilege that the U.S. Supreme Court recognized in *Saenz*, 526 U.S. at 500.

U.C. Defendants then fall back to a slightly different line of argument. They state that the Privileges and Immunities Clause only protects those privileges created by federal law, not those created by state law. U.C.O.B. 42. They then argue that the privilege "of attending the university as a student come not from federal sources but is given by the state." *Id.* (*quoting Hamilton v. Regents of the Univ. of Cal.* (1934) 293

U.S. 245, 261.) Again, Defendants' argument is entirely beside the point. The privilege asserted by Plaintiffs is not that of "attending the university." It is the comparative privilege of being treated no worse than an illegal alien in the distribution of postsecondary education benefits. And that privilege *does* come from federal sources. 8 U.S.C. §1623; *Saenz*, 526 U.S. at 500. The state need not admit anyone to its universities. Indeed, it need not even establish public universities in the first place. But once it does, and it subsidizes the tuition of illegal aliens, it must subsidize the tuition of all U.S. citizens to the same degree or more.

Indeed, if Defendants' argument were correct, then the U.S. Supreme Court could never have issued its *Saenz* holding. In that case, the Court considered the distribution of a *state-created* benefit—the "generous" additional welfare benefits provided by California law, over and above the welfare benefits provided by other states. *Saenz*, 526 U.S. at 492-93. California attempted to limit the welfare benefit eligibility of recently-arrived residents to the amount paid by their former U.S. state of residence, thereby reserving the extra benefits to longer-term California residents. *Id.* at 493, n.1. It was this discriminatory classification that offended the Privileges and Immunities Clause. *Id.* at 499. The fact that the state created the benefit did not in any way undermine the Supreme Court's holding that allocating the benefit in this manner violated the Privileges and Immunities Clause.

2. The Fact that Some U.S. Citizens Benefit is Irrelevant

Defendants also attempt to evade Plaintiffs' Privileges and Immunities Clause claim by repeating their assertion that §68130.5 treats citizens and aliens equally. U.C.O.B. 40-41; C.CC.O.B. 29-30. However, there are two fatal flaws in this argument. First, Defendants pointedly ignore the factual allegations made by Plaintiffs in the trial court that certain postsecondary institutions have categorically excluded *all* U.S. citizens from receiving the benefits conferred under §68130.5. See slip op. 74-75. At this stage, the reviewing court treats the demurrer as admitting all material facts alleged. *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 966-967.

The second problem with this argument is that it fails to address Plaintiffs' additional contention that the Privileges and Immunities Clause prohibits the treatment of *any* U.S. citizen worse than illegal aliens in the allocation of public benefits.[37] In other words, the fact that a relatively

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[37] Defendant Regents claim that this definition of the privilege protected by the Privileges and Immunities Clause would have "breathtaking implications." U.C.O.B. 41. However, their breathless argument is an empty one. They declare that if the privilege were so defined, all U.S. citizens would have to be eligible for public services provided to illegal aliens—as if this would result in a radical departure from the status quo. *Id.*, 41 n.24. However, Defendants fail to acknowledge that 8 U.S.C. §1621 already bars illegal aliens from receiving almost all state and local public benefits, and 8 U.S.C.§1611 already bars illegal aliens from receiving almost all federal public benefits. Thus the universe of public benefits that illegal aliens can legally receive is a small one, and U.S. citizens already receive them. The only example of an expansion of public benefits for U.S.

miniscule percentage of the beneficiaries of §68130.5 are U.S. citizens does not cure the fact that the overwhelming majority of nonresident U.S. citizens attending public postsecondary education institutions in California are paying more in tuition and fees than illegal aliens are. Defendants attempt in vain to find support in *Martinez v. Bynum* (1983) 461 U.S. 321, 328-29. However, that was a case involving the Equal-Protection Clause (which protects U.S. citizens and aliens alike), not the Privileges and Immunities Clause (which protects the special privileges of U.S. citizens). It is therefore inapposite.

3. Defendants Incorrectly Describe *Saenz* and *Mathews*

U.C. Defendants then resort to an erroneous and largely irrelevant argument. They claim that the Supreme Court's description in *Saenz* of the right relied upon by Plaintiffs used the term "alien" to mean residents of other states, not foreign nationals. U.C.O.B. 43. To see the error of

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citizens that Defendants can come up with is public defender services being available to all U.S. citizens, including those who are not indigent. Plaintiffs respectfully suggest that U.S. citizens with adequate resources to afford their own counsel would continue to retain their own counsel in the future, rather than rely on public defenders. Defendants offer this example because it is a rare (perhaps the *only*) public service that is constitutionally required. It presents an interesting case of the Fourteenth Amendment Due Process Clause requiring states to provide this service to the indigent, while the Fourteenth Amendment Privileges and Immunities Clause might require it to be provided to all U.S. citizens if provided to any illegal aliens. It is unclear how a future court might interpret these two constitutional provisions in tandem. Indeed, it is possible that one Clause may be read to trump the other in such a scenario. But resolving that fascinating question is not necessary for this Court to apply the Privileges and Immunities Clause in the case at bar.

