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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL.,
Plaintiffs and Appellants,

v.

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

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

RESPONDENTS' OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

INTRODUCTION AND SUMMARY 2

STATEMENT OF FACTS 4

A. Section 68130.5 Applies On Its Face to All Students Who Meet Its Criteria, Regardless of Residence. 4

B. The Findings And Legislative History Of Section 68130.5 Establish That The Legislature Carefully Drafted That Statute To Avoid Any Conflict With Federal Law. 6

PROCEDURAL HISTORY 10

ARGUMENT 10

I. FUNDAMENTAL PRINCIPLES OF PREEMPTION STRONGLY SUPPORT THE VALIDITY OF EDUCATION CODE SECTION 68130.5. 10

A. Appellants Bear The Burden Of Proving That Congress Intended To Preempt Section 68130.5, Which Is Entitled To A Presumption Of Constitutionality 11

B. There Is A Strong Presumption Against Preemption. 12

C. State Laws Concerning Higher Education And Student Fees Are Areas Of Traditional State Concern. 15

II. SECTION 1621 EXPRESSLY AUTHORIZES STATES TO ENACT LAWS AFFIRMATIVELY PROVIDING THAT UNDOCUMENTED IMMIGRANTS SHALL BE ELIGIBLE FOR PUBLIC BENEFITS. 17

A. Section 68130.5 "Affirmatively Provides" That "Persons Without Lawful Immigration Status" Shall Be Eligible For Tuition Relief 19

B. Section 1621 Does Not Mandate That States Employ Any "Magic Words" In Their Legislation 22

TABLE OF CONTENTS
(continued)

Page

C. The Plain Language of Section 1621 Controls. 24

III. THE COURT OF APPEAL'S HOLDING THAT SECTION 68130.5 IS PREEMPTED BY 8 U.S.C. §1623 IS INCONSISTENT WITH ITS PLAIN LANGUAGE AND LEGISLATIVE HISTORY. 25

A. Section 68130.5 Does Not Confer A Benefit On Undocumented Immigrants "On The Basis Of Residence." 26

B. The Legislative History of Section 68130.5 and The Legislature's Finding Establish That The Legislature Intended To Benefit Nonresidents And Residents Alike. 29

C. The Court Of Appeal's Conclusion That Section 68130.5 Contains A "De Facto" Residence Requirement Is Erroneous. 31

D. The Court Of Appeal's Sweeping Holding That Section 1623 Invalidates Any State Law That Is "Intended To Benefit Illegal Aliens" Is Inconsistent With The Plain Language Of The Federal Law... 34

E. Section 1623's Limited Legislative History Cannot Invalidate Section 68130.5. 35

IV. EDUCATION CODE SECTION 68130.5 IS NOT IMPLIEDLY PREEMPTED BY FEDERAL LAW. 37

V. EDUCATION CODE SECTION 68130.5 DOES NOT VIOLATE NONRESIDENT STUDENTS' FEDERAL RIGHTS UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE. 39

A. Section 68130.5 Treats U.S. Citizens and Undocumented Immigrants Equally. 40

B. The Privileges Or Immunities Clause Does Not Guarantee That U.S. Citizens Will Always Be Treated More Favorably Than Non-Citizens. 41

CONCLUSION 44

TABLE OF AUTHORITIES

Page

Cases

Altria Group, Inc. v. Good,
129 S. Ct. 538 (2008) 13

Arcadia Unified Sch. Dist. v. State Dep't of Educ.,
2 Cal. 4th 251 (1992) 12

Ardestani v. INS,
502 U.S. 129 (1991) 24

Bronco Wine Co. v. Jolly,
33 Cal. 4th 943 (2004) 12, 13, 15, 17

Cal. Hous. Fin. Agency v. Elliott,
17 Cal. 3d 575 (1976) 12

Canyon County v. Syngenta Seeds, Inc.,
519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008) 23

Chicanos Por La Causa, Inc. v. Napolitano,
544 F.3d 976 (9th Cir. 2008) 14

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 38

Conservatorship of Wendland,
26 Cal. 4th 519 (2001) 12

Crawford v. Marion County Election Bd.,
128 S. Ct. 1610 (2008) 33

Day v. Bond,
500 F.3d 1127, *reh'g and reh'g en banc denied*, 511 F. 3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008) 32, 36

DeCanas v. Bica,
424 U.S. 351 (1976) 14, 37

TABLE OF AUTHORITIES
(continued)

Page

Dix v. Superior Court,
53 Cal. 3d 442 (1991) 35

Doe v. Wilson,
57 Cal. App. 4th 296 (1997) 23

Dowhal v. SmithKline Beecham Consumer Healthcare,
32 Cal. 4th 910 (2004) 39

Duncan v. Walker,
533 U.S. 167 (2001) 35

Equilon Enters. v. Consumer Cause, Inc.,
29 Cal. 4th 53 (2002) 21

Farm Raised Salmon Cases, 42 Cal. 4th 1077 (2008), *cert. denied sub nom. Albertson's, Inc. v. Kanter*,
129 S. Ct. 896 (2009) 11-13, 26, 38

Garcia v. United States,
469 U.S. 70 (1984) 37

Guillen v. Schwarzenegger,
147 Cal. App. 4th 929 (2007) 37

Hamilton v. Regents of the Univ. of Cal.,
293 U.S. 245 (1934) 42

Hernandez v. Paicius,
109 Cal. App. 4th 452 (2003) 23

In re Demergian,
48 Cal. 3d 284 (1989) 42

Jama v. Immigration and Customs Enforcement,
543 U. S. 335 (2005) 20

Kimbrough v. United States,
128 S. Ct. 558 (2007) 20

Kirk v. Board of Regents,
273 Cal. App. 2d 430 (1969) 40

TABLE OF AUTHORITIES
(continued)

Page

Lockyer v. City & County of San Francisco,
33 Cal. 4th 1055 (2004) 12

Martinez v. Bynum,
461 U.S. 321 (1983) 41

Matthews v. Diaz,
426 U.S. 67 (1976) 43, 44

Md. Stadium Auth. v. Ellerbe Becket Inc.,
407 F.3d 255 (4th Cir. 2005) 15

Merrifield v. Lockyer,
2008 U.S. App. LEXIS 19622 (9th Cir. Sept. 16, 2008),
amended, 547 F.3d 978 (9th Cir. 2008) 42

Mendoza v. State,
149 Cal. App. 4th 1034 n.5 (2007) 8

Miklosy v. Regents of University of California,
44 Cal. 4th 876 (2008) 24, 27, 29

Mora v. Hollywood Bed & Spring,
164 Cal. App. 4th 1061 (2008) 19

Murphy v. Kenneth Cole Prods., Inc.,
40 Cal. 4th 1094 (2007) 27

Owasso Indep. Sch. Dist. No. I-011 v. Falvo,
534 U.S. 426 (2002) 15

Pac. Lumber Co. v. State Water Res. Control Bd.,
37 Cal. 4th 921 (2006) 8

Paul v. Virginia,
8 Wall. 168, 19 L.Ed. 357 (1869) 43

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

People v. Superior Court (Romero),
13 Cal. 4th 497 (1996) 12

TABLE OF AUTHORITIES
(continued)

Page

People v. Watson,
42 Cal. 4th 822 (2007) 27

Prof'l Eng'rs v. Dep't of Transp.,
15 Cal. 4th 543 (1997) 31

Regents of University of California v. Superior Court,
225 Cal. App. 3d 972 (1990) 23, 25

Reyes v. Van Elk, Ltd.,
148 Cal. App. 4th 604 (2007) 14

Rosario v. INS,
962 F.2d 220 (2d Cir. 1992) 25

Saenz v. Roe,
526 U.S. 489 (1999) 40, 43

Smith v. Novato Unified Sch. Dist.,
150 Cal. App. 4th 1439 (2007), *cert. denied*, 128 S. Ct.
1256 (2008) 23

Smith v. Superior Court,
39 Cal. 4th 77 (2006) 27

United States v. Lopez,
514 U.S. 549 (1995) 15

United States v. Menasche,
348 U.S. 528 (1955) 35

Vasquez v. State,
45 Cal. 4th 243 (2008) 20, 21

Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.,
41 Cal. 4th 929 (2007) 11, 38

Vlandis v. Kline,
412 U.S. 441 (1973) 40

TABLE OF AUTHORITIES
(continued)

Page

Wyeth v. Levine,
No. 06-1249, -- U.S. --, 2009 WL 529172 (Mar. 4, 2009) 12

Constitutional Provisions

U.S. CONST.
art. IV, §2 ..... 40, 43
amendmt. XIV, §1 42

Statutes

7 U.S.C.
§7253(d)(2) 21

8 U.S.C.
§1101(a)(15) 5
§1101(a)(33) 25
§1601(6) 39
§1621 ..... *passim*
§1621(a) 17
§1621(c)(1)(B) 17
§1621(d) 3, 8, 23, 39
§1623 ..... *passim*
§1623(a) 3, 25
§1641(a) 25

12 U.S.C.
§2279aa-12 20

15 U.S.C.
§37(d) 21
§77r-1(c) 21
§80a-3a(c) 21

25 U.S.C.
§2719(d)(2) 21

TABLE OF AUTHORITIES
(continued)

Page

38 U.S.C.
§3482 17

50 U.S.C.
§432b(e) 22

EDUC. CODE
§48050 28
§48051 28
§48054 28
§68017 41
§68023 41
§68040 16
§68050 16
§68052 16
§68130.5 .... *passim*
§68130.5(a) 3, 19
§68130.5(a)(4) 5, 18
§68134 5
§68040 16

Legislative Materials

OMNIBUS CONSOLIDATED APPROPRIATIONS ACT OF 1997, PUB. L. 104-208, §505, Sept. 30, 1996, 110 STAT. 3009-672 (1996) 35

H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS. (1996) 24

H.R. CONF. REP. 104-828, 104TH CONG., 2D SESS. 1996 (Sept. 24, 1996) 36

H.R. CONF. REP. 104-863, 104th CONG., 2D SESS. 1996 (Sept. 28, 1996) 35

142 CONG. REC. H11377 (Sept. 26, 1996) 36

142 CONG. REC. S11508 (Sept. 27, 1996) 36

142 CONG. REC. S11713 (Sept. 28, 1996) 36

TABLE OF AUTHORITIES
(continued)

