Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL., Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., Respondent.	S167791

Court of Appeal, Third Appellate District, Case No. C054124
Honorable Rick Sims, Acting Presiding Justice
Honorable Vance Raye, Justice
Honorable Harry E. Hull, Jr., Justice
Yolo County Superior Court No. CV 052064
Honorable Thomas E. Warriner

SUPREME COURT
FILED
NOV 24 2008
Frederick K. Ohlrich Clerk
Deputy

REPLY IN SUPPORT OF DEFENDANTS' PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of the State of California
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General

JULIE WENG-GUTIERREZ
Supervising Deputy Attorney General
State Bar No. 179277

1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8223
Fax: (916) 324-5567
Email: Julie.WengGutierrez@doj.ca.gov

Attorneys for Defendants and Respondents
Community Colleges

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. DEFENDANTS PROPERLY PETITIONED FOR REVIEW OF THE APPELLATE COURT'S PREEMPTION HOLDING	2
II. WHETHER FEDERAL LAW BARS CALIFORNIA FROM GRANTING IN-STATE TUITION TO ITS HIGH SCHOOL GRADUATES IS AN IMPORTANT ISSUE WORTHY OF REVIEW	2
III. PLAINTIFFS RELY ON INADMISSIBLE OR IRRELEVANT AUTHORITY	5
CONCLUSION	6

TABLE OF AUTHORITIES

Page

Cases

Equal Access Ed. v. Merten
(E.D. Va. 2004) 325 F.Supp.2d 655 — 5

League of United Latin American Citizens v. Wilson (*LULAC II*)
(C.D. Cal. 1997) 997 F.Supp. 1244 — 5

People v. Standish
(2006) 38 Cal.4th 858 — 2

PLCM Group v. Drexler
(2000) 22 Cal.4th 1084 — 2

Statutes

8 United States Code
§ 1621 — 3-5
§ 1623 — 3, 4

Education Code
§ 48050 — 3
§ 48051 — 3

Court Rules

California Rules of Court
rule 8.516(b)(1) — 2
rule 8.516(b)(2 — 2

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

Enrolled Bill Report on Assembly Bill No. 540
Office of the Secretary for Education
(2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5 ... 3, 4

Historical & Statutory Notes, 28 Pt. 3 West's Annotated Education Code
(2003 ed.) foll. § 68130.5, pp. 477-478 ... 4

Senate Committee on Education
(2001-2002 Reg. Sess.) June 14, 2001, p. 4 ... 5

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<table>
<tr><td>ROBERT MARTINEZ, ET AL.,
Appellants,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
Respondent.</td><td>S167791</td></tr>
</table>

INTRODUCTION

Predictably, in their answer, plaintiffs—a group of non-Californians who admittedly do not qualify for the state program at issue—claim that the case does not merit review. However, the court below held that federal law preempts a state program that the Legislature designed to help more than 5,000 graduates of California high schools—including both U.S. citizens and undocumented immigrants—attend college in California. In the statutes at issue, the Legislature chose its words very carefully to avoid a conflict with federal law. The court below impeached the Legislature's motives, eschewed the plain words of state statutes, and re-wrote the statutes to say what the court presumed the Legislature meant, rather than what the statutes actually say. Plaintiffs make little attempt to reconcile the decision below with the normal rules for statutory interpretation, dismiss the affect on California high school graduates as mere policy arguments, and assign no importance to the federal preemption of California law. The Court should grant review.

I.

DEFENDANTS PROPERLY PETITIONED FOR REVIEW OF THE APPELLATE COURT'S PREEMPTION HOLDING

Plaintiffs' assertion that defendants have forfeited review of the appellate court's analysis on *implied* preemption—as opposed to express preemption—is plainly wrong. The question presented is whether "federal immigration laws preempt California's policy of granting in-state tuition to nonresident high school graduates." (Community Colleges' Petn. for Review, p. 1.) By framing the issue broadly, defendants sought review of the appellate court's entire preemption analysis. Preemption—whether express or implied—is "fairly included" in the issue. (Cal. Rules of Court, rule 8.516(b)(1).)

