IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL.,

Plaintiffs and Appellants,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Defendants and Respondents.

S167791
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Honorable Thomas E. Warriner

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TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
INTRODUCTION	2
STATEMENT	3
ARGUMENT	8
I. State Law Does Not Conflict with Immigration Laws Because it Is Possible for Both Citizens and Noncitizens to Pay Lower Tuition Rates If They Attend and Graduate from a California High School, Without Regard to Their Residence in California.	9
A. Attending California high school does not require residence in California.	9
B. The exemption does not alter the undocumented immigrants' legal status, and no resident benefits flow from it.	11
C. Although the statute is clear on its face, legislative history confirms that the Legislature did not intend to grant resident status to nonresident high school graduates.	14
II. State Law Does Not Frustrate Congress's Objectives Because the Exemption Promotes Educated Self-sufficient Immigrants and Encourages Legalizing Immigration Status.	16
A. Encouraging access to education supports Congress's immigration goal of making immigrants self-sufficient.	17
B. The State's policy of educating immigrants who are already here, and encouraging them to legalize their status, does not frustrate Congress's desire to discourage illegal immigration from occurring.	18
III. Congress Has Not Preempted the Field of Tuition Rates for State Colleges and Universities.	21

TABLE OF CONTENTS (continued)

Page

IV. Congress Did Not Expressly Preempt State Laws Providing Public Postsecondary Benefits to Undocumented Immigrants but Explicitly Reserved that Power to States. 23

V. The Privileges or Immunities Clause Does not Apply Where Congress Conferred No Individual Rights by Enacting Immigration Laws and Where the Exemption Does Not Discriminate Against Nonresidents. 26

A. Plaintiffs can allege no violation of the Privileges or Immunities Clause because federal immigration laws create no individual rights. 26

B. There Is No Violation of the Privileges and Immunities Clause Because the Exemption Does Not Discriminate Against Nonresident Citizens. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Federal Cases

Affordable Housing Foundation, Inc. v. Silva
(2d Cir. 2006) 469 F.3d 219 — 21

Alerding v. Ohio High School Athletic Association
(6th Cir. 1985) 779 F.2d 315 — 28

Bethesda Lutheran Homes and Services, Inc. v. Leean
(7th Cir. 1997) 122 F.3d 443 — 29

California v. ARC America Corp.
(1989) 490 U.S. 93 — 22

Chicanos Por La Causa, Inc. v. Napolitano
(9th Cir., March 9, 2009, Nos. 07-17272, 07-17274,
08-15357, 08-15359, 08-15360)
____F.3d___[2009 WL 735869] — 22

Cipollone v. Liggett Group, Inc.
(1992) 505 U.S. 504 — 22

Cote-Whitacre v. Dept. of Public Health
(2006) 446 Mass. 350 [844 N.E.2d 623] — 29

DeCanas v. Bica
(1976) 424 U.S. 351 — 19, 23

Deubert v. Gulf Federal Savings Bank
(5th Cir. 1987) 820 F.2d 754 — 27

Exxon Mobil Corp. v. Allapattah Services, Inc.
(2005) 545 U.S. 546 — 25, 26

Florida Lime & Avocado Growers, Inc. v. Paul
(1963) 373 U.S. 132 — 16, 18

Gade v. National Solid Waste Management Assn.
(1992) 505 U.S. 88 — 8

TABLE OF AUTHORITIES (continued)

	Page
Hamilton v. Regents of the University of California (1934) 293 U.S. 245	28
Hines v. Davidowitz (1941) 312 U.S. 52	23
League of United Latin American Citizens v. Wilson (C.D.Cal. 1997) 997 F. Supp.1244	22
Madden v. Kentucky (1940) 309 U.S. 83	27
Maryland Stadium Authority v. Ellerbe Becket Inc. (4th Cir. 2005) 407 F.3d 255	22
New York v. United States (1992) 505 U.S. 144	23
Plyler v. Doe (1982) 457 U.S. 202	19-21
Printz v. United States (1997) 521 U.S. 898	23
Saenz v. Roe (1999) 526 U.S. 489	27, 29
San Antonio Independent School District v. Rodriguez (1973) 411 U.S. 1	28
United States v. Locke (2000) 529 U.S. 89	22
Vlandis v. Kline (1973) 412 U.S. 441	29

TABLE OF AUTHORITIES (continued)

Page

State Cases

Delaney v. Superior Court
(1990) 50 Cal.3d 785 15

Elsner v. Uveges
(2004) 34 Cal.4th 915 15

Farm Raised Salmon Cases
(2008) 42 Cal.4th 1077 10

Halbert's Lumber v. Lucky Stores
(1992) 6 Cal.App.4th 1233 14

Hartzell v. Connell
(1984) 35 Cal.3d 899 17

In re Jose C.
(2009) 45 Cal.4th 534 16, 19

Jevne v. Superior Court
(2005) 35 Cal.4th 935 24

Kaufman & Broad
(2005) 133 Cal.App.4th 26 15

Kirk v. Board of Regents
(1969) 273 Cal.App.2d 430 28, 29

Lockyer v. San Francisco
(2004) 33 Cal.4th 1055 9

Martinez v. Regents of University of California
(2008) 166 Cal.App.4th 1121 4

Meyer v. Sprint Spectrum L.P.
(2009) 45 Cal.4th 634 15, 25

TABLE OF AUTHORITIES (continued)

Page

Murphy v. Kenneth Cole Productions, Inc.
(2007) 40 Cal.4th 1094 — 15, 25

People v. Edward D. Jones & Co.
(2007) 154 Cal.App.4th 627 — 24

Regents of University of California v. Superior Court (Bradford)
(1990) 225 Cal.App.3d 972 — 13

Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.
(2007) 41 Cal.4th 929 — 8, 9, 16, 22

Constitutional Provisions

U.S. Const., 14th Amend., § 1, Privileges & Immunities Clause — 26-28

U.S. Const., Art. IV, § 2 — 27

Statutes

8 United States Code
§ 1182(k) — 20
§ 1182(a)(9)(B)(v) — 20
§ 1182(a)(9)(C)(ii) — 21
§ 1182(d)(11) — 20
§ 1182(d)(12) — 20
§ 1182(d)(4) — 20
§ 1182(g) — 20
§ 1182(h) — 20
§ 1182(i)(1) — 20
§ 1255(d) — 20
§ 1255(i) — 20
§ 1601 — 16
§ 1601(2)(A) — 17

