

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

SUPREME COURT
FILED

NOV 14 2008

Frederick K. Ohlrich Clerk

Deputy

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

ROBERT MARTINEZ, ET AL.,
Plaintiffs and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendants and Respondents.

After a Decision by the Court of Appeal,
Third Appellate District

ANSWER TO PLAINTIFFS' PETITION FOR REVIEW

CHARLES F. ROBINSON (No. 113197)
CHRISTOPHER M. PATTI (No. 118283)
Christopher.Patti@ucop.edu
UNIVERSITY OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
1111 Franklin Street, 8th Floor
Oakland, California 94607-5200
Telephone: 510/987-9800
Facsimile: 510/987-9757

ETHAN P. SCHULMAN (No. 112466)
eschulman@flk.com
FOLGER LEVIN & KAHN LLP
275 Battery Street, 23rd Floor
San Francisco, California 94111
Telephone: 415/986-2800
Facsimile: 415/986-2827

*Attorneys for Defendants and Respondents
The Regents of the University of California and
Robert C. Dynes*

[Additional counsel listed on the following page.]

CHRISTINE HELWICK (No. 057274)
ANDREA M. GUNN (No. 212259)
CALIFORNIA STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
401 Golden Shore, 4th Floor
Long Beach, California 90802-4210
Telephone: 562/951-4500

*Attorneys for Defendants and
Respondents the Board of Trustees of
the California State University and
Charles B. Reed*

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
NONE OF THE ISSUES PRESENTED BY PLAINTIFFS WARRANTS REVIEW.....	2
I. PLAINTIFFS HAVE IMPROPERLY SOUGHT REVIEW OF ISSUES THEY FAILED ADEQUATELY TO RAISE BELOW.....	2
A. Plaintiffs Did Not Even Plead Claims Raising Three Of The Four Issues On Which They Now Seek Review.....	3
B. Plaintiffs’ Request That This Court Grant Review To Decide The Constitutionality Of A Second State Statute, Although That Issue Was Not Raised Or Briefed In The Court Of Appeal, Is Baseless.	5
II. PLAINTIFFS HAVE NOT PRESENTED ANY ISSUE UNDER THE UNRUH ACT THAT WARRANTS REVIEW.....	7
III. PLAINTIFFS’ STATUTORY CONFLICT CLAIM DOES NOT WARRANT REVIEW.....	10
IV. PLAINTIFFS’ “TAKING” CLAIM DOES NOT PRESENT ANY BASIS FOR REVIEW.....	13
V. PLAINTIFFS’ NEWLY-ASSERTED PROPOSITION 209 CLAIM DOES NOT WARRANT REVIEW.....	15
CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

Cases

<i>Blank v. Kirwan</i> , 39 Cal. 3d 311 (1985)	4
<i>County of Ventura v. Barry</i> , 202 Cal. 550 (1927)	7
<i>Day v. Bond</i> , 500 F.3d 1127, <i>reh 'g and reh 'g en banc denied</i> , 511 F.3d 1030 (10th Cir. 2007), <i>cert. denied</i> , 128 S. Ct. 2987 (2008).....	13
<i>Espinoza v. Farah Mfg. Co.</i> , 414 U.S. 86 (1973).....	16, 17
<i>Flannery v. Prentice</i> , 26 Cal. 4th 572 (2001)	2
<i>Garcia v. Gloor</i> , 618 F.2d 264 (5th Cir. 1980)	17
<i>Harris v. Capital Growth Investors XIV</i> , 52 Cal. 3d 1142 (1991)	8, 9
<i>Hi-Voltage Wire Works, Inc. v. City of San Jose</i> , 24 Cal. 4th 537 (2000)	16
<i>Horn v. County of Ventura</i> , 24 Cal. 3d 605 (1979)	14
<i>Howard Jarvis Taxpayers Ass'n v. City of Roseville</i> , 106 Cal. App. 4th 1178 (2003)	8
<i>Jacob B. v. County of Shasta</i> , 40 Cal. 4th 948 (2007)	3
<i>Jimenez v. Superior Court</i> , 29 Cal. 4th 473 (2002)	2

TABLE OF AUTHORITIES
(continued)

	Page
<i>Koebke v. Bernardo Heights Country Club</i> , 36 Cal. 4th 824 (2005)	8
<i>Lazar v. Hertz Corp.</i> , 69 Cal. App. 4th 1494 (1999)	8, 10
<i>Lister v. Hoover</i> , 706 F.2d 796 (7th Cir. 1983)	14
<i>Marriage of Goddard</i> , 33 Cal. 4th 49 (2002)	3
<i>Michelson v. Cox</i> , 476 F. Supp. 1315 (S.D. Iowa 1979)	14
<i>Oceanside Marina Towers Ass'n v. Oceanside Cmty. Dev.</i> <i>Comm'n</i> , 187 Cal. App. 3d 735 (1986)	14
<i>Prof'l Eng'rs in Cal. Gov't v. Kempton</i> , 40 Cal. 4th 1016 (2007)	11
<i>Regents of University of California v. Bradford</i> , 225 Cal. App. 3d 972 (1990)	11, 12
<i>Sanders v. Brown</i> , 504 F.3d 903 (9th Cir. 2007)	7
<i>Santisas v. Goodin</i> , 17 Cal. 4th 599 (1998)	8
<i>Spielberg v. Board of Regents, Univ. of Michigan</i> , 601 F. Supp. 994 (E.D. Mich. 1985)	14
<i>Torres v. Parkhouse Tire Serv., Inc.</i> , 26 Cal. 4th 995 (2001)	3
<i>Turner v. Assoc. of Amer. Medical Colleges</i> , No. A117071, slip op. (1st Dist. Oct. 30, 2008)	9