Defendants' argument, first recall what the *Saenz* Court recognized at page 500 of that opinion: a U.S. citizen's "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz*, 526 U.S. at 500. However, Defendants then leap ahead to page 501 of the *Saenz* opinion and declare that "the Court's use of the word 'aliens' referred to U.S. citizens of other state, not citizens of other countries." U.C.O.B. 43. Indeed, that subsequent section of the *Saenz* opinion did. But the passage on page 500 speaks in different and more general terms, using the phrase "unfriendly alien." *Saenz*, 526 U.S. at 500. Although the phrase is susceptible to various interpretations, it is most reasonable to equate it to an alien whose presence in the United States is an affront to federal law. Such conduct is certainly "unfriendly" to the laws of the United States.

Finally, U.C. Defendants point to a footnote *Mathews v. Diaz*, claiming that *Mathews* "approvingly cited" statutes treating aliens more favorably than citizens. U.C.O.B. 44 (*citing Mathews*, 426 U.S. at 78 n.12). However, contrary to Defendants' implication, this footnote does not undermine Plaintiffs' argument in the slightest. At the outset, it must be remembered that the *Mathews* Court sustained a federal statute treating aliens *less favorably* than U.S. citizens with regard to access to Medicare supplemental medical insurance by subjecting them to a five-year residency requirement. *Mathews*, 426 U.S. at 69. The footnote in question begins

with the point it is intended to illustrate: "The Constitution protects the privileges and immunities only of citizens." *Id.* at 78 n.12. After listing a dozen federal statutes that treat aliens worse that U.S. citizens, including "statutes excluding aliens from benefits available to citizens," *id.*, the footnote mentions without any comment two statutes that appear to treat certain aliens more favorably than citizens—19 U.S.C. §1586(e) and 50 U.S.C. App. §453 (1970 ed., Supp. IV). *Id.*

There are three problems with Defendants' attempt to use this footnote to advance their argument. First, they mislead this Court when they claim that *Mathews* "approvingly" cited the two statutes. U.C.O.B. 44. The statutes are simply listed in the footnote, without any normative comment whatsoever. *Mathews*, 426 U.S. at 78 n.12. Second, 19 U.S.C. §1586(e) actually does *not* treat aliens more favorably than citizens. It punishes both aliens and citizens equally by making them subject to fifteen years imprisonment for the unlawful unlading or transshipment of merchandise on vessels. The only difference is that aliens are subject to the obligation only when in the United States or within customs waters. This is merely a reflection of the fact that aliens cannot be so constrained on the high seas because the United States *lacks jurisdiction* to do so. Third, 50 U.S.C. App. §453 is also irrelevant here. It exempts aliens from registering under the Selective Service Act, and thereby serves to prevent violations of United States treaty obligations. Moreover, 50 U.S.C. App. §453 does not

grant any *public benefit* to aliens over citizens. It is not intended to confer a benefit on aliens, but merely to recognize the unremarkable fact of international law that people cannot be conscripted into military service by foreign countries. Only a person's country of citizenship can demand such an obligation. In summary, neither of these examples undermines the larger point that "[t]he Constitution protects the privileges and immunities only of citizens." *Mathews*, 426 U.S. at 78 n.12; and neither constitutes an example of a law treating an illegal alien more favorably than a U.S. citizen in the allocation of public benefits—which would be a violation of the Privileges and Immunities Clause.

D. Plaintiffs' Privileges and Immunities Clause Claim Triggers Strict Scrutiny

Having established that a privilege of citizenship protected by the Privileges and Immunities Clause is at issue, Plaintiffs must prevail unless Defendants can offer a justification for §68130.5 that is sufficient to withstand strict scrutiny. As the U.S. Supreme Court explained in *Saenz*, the protections of the Privileges and Immunities Clause trigger strict scrutiny "Neither mere rationality nor some intermediate standard of review should be used .... The appropriate standard may be more categorical than that articulated in *Shapiro*, ... but it is surely no less strict." *Saenz*, 526 U.S. at 504 (citing *Shapiro v. Thompson* 394 U.S. 618 (1969)).