TABLE OF AUTHORITIES (continued)

	Page
8 United States Code (cont.)	
§ 1601(6)	18
§ 1621	1, 7, 16, 24, 25, 28, 30
§ 1621(d)	23, 24
§ 1623	1,2,5,7,9, 16, 24, 25, 28, 30
20 United States Code	
§ 1400	27
29 United States Code	
§ 1441(a)	23
42 United States Code	
§ 1981	27
§ 1983	6
§ 12101	27
California Code of Regulations	
tit. 5, § 54020	10, 12
tit. 5, § 54022	12
tit. 5, § 54045.5, subd. (e)	13
Education Code	
§ 48050	3, 10, 11
§ 48051	3, 10, 11, 21
§ 48052	11
§ 48220	11
§ 48222	11
§ 68018	3
§ 68040	3
§ 68050	3
§ 68062, subd. (h)	10
§ 68062, subd. (h)	4, 12
§ 68073	12
§ 68074	12
§ 68075.5	12
§ 68076	12

TABLE OF AUTHORITIES (continued)

	Page
Education Code (cont.)	
§ 68077	12
§ 68078	12
§ 68079	12
§ 68080	12
§ 68081	12
§ 68082	12
§ 68083	12
§ 68120	13
§ 68121	13
§ 68130.5	1, 2, 5-7, 10, 11, 13
§ 68130.5, subd. (a)(4)	5,7,18, 20,25,26
§ 76300, subd. (h)	13
Vehicle Code	
§ 12801.5	13
Stats. 2001, ch. 814, § 1	6

Other Authorities

1 Sutherland, Stat. & Statutory Construction (6th ed. 2002) Limitations on Legislative Power, § 2:1, p. 21	15
16B Corpus Juris Secundum (2008) Constitutional Law, § 1065	29
7 Witkin, (10th ed. 2005) Constitutional Law, § 610, p. 1000	29
Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.	4, 11-13, 15, 16, 18
H.R. Rep. No. 104-725, 2nd Sess., p. 1 (1996)	25
See Historical and Statutory Notes, 28 Pt. 3 West's Ann. Ed. Code (2003 ed.) foll. § 68130.5, pp. 477-478	4, 19

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL., Plaintiffs and Appellants, v. **REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,** Defendants and Respondents.	S167791

ISSUES PRESENTED

Education Code section 68130.5 permits any graduate of a California high school, including both undocumented immigrants and U.S. citizens who are residents of other states, to pay in-state tuition rates to attend a public college or university. Federal immigration laws allow states to provide postsecondary education benefits to undocumented immigrants (8 U.S.C. § 1621) if the benefits are not based on their residence within the state and if citizens are also eligible regardless of residence (8 U.S.C. § 1623). The questions presented are:

1. Do federal immigration laws preempt California's policy of granting in-state tuition to nonresident high school graduates?

2. Whether Education Code section 68130.5, which exempts certain students from nonresident tuition without regard to their residence or citizenship, violates nonresident students' rights under federal law in violation of the Privileges and Immunities Clause of the Fourteenth Amendment?[1]

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1. This issue was presented in the petition for review filed by the Regents of the University of California, Robert C. Dynes, Board of Trustees of

INTRODUCTION

Thousands of students attend California high schools despite the fact that they are not residents of California, including U.S. citizens from other states, foreign nationals, and undocumented immigrants. The California Legislature decided to make higher education more accessible to all students that graduate from California high schools. The Legislature determined that helping these students attend California colleges and universities would foster the State's productivity and economic growth. Thus, although nonresidents ordinarily pay a higher tuition rate to attend California colleges and universities, the Legislature created an exemption for students who graduate from California high schools, regardless of their residence. (Ed. Code, § 68130.5.)

The court below erred when it held that federal law preempts this exemption. Congress requires states to provide citizens with the same higher education benefits offered to undocumented immigrants if the benefit is based on residence. (8 U.S.C. § 1623.) However, the exemption does not conflict with federal law because it does not require residence in the State: the exemption is available to anyone who graduates from a public or private high school in California regardless of their residence. (Ed. Code, § 68130.5.) Nor can the exemption from out-of-state tuition be a de facto residence requirement, as the court below held, because California does not classify or otherwise treat undocumented immigrants as residents.

Similarly, the exemption is not preempted on the ground that it stands as an obstacle to Congress's objectives. California's policy of granting in-state tuition to high school graduates complements Congress's objectives, which are to make immigrants more self-reliant and to discourage illegal immigration. California's exemption complements these objectives. The exemption helps

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the California State University, and Charles B. Reed.

students advance their education and thus become more self-reliant. And rather than encourage illegal immigration, the exemption applies to students who have already immigrated and have attended California schools for several years, and it requires them to legalize their immigration status as a condition of receiving the exemption.

Nor has Congress preempted the field of state college tuition. California's exemption regulates higher education tuition rates, a field traditionally reserved to the states.

Plaintiffs' express preemption theory must also fail because Congress explicitly, by its own language, authorized states to pass laws granting higher education benefits to undocumented immigrants, only requiring that a nonresident citizen also be eligible for any resident-based benefit available to an undocumented immigrant.

Finally, plaintiffs cannot allege a violation of the Privileges and Immunities clause. Congress did not create federal rights in citizens when it enacted immigration reform.

STATEMENT

1. Students at California colleges and universities pay varying amounts of tuition. Generally, California residents pay lower tuition than nonresidents. (See Ed. Code, § 68040.) Students are either classified as a resident (Ed. Code, § 68017), in which case they are charged the lower resident tuition, or as a nonresident (Ed. Code, § 68018), in which case they are charged the more costly nonresident tuition (Ed. Code, § 68050).

There are, however, several thousand students who graduate from California high schools who, for various reasons, are not legal residents of the State. The Secretary for Education estimates, for example, that there are about 500 children who attend California high schools but are residents of an adjoining state or country (Mexico) (see Ed. Code, §§ 48050-48051) or who

attend California boarding schools but legally reside in another state. (Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5; see Opn. at p. 53 [*Martinez v. Regents of University of California* (2008) 166 Cal.App.4th 1121].) In addition, about 5,000 to 6,000 children of undocumented immigrants—who are barred from establishing residency under California law (Ed. Code, § 68062, subd. (h))—graduate from California high schools. (Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5; See Opn. at pp. 52-53.)