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

CAL. CONST.	
art. I, §31	15,16
art. I, §31(a).....	15, 16

Statutes

8 U.S.C.	
§1623.....	6
42 U.S.C.	
§1983.....	6
§2000(e)-2(a)(1).....	16
CIV. CODE	
§51.....	7
§51(c).....	9
EDUC. CODE	
§66025.3.....	10
§68040.....	10
§§68050-68052	10
§68062.....	11, 12
§68062(h).....	11, 12
§§68070-68084	10
§68120.....	10
§68121.....	10
§68124.....	10
§68130.....	10
§68130.5.....	<i>passim</i>
§68130.7.....	5
§76140.....	10
§§89705-89707	10

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

CAL. R. CT.	
8.500(b)(1)	5
8.500(c)(1)	2
8.500(c)(2)	3
8.504(b)(1)	6

INTRODUCTION

In its opinion below,¹ the Court of Appeal held that Education Code Section 68130.5 is preempted by two different provisions of federal law, and also held that Plaintiffs had stated claims for violations of the Privileges or Immunities Clause and of equal protection. All Defendants, including the State Attorney General, have sought review of that decision (other than as to Plaintiffs' equal protection claims, as to which the Court of Appeal granted leave to amend).

Plaintiffs, who contended below that this case “presents an extraordinary and unprecedented factual setting” (AOB at 1), *agree* that this case presents issues of sufficient importance to warrant review by this Court. Indeed, they have filed their own petition seeking review of at least four *additional* issues, which they contend pose “fundamental public policy issues” and constitute “momentous constitutional and civil rights issues.” Pl. Pet. at 4, 11. However, Plaintiffs have improperly asked this Court to review issues that they never pled in their complaint, that they did not timely raise or preserve in the Court of Appeal, and that are barred by aspects of that ruling as to which they have not sought review. Indeed, by their own admission, Plaintiffs ask this Court to decide issues that were “never briefed by any of the parties in the court of appeal.” *Id.* at 21. Those requests contravene long-standing policies of this Court set forth in its decisions and the Rules of Court.

Even if they had been properly raised below, none of the issues presented by Plaintiffs' Petition remotely satisfies the criteria for review. Accordingly, the Court should grant Defendants' petitions for review and deny Plaintiffs' petition, which would unduly expand the scope of briefing and interfere with this Court's ability to resolve

¹The Court of Appeal's opinion is published at 166 Cal. App. 4th 1121 (2008), *modified, reh'g denied*, 2008 Cal. App. LEXIS 1568 (Oct. 7, 2008). This Answer continues to cite to that court's slip opinion (“slip op.”).

the genuinely significant issues presented by the Court of Appeal's ruling.

**NONE OF THE ISSUES PRESENTED BY
PLAINTIFFS WARRANTS REVIEW.²**

Plaintiffs purport to seek review of four issues, relating to their claims for violation of the Unruh Civil Rights Act, for alleged due process violations, for an alleged "conflict" between Section 68130.5 and another section of the Education Code, and for violation of Article I, Section 31 of the California Constitution. Pl. Pet. at 2-3. However, Plaintiffs failed to timely raise or preserve a number of those issues in the lower courts. In any event, none satisfies the criteria for review by this Court.

I.

**PLAINTIFFS HAVE IMPROPERLY SOUGHT
REVIEW OF ISSUES THEY FAILED
ADEQUATELY TO RAISE BELOW.**

"As a policy matter," this Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." CAL. R. CT. 8.500(c)(1); *see Jimenez v. Superior Court*, 29 Cal. 4th 473, 481 (2002); *Flannery v. Prentice*, 26 Cal. 4th 572, 591 (2001). Likewise, this Court "normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." CAL. R.

²Plaintiffs' Petition contains a "Statement of Facts and Procedural History" (Pl. Pet. at 6-11) that, among other things, incompletely summarizes the statute and its legislative history, makes unsupported factual assertions without citations to the record, misstates the Court of Appeal's opinion, and relies on evidence that the trial court excluded in evidentiary rulings affirmed by the Court of Appeal. For similar reasons, the Court of Appeal repeatedly faulted Plaintiffs for their "disregard for the California Rules of Court." Slip op. at 18-19 & n.12, 23 & n.13, 26 ("plaintiffs again violate the rules of court"). Rather than burden the Court by responding, we respectfully refer the Court to the statement of facts found in our Petition for Review. *See* Pet. at 3-8.