Page

AB 540 ch. 814, Stats. 2001

§1(a)(1)-(3) 5

§1(a)(4) 6, 18

§1(a)(5) 10, 31

§2(a) 5

AB 540 ASSEMBLY BILL ANALYSIS, CONCURRENCE IN SENATE AMENDMENTS, as amended Sept. 7, 2001 9

ASSEMBLY COMM. ON HIGHER EDUC., AB 540 BILL ANALYSIS, April 17, 2001 9

ASSEMBLY FLOOR, BILL ANALYSIS, AB 540, CONCURRENCE IN SENATE AMENDMENTS, as amended Sept. 7, 2001 .... 30, 32

SEN. COM. ON APPROPRIATIONS, FISCAL SUMMARY OF SB NO. 160 (2007-08 Reg. Sess.) May 14, 2007 33

SENATE RULES COMM., OFF. OF SEN. FLOOR ANALYSES, ASSEM. BILL NO. 540 (2001-2002 Reg. Sess.) Sept. 7, 2001 30

AB 1197, as amended Jan. 4, 2000 (vetoed by Governor Sept. 29, 2000) 6, 7, 8, 9

Op. Cal. Legislative Counsel, No. 15729, Public Postsecondary Education: Residency Requirements, Assem. Bill No. 540 (2001-2002 Reg. Sess.) (June 22, 2001) 8

Other Authorities

A MASTER PLAN FOR HIGHER EDUCATION IN CALIFORNIA 1960-1975 (1960) 16

ANNOT., 37 L. Ed. 2d 1056 §1 (2008) 16

UNIV. OF CALIF. OFC. OF THE PRESIDENT, ANNUAL REPORT ON AB 540 TUITION EXEMPTIONS 2006-07 ACADEMIC YR. (Mar. 5, 2008) 33

QUESTIONS PRESENTED

1. Whether Education Code Section 68130.5 is preempted by 8 U.S.C. Section 1621 because, although it satisfies the statutory prerequisites—it was enacted after August 22, 1996, and provides that aliens who are not lawfully present in the United States are eligible to pay resident tuition—it does not "expressly reference" Section 1621.

2. Whether Education Code Section 68130.5 is preempted by 8 U.S.C. Section 1623 because, although it does not expressly condition eligibility for exemption from nonresident tuition "on the basis of residence within a State," and the legislative findings and the statute's legislative history contradict any intent to do so, the statute nevertheless should be read as a "de facto" or "surrogate" residence requirement.

3. 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 or Immunities Clause of the Fourteenth Amendment.

The Attorney General's separate petition for review presented the following issue:

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

INTRODUCTION AND SUMMARY

This case is an attack on California Education Code Section 68130.5 ("Section 68130.5"), which since its enactment in 2001 has enabled thousands of students to get an affordable college education in California. Section 68130.5 provides that students who have attended high school in California for three or more years and graduated are exempt from paying nonresident tuition at California's public colleges and universities, whether they reside in California or not. By its plain language, the statute exempts all students who meet its criteria, including U.S. citizens who are residents of other states and undocumented immigrants.

The Court of Appeal held that Section 68130.5 is, on its face, preempted by two different provisions of federal law. That ruling cannot be squared with the plain language of the state statute or with applicable law.

The Court of Appeal misapplied or ignored fundamental principles governing a federal preemption challenge to the validity of state legislation. Those principles include the plaintiff's burden to prove that Congress intended to preempt state law; the courts' obligation to resolve statutory ambiguities in favor of a construction that would render the statute constitutional; and the strong presumption against preemption that applies where the state law concerns an area of traditional state regulation, such as higher education and student fees. *See* Part I, *infra*.

The Court of Appeal's conclusion that Section 68130.5 violates 8 U.S.C. Section 1621 ("Section 1621") because it does not "expressly reference" that federal law and does not "clearly put the public on notice that tax dollars are being used to benefit illegal aliens" is inconsistent with Section 1621's plain language and with elementary principles of statutory interpretation. Even assuming that in-state tuition constitutes a "benefit" under Section 1621, subsection (d) of that Section expressly *authorizes* states to make aliens who are not lawfully present in the United States eligible for State public

benefits "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. §1621(d). Section 68130.5 meets both requirements: it was enacted after August 22, 1996 (the effective date of Section 1621), and it expressly states that "person[s] without lawful immigration status" are among those eligible for the tuition exemption it provides. EDUC. CODE §68130.5(a). The Court of Appeal impermissibly imposed additional requirements that nowhere appear in the text of the federal statute. *See* Part II, *infra*.

The Court of Appeal's ruling that Section 68130.5 violates 8 U.S.C. Section 1623 ("Section 1623") cannot be squared with the plain language of the federal statute or with Section 68130.5. 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 such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." 8 U.S.C. §1623(a) (emphasis added). However, as the Court of Appeal itself acknowledged, on its face Section 68130.5 does not refer to residence, nor does it require that a student be a California resident in order to qualify for its exemption. Under the statute, *any* student who meets its criteria—*regardless* of residence or citizenship—is eligible for the exemption. The Court of Appeal nevertheless found Section 68130.5 "ambiguous," and read it as creating a "de facto residence requirement." That ruling cannot be squared with Section 68130.5, which expressly applies to numerous nonresidents as well as residents. *See* Part III, *infra*.

The Court of Appeal's further conclusion that Section 68130.5 is not only expressly preempted, but also impliedly preempted by federal law, cannot withstand scrutiny. Section 68130.5 neither renders compliance with both state and federal law an impossibility nor stands as an obstacle to the accomplishment of the purposes and objectives of Congress. *See* Part IV, *infra*.

Finally, the Court of Appeal's novel ruling that Section 68130.5 violates nonresident students' rights under the Privileges or Immunities Clause of the Fourteenth Amendment is groundless. As the Court of Appeal itself acknowledged, Section 68130.5 treats U.S. citizens and undocumented immigrants equally, as it makes no distinction on the basis of citizenship or residence. The Clause does not protect rights that depend solely on state law, such as the right to pay in-state tuition asserted here. In any event, there is no authority for Plaintiffs' central contention: that the Privileges or Immunities Clause provides a constitutional guarantee that U.S. citizens will always be treated more favorably than non-citizens. *See* Part V, *infra*.

STATEMENT OF FACTS

A. Section 68130.5 Applies On Its Face to All Students Who Meet Its Criteria, Regardless of Residence.

Assembly Bill 540 ("AB 540") was introduced by Representative Marco Firebaugh on February 21, 2001. Approved with overwhelming support in the Assembly and Senate (57-15 and 27-7, respectively), the bill was signed into law on October 12, 2001, by Governor Gray Davis. 6 Clerk's Transcript on Appeal ("CT") 1669 (Assembly Final History, 2001-2002 Session). Ch. 814, Stats. 2001.

Pursuant to its terms, effective January 1, 2002, "notwithstanding any other provision of law":

> (a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, 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 the 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.

AB 540 ch. 814, §2(a) (6 CT 1666).[1]

On its face, Section 68130.5 does not confer eligibility for the exemption from out-of-state tuition on the basis of a student's residence in California, but rather exempts *all* students, residents and nonresidents alike, who attended high school in the state for three or more years and graduated (or its equivalent).[2] As the Court of Appeal observed, "the only real conditions imposed by section 68130.5 are that the student (1) attend a California high school for three years, and (2) graduate or attain the equivalent." Slip op. 48.

Contrary to the Court of Appeal's charge that the statute "does its best to conceal the benefit to illegal aliens" (*id.* at 70), the statute applies on its face to "a person without lawful immigration status." EDUC. CODE §68130.5(a)(4). Similarly, in an uncodified portion of the bill, the Legislature expressly found that it "allows all persons, *including undocumented immigrant students who meet the requirements set forth [in the statute]*, to be exempt from

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[1]Section 68130.5 as enacted did not apply to the University of California. EDUC. CODE §68134 ("No provision of this part shall be applicable to the University of California unless the Regents of the University of California, by resolution, make such resolution applicable"). The Regents later adopted Section 68130.5 in Standing Order 110.2. 1 CT 22 ¶80, 87.

[2]The only exception is for nonimmigrant aliens as defined in 8 U.S.C. §1101(a)(15), primarily temporary visa holders. Thus, a lawfully admitted permanent resident (or "green card" holder) who met the other statutory criteria could qualify under the statute, as could other immigrant aliens, political refugees or asylees, and U.S. citizens.

nonresident tuition in California's colleges and universities." AB 540 §1(a)(4) (emphasis added) (6 CT 1666).

In enacting Section 68130.5, the Legislature made express findings regarding its intent:

> (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 pupils have already proven their academic eligibility and merit by being accepted into our state's colleges 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.

Id. §1(a)(1)-(3) (6 CT 1665).

B. The Findings And Legislative History Of Section 68130.5 Establish That The Legislature Carefully Drafted That Statute To Avoid Any Conflict With Federal Law.

As the Court of Appeal noted, Plaintiffs "alleged defendants knew section 68130.5 violated and was preempted by federal law." Slip op. 8. Indeed, Plaintiffs accused the Legislature and Defendants of engaging in "a knowing and deliberate decision to violate federal and state law." 1 CT 16 ¶55; 13 CT 3729 (contending that Legislature "knew that AB 540 violated [federal] immigration laws"); *id.* at 3740 (alleging "defendants had antecedent knowledge that §68130.5 violated federal and California law"); AOB 7, 27-28 (same). However, the statute's express findings and legislative history establishes that precisely the *opposite* of Plaintiffs' inflammatory rhetoric is true: the Legislature was well aware of the provisions of federal law Plaintiffs rely upon, and carefully drafted Section 68130.5 to *avoid* any conflict with those provisions.