Seven years ago, the Legislature decided to exempt these students from the higher, nonresident tuition rates if the students choose to attend California colleges or universities. On October 12, 2001, the Governor signed into law Education Code section 68130.5, which exempts all California high school graduates, including undocumented immigrant students, from paying nonresident tuition. The Legislature declared that the California's collective productivity and economic growth would increase by creating a tuition policy for all high school graduates that ensures access to its colleges and universities. (See Historical and Statutory Notes, 28 Pt. 3 West's Ann. Ed. Code (2003 ed.) foll. § 68130.5, pp. 477-478.) The Legislature recognized these students' academic merit by virtue of their graduation from California high schools and their acceptance into California colleges and universities. (*Ibid.*)

Thus, Education Code section 68130.5[2] (section 68130.5 or exemption) exempts *any* student from out-of-state tuition who is registered at a California university or college and has graduated from and attended three years of California high school. Undocumented immigrants may also qualify for this exemption, assuming they meet these threshold requirements and file an affidavit stating they have filed or will file an application to legalize their status. (Ed. Code, § 68130.5, subd. (a)(4).)

By extending this tuition exemption to all high school graduates, regardless of residency, the Legislature tailored this program to avoid federal restrictions on benefits to undocumented immigrants that are based on residence. A federal immigration law, 8 U.S.C. section 1623, provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for the benefit . . . without regard to whether the citizen or national is such a resident." While section 1623 relies on residency, the exemption at issue here is based on high

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2. Section 68130.5 provides: "Notwithstanding any other provision of law:
(a) A student, other than a nonimmigrant alien . . . , who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges: [¶] (1) High school attendance in California for three or more years. [¶] (2) Graduation from a California high school or attainment of the equivalent thereof. [¶] (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of 2001-02 academic year. [¶] (4) In the case of a person without lawful immigration status, 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.

. . .

(d) Student information obtained in the implementation of this section is confidential."

school attendance and graduation. Indeed, the Legislature passed a statute that explains: "This act . . . does not confer postsecondary education benefits on the basis of residence within the meaning of section 1623 of Title 8 of the United States Code." (Stats. 2001, ch. 814, § 1.)

2. Plaintiffs are United States citizens who are non-California residents. They pay higher, nonresident tuition to attend a California university or college because they did not meet the high school attendance and graduation requirements to qualify for the exemption afforded by section 68130.5. Plaintiffs allege that the exemption is preempted by immigration laws, violates their rights arising under the Equal Protection and Privileges and Immunities clauses, and violates the California Unruh Civil Rights Act. Plaintiffs seek damages, and injunctive and declaratory relief.

Defendants Regents of the University of California, Robert C. Dynes (collectively UC), Board of Trustees of the California State University, and Charles B. Reed (collectively CSU), and the Board of Governors of the California Community Colleges and Chancellor Marshall Drummond (collectively Community Colleges) filed a demurrer on several grounds, which the trial court sustained without leave to amend. Although the trial court found that, at the pleadings stage, plaintiffs have established standing,[3] the trial court ruled that (1) plaintiffs had no private right of action under 42 U.S.C. section 1983 to enforce federal immigration laws; (2) the immigration laws do not preempt section 68130.5; and (3) plaintiffs could not state a violation of their rights arising under the Equal Protection or Privileges and Immunities clauses, nor under the Unruh Civil Rights Act. Plaintiffs appealed.

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3. Defendants did not appeal the adverse ruling on standing because the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal.

3. In an 84-page opinion, the Third District Court of Appeal reversed. It concluded that two federal immigration laws preempt section 68130.5. It found that 8 U.S.C. section 1623 preempts the exemption because, inter alia, the high school attendance and graduation requirements were "de facto" residency requirements. (Opn. at p. 53.)

The Court of Appeal also found that the tuition exemption was preempted because the law did not "clearly put the public on notice that tax dollars are being used to benefit illegal aliens." (Opn. at p. 71.) 8 U.S.C. section 1621 prohibits undocumented immigrants from eligibility for public benefits unless a state enacts a law that "affirmatively provides" that undocumented immigrants are eligible. Although section 68130.5 affirmatively provides that a "person without lawful immigration status" is eligible for in-state tuition (Ed. Code, § 68130.5, subd. (a)(4)), the court below held the language insufficient. The court reasoned that the phrase "person without lawful immigration status" concealed that "illegal aliens" could qualify because it was convoluted and did not specifically reference the federal statute, section 1621. (Opn. at p. 70.)

Although the court below noted that its preemption ruling, alone, decided the case (Opn. at p. 67), it concluded that plaintiffs stated a valid Privileges and Immunities clause violation, and it allowed plaintiffs leave to amend their equal protection clause claim.

In rulings favorable to the defendants, the court below found that plaintiffs forfeited any appeal of the ruling that plaintiffs lacked a private right of action under section 1983, effectively, eliminating any claim for damages. (Opn. at p. 23.) The court also recognized that defendants were immune from damages, tuition refunds or waivers, or other retroactive relief precluding an award under the Unruh Civil Rights Act. (Opn. at p. 80, citing Ed. Code, § 68130.7.)

Plaintiffs and defendants both submitted petitions for rehearing which were denied. The court below, however, slightly modified its decision without changing its substantive ruling. It clarified that it was not granting leave to amend the Privileges and Immunities claim because plaintiffs stated an adequate claim alleging such violation.

Petitions for Review were filed by all parties. This Court denied plaintiffs' petition for review and granted defendants' respective petitions for review.[4]

ARGUMENT

"The Supremacy clause of the Unites States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." (*Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935 (*Viva!*).) There are four types of federal preemption— conflict, obstacle, field, and express. (*Ibid.*)

Regardless of the type, however, the touchstone of preemption analysis is Congressional intent. (*Gade v. National Solid Waste Management Assn.* (1992) 505 U.S. 88, 96; *Viva!, supra*, 41 Cal.4th at p. 939.) Moreover, there is a presumption against federal preemption in areas traditionally regulated by states unless it is the "clear and manifest purpose" of Congress to do so. (*Viva!, supra*, 41 Cal.4th at p. 938.) This Court is generally reluctant to infer preemption, and "it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Id.* at p. 936, internal quotations omitted.) Finally, courts presume that a statute is constitutional, and all doubts are

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4. Defendants Community Colleges filed a separate petition for review. Defendants UC and CSU filed a joint petition for review. This Court granted both petitions for review.

resolved in favor of the statute's constitutionality. (*Lockyer v. San Francisco* (2004) 33 Cal.4th 1055, 1086.)