CT. 8.500(c)(2); *Marriage of Goddard*, 33 Cal. 4th 49, 53 n.2 (2002); *Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal. 4th 995, 1000 n.2 (2001); see *Jacob B. v. County of Shasta*, 40 Cal. 4th 948, 952 (2007) (“Because neither party petitioned the Court of Appeal for a rehearing, we take our facts largely from that court’s opinion”). Here, three of the four issues on which Plaintiffs seek review were not properly raised or preserved in the lower courts. It follows that Plaintiffs’ Petition should be denied as to those issues on that ground alone. Their additional request that this Court decide an issue that, by their own admission, was “never briefed in the court of appeal” (Pl. Pet. at 21), is equally improper.

A. Plaintiffs Did Not Even Plead Claims Raising Three Of The Four Issues On Which They Now Seek Review.

Although the appeal below was from an order by the trial court dismissing the action after sustaining Defendants’ demurrers without leave to amend, Plaintiffs did not even plead causes of action in their Complaint that presented three of the four issues as to which they now seek review by this Court.

Plaintiffs’ complaint contained ten separate causes of action. Slip op. at 4, 9-13; 1 CT 1-92. Nowhere in that lengthy complaint, however, did Plaintiffs assert any claim that Defendants’ implementation of the statute constituted a “taking” of property without due process of law under the federal and California Constitutions. Thus, the Court of Appeal observed, “No such claim was asserted in the complaint, and we see no reason for leave to amend.” Slip op. at 76. Likewise, Plaintiffs’ argument that Section 68130.5 “violated” another Education Code provision, Section 68062, was “not pleaded as a cause of action.” *Id.* at 31. Nor was their argument, which they briefed for the first time in the Court of Appeal, that Section 68130.5 violates Article I, Section 31 of the California Constitution. That claim, too, was “not alleged in the

complaint,” although Plaintiffs claimed to have raised it orally at the hearing on the demurrer. *Id.* at 80;³ *see also* AOB at 45 n.12 (conceding that “Plaintiffs did not allege Article I, §31 in the complaint,” but arguing that issue could be properly raised “for the first time on appeal”).

Under the circumstances, none of these issues is properly presented for review by this Court. All that the Court of Appeal determined was that Plaintiffs had failed to show they could *amend* the complaint to allege a viable claim on any of these newly-asserted grounds, which Plaintiffs had effectively raised for the first time in that court. *See slip op.* at 33 (“We conclude plaintiffs fail to show they could amend the complaint to allege a viable claim that section 68130.5 constitutes discrimination in violation of section 68062”); *id.* at 76 (“Plaintiffs fail to show they could amend the complaint to add a viable takings claim”); *id.* at 83 (“We conclude plaintiffs fail to show a viable claim for violation of California Constitution, article I, section 31”).

Plaintiffs bore the burden below to establish that they had made a sufficient showing to warrant granting them leave to amend their complaint to add these newly-asserted claims. *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985) (“The burden of proving such reasonable possibility [that the defect can be cured by amendment] is squarely on the plaintiff”). Plaintiffs have not sought review of the Court of Appeal’s determination that they failed to carry that burden. Instead, Plaintiffs have sought review as to the *merits* of the newly-asserted claims – claims that Plaintiffs never pled, did not brief in the Superior Court, and only belatedly (and often cursorily) raised in the Court of Appeal.⁴

³Plaintiffs failed to establish even that, as “no transcript appears in the record on appeal.” *Slip op.* at 80.

⁴For example, Plaintiffs’ taking argument comprised exactly three sentences of their opening brief. AOB at 44-45. Likewise, Plaintiffs discussed the alleged “violation” of Education Code Section 68062, not as a separate claim, but as the purported “basis” for their other state law
(continued . . .)

Nothing in the Court of Appeal's ruling that Plaintiffs had failed to show they could amend the complaint to allege viable claims on these newly-asserted grounds presents any basis for review by this Court, nor do Plaintiffs assert that review of the Court of Appeal's rulings in that regard is "necessary to secure uniformity of decision or to settle an important question of law." CAL. R. CT. 8.500(b)(1). Under the circumstances, this Court should deny review as to those issues on the ground that Plaintiffs failed timely to raise or preserve them in the lower courts.

B. Plaintiffs' Request That This Court Grant Review To Decide The Constitutionality Of A Second State Statute, Although That Issue Was Not Raised Or Briefed In The Court Of Appeal, Is Baseless.

In addition to the four issues they purport to raise in the "Statement of Issues" section of their Petition (Pl. Pet. at 2-3), Plaintiffs also ask this Court to determine, in the first instance, the constitutionality of another state statute, Education Code Section 68130.7. *Id.* at 20-22. That statute, enacted by the Legislature in 2002, specifies the relief that could be granted in the event that a trial court found Section 68130.5 unlawful, and confers immunity from damages or other retroactive relief on the state's public colleges and universities. *See slip op.* at 9 n.6 (quoting §68130.7). Plaintiffs concede that although they challenged the validity and effect of Section 68130.7 in the trial court, that issue was "never briefed by any of the parties in the court of appeal." Pl. Pet. at 21. In the body of their Petition, Plaintiffs nevertheless request this Court to "grant review and independently determine" the issue—but they do not cite *any* authority supporting their charge that Section 68130.7 is invalid, instead merely inviting a "review of the record" on that point. *Id.* at 22.