Plaintiffs' charge was based largely on Governor Davis's veto of AB 1197, which had been introduced in a prior legislative session,

on the ground that it appeared to conflict with federal law. Plaintiffs inferred from the Legislature's passage of AB 540, despite its supposed similarity to AB 1197, that the Legislature deliberately set out to violate federal law.[3] However, contrary to the Court of Appeal's assertion that the two bills were "not significantly different" (slip op. 60), there were two key differences.

First, in addition to high school attendance in California for three or more years and graduation, AB 1197 imposed a third requirement for a student to qualify for the statutory exemption: "[c]ontinuation of his or her education at a California institution of higher education within one year of high school graduation on or before January 1, 2001." AB 1197, as amended Jan. 4, 2000 (vetoed by Governor Sept. 29, 2000) (8 CT 2121). That requirement made it far more likely that nearly all of those qualifying would be California residents, since most California high school graduates would be likely to remain in the State in the few months between their graduation from high school and their enrollment in college or university. AB 540 contained no such requirement.

Second, AB 1197 explicitly required a student seeking the exemption to present "documentation that the person is lawfully in the United States, or in the case of an alien precluded from establishing California residency by reason of subdivision (h) of Section 68062, presentation of documentation that a petition or application for lawful immigration status has been initiated, either by the person seeking the exemption from nonresident tuition or by another person on behalf of the person seeking the exemption." *Id.* (8 CT 2121-22). AB 540, in contrast, does not require institutions of higher education affirmatively to verify applicants' immigration status.

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[3]Plaintiffs leveled the same accusation at former Governor Davis, charging that he signed the later bill because he was "facing political pressures that evidently overwhelmed his desire to comply with federal law." AOB 7.

AB 1197 was passed by both houses only to be vetoed by then-Governor Davis, who expressed the concern that the bill might conflict with Section 1623. *See* slip op. 59. Recognizing the need to address that concern, the author of AB 540, Representative Firebaugh, sought the opinion of California's Legislative Counsel.[4] In a June 22, 2001 opinion letter (the "Opinion"), the Legislative Counsel squarely concluded that AB 540 "would not conflict with Section 1623 of Title 8 of the United State Code." Opinion at 1.[5] The basis for the Legislative Counsel's conclusion was that "United States citizens or nationals would be eligible for the same benefits that the bill would extend to aliens not lawfully present in the country." *Id.* at 5. The Legislative Counsel reasoned that the bill would not confer any benefit "on the basis of residence" because "A.B. 540 would not permit an undocumented alien to establish residence in California, but instead would exempt from the payment of nonresident tuition persons who, *without regard to their place of residence*, meet its qualifications." *Id.* (emphasis added). In particular, "any person, including a resident of another state or a resident of a foreign country who is lawfully in the United States, other than a nonimmigrant alien, as defined, could meet the requirements of A.B. 540 and qualify for an exemption from nonresident student tuition." *Id.* at 5-6. The Opinion explained that provisions of the Education Code authorize residents of neighboring states to attend high school in California. *Id.* at 6. Thus, "[b]ecause

---

[4]"The Legislative Counsel is selected on a nonpartisan basis by concurrent resolution of the Legislature. One of the primary duties of the Legislative Counsel is to assist in the preparation and consideration of proposed legislation. In practice, this frequently involves submission of opinions as to the constitutionality of a proposed statute." *Mendoza v. State*, 149 Cal. App. 4th 1034, 1044 n.5 (2007) (citations omitted).

[5]By the accompanying Motion, Respondents seek judicial notice of that opinion. "Opinions of the Legislative Counsel, though not binding, are entitled to great weight when courts attempt to discern legislative intent." *Pac. Lumber Co. v. State Water Res. Control Bd.*, 37 Cal. 4th 921, 939 (2006).

United States citizens or nationals would be eligible for any benefit granted to undocumented aliens by A.B. 540, we conclude that the benefits that would be conferred by that bill would not violate Section 1623." *Id.*

The Legislature expressly relied upon the Legislative Counsel's Opinion:

> In his veto message, Governor Davis cited the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), by which undocumented aliens are ineligible to receive postsecondary education benefits based on state residence unless a citizen or national of the U.S. would be eligible for the same benefits without regard to their residence (Title VIII, Section 1623).
>
> In response to the veto message, the Chief Legislative Counsel issued an opinion that AB 1197 did not violate federal law since it did not tamper with a student's residency status under federal law and because it excluded from out-of-state tuition exemptions foreign residents as specified in the United States Code.

AB 540 ASSEMBLY BILL ANALYSIS, CONCURRENCE IN SENATE AMENDMENTS, as amended Sept. 7, 2001 (7 CT 1887); slip op. 59-60 (quoting passage).[6]

The Assembly Committee on Higher Education offered a similar analysis:

> A close reading of the legislation shows that the benefit provided in AB 540 is available to "any person". . . which could include non-residents as well as U.S. residents from other states, as long as they meet the outlined conditions.

ASSEMBLY COMM. ON HIGHER EDUC., AB 540 BILL ANALYSIS, April 17, 2001, at 3 (6 CT 1673). As a result, the Committee concluded, "It is unlikely that the legislation in its current form is in violation with existing federal law." *Id.*

Finally, in enacting Section 68130.5, the Legislature expressly found: "This act . . . does not confer postsecondary education

[6]This analysis mistakenly stated that the Opinion concerned the prior legislation, AB 1197, rather than AB 540.

benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code." AB 540 §1(a)(5) (6 CT 1666).

PROCEDURAL HISTORY

"Plaintiffs are U.S. citizens from states other than California and are students, or tuition-paying parents of students, enrolled after January 1, 2002, in a course of study for an undergraduate or graduate degree at a California public university or college." Slip op. 6-7; 1 CT 3 ¶1. They filed their putative class action complaint attacking Section 68130.5 on December 14, 2005. 1 CT 1-92. Plaintiffs asserted ten causes of action related to Section 68130.5 and Defendants' implementation of that statute. *See* slip op. 4, 6-13. The trial court sustained Defendants' demurrers without leave to amend and dismissed the action. 23 CT 6536-43.

The Court of Appeal reversed, directing the trial court to overrule Defendants' demurrers as to four claims: that Section 68130.5 is preempted by 8 U.S.C. Sections 1621 and 1623, violates the Privileges or Immunities Clause of the Fourteenth Amendment, and violates equal protection (as to which it granted Plaintiffs leave to amend). The court rejected Plaintiffs' remaining claims. This Court granted Respondents' petitions for review and denied Plaintiffs' petition for review.

ARGUMENT

I.

FUNDAMENTAL PRINCIPLES OF PREEMPTION STRONGLY SUPPORT THE VALIDITY OF EDUCATION CODE SECTION 68130.5.

The central issue presented by this case is whether Education Code Section 68130.5 is preempted by federal law. Analysis of that issue is governed by fundamental principles that this Court and the U.S. Supreme Court repeatedly have recognized and applied. Those

principles strongly support the conclusion that Education Code Section 68130.5 is valid and is not preempted by federal law.

A. Appellants Bear The Burden Of Proving That Congress Intended To Preempt Section 68130.5, Which Is Entitled To A Presumption Of Constitutionality.

As this Court recently observed,

> The basic rules of preemption are not in dispute: Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court's task is to discern congressional intent. Congress's express intent in this regard will be found when Congress explicitly states that is preempting state authority. Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Farm Raised Salmon Cases, 42 Cal. 4th 1077, 1087 (2008), *cert. denied sub nom. Albertson's, Inc. v. Kanter*, 129 S. Ct. 896 (2009) (citations omitted).

"It is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." *Id.* at 1088 (citations omitted); *accord*, *Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.*, 41 Cal. 4th 929, 936 (2007) ("Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it" (citations and internal quotations omitted)).

This burden is compelled by core constitutional principles. "[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, is presumed to be constitutional. Unconstitutionality must be clearly shown, and

doubts will be resolved in favor of its validity." *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1086 (2004) (citation and internal quotations omitted). Thus, "[u]nless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act." *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 594 (1976) (citations omitted); *accord, Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 260, 265 (1992). If a court finds any ambiguity in a state statute, it has a duty to resolve the ambiguity in favor of a construction that would render the statute constitutional. *Conservatorship of Wendland*, 26 Cal. 4th 519, 548 (2001); *accord, People v. Superior Court (Romero)*, 13 Cal. 4th 497, 509 (1996). Here, as discussed below, the Court of Appeal erred both in holding that the statutory language was ambiguous and in how it chose to resolve those purported ambiguities.

B. There Is A Strong Presumption Against Preemption.

"The interpretation of the federal law at issue here is further informed by a strong presumption against preemption." *Farm Raised Salmon Cases*, 42 Cal. 4th at 1088 (citations omitted). As the U.S. Supreme Court has recently observed, preemption jurisprudence has "two cornerstones":

> First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, No. 06-1249, -- U.S. --, 2009 WL 529172 at *5 (Mar. 4, 2009) (citations and internal quotations omitted).

The presumption against preemption applies to claims of both express and implied preemption. *Id.* at *5 n.3; *accord, Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 958 n.12 (2004). The presumption applies "to the *existence* as well as the *scope* of preemption." *Farm*

Raised Salmon Cases, 42 Cal. 4th at 1088. "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citations omitted); *accord, Bronco Wine Co.*, 33 Cal. 4th at 994 ("The presumption against preemption 'reinforces the appropriateness of a narrow reading of assertedly preempting language'").

The presumption against preemption applies "with particular force" where, as here, the subject matter of the state law is in an area of traditional state presence. *Farm Raised Salmon Cases*, 42 Cal. 4th at 1088. Thus, in *Farm Raised Salmon Cases*, the Court held that claims for deceptive marketing of food products predicated on alleged violations of state laws were not impliedly preempted by the Federal Food, Drug, and Cosmetic Act. The Court found that the presumption against preemption was particularly strong because the consumer protection laws that served as the basis for plaintiffs' claims are "within the states' historic police powers." *Id.* (citations omitted).

