IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL.,

Plaintiffs and Appellants,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Defendants and Respondents.

Case No. S167791

Third Appellate District, Case No. C054124
Yolo County Superior Court Case No. CV 052064
The Honorable Thomas Edward Warriner, Judge

REPLY BRIEF OF THE BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES AND MARSHALL DRUMMOND

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
JULIE WENG-GUTIERREZ
Supervising Deputy Attorney General
State Bar No. 179277
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8223
Fax: (916) 324-5567
Email:Julie.WengGutierrez@doj.ca.gov
Attorneys for Defendants and Respondents California Community Colleges and Chancellor Marshall Drummond

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

STATE CASES

FEDERAL CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' argument principally relies on rewriting federal law. Two federal laws allow undocumented immigrants to receive public benefits. 8 U.S.C. section 1621 allows states to affirmatively enact laws granting benefits to undocumented immigrants and section 1623 permits undocumented immigrants to receive postsecondary education benefits not based on state residence if a nonresident citizen receives the same. First, to support their preemption argument, plaintiffs ignore the plain language of the law and argue that federal law absolutely prohibits an undocumented immigrant from receiving any postsecondary education benefit. Next, plaintiffs contort the phrase "residence within a state" into mere physical presence redefining "residence" under federal law. (8 U.S.C. § 1101(a)(33) [actual dwelling place, general place of abode].)

Second, plaintiffs argue that if California's exemption from out-of-state tuition is given to even one undocumented immigrant, then *all* citizens should receive the exemption, rather than "*a* citizen or national" as provided in section 1623. They reinterpret section 1623's language that a citizen must be "eligible for" the exemption and cast it as all citizens should be "given the benefit."

Finally, plaintiffs ignore the law of the case that they have no federal right to enforce immigrations laws[1] which is fatal to their privileges or immunities clause claim. In any case, the claim has no merit. To allege a violation of plaintiffs' privileges or immunities, they must allege a federal

[1] "The [trial] court dismissed the title 42 U.S.C. section 1983 count as to all defendants on the ground . . . that the federal immigration statutes (8 U.S.C. §§ 1621, 1623) conferred no private right of action in plaintiffs and therefore could not support a federal civil rights claim." (Opn., p. 21.) The appellate court concluded that plaintiffs forfeited this issue by failing to address it in their opening brief. (Opn., p. 23.) Plaintiffs did not seek review of this issue. (See Cal. Rules of Court, rule 8.500(a)(2).)

right. But immigrations laws create no federal rights in plaintiffs. Case law fails to support their expansive reading of the privileges or immunities clause of the Fourteenth Amendment.

Plaintiffs are simply unsatisfied with the current text and interpretation of federal law and beckon this Court to rewrite federal law.

ARGUMENT

I. PLAINTIFFS FAIL TO SHOW THAT CALIFORNIA'S EXEMPTION FROM OUT-OF-STATE TUITION IS FACIALLY UNCONSTITUTIONAL

A facial challenge to a statute requires examination of the language of the law itself. Plaintiffs' immediate detour into the legislative history demonstrates the inherent weakness of their argument because a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (*United States v. Salerno* (1987) 481 U.S. 739 [Bail Reform Act is not facially unconstitutional]; *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 49 citing *People v. Harris* (1985) 165 Cal.App.3d 1246, 1255-1256 [statute will withstand facial attack if court can conceive of a situation where statute could be constitutionally applied].) Despite this challenge, plaintiffs begin by arguing congressional intent as the cornerstone of their preemption analysis (Plfs.' Answer Brief, p. 13) but evade the actual text of federal law and leap directly into legislative history. (Plfs.' Answer Brief, pp. 14-18.)

Plaintiffs fail to show that no set of circumstances exists where section 68130.5 would be valid. Plaintiffs assert, however, that where there are two alternative readings of a statute, the Court must effectuate legislative intent. (Plfs.' Answer Brief, p. 23.) But because plaintiffs bring a facial challenge to the constitutionality of section 68130.5, they must show that there is no possibility of a constitutional interpretation of a statute

for their challenge to survive. They cannot, because they concede — as they must — but dismiss the fact that both citizens and undocumented immigrants are eligible to attend California high schools. Plaintiffs simply cannot meet their burden here.

Plaintiffs are also dismissive of the presumption of constitutionality and fail to recognize that their facial challenge to the statute carries a high threshold for a finding of unconstitutionality. "'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.'" (*In re Dennis M.* (1969) 70 Cal.2d 444, 453 quoting *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484; accord *In re Ricky H.* (1970) 2 Cal.3d 513, 519.)

> Because this is a challenge to the facial validity of the [the statute], our task is to determine whether the statute can constitutionally be applied. "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. ... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." [Citation omitted.]

(*Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1529.)