(... continued)

claims. AOB at 43. Plaintiffs did not seek rehearing in the Court of Appeal as to any of these issues, other than by objecting to that court's alternative discussion of the doctrine of implied repeal.

Plaintiffs' request is improper, for at least three reasons. *First*, it violates the Rule of Court governing the form of petitions for review, which requires the petition to “*begin* with a concise, nonargumentative statement of the issues presented for review.” CAL. R. CT. 8.504(b)(1) (emphasis added). Burying an additional issue two-thirds of the way through a petition does not comply with that requirement. *Second*, fundamental principles governing review by this Court mandate that issues—especially ones as significant as an attack on the constitutionality of a state statute—must be properly raised, briefed and decided in the lower courts before being presented to this Court. *See* pp. 2-3, *supra*. *Third*, even assuming such an issue is raised, the petitioner bears the burden of persuading the Court that the criteria for review have been met, and cannot carry that burden merely by inviting the Court to “review . . . the record” to verify its assertion. Certainly, the Court of Appeal’s passing reference to an existing and presumptively valid state statute (*see* slip op. at 80) does not present any basis for this Court to reach out to determine the constitutionality of that statute.⁵

⁵Plaintiffs also improperly ask this Court to decide issues that they forfeited below. In their Complaint, Plaintiffs sought to state a cause of action under 42 U.S.C. §1983 premised on an alleged violation of 8 U.S.C. Section 1623. *See* slip op. at 11; 1 CT 29-30. The trial court dismissed that claim on the ground that the federal immigration statutes did not confer any private right of action on Plaintiffs and therefore could not support a federal civil rights claim. Slip op. at 16-17. In an unpublished portion of its opinion, the Court of Appeal ruled that by failing to raise that issue in their opening brief, Plaintiffs forfeited any claim that they have a private right of action to enforce Sections 1621 or 1623. *Id.* at 18-23. Although Plaintiffs have not squarely sought review of that ruling, they appear to assert that this Court nevertheless should decide the issue. Pl. Pet. at 17 n.3.

II.

PLAINTIFFS HAVE NOT PRESENTED ANY ISSUE UNDER THE UNRUH ACT THAT WARRANTS REVIEW.

Plaintiffs present only one issue for review that they actually pled in their Complaint: their claim that Defendants' enforcement of Section 68130.5 constitutes "discrimination predicted on geographic origin" in violation of the Unruh Civil Rights Act, CIV. CODE §51. 1 CT 37-39 ¶¶154-65; *see slip op.* at 12-13. Plaintiffs argued for the first time on appeal that Section 68130.5 also violates the Unruh Act's prohibition against discrimination on the basis of "national origin." AOB 50-51. Although Plaintiffs devoted less than three pages of their opening brief below to this claim (*see* AOB at 49-51), they now make it the centerpiece of their Petition for Review. Pl. Pet. at 12-22.⁶ For numerous reasons, however, Plaintiffs' Unruh Act arguments are meritless and do not warrant review.

First, Plaintiffs ignore a dispositive threshold defect in their claim: by definition, Section 68130.5 cannot "violate" another statute, such as the Unruh Act, previously enacted by the Legislature. "[T]he California legislature could hardly have violated its own statutes by passing another statute." *Sanders v. Brown*, 504 F.3d 903, 919 (9th Cir. 2007). It is black-letter law that the Legislature is free to amend or repeal an existing statute, or to enact a different statute that has the effect of modifying an earlier one, and that in the event of a conflict, the later-enacted statute prevails. *See, e.g., County of Ventura v. Barry*, 202 Cal. 550, 556 (1927) ("a subsequent expression of the law-making power on this same subject . . . must be given control over the provisions of the earlier section");

⁶Plaintiffs did not timely raise in the Court of Appeal a number of subissues as to which they now seek review, including whether the Act protects citizens of other states (Pl. Pet. at 2) and whether it extends to claims purportedly brought directly under the Fourteenth Amendment or Article I, Section 7 of the California Constitution. *Id.* at 16-20. Because Plaintiffs did not raise those issues below, they are not properly presented here. *See* Part I, *supra*.

Howard Jarvis Taxpayers Ass'n v. City of Roseville, 106 Cal. App. 4th 1178, 1188 (2003) (same). Indeed, the Unruh Act itself “anticipates that if there is a conflict between its provisions and those of another statute, the former defers to the latter.” *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1504 (1999). Section 68130.5 was more recently enacted and is a more specific statute than the Unruh Act, and therefore controls in the event of any conflict. *Id.* at 1404-05. On that ground alone, Plaintiffs’ Unruh Act claim is fatally defective, and presents no basis for review.