Likewise, in *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943 (2004), the Court found that a strong presumption against preemption applied to a state wine labeling statute, in light of a history of "substantial state involvement and very little federal regulation" in the area prior to Congress's adoption of the federal law in question. *Id.* at 956. After exhaustively surveying the history of federal and state regulation of wine labels (*id.* at 959-73), the Court found that in 1935, when Congress entered the field by enacting the Federal Alcohol Administration Act, it was legislating in a field traditionally regulated by the States. *Id.* at 974. The Court unanimously concluded that because Bronco had failed to establish that Congress acted with the "clear and manifest" purpose to preempt wine labeling regulation by the states, the state law was not impliedly preempted by federal law. *Id.*

That Section 68130.5 concerns the rights of undocumented students, among others, does not affect either the applicability or strength of the presumption against preemption. In *De Canas v. Bica*, 424 U.S. 351 (1976), the Supreme Court upheld a California Labor Code provision prohibiting the employment of illegal aliens against a claim that it was preempted by federal immigration laws. The Court explained that while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power." *Id.* at 355. To the contrary, the Court cautioned, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*

Thus, even if California's attempt "to strengthen its economy" by enacting the statute "has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration." *Id.* at 355-56. Rather, California's authority to regulate the employment of unauthorized workers is "certainly within the mainstream" of the state's police powers. *Id.* at 356; *see also, e.g., Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 983 (9th Cir. 2008) (presumption against preemption applied to Arizona state law targeted at employers who hire illegal aliens "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers"); *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 617-18 (2007) (presumption that state prevailing wage law is not preempted by federal immigration law).

C. State Laws Concerning Higher Education And Student Fees Are Areas Of Traditional State Concern.

Here, the state's authority to set the tuition and fees to be paid by students in its public colleges and universities is well "within the mainstream" of its historic police powers. It follows that a strong presumption against preemption of state law applies here, and that the Court should not find the State's traditional powers to set tuition and fees in its public colleges and universities superseded "unless it is clear and manifest that Congress intended to preempt state law." *Bronco Wine Co.*, 33 Cal. 4th at 974.

"Higher education is an area of quintessential state concern and a traditional state governmental function." *Md. Stadium Auth. v. Ellerbe Becket Inc.,* 407 F.3d 255, 265 (4th Cir. 2005) (citations omitted). Accordingly, the U.S. Supreme Court has narrowly construed federal laws that impinge upon state educational concerns. Where a proffered interpretation of federal law "would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools," a court must "hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002); *see also, e.g., United States v. Lopez*, 514 U.S. 549, 580-81 (1995) (Kennedy, J., concurring) (because "it is well established that education is a traditional concern of the States," courts "have a particular duty to ensure that the federal-state balance is not destroyed," which supports the presumption against preemption).

Here, there can be no doubt that setting the levels of tuition and fees charged to students in public colleges and universities is an area "traditionally regulated by the States." Indeed, until the passage of the federal statutes at issue in 1996, Respondents are unaware of *any* attempt by the federal Government to interfere with that traditional state power, either by directly regulating the level of tuition and fees charged by state public colleges and universities or by prohibiting

the states from offering in-state tuition rates to particular classes of students.

In California, as in all states, the State has always set the amount of fees and tuition to be paid by students who attend the State's public colleges and universities. State residents typically pay fees in order to attend public institutions of higher education, while nonresident students are charged tuition, typically in a substantially greater amount. *See, e.g.,* EDUC. CODE §68040 (each student shall be classified as a resident or nonresident); *id.* §68050 (students classified as nonresidents shall be required, except as otherwise provided, to pay nonresident tuition as well as other fees required by the institution); *id.* §68052 (state policies regarding nonresident student tuition). California's scheme in this regard is typical. "In all 50 states, nonresidents must pay substantially more tuition than residents to attend state-supported colleges and universities." ANNOT., 37 L. Ed. 2d 1056 §1 (2008). Moreover, "the practice of charging nonresident students tuition in addition to regular student fees for the use of state schools has been accepted in the United States since the inception of the public school system . . . ." *Id.* §2.

California's public colleges and universities, including the University of California, have charged tuition to nonresidents since they were first founded in the nineteenth century. As the landmark Master Plan for Higher Education noted in 1960,

> Continuing a principle in the Organic Statutes of California in 1867-68, under which the University of California was created, public higher education institutions in California do not charge tuition to bona fide legal residents of the state. On the other hand, students who do not qualify as residents must pay tuition. . . . .

A MASTER PLAN FOR HIGHER EDUCATION IN CALIFORNIA 1960-1975 at 172 (1960). While the Master Plan endorsed the continuation of tuition-free education for state residents, it recommended that resident students be charged fees sufficient to cover the operating costs of services not directly related to instruction (*id.* at 173), a practice that continues to this day.

To Respondents' knowledge, before 1996, when the federal statutes at issue here were enacted, the federal government had never sought to interfere with the states' authority to set fees and tuition rates for attendance at their public colleges and universities.[7] Thus, in 1996, when Congress entered the field by enacting those laws, it was legislating for the first time in a field traditionally regulated by the States, and a strong presumption against preemption therefore applies. *Bronco Wine Co.*, 33 Cal. 4th at 974.

II.

SECTION 1621 EXPRESSLY AUTHORIZES STATES TO ENACT LAWS AFFIRMATIVELY PROVIDING THAT UNDOCUMENTED IMMIGRANTS SHALL BE ELIGIBLE FOR PUBLIC BENEFITS.

The first of the two federal statutes at the heart of this appeal is Section 1621, which was part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). That statute articulated a general policy that, except as elsewhere provided in Section 1621, an undocumented alien "is not eligible for any State or local public benefit," as specifically defined. 8 U.S.C. §1621(a).[8] However, even if an exemption from nonresident tuition

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[7]For example, when the federal government extends educational assistance to military veterans under the "GI Bill," it does so *not* by directing state institutions of higher education what tuition or fees to charge veterans or how they should classify veterans, but rather by setting specific monthly allowances. *See generally* 38 U.S.C. §3482.

[8]To constitute a "State or local public benefit" under Section 1621, a program must meet very specific criteria. *See* 8 U.S.C. § 1621(c)(1)(B). Because an exemption from nonresident tuition does not entail the provision of "payments or assistance . . . to an individual" (*id.*), the Court of Appeal erred in concluding that in-state tuition is a "postsecondary education benefit" within the meaning of Section 1621. Slip op. 38-42. However, even if in-state tuition were a "benefit," Section 68130.5 does not violate Section 1621 because it meets the conditions set forth in Section 1621(d). Thus, Respondents will assume for purposes of argument that in-state tuition constitutes a benefit under Section 1621. If the Court concludes that Section 1621(d)'s

(continued . . .)

is a "benefit" under Section 1621, that statute contains a savings clause that expressly *authorized* states to enact legislation making undocumented immigrants eligible for benefits, as long as they did so after the effective date of Section 1621 by enacting a state law which "affirmatively provides" for such eligibility. Section 1621(d) provides that notwithstanding subsection (a),

> 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.

8 U.S.C. §1621(d). Thus, the only prerequisites are that such legislation be enacted after August 22, 1996, and that it "affirmatively provides" that "an alien who is not lawfully present in the United States" shall be eligible for the benefit. *Id.*

Section 68130.5 readily meets both requirements of the clause. It was enacted in 2001 and it includes the following express eligibility provision:

> 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.

EDUC. CODE §68130.5(a)(4) (emphasis added). Likewise, as noted, the legislation stated that it applies to "all persons, *including undocumented immigrant students* who meet the requirements set forth in [the statute]." AB 540 ch. 814, §1(a)(4) (6 CT 1665) (emphasis added).

Plaintiffs nevertheless argued that Section 68130.5 did not fall within the savings clause, and the Court of Appeal agreed. Even without the benefit of the presumptions discussed above, the Court

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(. . . continued)
requirements have been satisfied, it should reserve the question of what types of benefit meet the definition set forth in Section 1621.

of Appeal's analysis is inconsistent with fundamental principles of statutory interpretation and cannot be sustained.

A. Section 68130.5 "Affirmatively Provides" That "Persons Without Lawful Immigration Status" Shall Be Eligible For Tuition Relief.

The Court of Appeal reasoned first without explanation that the statutory phrase "affirmatively provides" is "ambiguous." Slip op. 69. Although the court acknowledged that the statute does refer on its face to "a person without lawful immigration status," it suggested that "something more is required" to satisfy that requirement. *Id.* To resolve that purported ambiguity, the court, relying on a brief conference report that apparently constitutes the statute's sole legislative history, concluded that "not only must the state law specify that illegal aliens are eligible, but the state Legislature must also expressly reference title 8 U.S.C. section 1621 (which was not done in the case of section 68130.5)." *Id.* at 69-70. That holding is strikingly wrong, for at least two reasons.

First, the Court of Appeal's starting premise—that the phrase "affirmatively provides" is "ambiguous"—is erroneous. That phrase is not ambiguous and has a clear meaning: the state law must contain an express statement that undocumented immigrants are eligible, rather than providing for such eligibility implicitly through a law of general application. In short, the words "affirmatively provide" mean no more than "expressly states" or "expressly establishes." Significantly, other courts have had no trouble construing closely similar statutory language. *See, e.g., Mora v. Hollywood Bed & Spring*, 164 Cal. App. 4th 1061, 1069 (2008) ("[t]he ordinary meaning of the words 'affirmative instruction' in this context is an express directive statement, rather than an implied statement or tacit acquiescence").

Second, there is no textual basis whatever for requiring states to refer specifically to Section 1621. No such requirement appears in the language of the savings clause, which simply requires the state to "affirmatively provide" for eligibility. By inserting such a

requirement where the statute is silent on that subject, the Court of Appeal impermissibly rewrote the statute, in violation of fundamental principles of statutory interpretation. As the U.S. Supreme Court recently observed with respect to a similar attempt to read into a statute a requirement that nowhere appeared in its text,

> This argument encounters a formidable obstacle: It lacks grounding in the text of the [Congressional] Act. . . . The statute says nothing about the [subject], and we decline to read any implicit directive into that congressional silence. *See Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . . "). Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to [adopt such provisions] in express terms.