The underpinnings of §68130.5 cannot survive such elevated scrutiny, for the statute falls even under minimal scrutiny.[38]

As explained below, Defendants have not, and cannot, show any compelling governmental interest that is served by §68130.5, nor can they demonstrate that §68130.5 is the least restrictive means of serving that interest. Consequently, the statute is unconstitutional.

E. Section 68130.5 Fails to Survive Strict Scrutiny, and Even Fails Rational-Basis Review

1. There Is No Legitimate Government Interest In Subsidizing A Labor Force That Cannot Legally Work

The statutory findings of the California Legislature reveal its purpose in enacting §68130.5 to be "increas[ing] the state's collective productivity and economic growth." Cal. Stats 2001 Ch. 814 §1(a)(3). C.C.C. Defendants agree, claiming that by creating a more educated workforce, the law will "foster the state's productivity and economic growth." C.C.C.O.B. 2, 19 n.10.

What the Legislature and Defendants evidently failed to realize is that an alien who is unlawfully present in the United States and who attends a California university or community college *cannot legally work in the United States* after graduation. Moreover, there is no mechanism in federal law for the illegal alien beneficiaries of §68130.5 to acquire work

[38] Minimal scrutiny, or rational-basis review, would require "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe* (1993) 509 U.S. 312, 320.

authorization. *See* 8 U.S.C. §1101 *et seq.* There can be no rational basis, and certainly no compelling government interest, in subsidizing the higher education of those who cannot legally work or contribute to the economy of the state. It is an unlawful workforce that can be removed from the country at any moment. Moreover, even if federal Immigration and Customs Enforcement (ICE) officers do not succeed in removing these graduates, they are unlikely to be able to take economic advantage of their college educations. Employers who seek employees with college degrees are careful to avoid violating federal immigration laws by hiring unauthorized workers.[39] Consequently, in the years since §68130.5 has been in effect, illegal aliens graduating from public universities have been unable to secure higher-paying jobs at companies seeking employees with college degrees.[40] Unlike employers who rely on unauthorized low-skill labor, such companies are reluctant to hire aliens who lack work authorization.

In contrast, many of the U.S. citizen Plaintiffs intend to settle and work (lawfully) in California after graduation. "The state's legitimate interests in denying resident tuition to undocumented aliens are manifest and important. We will name just a few: the state's interest in not subsidizing violations of law; in preferring to educate its own lawful residents; ... in *avoiding discrimination against citizens of sister states*."

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[39] Miriam Jordan, *Illegals' New Lament: Have Degree, No Job*, WALL STREET J., Apr. 26, 2005, at B1.
[40] *Id.*

Regents of the University of California v. Superior Court (Bradford), *supra*, 225 Cal.App.3d at 981 (emphasis added).

It must also be noted that the State's irrational subsidization of an illegal workforce comes at tremendous cost to California taxpayers. The difference between in-state and out-of-state tuition, which §68130.5 provides to its illegal alien beneficiaries, comes out of the pockets of California taxpayers. The California Senate Committee on Appropriations stated that any waiver (referring to illegal aliens getting in-state tuition) has a direct impact on state costs, because it is a zero-sum public expense and is borne by California taxpayers.[41] The cost is truly colossal. During the discovery phase of this case, it was estimated that more than 25,000 illegal aliens are receiving subsidized tuition every year through §68130.5.[42] The total cost of this subsidy each year is more than $208 million.[43] Thus, California taxpayers are being forced to pay $208 million a year

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[41] Sen. Com. on Appropriations, Fiscal Summary of SB No. 160 (2007-2008 Reg. Sess.) May 14, 2007, available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0151-0200/sb_160_cfa_20070514_113154_sen_comm.html.

[42] The distribution of illegal alien beneficiaries of §68130.5 in the three postsecondary education systems is as follows. UC-430; CCC-approximately 15,000; CSU-approximately 10,000. See Plaintiffs' Response to Amicus Brief of Alicia A., et al., filed in the Court of Appeal, at 15 n.6.

[43] The total taxpayer subsidy to illegal aliens in the three systems combined is approximately $208,436,600 a year. For an explanation of the derivation of this figure, see Plaintiffs' Response to Amicus Brief of Alicia A., et al., filed in the Court of Appeal, at 15-16 n.7.

subsidizing the education of illegal aliens, in a quixotic program that produces no benefit for those taxpayers.