As explained below, petitioners have not carried their burden here. Exercising its traditional role over education policy, the Legislature carefully tailored the statutes at issue to harmonize with federal immigration law.

I.

State Law Does Not Conflict with Immigration Laws Because it Is Possible for Both Citizens and Noncitizens to Pay Lower Tuition Rates If They Attend and Graduate from a California High School, Without Regard to Their Residence in California.

A. Attending California high school does not require residence in California.

Conflict preemption occurs when it is impossible to comply with both federal and state law. (*Viva!*, *supra*, 41 Cal.4th at p. 936.) Here, there is no conflict. Indeed, the Legislature tailored California's statute to comply with federal law.

The plain language of the key federal statute, section 1623, allows a state to grant an undocumented immigrant a postsecondary education benefit on the basis of residence so long as the state also grants that benefit to a citizen regardless of residence:

> an alien . . . not lawfully present . . . shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit *unless* a citizen . . . is eligible . . . without regard to whether the citizen . . . is such a resident.

Congress made the prohibition contingent on a nonresident citizen being eligible for the same benefit. Where a federal law "speaks in terms of what states may *not* do, by negative implication, [the federal law] also expresses what states *may* do." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1086.)

Accordingly, federal law allows a state to grant benefits to undocumented immigrants, so long as it does not do so on the basis of the their residence within California. If a state *does* grant benefits on the basis of an undocumented immigrant's residence, it must also grant the benefits to a citizen without respect to his residence.

California law complies with, rather than conflicts with, these requirements. First, undocumented immigrants cannot qualify for lower tuition on the basis of residency. California law bars undocumented immigrants from establishing residency for tuition purposes if prohibited by federal law. (Ed. Code, § 68062, subd. (h) [alien precluded from establishing residence if immigration law prohibits alien from establishing domicile]; Cal. Code Regs., tit. 5, § 54020 [a person must be capable of establishing residence].) No California statute grants undocumented aliens residency or grants them lower tuition on the basis of residency.

Second, California permits any nonresident—citizens, nationals, legal immigrants, or undocumented immigrants—to qualify for lower tuition without respect to their residency status, provided they attend and graduate from a California high school. (Ed. Code, § 68130.5.) California high schools are comprised of residents and nonresidents who include citizens, nationals, immigrants, and undocumented immigrants. A student need not be a California resident to attend a California high school. State law permits citizen and foreign nonresidents to attend California high schools. (Ed. Code, § 48050 ["The governing board of any school district may, . . . admit to the elementary and high schools of the district pupils living in an adjoining state which is contiguous to the school district;" § 48051 ["Any person, . . . whose parents are or are not citizens of the United States, whose actual and legal residence is in a foreign country adjacent to this state, and who regularly returns within a 24-hour period to said foreign country may be admitted to the class or school of the

district . . . ."].) Thus, nonresidents students that live in a bordering state or country may attend California public schools. (Ed. Code, §§ 48050-48052.) In addition, private high schools are open to anyone, including a nonresident citizen, who otherwise meets the admission requirements. (Ed. Code, §§ 48220 & 48222 [exempting private schools from attendance requirements].)

Manifestly, it is possible to comply with both federal and state law. California's law at issue here does not grant benefits to anybody—immigrants or citizens—on the basis of residence. The plain language of section 68130.5 conditions eligibility upon high school attendance and graduation, not residence. *Any* nonresident who meets these criteria is eligible for the lower tuition rates. (Ed. Code, § 68130.5.) No federal law bars a state from granting nonresidents lower tuition if they attend and graduate from the state's high schools.

B. The exemption does not alter the undocumented immigrants' legal status, and no resident benefits flow from it.

The plaintiffs, like the court below, argue that section 68130.5 is a surreptitious residency requirement because, if a person attends and graduates from a California high school, she is a de facto resident because, logically, a person must live in the California to attend a high school here. Plaintiffs are attempting to re-write the relevant statutes.

First, it is incorrect—both factually and legally—that people who attend and graduate from California high schools are residents. The State estimates that there are about 500 children who attend California high schools but are residents of an adjoining state or country (Mexico) (see Ed. Code, §§ 48050-48051) or who attend California boarding schools but legally reside in another state. (Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5; See Opn. at p. 53.) Their physical presence within California is irrelevant because "physical presence within the

state solely for educational purposes does not constitute establishing California residence regardless of the length of that presence." (Cal. Code Regs, tit. 5, § 54022.) These people are not California residents, and the courts are not at liberty to declare that they are.

Likewise, the estimated 5,000 to 6,000 undocumented immigrants who graduate from California high schools are not residents under California law. Plaintiffs can point to no statute that grants them residency status. As noted, California prohibits granting an undocumented immigrant residence for tuition purposes if prohibited by federal law. (Ed. Code, § 68062, subd. (h); Cal. Code Regs., tit. 5, § 54020.) Even if undocumented immigrants meet the requirements of the exemption, they do not and cannot become residents of California.

Second, qualifying for the exemption does not change the student's nonresident classification. (Clerk's Transcript (CT) at p. 1565, Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p.1 ["The purpose of this bill is to allow students who have attended California high schools to receive a nonresident tuition exemption, *without* classifying these students as California residents . . ."].) Certain exemptions or waivers from tuition do classify nonresidents as residents,[5] but

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5. (See e.g., Ed. Code, §§ 68073 [student under care of adult domiciled in state]; 68074-68075.5 [student or parent who is member of armed forces stationed in state]; 68076 [dependent of state resident]; 68077 [graduate of Bureau of Indian Affairs' school]; 68078 [teaching credential holder]; 68079 [employee, child, spouse of employee of state agency or institution]; 68080 [student outside community college district]; 68081 [state government fellow] 68082 [Native American]; 68083 [U.S. Olympic athlete] 68084 [child of federal civil service employee relocated to California].)

others, like section 68130.5, do not.[6] Thus, any nonresident high school graduate remains a nonresident.