Kimbrough v. United States, 128 S. Ct. 558, 571 (2007). Similarly, this Court recently declined to hold that a prelitigation demand is a prerequisite to an attorneys' fees award under Code of Civil Procedure Section 1021.5 because the statutory language contains no such requirement, although "the Legislature clearly knows how to require prelitigation demands unambiguously when that is what it wishes to do." *Vasquez v. State*, 45 Cal. 4th 243, 252 (2008).

Here, too, Congress has shown that it knows how to mandate that a law expressly cite a statute when it wishes to do so. "Many statutes illustrate the point." *Id.* at 252. For example:

> The provisions of paragraph (1) shall not be applicable to any State that, during the 8-year period beginning on January 6, 1988, enacts a law that—(A) *specifically refers to this subsection; and* (B) *expressly provides* that paragraph (1) shall not apply to the State.

12 U.S.C. §2279aa-12 (emphasis added). Likewise, Congress has enacted statutes that squarely authorize states to enact subsequent legislation inconsistent with otherwise applicable federal law, so long as the state law specifically refers to the authorizing federal statute:

> Notwithstanding subsections (a) and (b), . . . a State may enact a statute that *specifically refers to this section*

> and provides prospectively that this section shall not preempt the laws of that State referred to in this section.

15 U.S.C. §80a-3a(c).[9] Similarly, many other federal statutes authorize the later enactment of federal legislation, conditional upon a specific reference to the authorizing statute.[10]

The statute first quoted above in particular reveals the error of the Court of Appeal's analysis, because it explicitly distinguishes between a "specific-reference" requirement, on the one hand, and an "express or affirmative provision" requirement, on the other. Thus, as that statute illustrates, the phrase "affirmatively provides" conveys an entirely different meaning than a specific reference or citation to the statute, and the Court of Appeal erred in assuming the two to be synonymous.

In short, in enacting Section 1621, Congress chose to require only that state legislation "affirmatively provide" for undocumented immigrants' eligibility, and *not* that the legislation "specifically cite" Section 1621.[11] The Court of Appeal erred in rewriting Section 1621 judicially to impose an express reference requirement that it does not contain, even though Congress "is familiar with the language that will create such a requirement and has used such language on many occasions." *Vasquez*, 45 Cal. 4th at 253. In so doing, it violated "the foremost rule of statutory construction": "When interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . . This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 59 (2002) (citations and internal quotations omitted).

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[9] *See also, e.g.,* 15 U.S.C. §§37(d), 77r-1(c).

[10] *See, e.g.,* 7 U.S.C. §7253(d)(2); 25 U.S.C. §2719(d)(2); 50 U.S.C. §432b(e).

[11] Notably, *not one* of the ten state legislatures that have enacted legislation similar to AB 540 understood Section 1621 to impose any such requirement.

B. Section 1621 Does Not Mandate That States Employ Any "Magic Words" In Their Legislation.

The second ground for the Court of Appeal's ruling that Section 68130.5 is preempted by Section 1621 was, if anything, even more flawed. The court concluded that "even accepting defendants' view that 'affirmatively' merely means explicitly rather than implicitly and does not require the statute to use the words 'illegal aliens,' section 68130.5 does it best to conceal the benefit to illegal aliens. Although section 68130.5 does indicate that illegal aliens are eligible, it does so in a convoluted manner." Slip op. 70. "Thus, while we do not hold that title 8 U.S.C. section 1621 requires the state statute to use the words 'illegal aliens,' we conclude that the language of section 68130.5 does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens." *Id.* at 71. That holding, too, is inconsistent with basic principles of statutory construction.

Nothing in the plain language of Section 1621 imposes any such requirement that a conforming state statute "clearly put the public on notice that tax dollars are being used to benefit illegal aliens." If that was, in fact, Congress's purpose in enacting Section 1621(d), Congress chose to carry out that purpose by requiring any state that chose to enact such a law to "affirmatively provide" that an alien who is not lawfully present in the United States would be eligible. As the Court of Appeal acknowledged, the Legislature did just that when it enacted Section 68130.5, which "*does* indicate that illegal aliens are eligible." Slip op. 69 (emphasis added). In purporting to find a further requirement that a conforming statute more "clearly put the public on notice," the Court of Appeal improperly rewrote the federal law.

Nor does Section 1621 contain any "magic words" requirement, as Plaintiffs asserted below, that the statute must use the term "illegal alien" rather than "a person without lawful immigration status." Indeed, Section 1621 *itself* does not use that term, referring instead to "an alien who is not lawfully present in the United States." 8 U.S.C. §1621(d). For similar reasons, the Court of

Appeal was off base in criticizing Respondents for using the term "undocumented immigrants," asserting that term lacks an authoritative definition and that it is not interchangeable with the term "illegal alien," which it considered "less ambiguous." Slip op. 3 n.2. In fact, those terms *are* used interchangeably by state and federal courts, and *neither* has an authoritative definition. *See, e.g.*, *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 971, 973 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008) (using "undocumented immigrants"); *Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1458 (2007), *cert. denied*, 128 S. Ct. 1256 (2008) (same); *Doe v. Wilson*, 57 Cal. App. 4th 296, 301 n.2 (1997) ("We use the briefer terms 'undocumented alien' or 'illegal aliens'"); *Regents of University of California v. Superior Court*, 225 Cal. App. 3d 972, 976, 978-80 (1990) ("undocumented alien students").[12]

Despite the Court of Appeal's view that the Legislature could have drafted the statute in a less "convoluted" way (*id.*), substandard drafting is not a proper basis on which to invalidate a state statute. Our courts are directed to uphold state laws unless their unconstitutionality is "clear and unquestionable," not to strike down those laws merely because they believe they could or should have been more clearly drafted.

C. The Plain Language of Section 1621 Controls.

Because the plain language of the savings clause in Section 1621(d) is dispositive, and there is no genuine ambiguity in that language, there was no need for the Court of Appeal to consider the statute's legislative history. *Ardestani v. INS*, 502 U.S. 129, 135-36

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[12]The term "illegal alien" often is considered to carry offensive connotations. Our courts recognize that immigration is a "sensitive" subject, and courts should be especially careful to avoid the appearance that they hold "preconceived ideas based on stereotypes of undocumented aliens." *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 455-63 (2003).

(1991) ("the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used") (citations and internal quotations omitted); *see also, e.g., People v. Edward J. Jones & Co.*, 154 Cal. App. 4th 627, 639 (2007) ("Because we reach this conclusion based on the unambiguous language of the statute, we need not consider the statute's legislative history. As a matter of plain statutory meaning, this action does not conflict with the [federal statute] and is therefore not preempted by that statute").

But even if resort to the legislative history were appropriate, it does not support the Court of Appeal's conclusion. While the Conference Report states, "[o]nly the affirmative enactment of a law . . . that references this provision, will meet the requirements of this section," the very next sentence reads,

> 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.

H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS., pg. 1 (1996) (6 CT 1415); slip op. 69. As the Court of Appeal acknowledged, Section 68130.5 does just that. Slip op. 70.

That is all that the plain language of the statutory savings clause requires. "If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." *Miklosy v. Regents of University of California*, 44 Cal. 4th 876, 888 (2008). "That which is expressly permitted cannot be implicitly prohibited." *People v. Edward D. Jones & Co.*, 154 Cal. App. 4th at 637-39 (state securities law enforcement action by Attorney General not preempted by federal law containing savings clause allowing such actions).

III.

THE COURT OF APPEAL'S HOLDING THAT SECTION 68130.5 IS PREEMPTED BY 8 U.S.C. §1623 IS INCONSISTENT WITH ITS PLAIN LANGUAGE AND LEGISLATIVE HISTORY.

The Court of Appeal also found that Section 68130.5 is preempted by a second federal statute, Section 1623, which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). That statute provides:

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

8 U.S.C. §1623(a). The term "residence" refers to a person's "principal, actual dwelling place in fact, without regard to intent." *Id.* §§1101(a)(33), 1641(a); *see Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992) ("Residency means an established abode, for personal or business reasons, permanent for a time. A resident is so determined from the physical fact of that person's living in a particular place" (citation omitted)).

Thus, Section 1623 prohibits states from basing eligibility for such benefits on the recipient's "principal, actual dwelling place" unless every citizen or national of the United States can receive those benefits as well without regard to residence. Congress's apparent intent in enacting this provision was to prevent states from extending eligibility for postsecondary education benefits to undocumented immigrants residing within their borders while excluding others from the same benefits.[13] However, nothing in

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[13] *Regents of University of California v. Superior Court*, 225 Cal. App. 3d 972 (1990) held that Education Code Section 68062(h), which provides that an alien may establish legal residence in California "unless precluded by the Immigration and Nationality Act . . . from establishing domicile in the United States," precludes undocumented
(continued . . .)

Section 1623 prevented states from enacting statutes, such as Section 68130.5, that uniformly extend benefits on the basis of neutral criteria, *regardless of* residence. Furthermore, section 1623 does not prohibit a state from extending benefits to undocumented immigrants who *happen to be residents* if the criteria for eligibility are not based on the recipients' "principal, actual dwelling place." As this Court instructed in *Farm Raised Salmon*, the statutory prohibition means, "by negative implication," that California *may* provide such benefits on any basis *other than* "residence within" the state. 42 Cal. 4th at 1086.

Section 68130.5 does not confer eligibility for the exemption from nonresident tuition "on the basis of residence within a State." To the contrary, both on its face and as applied, it confers such eligibility on the basis of *other* criteria: past attendance at and graduation from a California high school. *All* students who meet the specified criteria, *regardless* of their residence or citizenship status, qualify for the statutory exemption; such students receive the exemption whether or not their "principal, actual dwelling place" is located in the state. In fact, the substantial majority of students in the University of California system who qualify for the exemption are U.S. citizens who are *not* California residents. The Court of Appeal nevertheless found that Section 68130.5 conflicts with Section 1623, offering several mutually inconsistent rationales. None can withstand scrutiny, especially in light of the presumption against preemption.