Ultimately, however, Defendants' greatest problem in demonstrating a compelling governmental interest is the fact that they are asserting an interest in undermining federal law. Defendants' implementation of §68130.5 directly contradicts the federal government's "compelling government interest [in] remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. 1601(6). It is also a financial inducement for illegal aliens to remain unlawfully present in the United States, as well as an action that is in conflict with 8 U.S.C. §1324(a)(1)(A)(iv), as noted above. In a revealing statement, C.C.C. Defendants declare: "From the State's perspective, it is important to realize that illegal immigration is a reality." C.C.C.O.B. 19. That may very well be the State's point of view, but the state does not have the authority to determine immigration policy. And the state certainly does not have the authority to reward the violation of federal immigration laws. As this Court recently recognized, "Congress has established a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the *achievement* of federal criminal immigration policy." *In re Jose C.* (2009), 45 Cal. 4th 534, 553 (emphasis added). Plaintiffs are aware of no court that has recognized a legitimate governmental interest in

subsidizing the violation of federal laws. Plaintiffs respectfully urge this Court not to reverse course and become the first.

2. Defendants Misstate Federal Law in Claiming that Illegal Alien Beneficiaries of Section 68130.5 Can "Legalize" their Status

The text of section 68130.5 is premised upon a myth—the fiction that its illegal alien beneficiaries will eventually become aliens lawfully present in the United States. The statute requires a "person without lawful immigration status" to sign an affidavit "stating that the student has filed an application to legalize his or her immigration status." §68130.5(a)(4). What sort of status did the Legislature envision? Evidently a permanent one. The legislative findings and declarations accompanying §68130.5 state: "There are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain...." AB 540 (2001-2002 Reg. Sess.) §1(a)(1). Of course, under current federal law, there is no such path to lawful immigration status and naturalization for illegal aliens, so the affidavit requirement is essentially meaningless. Federal law imposes a general prohibition against illegal aliens adjusting to lawful status. 8 U.S.C. §1255(b),(k). As the Court of Appeal accurately observed, "This is an empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur." Slip op. 48. But in the Legislature's imaginary world of immigration law, these illegal alien students need only file an "application to legalize" their

status, and they may permanently remain in the United States.

C.C.C. Defendants attempt to defend the governmental purpose of subsidizing the postsecondary education of an unauthorized workforce by claiming that "section 68130.5 complements [federal immigration laws] because it encourages undocumented immigrants to legalize their status...." C.C.C.O.B. 20. All that Defendants offer in support of their assertion that the illegal alien beneficiaries of §68130.5 may somehow "legalize their status" is a fleeting reference to three federal immigration statutes: 8 U.S.C. §1255(d) concerning adjustment of status through marriage, 8 U.S.C. §1255(i) concerning a narrow amnesty granted ten years ago, and 8 U.S.C. 1182(a)(9)(C)(ii) concerning aliens previously removed from the United States. C.C.C.O.B. 20. Defendants' presentation of these three statutes in support of the proposition that the illegal alien beneficiaries of §68130.5 can "legalize their status" demonstrates their profound misunderstanding of federal immigration law.

First, 8 U.S.C. §1255(d) governs access to K "fiancé" visas for aliens lawfully present in the United States; it does not even apply to illegal aliens. Second, U.S.C. §1255(i) only applies to an alien who had a petition for this limited amnesty filed on his or her behalf by April 30, 2001. The number of potential alien beneficiaries of §68130.5 still in such a pending application status (eight years later) would be tiny, if any exist at all. Third, Defendants' reference to 8 U.S.C. 1182(a)(9)(C)(ii) is even more

preposterous. What Defendants fail to mention is that the ability of the Secretary of Homeland Security to waive inadmissibility under 8 U.S.C. 1182(a)(9)(C)(ii) only applies to aliens who meet two criteria: (1) the alien has been previously ordered removed by an immigration judge, and either (2) the alien has remained outside the United States for at least ten years and is attempting to reenter lawfully, or (2) the alien has "been battered or subjected to extreme cruelty." 8 U.S.C. §1182(a)(9)(C). This statute could apply only to a handful of individuals each year. The notion that this tiny doorway for admissibility would apply to the thousands of beneficiaries of §68130.5 is utterly absurd. It is unlikely to apply to *any* of them. In sum, for virtually all of the illegal alien beneficiaries of §68130.5 there is no pathway "to legalize his or her immigration status." §68130.5(a)(4). The California Legislature may have hoped that Congress would one day change federal law to grant a broad amnesty and create such a pathway. But such a hope does not change the United States Code. There is no such process at present; and consequently there is no legitimate governmental interest in subsidizing the postsecondary education of an alien who cannot lawfully work in the United States.