II. LEGISLATIVE HISTORY CANNOT DEFEAT THE EXPLICIT TEXT OF THE LAW

Plaintiffs immediately veer into the legislative history of sections 1621 and 1623 to avoid the explicit language of the statutes.[2] Plaintiffs

---

[2] Plaintiffs first address section 1623 in their brief and immediately venture into legislative history. (Plfs.' Answer Brief, pp. 13-16.)

(continued...)

summarily conclude that ambiguity exists in the wording of the federal statutes simply by virtue of the parties' different interpretations. Plaintiffs then proceed directly to the legislative history without first considering the actual language of the federal law for which they offer their interpretation. (Plfs.' Answer Brief, pp. 13-14.) They justify their detour into legislative history by arguing alleged conformity with Congressional intent. But where intent is clear from the face of the statute, there is no need to venture into legislative history. (*Dean v. United States* (2009) 129 S.Ct. 1849, 1853 [we start with the language of the statute]; *Barnhill v. Johnson* (1992) 503 U.S. 393, 401 [appeals to legislative history are well taken only to resolve statutory ambiguity]; *U.S. v. Rone* (1979) 598 F.2d 564, 569 [proper function of legislative history is to solve, not create, ambiguity]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, 801.) Courts should not consult external sources of legislative intent where the statutory language is clear and unambiguous.

Plaintiffs state they "have presented every statement that exists on the congressional record concerning" section 1623, yet they only present three items: a Conference Committee Report and two legislator's statements regarding section 1623.[3] (Plfs.' Answer Brief, pp. 14-16.) Likewise, with respect to section 1621, plaintiffs only rely on one conference report. (Plfs.' Answer Brief, pp. 41-42.) This meager legislative history cannot defeat the plain language of the law. Two legislators' statements do not represent the intent of the entire Congress as reflected in the language of the

---

(...continued)
Similarly, in their discussion of section 1621, they rely on a conference report to insert language not otherwise in the text of the law. (Plfs.' Answer Brief, p. 41-42.)

[3] Plaintiffs also rely on an opinion by the General Counsel of the University of California which was rejected by the appellate court and, of course, has nothing to do with Congress's intent. (Opn. at p. 26.)

enacted version of section 1623. (*Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 311 [remarks of a single legislator, even sponsor, are not controlling in analyzing legislative history].) In addition, plaintiffs' reliance on Conference Reports, cannot trump the actual text of the statute, itself:

> [T]he authoritative statement is the statutory text, not the legislative history . . . . judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

(*Exxon Mobile v. Allpattah Services* (2005) 545 US 546, 568-569.) Here, the statutory text is clear eliminating any need to consult external sources.

III. CONGRESS EXPRESSLY PERMITTED STATES TO GIVE UNDOCUMENTED IMMIGRANTS PUBLIC BENEFITS AND POSTSECONDARY EDUCATION BENEFITS

Despite plaintiffs' attempt to focus this Court's sole attention on two conference reports and two individual legislator's statements purporting to reflect Congressional intent, we submit that the inquiry begins and ends with the language of the statute itself. Statutory interpretation "must begin . . . with the language of the statute itself," which is "also where the inquiry should end, for where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (*United States v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 241, quoting *Caminetti v. United States* (1917) 242 U.S. 470, 485; *Delaney v. Superior Court*, *supra*, 50 Cal.3d 785, 800, 801.) Congress explicitly, in the text of the statute itself, authorized states to pass laws granting higher education benefits to undocumented immigrants (8 U.S.C. § 1621(d)), only requiring that a nonresident citizen also be eligible for any postsecondary education benefit

available to an undocumented immigrant based on residence within a state. (8 U.S.C. § 1623.) There can be no express preemption in light of these two savings clauses. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [no express or field preemption where Securities Exchange Act contained two savings clauses expressly preserving state law in certain limited areas].)

Congress knows how to preempt state law clearly in the text of a federal statute, and it regularly does so. (See 29 U.S.C. § 1441(a) [Employment Retirement Income Security Act states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"].) Here, both sections 1621 and 1623 contain express contingencies that allow states to enact laws permitting postsecondary benefits to undocumented immigrants. This is not a case where Congress made federal law exclusive in a field.

A. Congress Expressly Permitted States to Grant Public Postsecondary Benefits to Those Not Lawfully Present in the United States.

Section 1621 starts with a blanket prohibition against providing any state or local public benefits to undocumented immigrants (8 U.S.C. § 1621(a)), but then lists exceptions to this bar. Notably, Congress allowed states to provide benefits to aliens not lawfully present if the state enacts a law after August 22, 1996 which affirmatively provides for eligibility. (8 U.S.C. § 1621(d).) This is precisely what section 68130.5 does.