A. Section 68130.5 Does Not Confer A Benefit On Undocumented Immigrants "On The Basis Of Residence."

The Court of Appeal acknowledged that "the plain language of section 68130.5, on its face, does not condition the exemption from

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(. . . continued)
alien students from being classified as residents for tuition purposes. *Id.* at 978-80. Section 68130.5 does not affect the residency status of undocumented immigrants, nor does it address residence at all.

nonresident tuition on the basis of residence." Slip op. 47. However, it suggested that "the question is whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred." *Id.* The court reasoned that because "[a] reasonable person would assume that a person attending a California high school for three years also lives in California," Section 68130.5 is "ambiguous" as to whether it affords a benefit to illegal aliens based on residence. *Id.* at 48-49.

The Court of Appeal erred in finding the statute ambiguous based on what it believed a "reasonable person would assume." Instead, under well-accepted principles of statutory interpretation, that court should have looked first to the plain statutory language, read in its overall context. As this Court recently observed, the rules governing statutory construction are "familiar":

> We begin with the statutory language because it is generally the most reliable indication of legislative intent. If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.

Miklosy, 44 Cal. 4th at 888 (citations omitted); *accord, Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103 (2007). These principles require a court to read the words of the statute "in their statutory context." *People v. Watson*, 42 Cal. 4th 822, 828 (2007). "In other words, we do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Smith v. Superior Court*, 39 Cal. 4th 77, 83 (2006) (citations and internal quotations omitted).

The Court of Appeal's unsupported inference that a "reasonable person" would "assume" that the statutory factors equate to residence cannot be reconciled with these basic principles of statutory construction. Not only does the plain language of Section 68130.5 make no reference to residence, the statute's context within the Education Code makes clear that the Court of Appeal's

unsupported assumption that attendance at and graduation from a California high school automatically or necessarily equates with California residence is mistaken.

First, that a student *once* attended high school in California has no necessary relationship to his or her current residence. Indeed, the vast majority of University of California students who are exempt from non-resident tuition under Section 68130.5, although they attended California high schools at one time, are no longer California residents. *See* pg. 33 & n.19, *infra*.[14] These students include U.S. citizens who attended high school in California but have resided in another state after completing high school and before enrolling in college or graduate school. The Court of Appeal's passing suggestion that as applied to such a student, Section 68130.5 would confer a benefit "based on *prior* California residence" (slip op. 52 (emphasis added)) stretches the statutory language past its breaking point. Section 1623 prohibits states from conditioning eligibility "on the basis of residence," not "on the basis of prior residence."

Furthermore, eligibility under Section 68130.5 does not even require *past* residency. California law explicitly provides that *nonresidents* may attend public high school in California. In an Article entitled "Nonresidents," the Education Code provides that "pupils living in an adjoining state which is contiguous to the school district" may be admitted to elementary and high schools in California. EDUC. CODE §48050. Moreover, a person "whose actual and legal residence is in a foreign country adjacent to this state, and who regularly returns within a twenty-four-hour period to said foreign country" may be admitted to California schools, whether or not the student's parents are U.S. citizens. *Id.* §48051; *see also id.* §48054 (educational exchange of high school students between United States and Japan). Likewise, students may attend boarding

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[14]If these students still resided in California, they would be eligible for in-state fees even without Section 68130.5.

school for part of the year in California while maintaining a permanent residence in another state. In each instance, the student is *not* a California resident, but nonetheless qualifies under Section 68310.5 for exemption from nonresident tuition.[15]

Furthermore, Section 68130.5 also *excludes* undocumented students who *do* reside in California. Undocumented students whose "principal, actual dwelling place" is located in California are nevertheless ineligible if they did not attend a California high school for at least the requisite three years, or did not graduate. In short, the criteria that the Legislature established in Section 68130.5 both *includes* many students who are not California residents and *excludes* many students who are California residents. Both practically and logically, those criteria are simply not based on "residence" in California.

B. The Legislative History of Section 68130.5 And The Legislature's Finding Establish That The Legislature Intended To Benefit Nonresidents And Residents Alike.

Although there is no ambiguity in the statutory language of Section 68130.5, "and therefore no reason to consult the legislative history, the legislative history actually supports our conclusion." *Miklosy*, 44 Cal. 4th at 890-91. In fact, both the legislative history of Section 68130.5 and the Legislature's express finding accompanying that statute further support the conclusion that the Legislature did not intend to confer a benefit on the basis of residence, but rather intended to benefit both nonresidents and residents alike.

The Court of Appeal rejected Defendants' reliance on the statutory provisions that allow nonresidents from adjoining states and Mexico to attend high school in California, opining that it "makes no sense" to believe that the Legislature intended to

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[15]The Education Code contains at least *eighteen* additional exemptions from nonresident tuition. *See* slip op. 46-47. Many of those exemptions, like Section 68130.5, are not contingent on either actual or legal residence in California.

subsidize such students' college education. Slip op. 49-51. However, the court itself discussed an Enrolled Bill Report which establishes that the Legislature was well aware that such "border area students in California," among others, "are expected to qualify for a nonresident tuition exemption under the provisions of this bill." *Id.* at 53 (quoting 6 CT 1569). The same report recognized that "boarding school students who attend California schools" could also qualify for the statutory exemption. *Id.*

Even more broadly, the Court of Appeal did not refer to the bill's legislative history establishing that the Legislature envisioned that "*any* student who meets the specified criteria, *without regard to residency*, [will] be eligible to receive the exemption." 6 CT 1566 (Enrolled Bill Report) (emphasis added); *see also, e.g.,* 6 CT 1673 ("A close reading of the legislation shows that the benefit provided in AB 540 is available to 'any person' . . . which could include non-residents as well as U.S. residents from other states, so long as they meet the outlined conditions") (Assembly Committee on Higher Education bill analysis).

Other portions of the bill's legislative history also reveal that the Legislature expressly recognized that the legislation would benefit nonresidents. Thus, the Legislature repeatedly recognized that the bill would "*[e]xempt nonresidents* from paying resident tuition at CSU or CCC" provided they met the statutory criteria. ASSEMBLY FLOOR, BILL ANALYSIS, AB 540, CONCURRENCE IN SENATE AMENDMENTS, as amended Sept. 7, 2001 (emphasis added) (7 CT 1886); *see also, e.g.,* SENATE RULES COMM., OFF. OF SEN. FLOOR ANALYSES, ASSEM. BILL NO. 540 (2001-2002 REG. SESS.) Sept. 7, 2001, pg. 2 (7 CT 1855) (same). Likewise, the legislative history recognized,

> This 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". Instead, this measure simply requires that CSU and CCC charge *only* mandatory systemwide fees and *not* nonresident tuition to those students who have met the prescribed requirements.

ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS (7 CT 1887). Thus, the Legislature was well aware that the legislation would benefit nonresidents, and correctly did not view the statutory criteria as equating with residence.[16]

Finally, the Legislature expressly found that Section 68130.5 "does not confer postsecondary education benefits on the basis of residence" within the meaning of Section 1623. AB 540 ch. 814, §1(a)(5) (6 CT 1665). While that legislative finding may not be dispositive, it establishes that the Legislature did not intend to confer a benefit "on the basis of residence" in violation of Section 1623. This Court repeatedly has recognized that "courts must give legislative findings great weight and should uphold them unless unreasonable or arbitrary." *Prof'l Eng'rs v. Dep't of Transp.*, 15 Cal. 4th 543, 569 (1997) (citations omitted). At a minimum, that legislative finding constitutes further evidence that the Legislature was well aware of the Congressional limits on its ability to legislate in this area and carefully sought to avoid violating those restrictions.

C. The Court Of Appeal's Conclusion That Section 68130.5 Contains A "De Facto" Residence Requirement Is Erroneous.

Thus, both the plain language of Section 68130.5 and its legislative history establish that the statute applies to *all* students who meet its criteria, *regardless* of residence. The Court of Appeal nevertheless concluded the "wording of the California statute, requiring attendance at a California high school for three or more years, creates a de facto residence requirement." Slip op. 53. "Or, as plaintiffs put it, if section 68130.5 requires an illegal alien to

[16]The Court of Appeal pointed to language in the legislative history referring to students who would qualify under the statute as "long-term California residents," contending that it "admits an intent to benefit residents, which is telling." Slip op. 57-58. However, as just discussed, the very *same* legislative history clarified that the bill "[e]xempts *non-residents* from paying resident tuition" if they met the stated criteria. Furthermore, that *some* "long term residents" might qualify does not mean that the provision is *based on* residence.

attend a California high school for three years in order to qualify for the exemption from nonresident tuition, then the state has effectively established a surrogate criterion for residence." *Id.* (footnote omitted). The Court of Appeal asserted *as fact* that "[t]he vast majority of students who attend a California high school for three years are residents of the state of California." *Id.* at 5-6. Later in its opinion, however, the court acknowledged that it only "suspect[s]" that to be the case. *Id.* at 52. Thus, the court assumed that because the majority of students who would qualify for the statutory exemption are California residents, the statutory criteria should be read as imposing a "de facto" residence requirement.