Second, there is no “conflict” between Section 68130.5 and the Unruh Act in any event. The Unruh Act does not prohibit discrimination against citizens of other states based on their “geographic origin,” the novel claim that Plaintiffs first alleged. The Court of Appeal correctly rejected Plaintiffs’ contention (Pl. Pet. at 14) that in *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005), this Court extended the Act’s protection to persons supposedly discriminated against on that basis. Slip op. at 79. *Koebke* held only that the version of the Unruh Act in effect at the time prohibited discrimination in favor of married couples and against domestic partners. 36 Cal. 4th at 850. The case did not hold that there is any statutory prohibition on discrimination on the basis of “geographic origin,” an issue not presented in that case. “An appellate decision is not authority for everything said in the court’s opinion but only for the points actually involved and actually decided.” *Santisas v. Goodin*, 17 Cal. 4th 599, 620 (1998) (citation and internal quotations omitted). Thus, there is no conflict between it and the Court of Appeal’s opinion that could warrant review.⁷

⁷In attempting to concoct such a conflict, Plaintiffs twist out of context (Pl. Pet. at 14) the Court’s discussion of an earlier decision, which in discussing the statutory categories distinguished between “personal characteristics,” which are protected against discrimination under the Act, and economic status, which is not. *Koebke*, 36 Cal. 4th at 842-43 (“unlike economic status, enumerated categories involve personal characteristics like ‘a person’s geographical origin, physical attributes, and personal beliefs’” (quoting *Harris v. Capital Growth* (continued . . .)

Nor did Plaintiffs present a colorable claim that Section 68130.5 discriminates on the basis of “national origin.” As the Court of Appeal succinctly observed, “Plaintiffs are denied the exemption from nonresident tuition, *not* because they are U.S. citizens, but because they have not attended high school in California.” Slip op. at 78. Indeed, as we have shown in our Petition for Review, whether one consults the plain statutory language, the statute’s legislative history, or the limited factual record before the Court of Appeal, the conclusion is the same: Section 68130.5 exempts *all* students who meet its criteria, *regardless* of their residence or citizenship status. Pet. at 16-21.⁸ Thus, Plaintiffs’ key assumption – that the statute “discriminates” against U.S. citizens and in favor of undocumented immigrants – is erroneous as a matter of law.⁹

(. . . continued)

Investors XIV, 52 Cal. 3d 1142, 1160 (1991)). The only statutorily enumerated category the Court could have been referring to was the prohibition against discrimination on the basis of “national origin.” There is no statutory bar against discrimination on the basis of “geographic origin,” nor do Plaintiffs cite any case finding such a prohibition.

⁸Plaintiffs raise yet another new claim in their Petition: that the Unruh Act prohibits discrimination on the basis of “residence.” Pl. Pet. at 14-15. But not only is that new claim barred by Plaintiffs’ failure to raise it below (*see* Part I, *supra*), it is unsupported by Plaintiffs’ citation to *Harris*, where the Court was describing various protected categories added to public accommodation statutes in *other* states. 52 Cal. 3d at 1161 n.10.

⁹Neutral standards that “extend to all applicants regardless of their membership in a particular group” cannot be the basis for an Unruh Act claim. *Turner v. Assoc. of Amer. Medical Colleges*, No. A117071, slip op. at 6-8 (1st Dist. Oct. 30, 2008) (“Despite its broad application, the Unruh Act does not extend to practices and policies that apply to all persons: ‘This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, martial status, or sexual orientation.’” (quoting CIV. CODE §51(c) (citation omitted))).

Third and finally, as the Court of Appeal correctly concluded (slip op. at 80), the Unruh Act prohibits only “arbitrary discrimination” on the basis of specified classifications, such as age. *Lazar*, 69 Cal. App. 4th at 1502. This Court “has determined that certain types of discrimination are reasonable and thus not arbitrary under the Act.” *Id.* (citation omitted). In particular, “[b]usinesses retain the right under the Act to establish reasonable regulations that are rationally related to the services performed and facilities provided.” *Id.* Here, the Legislature has specifically permitted public universities and colleges to charge nonresident tuition and to exempt certain persons from the requirement of paying nonresident tuition. *See* EDUC. CODE §§68050-68052 (policies governing payment of nonresident tuition); *id.* §68040 (each student at the University of California, the California State University and at a California community college shall be classified as a resident or nonresident). In numerous sections of the Education Code, the Legislature has enacted a variety of exemptions from and waivers of nonresident tuition rates. *See, e.g., id.* §§66025.3, 68070-68084, 68120, 68121, 68124, 68130, 76140, 89705-89707. Many of these statutory exemptions, like Section 68130.5, do not depend on whether the students reside in California, but are available to all students who meet the stated criteria, regardless of their residence. Accordingly, even if Section 68130.5 somehow could be construed as “discriminating” against those students who do not qualify for the statutory exemption, it does not constitute “arbitrary” discrimination on the basis of a protected category in violation of the Unruh Act, and there is no basis for review of that unsupported claim.

III.

PLAINTIFFS’ STATUTORY CONFLICT CLAIM DOES NOT WARRANT REVIEW.