Nor does the exemption alter the status or legalize the presence of the undocumented immigrant student in the United States. Undocumented high school graduates continue to be denied public benefits that legal residents can receive. "California law withholds from undocumented aliens fundamental political, economic, and social privileges. They cannot vote, cannot work, and are ineligible for public assistance, free medical care, and unemployment compensation." (*Regents of University of California v. Superior Court (Bradford)* (1990) 225 Cal.App.3d 972, 980, citations omitted.) Nor can they receive a California driver's license or identification card without proving their legal status. (Veh. Code, § 12801.5.) They also remain ineligible for federal and state financial aid such as Pell Grants, Supplemental Educational Opportunity Grants, subsidized and unsubsidized Stafford and Family Education Loans, Cal Grant Programs, Work Study, Graduate Fellowship, and Law Enforcement Personnel Dependents Grants. (CT at p. 1567, Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, pp. 2-3; Cal. Code Regs, tit. 5, § 54045.5, subd. (e).)

In short, California's exemption for lower tuition—based on attendance and graduation from a California high school—is not a de facto residency requirement. The Legislature determines who is, and who is not, a resident. It has not provided residency status to persons who attend California high schools.

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6. (See e.g. Ed. Code, §§ 68120 [dependent of surviving spouse of police or fire fighter]; 68121 [surviving dependents of individuals killed during September 11, 2001 terrorist attacks]; 76300, subd. (h) [spouse or dependent of Cal. National Guard killed, permanently disabled, or died of disability].)

C. Although the statute is clear on its face, legislative history confirms that the Legislature did not intend to grant resident status to nonresident high school graduates.

Relying on selected excerpts from legislative history, the court below concluded that the Legislature granted these students residency status, despite the express declaration of the Legislature itself to the contrary. (Opn. at pp. 54-61.) The court cited, for example, references to the word "resident" in committee analyses (Opn. at pp. 57-59) and a Governor's veto message concerning prior similar legislation. (Opn. at p. 59 [Governor's veto message for prior legislation]; Opn. at p. 60 [legislative intent for subsequently enacted statute].) However, it is axiomatic that the statute itself is a more accurate measure of legislative intent:

> [I]t is the language of the statute itself that has successfully braved the legislative gauntlet. . . . The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.'

(*Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1238.)

Moreover, the Legislature made express findings that the exemption "does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623." (CT 1665; Assem. Bill No. 540 (2001-2002 Reg. Sess.) § 1(a)(5).) The lower court discarded these findings as a mere legal conclusion. (Opn. at p. 54.) But we submit that court should not brush aside such findings from the Legislature so casually, particularly where, as here, the court determined that the statute is ambiguous. After all, the court's task is to determine the Legislature's intent. In these findings, the Legislature makes clear that (1) the Legislature is aware of the federal statute and has deliberately crafted its education policy to avoid a conflict, and (2) the Legislature intended the plain language of the statutes to mean what it says: the exemption is based on graduation from a California high school, not residence within the State. A

"court is not empowered to substitute its judgment for that of the legislature on matters of policy, nor to strike down a statute which is not manifestly unconstitutional even though the court may consider it unwise." (1 Sutherland, Stat. & Statutory Construction (6th ed. 2002) Limitations on Legislative Power, § 2:1, p. 21.) The court below should have followed the Legislature's own clear and unambiguous language, rather than attempt to impeach the Legislature with external sources of legislative intent. (See *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 640, citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, 801.)

Finally, other parts of the legislative history contradict the plaintiffs' position. The bill analysis that the court below cited[7], for example, provides that "[t]his measure does not change the definition of 'California resident' nor does it alter current law regarding the assessment of nonresident tuition to students that are not 'California residents.' (CT at p. 1685, Concurrence in Sen. Amends., Assem. Bill No. 540 (2001-2002 Reg. Sess.) as amended Sept. 7, 2001, p. 2; see Opn. at p. 58.) The Enrolled Bill Report also supports the Legislature's plain language:[8]

> The purpose of this bill 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.

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7. The court below relied on a Sept. 7, 2001 concurrence in Senate Amendments to AB 540. (Opn. at pp. 57-58.)

8. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934 [relying on enrolled bill report for legislative intent]; Contra: *Kaufman & Broad* (2005) 133 Cal.App.4th 26.)

(CT at p. 1565, Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 1.)

The legislative history confirms that the Legislature meant precisely what it said: the exemption from nonresident tuition is based on attending and graduating from a California high school, not on residence. Because it is possible to comply with both the State and federal law, the California law is not preempted.

II.

State Law Does Not Frustrate Congress's Objectives Because the Exemption Promotes Educated Self-sufficient Immigrants and Encourages Legalizing Immigration Status.

"Obstacle preemption arises when, '"under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citation omitted]." (*In re Jose C.* (2009) 45 Cal.4th 534, 551, quoting *Viva!, supra,* 41 Cal.4th at p. 936; see also, *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 141.)

Congress enacted sections 1621 and 1623 as part of immigration and welfare reform to reduce immigrant reliance on public benefits and avoid encouraging illegal immigration.[9] (8 U.S.C. 1601.) California's exemption

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9. In their statement of national policy concerning welfare and immigration, Congress asserted:
(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
(2) It continues to be the immigration policy of the United States that —
(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
(B) the availability of public benefits not constitute an incentive for immigration to the United States.
. . .
(5) It is a compelling government interest to enact new rules for eligibility and

from nonresident tuition neither frustrates nor stands as an obstacle to Congress's objective of making immigrants self-reliant but instead promotes an educated and productive society that reduces immigrants' reliance on public benefits. In addition, the exemption does not act as an incentive for illegal immigration. Illegal immigrants come here to work, not because of the possibility that—several years after they have immigrated and their children have graduated from high school—their children may qualify for a college discount.

A. Encouraging access to education supports Congress's immigration goal of making immigrants self-sufficient.

Congress imposed restrictions on welfare benefits for immigrants to make them self-reliant and encourage them to use "their own capabilities." (8 U.S.C. § 1601(2)(A).) California's exemption complements this objective by helping to create educated, self-sufficient individuals who will contribute to the State's productivity and economy.

Education serves to enhance job prospects and makes it less likely that the individual will depend on public benefits.