However, plaintiffs impermissibly venture into a conference report in their attempt to insert additional requirements that are not present in the text of the law itself. (Plfs.' Answer Brief, p. 41.) Plaintiffs attempt to have section 68130.5 fall outside the express savings clause of section 1621(d) by inserting language not in the statute — an alleged requirement that state

law reference section 1621 and use the term "illegal alien." (Plfs.' Answer Brief, pp. 41-42.) This attempt is inappropriate.

Congress could not have intended that states reach into the archives of legislative history to parse out additional requirements not stated in the text of the law itself. Plaintiffs' interpretation would require a state to doubt the precise words of Congress, presume the law unclear, and then to scour the legislative history to determine what more it had to do that the law did not expressly provide. Nevertheless, this is what plaintiffs repeatedly contend in their Answer Brief. (Plfs.' Answer Brief, pp. 13-16, 41-42.)

Plaintiffs' insistence that California must use the term "illegal alien," and not "person without lawful immigration status" as used in section 68130.5, is without merit. Section 1621 permits such benefits if a state "affirmatively enacts" a law providing for eligibility. (Opn. at pp. 70-71.) The plain language of "person without lawful immigration status" is readily understood to mean illegal alien. Moreover, federal law uses similar language to that found in section 68130.5 and does not always limit itself to the term "illegal alien." (See 8 U.S.C. §§ 1255a(a)(2) ["unlawful status"], 1373, ["immigration status, lawful or unlawful, of any individual"]; *DeMore v. Kim* (2003) 538 U.S. 510, 552 ["no lawful immigration status"].)

Plaintiffs' reliance on *Department of Health v. Rodriguez* (2009) 5 So.3d 22 (*Rodriguez*) likewise is misplaced. (Plfs.' Answer Brief, pp. 45-46.) Plaintiffs argue that Florida failed to enact a law "specifying that illegal aliens are eligible" for brain and spinal injury program benefits. (Plfs.' Answer Brief, pp. 45-46 citing *Rodriguez* at p. 26.) But plaintiffs omit that the Florida law at issue was enacted in 1994, and was never reenacted or otherwise altered after August 22, 1996, as is required under section 1621(d)'s savings clause. This fact was what the *Rodriguez* court

was referencing — not that the law needed to specifically use the term "illegal aliens."

Plaintiffs' use of legislative history to create an ambiguity and insert additional requirements that are not in the text of the law itself should be rejected.

B. Congress Also Expressly Allowed States to Make Postsecondary Education Benefits Available to Undocumented Students Not Based on Residence in a State.

It is clear that Congress did *not* enact a blanket prohibition against postsecondary benefits to be accorded to undocumented immigrants. Rather, Congress gave states authority to grant higher education benefits to undocumented immigrants not based on residence within a state. Congress set forth an exception in section 1623 that, if a state does condition eligibility for benefits on the basis of an undocumented immigrant's residence within a state, then the state must also provide eligibility to a nonresident citizen or national. (8 U.S.C. § 1623.)[4] Thus, Congress permitted states to give higher education benefits to undocumented students within specified clear parameters.

Section 68130.5's exemption is not based on residence but on high school attendance and graduation in California. Section 68130.5 does not grant resident tuition. It grants an exemption from paying out-of-state tuition which allows those eligible — nonresident citizens and undocumented students who attended for three years and graduated from

---

[4] Section 1623 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 . . . 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."

California high school — to pay the same amount of tuition that residents pay. Resident tuition is granted to California residents, whereas the exemption is given to nonresidents.

The exemption neither grants nor changes resident status. California prohibits granting residence status to anyone precluded from establishing domicile in the United States. (Ed. Code, § 68062, subd. (h).) Thus, undocumented immigrants who receive the exemption remain nonresidents. Nor does physical presence for the purpose of attending California schools establish residence. (Cal. Code Regs., tit. 5, § 54022 [prohibiting physical presence solely for educational purposes as establishing residence regardless of length of presence].) The exemption simply is not contingent on residence at all.

Residence in California is not required to attend California high school. State law permits citizen and foreign nonresidents to attend California high schools. (Ed. Code, § 48050 [permits pupils living in adjoining state to attend California elementary and high schools]; § 48051 [students of U.S. or foreign citizens who live in foreign county adjacent to California may attend California schools].) Thus, nonresidents that live in a state or country that borders California may attend California public schools. (Ed. Code, §§ 48050-48052.) In addition, beyond the realm of public schools, California private or parochial schools are not subject to residence requirements. (Ed. Code, §§ 48220, 48222.)

C. Section 1623 Permits Residence-Based Benefits for Undocumented Students So Long as a Citizen Is Equally Eligible.

Even if the Court deems section 68130.5's exemption as based on residence, Congress permitted this so long as "a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." (8 U.S.C. § 1623.)