Although Plaintiffs did not plead any separate cause of action based on this issue, as noted above, Plaintiffs argued on appeal that by implementing Section 68130.5, Defendants “violated” another

state law, Education Code Section 68062. AOB 4, 42-43. The Court of Appeal observed that this contention “is really a claimed conflict between state statutes, which does not help plaintiffs, because section 68130.5, as the later-enacted statute, would prevail.” Slip op. at 31-32 (citing *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1038 (2007)). After rejecting Plaintiffs’ misreading of *Regents of University of California v. Bradford*, 225 Cal. App. 3d 972 (1990) (“*Bradford*”), the court reasoned that to the extent the two statutes could be said to conflict, “the result would be, at most, an implied repeal of section 68062 as the earlier-enacted statute.” Slip op. at 32. Plaintiffs now seek review as to that issue. Pl. Pet. at 22-26. For several reasons, however, that request is ill-founded.

First, the entire premise for Plaintiffs’ argument—that there is a “conflict” between the two statutes—is wrong. Section 68062(h) provides that “[a]n alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act from establishing domicile in the United States.” EDUC. CODE §68062(h). Thus, as *Bradford* recognized, Section 68062(h) “precludes undocumented alien students from being classified as residents for tuition purpose.” *Bradford*, 225 Cal. App. 3d at 978.¹⁰ However, Section 68130.5 does *not* classify undocumented aliens as residents for tuition purposes, nor does it redefine residency. Instead, under Section 68130.5, a student—*regardless* of residency or citizenship—is eligible for exemption from nonresident tuition if he or she satisfies the applicable criteria:

¹⁰*Bradford* held only that Section 68062 “precludes undocumented alien students from qualifying as residents of California for tuition purposes,” and that so construed, it is constitutional. 225 Cal. App. 3d at 980-82. Nothing in that case barred the state from enacting, or Defendants from implementing, a statute that exempts students including undocumented immigrants who meet certain criteria from payment of nonresident tuition. That the state may have “legitimate interests in denying resident tuition to undocumented aliens” (*id.* at 981) hardly means that it is *compelled* in all cases to do so.

attendance at a California high school for at least three years and graduation (or the equivalent). Based on its plain language, therefore, Section 68130.5 does not conflict with Section 68062(h), and nothing in *Bradford* suggests otherwise.

Second, even if there arguably were a conflict between the two statutes, the Court of Appeal's analysis of that issue is unassailable. The Court of Appeal merely applied the black-letter principle, discussed above, that in the event of a conflict between two statutes, the later-enacted statute prevails. *See pp. 7-8, supra*. Plaintiffs respond that a preempted state law, Section 68130.5, cannot repeal an existing statute, Section 68062. Plaintiffs cite several cases to support their tautological argument that preempted statutes are preempted and therefore void. Pl. Pet. at 24-25. However, that argument does not help Plaintiffs because it commits the classic fallacy of assuming its conclusion by presupposing that Section 68130.5 is in fact preempted. If Section 68130.5 were preempted by federal law, then reference to Section 68062 would be unnecessary. On the other hand, if Section 68130.5 is not preempted by federal law, as explained in Defendants' Petition for Review, then to the extent Section 68130.5 is in conflict with Section 68062, Section 68130.5 prevails as the later-enacted statute.

Third and finally, the Court of Appeal's adoption of the "implied repeal" doctrine was not a square holding, but rather only an alternative rationale for its disposition of this claim. The court said only that "[t]o the extent section 68130.5, as a de facto residence statute, *could be said* to conflict with section 68062, the result would be, *at most*, an implied repeal of section 68062 as the earlier-enacted statute." Slip op. at 32 (emphasis added). Such a contingent alternative ruling would not present a proper vehicle for review, even if the criteria for review were otherwise met.

IV.

PLAINTIFFS' "TAKING" CLAIM DOES NOT PRESENT ANY BASIS FOR REVIEW.

In a three-sentence argument in their opening brief, Plaintiffs asserted for the first time on appeal that Defendants' "illegal extraction of excessive tuition from plaintiffs" constituted an illegal "taking" in violation of due process. AOB at 44. The Court of Appeal had no trouble disposing of that claim, which it found unsupported by any pertinent authority. Slip op. at 76-77. It does not present any basis for review by this Court.

Plaintiffs have no significant "property" interest that warrants protection under the due process clause because they have not claimed, nor could they, that the University ever promised them that they would not have to pay nonresident tuition.¹¹ Rather, Plaintiffs admit that they are United States citizens who pay *nonresident* tuition and *do not qualify* for the statutory exemption. See slip op. at 6-7. Just as under the similar Kansas statute, therefore, "[n]one of these Plaintiffs would be eligible to pay resident tuition . . . even if the allegedly discriminatory test . . . favoring illegal aliens were stricken," because none attended California high schools for at least three years and graduated. *Day v. Bond*, 500 F.3d 1127, 1135, *reh'g and reh'g en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008). Thus, even if Section 68130.5 were invalid, Plaintiffs had no "right" to pay resident tuition that was "taken" for which they would be entitled to compensation.