Contrary to the Court of Appeal's assumption, the statutory criteria set forth in Section 68130.5 are not a "surrogate" or proxy for residence because they can be and are met by numerous categories of nonresidents. By the same token, neither are they a proxy for undocumented status, because the criteria can be met by U.S. citizens, and because even undocumented immigrants living in California would not qualify for the exemption unless they met its criteria. As the Tenth Circuit found with regard to the closely similar Kansas statute, these statutory factors constitute "a nondiscriminatory prerequisite for benefits under [the statute], *regardless of the citizenship of the students*." *Day v. Bond*, 500 F.3d 1127, 1135 (emphasis added), *reh'g and reh'g en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).[17]

The Court of Appeal's factual assumption that Section 68130.5 would benefit only California residents was improper in this facial

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[17]*Day* held that nonresident students did not have standing to challenge the Kansas statute because "[n]one of these Plaintiffs would be eligible to pay resident tuition . . . even if the allegedly discriminatory test . . . favoring illegal aliens were stricken." 500 F.3d at 1135. *Day* also ruled that Section 1623 does not confer a private right of action on nonresident students such as Plaintiffs. *Id.* at 1138-40. The trial court here agreed with the latter holding, and the Court of Appeal held that Plaintiffs forfeited their appeal from that ruling. Slip op. 18-23.

attack on the constitutionality of that statute. *See Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621-22 (2008) (limited evidence in record was insufficient to meet "heavy burden of persuasion" to sustain broad attack on facial validity of statute). Even more fundamentally, as demonstrated above, that assumption is simply wrong. As a matter of law and fact, nonresidents may and do qualify for the tuition exemption.[18]

Similarly, contrary to the Court of Appeal's assumption that the statute only "incidentally benefits a few students other than resident illegal aliens" (slip op. 54), the only evidence before the Court of Appeal on that subject was to the contrary: a legislative report establishing that of the nearly 1,500 students who qualified for a tuition exemption at the University of California in 2005-06, only 390 students, or 26 percent, were undocumented. *Id.* at 53 n.19; SEN. COM. ON APPROPRIATIONS, FISCAL SUMMARY OF SB NO. 160 (2007-08 REG. SESS.) May 14, 2007.[19] In light of the numerous nonresidents who may and do qualify for the exemption, and the Legislature's expressed intent to benefit residents and nonresidents alike, the Court of Appeal's conclusion that Section 68130.5 imposes a "de facto" residence requirement cannot be sustained.

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[18]For this reason, the Court of Appeal's hypothetical example of a statute conditioning in-state tuition on the student's parents maintaining a post office box in California (slip op. 53 n.20) is unconvincing. One need not be a California resident to maintain a post office box in the state. The link between residence and the statutory conditions here is even more attenuated.

[19]Likewise, each year from 2002 through 2006-07, approximately 70 percent or more of tuition exemptions at the University of California went to U.S. citizens, permanent residents, or holders of immigrant visas. UNIV. OF CALIF. OFC. OF THE PRESIDENT, ANNUAL REPORT ON AB 540 TUITION EXEMPTIONS 2006-07 ACADEMIC YR. (Mar. 5, 2008), <http://www.ucop.edu/sas/sfs/docs/ab540_annualrpt_2008.pdf.>

D. The Court Of Appeal's Sweeping Holding That Section 1623 Invalidates Any State Law That Is "Intended To Benefit Illegal Aliens" Is Inconsistent With The Plain Language Of The Federal Law.

The Court of Appeal ruled on an even broader ground, holding it "irrelevant" whether Section 68130.5 benefits nonresidents because that statute was "intended to benefit illegal aliens living in California." Slip op. 54-61. In the court's view, "Section 68130.5 manifestly thwarts the will of Congress expressed in title 8 U.S.C. section 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." *Id.* at 54. Thus, in the Court of Appeal's view, if a state law confers *any* benefit on illegal aliens who happen to be living in that state, even if it does not condition the benefit in any way on residence in the state, and even if the law *also* applies to U.S. citizens and legal residents, it is preempted. That broad ruling cannot be reconciled either with the plain language of Section 1623 or with basic principles of statutory construction.

By the plain terms of Section 1623, Congress did *not* absolutely prohibit states from conferring *any* benefit on illegal aliens. Even its title refers to "*Limitation* on eligibility . . . ." Rather, it prohibited states from conferring such a benefit "on the basis of residence within a State" unless they confer the same benefit on U.S. citizens without regard to their residence. 8 U.S.C. §1623. Logically, then, Congress left undisturbed states' authority to confer such a benefit on the basis of *other* neutral criteria, such as attendance at and graduation from high school within the state. In short, Section 1623 simply clarified the *conditions* on which states could properly grant benefits to undocumented immigrants; it did not prohibit states from doing so altogether.

The Court of Appeal's holding that Section 68130.5 violates Section 1623 solely because it confers benefits on certain undocumented immigrants, among others, ignores the important qualifying phrase "on the basis of residence within a State," thereby effectively reading that phrase out of the statute. It therefore violates

a "cardinal principle of statutory construction": a court has a duty to "give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted). The Court of Appeal's construction of Section 1623 "would defeat and destroy the plain meaning of that section." *Id.* at 538; *see also, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("were we to adopt respondent's construction of the statute, we would render the word 'State' insignificant, if not wholly superfluous").[20] Although the Court of Appeal acknowledged this "principle of statutory construction [requiring it] to give effect to every word" (slip op. 66), it made no attempt to explain how its sweeping holding can be reconciled with the statutory language.

E. Section 1623's Limited Legislative History Cannot Invalidate Section 68130.5.

Plaintiffs relied heavily below on the limited available legislative history of Section 1623 as a basis for contending that Section 68130.5 is preempted by that statute. However, that legislative history is inconclusive at best, and in any event cannot overcome the plain language of the statute itself.

Section 1623 was enacted in 1996 as part of the Omnibus Consolidated Appropriations Act of 1997, PUB. L. 104-208, §505, Sept. 30, 1996, 110 STAT. 3009-672 (1996). The massive conference report on the appropriations bill by which Congress enacted IIRIRA, H.R. 3610, is silent as to the legislative intent underlying Section 1623, and merely summarizes that provision. H.R. CONF. REP. 104-863, 104th Cong., 2d Sess. 1996 (Sept. 28, 1996), 1996 WL 562036 at *688. However, a conference report on a predecessor IIRIRA bill—which was *not* enacted—contained a one-

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[20]This Court applies the same principle. "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." *Dix v. Superior Court*, 53 Cal. 3d 442, 459 (1991) (citations omitted).

line summary of an identically worded provision as "provid[ing] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." H.R. CONF. REP. 104-828, 104TH CONG., 2D SESS., 1996 (Sept. 24, 1996) (6 CT 1412).

Prior to the enactment of the omnibus appropriations bill, two Congressmen made similar statements during the debate on that legislation. Thus, Representative Cox characterized the bill as providing that "illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools." 142 CONG. REC. H11377 (Sept. 26, 1996) (6 CT 1429). Similarly, Senator Simpson stated, "Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges." 142 CONG. REC. S11508 (Sept. 27, 1996) (6 CT 1425). Likewise, the next day, he stated, "Illegal aliens will no longer be eligible for reduced in-State college tuition." 142 CONG. REC. S11713 (Sept. 28, 1996) (6 CT 1420).[21]

None of these brief references to IRRIRA (or to a prior, failed version of that Act) mentioned, much less illuminated, the key statutory phrase "on the basis of residence" in a state. Nor did they make any reference to the "unless" clause at the end of the section, which *permits* states to make undocumented immigrants eligible for in-state tuition rates on the basis of residence if they also allow out-of-state U.S. citizens to qualify for the same rates without regard to residence. As a result, this so-called legislative history is not an accurate description of Section 1623; indeed, it actually contradicts the statute's plain language by suggesting that it constitutes an outright prohibition on conferring eligibility on undocumented

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[21]In 2005, former Senator Simpson filed an amicus curiae brief in support of a challenge to Kansas's similar legislation, arguing that Congress had intended in 1996 to create a private right of action to enforce Section 1623. The Tenth Circuit disagreed. *Day*, 500 F.3d at 1138-39. The Court of Appeal held that the trial court here properly refused to take judicial notice of that brief and of a 2005 declaration to the same effect. Slip op. 24-26; 23 CT 6538.

immigrants for in-state tuition when the prohibition is only partial and conditional. At most, these are brief incomplete statements by individual legislators regarding the overall thrust of the provision, not detailed statements or explanations of overall Congressional intent. They are certainly not explicit and clear enough to override the plain language of the statute.

It is black-letter law that legislative history cannot overcome plain statutory language. *See* pg. 24, *supra*. Members of Congress must write amendments into the bill, not into committee reports or floor debates. Indeed, the Supreme Court has recognized that "only the most extraordinary showing of contrary intentions from those [legislative history] data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984).[22] Here, that plain meaning prohibits States from conferring postsecondary education benefits on undocumented immigrants only "on the basis of residence within a State." Because Section 68130.5 does not violate that prohibition, it is not preempted by Section 1623.

IV.

EDUCATION CODE SECTION 68130.5 IS NOT IMPLIEDLY PREEMPTED BY FEDERAL LAW.

Plaintiffs also contended that Section 68130.5 is impliedly preempted under each prong of the tripartite test set forth in *DeCanas v. Bica*, 424 U.S. 351 (1976). 1 CT 34-36 ¶140-48. The Court of Appeal flatly (and correctly) rejected the first of these claims: "Section 68130.5 does not regulate immigration and therefore is not expressly preempted as a regulation of immigration." Slip op. 62 (citation omitted). However, the court appeared to agree

[22]California courts follow the same approach. *See Guillen v. Schwarzenegger*, 147 Cal. App. 4th 929, 947 (2007) ("Although resort to legislative committee reports is appropriate when the meaning of a statute is unclear, the actual language of a statute bears far more significance than statements by legislative committee members").

that Section 68130.5 is impliedly preempted on other grounds. *Id.* at 62-65. However, that brief discussion does not supply any independent basis for the court's holding.

Contrary to the Court of Appeal's conclusion, Section 1623 does not demonstrate Congress' "[c]lear purpose to oust state power with respect to the subject matter [of Section 68130.5]." Slip op. 62. The plain language of Section 1623 necessarily "informs our analysis of the existence of any implied preemption." *Farm Raised Salmon Cases*, 42 Cal. 4th at 1092. "An express definition of the pre-emptive reach of a statute implies—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters." *Id.* (citations and internal quotations omitted). The inference from an express preemption clause that Congress did not intend to preempt other matters "is a simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.'" *Viva! Int'l Voice for Animals*, 41 Cal. 4th at 944-45 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)); *accord, Farm Raised Salmon Cases*, 42 Cal. 4th at 1086 ("Although [the express preemption clause] speaks in terms of what states may *not* do, by negative implication, [it] also expresses what states *may* do").