Plaintiffs' case citations are inapposite because the issues in those cases were neither preserved in the court of appeal, nor raised in the petition for review, and this Court declined to exercise its discretion under Rules of Court, rule 8.516(b)(2). (*People v. Standish* (2006) 38 Cal.4th 858, 888, fn. 9 [forfeiture claims were neither raised in appellate court nor in petition for review citing Cal. Rules of Court, rule 8.516(b)(1)]; *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1094, fn. 3 [issue not raised before appellate court, nor raised in petition deemed waived].)

II.

WHETHER FEDERAL LAW BARS CALIFORNIA FROM GRANTING IN-STATE TUITION TO ITS HIGH SCHOOL GRADUATES IS AN IMPORTANT ISSUE WORTHY OF REVIEW

This case presents an important issue of first impression in California: whether federal immigration laws prevent California from granting in-state tuition to its nonresident high school graduates. But the issue may have broad

implications for other states as well. Nine other states have followed California's trend of making college more accessible to its high school graduates and will look to this Court's decision. (See UC & CSU Petn. for Review, Appendix of similar state statutes.)

Mostly, plaintiffs argue that the decision below was correct. But plaintiffs' answer commits the same error of the appellate court — it ignores the language of the statute and inappropriately resorts to legislative history when the text of the law is clear. The text of both federal law and state law is clear without resort to legislative history. 8 U.S.C. § 1621 (Section 1621) allows a state to provide public benefits to undocumented immigrants by enacting a law that affirmatively provides for such benefit. 8 U.S.C § 1623 (Section 1623) further allows a state to grant a postsecondary education benefit to an undocumented immigrant so long as (1) the benefit is not based on residence and (2) a U.S. citizen receives the same benefit not based on residence. High school attendance in California is not based on residence—as demonstrated by the undisputed facts that non-resident students from neighboring states or countries may cross the border to attend California high schools (Ed. Code, §§ 48050-48051) and non-resident students may attend California's private boarding schools. (See Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sect. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5; see Opn. at p. 53.)

Plaintiffs repeatedly misinterpret Section 1623 as a flat prohibition (Plaintiffs' Petn. for Review, pp. 4, 8, 9, 10), and ignore the exception that only requires that a U.S. citizen be eligible for the same benefit not on the basis of residence within a state. (Plaintiffs' Petn. for Review, pp. 5, 11, 12.) Under plaintiffs' interpretation, if one undocumented immigrant receives in-state tuition, then all U.S. citizens should receive in-state tuition. But Section 1623 simply prohibits the benefit from being based on residence and requires that a U.S. citizen be eligible for the same. Any U.S. citizen student may attend a

California high school without changing their residence. The exemption from nonresident tuition does not grant a student resident status or modify the definition of residence.

Even resorting to legislative history, plaintiffs' reliance on it is misguided. Plaintiffs cite to one piece of legislative history of Section 1621 that requires any state law providing a public benefit to an undocumented immigrant to reference Section 1621, but that requirement never made it into the final version. (Plaintiffs' Answer, p. 15.) Plaintiffs cite to Section 1623's legislative history that purportedly demonstrates that undocumented immigrants will not be eligible for in-state tuition at public colleges, universities, technical and vocational schools. (Plaintiffs' Answer, pp. 8-9.) These statements conflict with the plain language of Section 1623 which allows States to provide for in-state tuition for undocumented immigrants, without granting them residence.

Indeed, the legislative history of California's exemption demonstrates the Legislature's intent to comply with the federal immigration law:

> The purpose of this bill [section 68130.5] is to allow students who have attended California high schools to receive a nonresident tuition exemption, *without* classifying these students as California residents for tuition purposes.

(Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sect. for Ed. (2001-2002 Reg. sess.) Oct. 3, 2001, p.1, original italics; Clerk's Transcript (CT), Vol. VI, p. 1565.) The Legislature declared that the exemption "does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 . . . ." (Historical & Statutory Notes, 28 Pt. 3 West's Ann. Ed. Code (2003 ed.) foll. § 68130.5, pp. 477-478.) The court below, like plaintiffs, discarded the Legislature's plain words.

III.