> Education holds out a 'bright hope' for the 'poor and oppressed' to participate fully in the economic life of American society. [Citations omitted.] And, it is 'an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.'

(*Hartzell v. Connell* (1984) 35 Cal.3d 899, 908.) The Legislature recognized that "increasing higher education access . . . will benefit the state . . . due to increases in attendance and future economic benefits due to the increased

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sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.
(6) 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.)

spending power and tax revenues of the educated students." (CT at p. 1569, Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5.) The Legislature's underlying assumption is that a person with a higher education will work and generate a higher income, thereby generating more tax revenue for the State. The undocumented students applying for the exemption sign an affidavit stating that they have filed an application to legalize their status or will do so as soon as they are eligible. (Ed. Code, § 68130.5, subd. (a)(4).) The Legislature contemplated that they would eventually legalize their status and, by virtue of their education and legal status, become employed and productive members of society rather than immigrants dependent on public benefits. Accordingly, the statute promotes, rather than frustrates, Congress's goals of reducing immigrants' reliance on public benefits and of supporting self-sufficient immigrants.

B. The State's policy of educating immigrants who are already here, and encouraging them to legalize their status, does not frustrate Congress's desire to discourage illegal immigration from occurring.

Similarly, there is no conflict between the State's education policy and Congress's attempts to reduce illegal immigration. Congress placed limits on public welfare benefits for immigrants, in part, to reduce incentives for illegal immigration. (8 U.S.C. § 1601(6).) California's exemption, by contrast, does not address illegal immigration; it promotes the State's interest in the health, safety, and welfare of the State by stimulating its economy through education. Importantly, the test is not whether the state and federal laws are aimed at similar or different objectives, but instead whether both can be enforced without impairing the federal superintendence of the field. (*Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at p. 142.) California's tuition

exemption can be enforced without impairing the federal government's regulation of illegal immigration.

From the State's perspective, it is important to realize that illegal immigration is simply a reality. Defendants do not contend—as surely they cannot—that the Legislature intended to encourage illegal immigration. And nobody disputes that the federal government has plenary power over immigration. (*In re Jose C.*, *supra*, 45 Cal.4th at p. 555 [recognizing exclusive federal authority over immigration matters, citing *DeCanas v. Bica* (1976) 424 U.S. 351, 354].) But the federal government fails to interdict all illegal immigrants, leaving states like California with hundreds of thousands of illegal immigrants within their borders.

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants-numbering in the millions-within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, . . .

(*Plyler v. Doe* (1982) 457 U.S. 202, 218-219.) Given this reality, California has an obvious, compelling interest in ensuring that immigrants obey its laws, pay taxes, and otherwise contribute to the health, safety and welfare of all people within the its borders.

Section 68130.5 promotes those goals. The Legislature specifically targeted this law at high school pupils who have been in California for at least three years. (See Historical and Statutory Notes, 28 Pt. 3 West's Ann. Ed. Code (2003 ed.) foll. § 68130.5, pp. 477-478.)[10] The Legislature recognized that

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10. The Legislative findings and declarations provide:
"(1) 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, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates.
"(2) These students have already proven their academic eligibility and merit by

most of these students have attended California elementary and secondary schools for most of their lives. (*Ibid.*) Rather than encourage illegal immigration, the statute is designed to make those already present productive members of society. (*Ibid.*) "[T]here is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." (*Plyler, supra*, 457 U.S. at p. 226.)

Rather than frustrate immigration laws, moreover, section 68130.5 complements them because it encourages undocumented immigrants to legalize their status as a condition of receiving lower tuition:

> In the case of a person without lawful immigration status, 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.

(Ed. Code, § 68130.5, subd. (a)(4).) Undocumented immigrants may legalize their status through marriage to U.S. citizens (8 U.S.C. § 1255(d)), or the undocumented parents may qualify to immigrate through waivers[11/] and then help their college students adjust to legal status (8 U.S.C. § 1255(i)), others may qualify for immigration relief for residing here for ten years and demonstrating extreme hardship if deported. (8 U.S.C. § 1182(a)(9)(C)(ii).)

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being accepted into our state's college and universities.
"(3) A fair tuition policy for all high school pupils in California ensures access to our state's colleges and universities, and thereby increases the state's collective productivity and economic growth."

11. The United States Attorney General is authorized to waive the inadmissibility of aliens on the following grounds: health (8 U.S.C. § 1182(g)), criminal acts (8 U.S.C. § 1182(h)), misrepresentation for admission to the United States or falsely claimed citizenship (8 U.S.C. § 1182(i)(1); smugglers (8 U.S.C. § 1182(d)(11)), subject of civil penalty (8 U.S.C. § 1182(d)(12)), documentation requirements (8 U.S.C. § 1182(d)(4) & (k)), unlawfully present or previously removed (8 U.S.C. § 1182 (a)(9)(B)(v)).

Finally, undocumented immigrants are motivated to come here for work, not for the possibility that, years after illegally immigrating, their children may graduate from high school, gain admission to a state college or university, and thereby qualify for a college discount. In *Plyler v. Doe*, the United States Supreme Court rejected the notion that a free public education acts as an incentive to illegally enter the United States. (*Plyler, supra*, 457 U.S. at p. 228, fn. 24 ["Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits"]; cf. *Affordable Housing Foundation, Inc. v. Silva* (2d Cir. 2006) 469 F.3d 219, 231 ["Employment is the magnet that attracts aliens here illegally"].) A discounted college education is even less of an incentive for illegal immigration. Indeed, an alien nonresident may qualify for the exemption without immigrating to California at all. Student's that live in Mexico near the border of California, for example, could qualify for the exemption if they arrange to attend a California public high school. (Ed. Code, § 48051.)

In short, the California's tuition exemption serves its traditional role of regulating health, education, and welfare, and can be comfortably harmonized with the federal government's supervision of illegal immigration. The exemption complements federal law by encouraging the undocumented immigrants who have already immigrated here to become self-reliant through education and by requiring them to legalize their status.

III.

Congress Has Not Preempted the Field of Tuition Rates for State Colleges and Universities.

Field preemption occurs when Congress intended to preempt all state law and applies when federal law is so comprehensive that the court may infer that Congress left no room for supplemental state laws. (*Viva!, supra*, 40 Cal.4th at p. 936.) Congress has, of course, preempted the field of immigration

but not the traditional state field of education and college tuition at state schools.