Here, as discussed above, Congress in passing Section 1623 *preserved* states' general authority to grant in-state tuition rates to undocumented students, prohibiting them only from conferring such rates *on the basis of residence*. Because that Congressional directive squarely and explicitly addresses the precise issue before the Court – the conditions under which States may provide in-state tuition to undocumented students – it leaves no room for any independent finding of implied preemption. Likewise, the Court of Appeal erred in concluding that Section 68130.5 was impliedly preempted because it would require state officials to violate Section 1623. Slip op. 63. Because Section 68130.5 is consistent with Section 1623

(*see* Part III, *supra*), compliance with both state and federal law is not impossible.

Nor does Section 68130.5 "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Slip op. 64-65. The provision cited by the Court of Appeal states, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). But that provision is nothing more than a general statement of policy; the operative provisions of the PRWORA clarify how Congress elected to implement that policy, namely by establishing a framework that limited but did not prohibit the provision of public benefits to undocumented immigrants. *Id.* §1621. Indeed, under that framework, Congress expressly *authorized* the States to provide public benefits to undocumented immigrants. *Id.* §1621(d). Congress logically could not have impliedly preempted in a general legislative statement that which it expressly *authorized* elsewhere in the very same statutory scheme. *See Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 924 (2004) (improper to recognize conflict preemption if doing so would "nullify the savings clause").

V.

EDUCATION CODE SECTION 68130.5 DOES NOT VIOLATE NONRESIDENT STUDENTS' FEDERAL RIGHTS UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE.

In a brief discussion virtually devoid of any supporting reasoning or authority, the Court of Appeal also held that Plaintiffs had stated a claim that Section 68130.5 violates the Privileges or Immunities Clause of the Fourteenth Amendment. Slip op. 75-76. That novel ruling, which apparently rested on Plaintiffs' inaccurate descriptions of the case law, has no basis in constitutional precedent.

The gist of Plaintiffs' claim was that by charging out-of-state students nonresident tuition while exempting certain undocumented immigrants from such payment, Defendants "denigrat[ed] U.S.

citizens by treating them worse than illegal aliens." Slip op. 11, 75. Plaintiffs alleged that Section 68130.5 thereby "abridges a fundamental privilege that attaches to U.S. citizenship: the privilege that a U.S. citizen shall be treated no worse under law than an alien unlawfully present in the United States." 1 CT 33 ¶135. This argument may be politically appealing as a rhetorical sound bite, but as a legal claim it lacks any merit.

A. Section 68130.5 Treats U.S. Citizens and Undocumented Immigrants Equally.

At the outset, Plaintiffs' contention that Section 68130.5 somehow "denigrates" U.S. citizens by placing them in a "disfavored" position compared to that of undocumented immigrants is erroneous. Rather—as the Court of Appeal itself acknowledged—Section 68130.5 does *not* treat U.S. citizens "worse than illegal aliens." Indeed, in its discussion of Plaintiffs' equal protection claim, the court *agreed* that Section 68130.5 applies equally to U.S. citizens and undocumented immigrants:

> [S]ection 68130.5 does not, on its face, allow illegal aliens a benefit denied to U.S. citizens from sister states. U.S. citizens, like illegal aliens, can obtain the benefit of section 68130.5 by attending a California high school for three years and obtaining a high school diploma or its equivalent.

Slip op. 72. And as discussed above, that is true in practice as well as in theory: U.S. citizens who are nonresidents of California can and do qualify for the statutory exemption.

Nor is there any merit to Plaintiffs' objection that the statute somehow "denigrates" nonresidents by charging them higher tuition than others. The courts have long recognized that states have legitimate grounds for distinguishing between state residents and nonresidents in the fees charged to attend their public universities, and that a uniformly applied residency requirement does not violate the similar Privileges and Immunities Clause found in Article IV, Section 2 of the Constitution. *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (citing *Vlandis v. Kline*, 412 U.S. 441, 445 (1973)); *Kirk v.*

Board of Regents, 273 Cal. App. 2d 430, 444-45 (1969) ("Residents and nonresidents can be treated differently where there are valid reasons for doing so, and the privileges and immunities clause does not guarantee to petitioner the right to attend the university for the same fee as that charged to persons who have met the one-year residence requirement") (citation omitted).[23] For this reason, Section 68130.5 would not violate the Privileges and Immunities Clause even if the Court of Appeal were correct that the statute imposes a "de facto" residency requirement. "A requirement of de facto residency, uniformly applied, would not violate any principle of equal protection." *Martinez v. Bynum*, 461 U.S. 321, 328-29 (1983). That is because "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.* at 328.

B. The Privileges Or Immunities Clause Does Not Guarantee That U.S. Citizens Will Always Be Treated More Favorably Than Non-Citizens.

Even if there were any factual basis for Plaintiffs' claim, it is based on a demonstrably erroneous legal premise. The key contention that underlies Plaintiffs' claim—that the Privileges or Immunities Clause guarantees that *all* U.S. citizens in *all* cases are entitled to be treated more favorably than *all* non-citizens—is entirely unsupported by any pertinent authority and would have breathtaking implications.[24]

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[23]Section 68130.5 actually imposes *greater* requirements on undocumented immigrants than it does on nonresident students: the former must attend high school in California for at least three years before qualifying for the exemption, while nonresident adult students typically can qualify for resident status after one year in the state. EDUC. CODE §§68017, 68023.

[24]Essentially, it would eliminate the ability to apply any eligibility standards or criteria to U.S. citizens for any public service if undocumented immigrants are also eligible to receive that service. Thus, for example, indigent undocumented immigrants could not

(continued . . .)

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." That Clause protects a citizen of the United States against actions by a state that abridge his or her federal rights as a citizen:

> The "privileges and immunities" protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources.

Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261 (1934). *Accord Merrifield v. Lockyer*, 2008 U.S. App. LEXIS 19622, at *9-13 (9th Cir. Sept. 16, 2008), *amended*, 547 F.3d 978 (9th Cir. 2008); *In re Demergian*, 48 Cal. 3d 284, 292-93 (1989) (Clause "protects only those rights incident to national citizenship; it does not protect rights that depend solely on state law" (citations omitted)).

Two related points follow. *First*, when a plaintiff asserts infringement of a right that is "a creature of state law," it cannot provide a basis for a claim under the Privileges or Immunities Clause. *In re Demergian*, 48 Cal. 3d at 292-93. Plaintiffs' claim cannot survive this fundamental principle. That is because "[t]he 'privilege' of attending the university as a student comes not from federal sources but is given by the State." *Hamilton*, 293 U.S. at 261 (rejecting claim that state law requiring University of California students to take course in military law and tactics violated Clause). There is no "privilege" given to U.S. citizens of attending a state college or university, much less of attending on terms more favorable than those enjoyed by non-citizens.

Second, and even more broadly, the Privileges or Immunities Clause only protects the rights of U.S. citizens against infringement

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(. . . continued)
receive public defender services unless all U.S. citizens, without regard to their financial circumstances, also received those same services.

by the states; it says nothing whatever about what those rights are in comparison to those of non-citizens.

Plaintiffs relied below primarily on *Saenz v. Roe*, 526 U.S. 489 (1999), for the proposition that the Clause protects a citizen's "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Id.* at 500 (*see* AOB 39; ARB 48). However, that reliance was badly misplaced. In *Saenz*, the Court invalidated a durational residency requirement that limited the benefits that could be received by new residents who moved to California from other states. The quoted passage from *Saenz* refers not to the Privileges or Immunities Clause of the Fourteenth Amendment, but to the Privileges and Immunities Clause of Article IV, Section 2. *Id.* at 501. However, Plaintiffs expressly disclaim any reliance on that provision. 1 CT 33-34 ¶¶134-39; Ans. to Pet. for Review 18-19; ARB 48-49. More importantly, the Court's use of the word "aliens" referred to U.S. citizens of *other states*, *not* citizens of other countries:

> Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States."

Id. (quoting *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1869) (footnote omitted)). The passage had nothing to do with the rights of citizens in comparison to those of non-citizens.

Matthews v. Diaz, 426 U.S. 67 (1976), on which Plaintiffs also relied below (AOB 40), is, if anything, even less helpful to their claim. *Mathews* addressed whether, under the *Due Process Clause* of the Fifth Amendment, it was unconstitutional for Congress to treat citizens better than aliens (noncitizens) in some circumstances (by conditioning aliens' eligibility for participation in Medicare on continuous residence in the United States for a five-year period and admission for permanent residence). The Court readily held it was not: "The fact that all persons, aliens and citizens alike, are

protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship." *Id.* at 78. That holding has nothing to do with either the Privileges or Immunities Clause or with state (as opposed to federal) power. In any event, it is a classic logical fallacy to say that, because the government *need not* treat aliens as well as its citizens, it *may not* treat them better than its citizens. Indeed, *Mathews* itself approvingly cited "statutes treat[ing] certain aliens more favorably than citizens" as evidence of Congress's authority to treat the two groups differently. *Id.* at 78 n.12. Thus, to the extent *Mathews* has any relevance, it undermines rather than supports the Court of Appeal's decision.

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be affirmed, and the case remanded for further proceedings.

Respectfully,

DATED: Mar. 25, 2009

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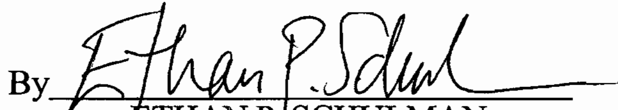
CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 8.504(d)(1)

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 RESPONDENTS' OPENING BRIEF ON THE MERITS contains 13,972 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: March 25, 2009

FOLGER LEVIN & KAHN LLP

By 
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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:

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Executed on March 25, 2009, at San Francisco, California.

Catherine A. Rogers

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