Plaintiffs deny that any cognizable property interest they may have in paying resident tuition is "slight." Pl. Pet. at 28. Plaintiffs are wrong: as the very cases they cite establish, even students who allege entitlement to be reclassified as residents for tuition purposes – which Plaintiffs do not – have at most a "slight" property interest

¹¹For that reason, as the Court of Appeal correctly concluded, "Plaintiffs' citation of authority that they have a contractual relationship with defendants adds nothing to their constitutional claims." Slip op. at 77.

in payment of the lower resident tuition rates. *Lister v. Hoover*, 706 F.2d 796, 803 (7th Cir. 1983) (“However large and important the tuition reduction may seem to students on a tight budget, and possibly without income, in a constitutional perspective plaintiffs’ interest is slight”); *Spielberg v. Board of Regents, Univ. of Michigan*, 601 F. Supp. 994, 999 (E.D. Mich. 1985) (“plaintiff’s interest is relatively slight”); *Michelson v. Cox*, 476 F. Supp. 1315, 1321 (S.D. Iowa 1979) (“the property interest that plaintiff or any . . . student has in the difference between the resident and nonresident tuition rate is slight both in an absolute monetary sense and relative to the other types of rights protected by the Constitution”).

Finally, even if Plaintiffs had any “entitlement” to lower tuition that could constitute a protectable property interest – and they do not – they would have no colorable due process claim. Unlike the cases relied upon by Plaintiffs, which involved administrative determinations by universities as to students’ residence status, this case involves a legislative enactment. The Legislature’s enactment of Section 68130.5 provided Plaintiffs with all the process they were due. “It is equally well settled, however, that only those governmental decisions which are *adjudicative* in nature are subject to procedural due process principles. *Legislative* action is not burdened by such requirements.” *Horn v. County of Ventura*, 24 Cal. 3d 605, 612 (1979) (citations omitted); *see also, e.g., Oceanside Marina Towers Ass’n v. Oceanside Cmty. Dev. Comm’n*, 187 Cal. App. 3d 735, 745-46 (1986) (same).¹²

¹²Moreover, Plaintiffs forfeited their claim for damages under Section 1983 by failing to raise it in their opening brief. *See slip op.* at 18-23. It is far too late for Plaintiffs to avoid that forfeiture by attempting to devise a new constitutional claim they failed to plead below.

V.

**PLAINTIFFS' NEWLY-ASSERTED
PROPOSITION 209 CLAIM DOES NOT
WARRANT REVIEW.**

Plaintiffs asserted for the first time on appeal that Section 68130.5 constituted an illegal preference based on “national origin” in violation of Article I, Section 31 of the California Constitution, which was adopted by Proposition 209 in 1996. The Court of Appeal correctly rejected that argument, reasoning that under analogous federal authority, “national origin” does not include alienage or citizenship. Slip op. at 80-83. Although Plaintiffs briefly reargue the issue (Pl. Pet. at 32-34), they do not address that dispositive point, nor do they even bother to cite a single case construing Article I, Section 31. They have not presented any basis for review.

Plaintiffs appear to contend that the statutory exemption from nonresident tuition discriminates against or constitutes “preferential treatment” to a group “on the basis of . . . national origin in the operation of . . . public education” in violation of Article I, Section 31(a). Pl. Pet. at 32-33. However, that unsupported claim suffers from the same fundamental defects as Plaintiffs’ other claims.

First, contrary to Plaintiffs’ contention, Section 68130.5 does *not* discriminate against or grant any preference to any group “on the basis of . . . national origin” or any other protected basis. Rather, it exempts *all* students, *regardless* of their national origin or citizenship, who meet the specified statutory criteria (attendance at a California high school for three or more years and graduation or its equivalent). U.S. citizens, permanent legal residents of the United States who are citizens of other countries, and undocumented immigrants all are equally entitled to the exemption if they meet those statutory criteria. Thus, as Plaintiffs’ amicus curiae, the Pacific Legal Foundation, recognized below, “nothing in Education Code section 68130.5 excludes students born in the United States from receiving the same benefits provided to illegal aliens as long as the requirements set forth in section 68130.5(a)(1)-(4) are satisfied.”

Brf. Amicus Curiae of Pac. Legal Found. at 19. Section 68130.5 therefore does not discriminate against students on the basis of birth or citizenship in the United States, nor does it grant preferential treatment to any group on the basis of their national origin.¹³

Second, “national origin” is not synonymous with alienage or citizenship. As this Court has recognized in a leading case concerning Article I, Section 31 that Plaintiffs do not mention,¹⁴ that provision was patterned after the Civil Rights Act of 1964. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 524, 561 (2000). Title VII of that Act forbids employment discrimination on the basis of “race, color, religion, sex, or national origin.” 42 U.S.C. §2000(e)-2(a)(1). In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), the United States Supreme Court interpreted the term “national origin” as it is used in Title VII. The Court held that “[t]he term ‘national origin’ on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came.” *Id.* at 88. It squarely rejected the attempt—identical to Plaintiffs’ argument here—to conflate national origin with citizenship or alienage:

Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.

¹³The mere fact that some of the beneficiaries of the statute “come[] from countries other than the U.S.” (Pl. Pet. at 33) obviously does not signify that the statute confers a preference “on the basis of” their national origin. The “basis” for the exemption is attendance and graduation from a California high school, not the student’s country of origin.

¹⁴In fact, as noted above, Plaintiffs do not cite a single case concerning Article I, Section 31, although this Court and the Courts of Appeal have addressed its history and intent at length in several reported decisions.