The federal government's restriction on this small aspect of state tuition rates does not preempt the field. California's exemption statute legislates in the field of education, which field states have traditionally occupied. (*Maryland Stadium Authority v. Ellerbe Becket Inc.* (4th Cir. 2005) 407 F.3d 255, 265 [higher education is a traditional state governmental function].) There is a presumption against preemption of state laws regulating areas traditionally reserved to the states. (*California v. ARC America Corp.* (1989) 490 U.S. 93, 101; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504.) "When Congress legislates in a field which States have traditionally occupied . . . [courts] start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Chicanos Por La Causa, Inc. v. Napolitano* (9th Cir., March 9, 2009, Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360) ___ F.3d ___ [2009 WL 735869] quoting, inter alia, *United States v. Locke* (2000) 529 U.S. 89, 108.) The exemption governs college tuition for nonresidents, but does not invade federal power over immigration.

Plaintiffs cannot prevail by defining a narrow field, such as the criteria by which states may grant tuition discounts to aliens, citizens of other states, or other nonresidents. The federal statute is limited, not a comprehensive scheme that purports to exclude the states' traditional control over tuition policy at their institutions. Nor does the holding in *League of United Latin American Citizens v. Wilson* (C.D.Cal. 1997) 997 F. Supp.1244 (LULAC II) change the analysis. While the district court in *LULAC II* held that Congress occupied the field of regulating post-secondary education benefits to aliens (citing § 1623), the court qualified its holding and acknowledged that there were "limited instances in which states have the right to determine alien eligibility for state or local public

benefit[s]." (*Id.* at p. 1255.) Moreover, to say Congress occupied a narrow "field" such as postsecondary education benefits to aliens, while still granting states some discretion, is meaningless:

> '[l]ittle aid can be derived from the vague and illusory but often repeated formula that, Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.'

(*DeCanas v. Bica*, *supra*, 424 U.S. at p. 360, fn. 8 [quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 78-79].) Sections 1621 and 1623 do not purport to exclude supplemental state laws; they simply place a restriction on them. There is no field preemption here.

IV.

Congress Did Not Expressly Preempt State Laws Providing Public Postsecondary Benefits to Undocumented Immigrants but Explicitly Reserved that Power to States.

We may presume, without conceding, that Congress could have prohibited states from granting postsecondary education benefits for undocumented immigrants outright.[12] It did not. Rather, Congress explicitly gave states the authority pass laws to grant public benefits to undocumented persons (8 U.S.C. § 1621(d)) and only narrowly proscribed limits for granting postsecondary education benefits — if California passes a law that affirmatively provides for eligibility and if the undocumented immigrant and citizen are both eligible for the same benefit regardless of residence within a state. (8 U.S.C.

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12. Congress can make federal law exclusive in a field. For example, the Employment Retirement Income Security Act states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." (29 U.S.C. § 1441(a).) But there are, of course, limits to Congress's power, such as the Tenth Amendment. (*New York v. United States* (1992) 505 U.S. 144; *Printz v. United States* (1997) 521 U.S. 898.)

§§ 1621(d) & 1623.) "That which is expressly permitted cannot be implicitly prohibited." (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [no express or field preemption where federal law contained express savings clauses]; *People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 638-639 [no preemption where savings clause expressly allowed state action and court declined to consider legislative history].) California's exemption falls within Congress's express permission to grant public postsecondary benefits to undocumented immigrants.

Assuming that in-state tuition is a public benefit,[13] section 1621 on its face allows the state to provide such benefit to an "alien . . . not lawfully present" by passing a law that "affirmatively provides for such eligibility."[14] California's exemption expressly allows all nonresidents, including undocumented immigrants, to receive in-state tuition. (Ed. Code, § 68130.5, subd. (a)(4).) The Legislature specifically identified a "person without lawful immigration status" as among those eligible for the exemption falling within the federal allowance

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13. A lower tuition is not a public benefit where no money, grant or tangible thing is transferred. In-state tuition is not the type of public benefit Congress intended to curb in passing welfare reform. Section 1621 lists 'retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit[s]." All of these benefits involve direct income support payments or services to meet daily needs. Similarly, the type of postsecondary education benefits referenced in both sections 1621 and 1623 involve financial aid or grant payments, not in-state tuition. A lower tuition rate is not the type of public benefit within the meaning of the sections 1621 and 1623 because it does not involve any financial payment or loan assistance.

14. 8 U.S.C. § 1621(d) provides:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

for benefits to undocumented immigrants. (*Ibid.*) Congress used similar language in sections 1621 and 1623 — "an alien who is not lawfully present." Even the court below acknowledged that the State law need not "use the words, 'illegal aliens.'" (Opn. at p. 71.) The exemption's language suffices to fall within section 1621's exception.

The court below, however, concluded that "affirmatively provides" is ambiguous, and resorted to legislative history. (Opn. at p. 69.) The court held that the exemption must "expressly reference" section 1621 in order to come within its purview. (Opn. at pp. 68-69.) It relied heavily on one reference in a conference report that stated:

> 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*, 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.

(Opn. at p. 69, quoting H.R. Rep. No. 104-725, 2nd Sess., p. 1 (1996), emphasis added.) The court below erred.

The federal law is clear on its face without need to resort to any legislative history. When interpreting federal laws, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." (*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 U.S. 546, 568; *Meyer v. Sprint Spectrum L.P.*, *supra*, 45 Cal.4th 634, 640, citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) The court below effectively rewrote the statute by relying on legislative history for a proposition not achieved through the explicit text. Legislative history,

including committee reports, have limited value where the statutory text is clear:

> judicial reliance on legislative materials like committee reports, . . . may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

(*Exxon Mobil Corp. v. Allapattah Services, Inc.*, *supra*, 545 U.S. 546, 568.) Congress knows how to include explicit language in the statutory text of a law and courts should refrain from inserting language into a statute that Congress could have, but did not insert itself.

The Legislature made no secret about its intention to tailor the tuition exemption to comply with federal law. Federal law requires a state to pass a law that affirmatively provides that an alien who is not lawfully present is eligible for the benefit. The Legislature made this quite clear when it explained, in the statute, that a "person without lawful immigration status" may be among those eligible for the exemption. (Ed. Code, § 68130.5, subd. (a)(4).)