3. Defendants Fail to Comprehend Federal Law Concerning Border Crossing Cards

Defendants further weaken their position when they raise the example of Mexican nationals who pay to attend California high schools,

while residing in Mexico and crossing into the United States daily with the use of a border crossing card. Defendants claim that such aliens might benefit from §68130.5. C.C.C.O.B. 21, U.C.O.B 28-29. However, Mexican nationals who enter the United States using border crossing cards *are expressly prohibited from attending school by federal regulations*. Mexican nationals may enter the United States with a border crossing card only if they are seeking entry in B-1 or B-22 status as a "temporary visitor for business or pleasure." 8 C.F.R. § 212.1(c). However, an alien entering in B-1 or B-2 status may not attend school without first obtaining an adjustment of status to F-1 nonimmigrant visa holder. 8 C.F.R. § 214.2(b)(7); 248.1(c)(3). This is where a truly irrational provision of § 68130.5 comes into play: any alien who obtains an F-1 student visa becomes a lawfully present nonimmigrant alien and is expressly *barred from eligibility* for in-state tuition rates under § 68130.5(a). By complying with federal immigration law and entering the United States lawfully on a student visa, the alien thereby disqualifies himself from receiving the benefits of § 68130.5. Defendants misunderstand the applicability of the law that they are attempting to defend.

4. Section 68130.5 is not the Least Restrictive Means

Finally, even if Defendants could somehow demonstrate that §68130.5 served a compelling government interest, it would fall on the second prong of strict scrutiny, because it is not the least restrictive means

of doing so. Congress spoke directly to this matter in 8 U.S.C. §1601(7), stating that the least restrictive means of "assuring that aliens be self-reliant in accordance with national immigration policy" is to "follow the Federal classifications in determining the eligibility of such aliens for public assistance." Id. The federal classifications, found in 8 U.S.C. §1611-15, provide only limited access to such benefits for aliens who are lawfully present in the United States. Illegal aliens are "not eligible for any Federal public benefit." 8 U.S.C. §1611(a). Because §68130.5 provides public benefits to illegal aliens, it is not the least restrictive means, and therefore cannot survive strict scrutiny.

CONCLUSION

Two California appellate courts, long ago, in published decisions, emphatically rejected defendants' then in-state tuition program for illegal aliens as being illegitimate, in violation of federal immigration law, and discriminatory against out-of-state American citizen students. See *University of California v. Superior Court (Bradford), supra*, 225 Cal.App.3d at 981; *American Association of Women et al. v. California State University* (1995) 31 Cal.App.4th 702. *Bradford* held that such a program undermined numerous salutary California public policies, including the avoidance of ". . . discrimination against citizens of sister states [plaintiffs herein]." *Bradford, supra,* at 981. The enactment by Congress of Sections 1623 and 1621 presents an even more compelling

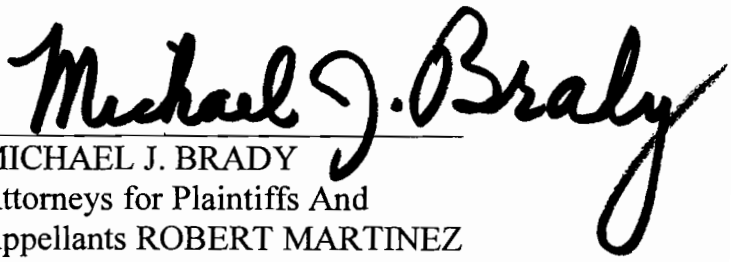
case for declaring invalid and unconstitutional defendants' present in-state tuition program and for granting relief to plaintiffs who have now been discriminated against under that program for eight years. It is one thing to treat California resident/American citizen students more favorably than out-of-state American citizen students, but it is quite another to prefer illegal aliens over students who are American citizens from other states. *Ibid.*

The Court of Appeal decision should accordingly be affirmed and the case remanded to the trial court for further litigation, including remedies under the Fourteenth Amendment and for other remedies provided by law.

Dated: June 23, 2009

Respectfully submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By: 

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RULE 14(c) CERTIFICATION

Pursuant to California Rules of Court, rule 14 (c) I hereby certify that the foregoing Answering Brief on the Merits (excluding the table of contents, table of authorities and signatures) is proportionately spaced in Times New Roman 13-point type and contains 20,099 words as counted by Microsoft word processing software.

Dated: June 23, 2009

ROPERS, MAJESKI, KOHN & BENTLEY

By: _____

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CASE NAME: **ROBERT MARTINEZ et al. v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.**

ACTION NO.: **S167791, C054124**

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