PLAINTIFFS RELY ON INADMISSIBLE OR IRRELEVANT AUTHORITY

Plaintiffs inappropriately cite to a letter from UC General Counsel that both lower courts excluded as not constituting legislative history. (Plaintiffs' Answer, p. 6, 11; Opn. at pp. 26-27.) Plaintiffs' reference to the Governor's veto message of a prior bill (Plaintiffs' Answer, p.5) fails to account for the subsequent opinion by the Chief Legislative Counsel that the exemption "did not violate federal law since it did not tamper with a student's residency status under federal law . . . ." (Sen. Com. on Ed. (2001-2002 Reg. Sess.) June 14, 2001, p. 4; CT, Vol. 6, p. 1559.)

Additionally, plaintiffs' reliance on *Equal Access Ed. v. Merten* (E.D. Va. 2004) 325 F.Supp.2d 655, is misplaced because that case dealt with a challenge to admission policies of higher education institutions and their classifications of applicants' immigration status. Neither issue is present here. Plaintiffs also rely on *League of United Latin American Citizens v. Wilson* (*LULAC II*) (C.D. Cal. 1997) 997 F.Supp. 1244 to support their preemption argument. However, *LULAC II* does not require a State to specifically reference Section 1621 in providing a public benefit to an undocumented immigrant. (*Id.* at 1255.)

The remainder of plaintiffs' answer addresses the appellate court's ruling on the Privileges and Immunities Clause issue which was raised in the UC & CSU Petition for Review. Community Colleges joins in the UC & CSU's Petition for Review and in their Reply.

CONCLUSION

For all of these reasons, the Court should grant the petition for review.

Dated: November 24, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General

JULIE WENG-GUTIERREZ
Supervising Deputy Attorney General
State Bar No. 179277

Attorneys for Defendants and Respondents
Board of Governors of the CA Community
Colleges, and Marshall Drummond

SA2008305971
10461270.wpd

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Robert Martinez, et al. v. Regents of the University of California, et al.**

No.: **S167791**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On November 24, 2008, I served the attached **Reply in Support of Defendants' Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight and FedEx**, addressed as follows:

Via Golden State Overnight Only
Michael J. Brady, Esq.
Ropers, Majeski, Kohn & Bentley
1001 Marshall Street
Redwood City, CA 94063
Attorneys for Appellants

Via Golden State Overnight Only
Ethan P. Schulman, Esq.
Folger, Levin, & Kahn LLP
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Attorneys for Respondents The Regents of the University of California and Robert C. Dynes

Via Golden State Overnight Only
Christine Helwick
Andrea Gunn
California State University
Chancellor's Office, Long Beach
Office of the General Counsel
401 Golden Shore, 4th Floor
Long Beach, CA 90802
Attorneys for Respondents Trustees of the California State University System and Charles B. Reed

Via FedEx Only
Kris Kobach
4701 N. 130th Street
Kansas City, KS 66109
Attorneys for Appellants

Via Golden State Overnight Only
Charles F. Robinson
Christopher M. Patti
University of California
UC Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607
Attorneys for Respondents The Regents of the University of California and Robert C. Dynes

Via Golden State Overnight Only
Sharon L. Browne
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Attorneys for Amicus Curiae Pacific Legal Foundation

Via Golden State Overnight Only
Cynthia Ann Valenzuela
Mexican American Legal Defense
and Educational Fund
634 South Spring Street, Eleventh Floor
Los Angeles, CA 90014
Attorneys for Amicus Curiae Alicia A. et al.

Via Golden State Overnight Only
Robert Rubin
Lawyers' Committee for Civil Rights
131 Steuart Street
San Francisco, CA 94105
Attorneys for Amicus Curiae Alicia A. et al.

Via Golden State Overnight Only
Honorable Rick Sims, Acting Presiding Justice
Court of Appeal of the State of California
Third Appellate District
900 N Street, Room 400
Sacramento, California 95814

Via Golden State Overnight Only
Bradley Stuart Phillips
Munger, Tolles & Olson LLP
355 S. Grand Ave. 35th Floor
Los Angeles, CA 90071-1560
Attorneys for Amicus Curiae Alicia A. et al.

Via Golden State Overnight Only
Honorable Thomas Edward Warriner
Judge of the Yolo County Superior Court
725 Court Street, Room 103
Woodland, CA 95695

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 24, 2008, at Sacramento, California.

Jana Boccalon
Declarant

Signature

10461268.wpd