V.

The Privileges or Immunities Clause Does not Apply Where Congress Conferred No Individual Rights by Enacting Immigration Laws and Where the Exemption Does Not Discriminate Against Nonresidents.

A. Plaintiffs can allege no violation of the Privileges or Immunities Clause because federal immigration laws create no individual rights.

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." (U.S. Const., 14th

Amend., § 1.)[15] Such privileges or immunities "protect all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship." (*Madden v. Kentucky* (1940) 309 U.S. 83, 90.) The Fourteenth Amendment Privileges or Immunities clause protects federal rights but the rights protected under that clause are few and unique:

> Since the *Slaughter House Cases*, [citation omitted], the reach of the privileges and immunities clause has been narrow. The clause protects only uniquely federal rights such as the right to petition Congress, the right to vote in federal election, the right to interstate travel, the right to enter federal lands, or the rights of a citizen while in federal custody.

(*Deubert v. Gulf Federal Savings Bank* (5th Cir. 1987) 820 F.2d 754, 760 [holding Privileges or Immunities clause of the 14th Amendment does create not protect the right to inform federal authorities of violations of federal banking law].) Congress has explicitly created rights in individuals[16] but section 1623 does not rise to this level.

Determining whether plaintiffs can allege a violation of a privilege or immunity based on section 1623, depends on whether the mere existence of a federal law gives rise to a federal right fundamental in nature. However, not all federal laws grant individual rights.

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15. Compare the 14th Amendment clause with U.S. Const., Art. IV, § 2, which provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The 14th Amendment was modeled after the Article IV clause. (*Saenz v. Roe* (1999) 526 U.S. 489, 503, fn. 15.)

16. (See e.g. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 et seq.; Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.)

The right to an education has not been protected under the Privileges and Immunities clause as a federal right incident to national citizenship. (*Hamilton v. Regents of the University of California* (1934) 293 U.S. 245, 261 [privilege of attending University is given by the state]; cf: *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1 [education not a fundamental right guaranteed by equal protection clause of Fourteenth Amendment]; *Alerding v. Ohio High School Athletic Association* (6th Cir. 1985) 779 F.2d 315 [no Privileges & Immunities clause violation under Art. IV, § 2 where nonresident student attending private high school was barred from playing in interscholastic sports].)[17/] If the right to an education does not rise to the level of a federal right, then the right to a tuition discount certainly does not.

The Court of Appeal was wrong to disregard the trial court's holding that plaintiffs have no right to enforce either section 1621 or 1623 of the federal immigration laws via 42 U.S.C. § 1983. (CT at pp. 6542-6543; Order on Demurrers, Motion to Strike and Motions by Proposed Intervenors.) The trial court explained that "[t]he focus of 8 U.S.C. § 1623 is on the aggregate, rather than the individual" and that "[t]he language of 8 U.S.C. § 1621 does not evince legislative intent to confer any right or benefit on the plaintiffs."[18/] (*Ibid.*) The trial court correctly ruled that there is no individual enforceable right derived from either section 1621 or 1623. (*Ibid.*) If Congress did not intend by enacting sections 1621 and 1623 to confer any individual right or benefit, then plaintiffs also lack a right under those same laws to claim a violation of the Privileges and Immunities clause.

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17. Even if plaintiffs claim a right to travel here, there is no Privileges and Immunities clause violation where California's exemption from out-of-state tuition does not discriminate against nonresidents. (See Argument, § IV, B.)

18. Plaintiffs forfeited any appeal of this ruling. (Opn. at p. 23.)

B. There Is No Violation of the Privileges and Immunities Clause Because the Exemption Does Not Discriminate Against Nonresident Citizens.

The Privileges or Immunities clause prevents a state from discriminating against nonresidents in favor of its own citizens. (7 Witkin, (10th ed. 2005) Constitutional Law, § 610, p. 1000.) However, it is well-established that "[s]tates do not violate the Constitution by giving preference to residents seeking admission to state universities and other facilities owned by the state or its subdivisions." (*Bethesda Lutheran Homes and Services, Inc. v. Leean* (7th Cir. 1997) 122 F.3d 443, 445 [citations omitted];*Kirk v. Board of Regents* (1969) 273 Cal.App.2d 430, 444 [Privileges and Immunities clause does not guarantee nonresident the right to attend university at resident rate]; *Saenz v. Roe*, *supra*, 526 U.S. at p. 502 citing *Vlandis v. Kline* (1973) 412 U.S. 441, 445.) A state may impose on nonresidents reasonable conditions, especially when it imposes similar conditions on its own citizens:

> Any regulation or prohibition imposed on both residents and nonresidents cannot be held a denial or abridgement of the privileges or immunities of nonresidents . . . .

(16B Corpus Juris Secundum (2008) Constitutional Law, § 1065.) The exemption does not discriminate against nonresident citizens because they, too, are able to attend a California high school and become eligible for in-state tuition. (Cf.: *Cote-Whitacre v. Dept. of Public Health* (2006) 446 Mass. 350 [844 N.E.2d 623] [law prohibiting marriages or marriage licenses to nonresidents who continued to live in state where marriage was void did not violate Privileges and Immunities clause because it applied equally to nonresidents].) Rather than favor its residents, California is extending in-state

tuition rates to all nonresidents that attend and graduate from California highschools. The Privileges or Immunities Clause has no application here.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court reverse the Court of Appeal's finding that sections 1621 and 1623 preempt California's nonresident tuition exemption, and its ruling that plaintiffs sufficiently stated a Privileges and Immunities clause claim.

Dated: March 25, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF OF THE BOARD OF GOVERNORSOF THE CALIFORNIA COMMUNITY COLLEGES AND CHANCELLOR MARSHALL DRUMMOND uses a 13 point Times New Roman font and contains 8,440 words.

Dated: March 25, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Martinez, et al. v. Regents, 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 March 25, 2009, I served the attached **OPENING BRIEF OF THE BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES AND CHANCELLOR MARSHALL DRUMMOND** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT (GSO) AND FED-EX** addressed as follows:

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725 Court Street
Woodland, CA 95695

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

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 March 25, 2009, at Sacramento, California.

Wanda Thissen
Declarant

Signature