Id. at 95; *see also, e.g., Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (“National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage”). Although Plaintiffs cite *Espinoza* in passing (Pl. Pet. at 33), they fail to acknowledge this holding, which is fatal to their claim.

CONCLUSION

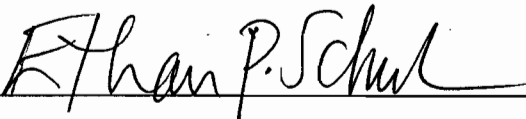
For the foregoing reasons, Plaintiffs’ Petition for Review should be denied, and Defendants’ Petitions for Review should be granted.

Respectfully,

DATED: Nov. 14, 2008

CHARLES F. ROBINSON
CHRISTOPHER M. PATTI
UNIVERSITY OF CALIFORNIA

ETHAN P. SCHULMAN
FOLGER LEVIN & KAHN LLP

By  _____

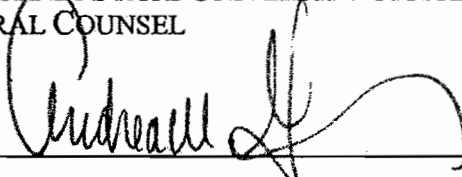
ETHAN P. SCHULMAN

*Attorneys for Defendants and Respondents
The Regents of the University of California and
Robert C. Dynes*

DATED: Nov. 14, 2008

CHRISTINE HELWICK
ANDREA M. GUNN
CALIFORNIA STATE UNIVERSITY OFFICE OF
GENERAL COUNSEL

By

A handwritten signature in black ink, appearing to read "Andrea M. Gunn", written over a horizontal line.

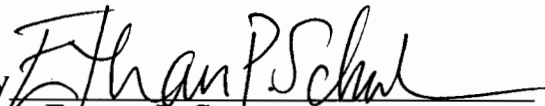
ANDREA M. GUNN

*Attorneys for Defendants and Respondents the
Board of Trustees of the California State University
and Charles B. Reed*

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the attached Answer to Plaintiffs' Petition for Review contains 5,497 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: November 14, 2008.

By 
ETHAN P. SCHULMAN
*Attorney for Defendants and
Respondents The Regents of the
University of California and
Robert C. Dynes*

PROOF OF SERVICE

I, Catherine A. Rogers, state:

My business address is Embarcadero Center West, 275 Battery Street, 23rd Floor, San Francisco, California 94111. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served the foregoing document(s) described as:

ANSWER TO PLAINTIFFS' PETITION FOR REVIEW

on the following person(s) in this action:

Michael J. Brady
Ropers, Majeski, Kohn & Bentley
1001 Marshall Street
Redwood City, CA 94063

Attorneys for Appellants

Kris W. Kobach
Professor of Law
University of Missouri,
Kansas City
Senior Counsel, Immigration
Reform Law Institute
4701 N. 130th Street
Kansas City, KS 66109

Attorneys for Appellants

Edmund G. Brown
Attorney General of the State of
California
Julie Weng-Gutierrez
Supervising Deputy Attorney
General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento CA 94244-2550

*Attorneys for Respondents Board
of Governors of the California
Community Colleges and
Marshall Drummond*

Christine Helwick
Andrea M. Gunn
California State University Office
of General Counsel
401 Golden Shore, 4th Floor
Long Beach, CA 90802-4210

*Attorneys for Respondents
Trustees of the California State
University System and Charles B.
Reed*

Charles F. Robinson
Christopher M. Patti
University of California
Office of General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Clerk of the Court
California Court of Appeal,
Third Appellate District
900 N. Street, Room #400
Sacramento, CA 95714-4869

*Attorneys for Respondents The
Regents of the University of
California and Robert C. Dynes*

Clerk of the Court
Yolo County Superior Court
725 Court Street, Rm. 103
Woodland, CA 95695

- BY FIRST CLASS MAIL:** I am employed in the City and County of San Francisco where the mailing occurred. I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, with postage fully paid. I placed the envelope or package for collection and mailing, following our ordinary business practice. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
- BY MESSENGER SERVICE:** I served the document(s) identified above by placing them in an envelope or package addressed to the person(s) listed above and providing them to a professional messenger service for service.
- BY OVERNIGHT DELIVERY:** I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, in an envelope or package designated by the overnight

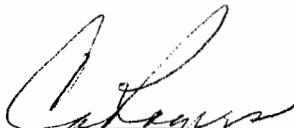
delivery carrier with delivery fees paid or provided for. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier, or by delivering to a courier or driver authorized by the overnight delivery carrier to receive documents.

- BY FACSIMILE: Based on an agreement of the parties to accept service by facsimile transmission, I faxed the document(s) identified above to the person(s) at the fax number(s) listed above. The transmission was reported complete and without error. I have attached a copy of the transmission report that was issued by the facsimile machine.

- BY ELECTRONIC MAIL: Based on a court order or an agreement of the parties to accept service by electronic mail, I caused the document(s) identified above to be transmitted electronically to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on November 14, 2008, at San Francisco, California.


Catherine A. Rogers

78074\9002\624442.1