Nonresident citizens can and do attend California's public and private high schools. (Enrolled Bill Report on Assem. Bill No. 540, Off. Of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5; see Opn. at p. 53 [500 children attend California high schools that are either residents of adjoining state or country (Mexico), or residents of other states].) Plaintiffs never discuss the private high schools throughout California. The significance of the availability of private and public high schools to nonresident citizens cannot be understated. Congress allowed states to give higher education benefits to undocumented students so long as nonresident citizens could be similarly eligible. Nonresident citizens are free to attend California public and private high schools. Thus, citizens are equally able to take advantage of California's exemption from nonresident tuition.

IV. FEDERAL LAW DOES NOT CONFLICT WITH THE STATE STATUTE

A. Residence Within a State Does Not Mean Physical Presence.

Plaintiffs boldly change section 1623's language "based on residence within a state" into mere physical presence. (Plfs.' Answer Brief, pp. 26-31, 33-34.) They base this argument on the flawed premise that California law explicitly links high school attendance with residence in a state. (*Id.* at p. 27.) However, they focus on only part of the picture. This statement is only true for public school districts and even then, there are exceptions. Plaintiffs ask this Court to ignore the exceptions. (*Id.* at pp. 27-28.) California law explicitly recognizes that if a student who lives outside of California in a border state or country, namely Oregon, Nevada, Arizona, or

Mexico, can attend California high schools. (Ed. Code, §§ 48050-48051.)[5] In addition, a student who lives outside of a school district, but whose parent or legal guardian works in that district may also attend school there. (Ed. Code, § 48204, subd. (b).) It is undisputed that these students are *not* California residents.

Not only do plaintiffs ignore the exceptions to public school attendance, but they never mention all of the other high schools throughout California that are privately operated. These private California high schools can accept nonresidents because they are free to set their own admission criteria and are not bound by district residence requirements. (Ed. Code, §§ 48220, 48222.) Thus, plaintiffs' attempt to convert "residence in a state" into mere physical presence must fail because high school attendance is not always linked to residence within a state. This Court should decline plaintiffs' invitation to rewrite the statutes that determine residency under state law — a function for the legislature, not the courts. (Code Civ. Proc., § 1858; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573 overruled on other grounds by *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 [court not authorized to insert qualifying provisions not included, and may not rewrite statute to conform to assumed intention which does not appear from its language, citing *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381].)

---

[5] Education Code sections 48050 and 48051 have been in existence since 1929 and 1941, respectively. Both were both passed by Stats. 1976, c. 1010, § 2, and operative on April 30, 1977. However, section 48050 has been in existence since 1929. (See School Code, § 3.339 enacted 1929; Amended by Stats. 1931, p. 1626; Repealed by Stats. 1933, pp. 2126, 2706; Re-enacted by Stats. 1935, p. 2231; Renumbered to § 3.105, by Stats. 1941, ch. 507, p. 1819, § 12.) Section 48051 has been in existence since 1941. (See School Code § 3.302, added by Stats. 1941, ch. 191, p. 1251, § 3.)

Moreover, plaintiffs' assertion that residence simply means mere physical presence is contrary to federal law. Federal law defines residence as someone's "principal, actual dwelling place in fact, without regard to intent." (8 U.S.C. § 1101(a)(33); see 8 U.S.C. § 1641(a).) Thus, mere physical presence does not equate to where one principally lives.

Finally, plaintiffs also argue that defendants' interpretation of section 1623 would render it mere surplusage because the federal law already prohibits a state from describing or acknowledging aliens as "residents" under state law. (Plfs.' Answer Brief, pp. 24-26.) Section 1623 uses the term "residence" not "resident" in referring to undocumented immigrants. What plaintiffs seem to overlook is that the federal law's definition of residence is not the same as the state's definition of resident. Federal law defines residence as where one principally lives (8 U.S.C. § 1101(a)(33); see 8 U.S.C. § 1641(a)) whereas, California's definition of residence is more akin to domicile, i.e. where one lives coupled with intent to remain. (Ed. Code, § 68062.) But a nonresident may still live in California without being deemed a California resident. Thus, existing federal law prohibits a state from deeming an undocumented immigrant a state *resident* (8 U.S.C. § 1101, et seq.), but section 1623 prohibits a state from conditioning eligibility for a higher education benefit based on "residence" or where they live.

Plaintiffs' surplusage argument is rooted in how they misconstrue the federal law:

> The phrase 'eligible on the basis of residence within a State . . . for any postsecondary education benefit' is simply a broader way of saying 'eligible for resident tuition rates.'

(Plfs.' Answer Brief, p. 36.) As explained above, however, the exemption neither grants resident status nor resident tuition. Section 68130.5, merely

grants a nonresident, who otherwise meets the eligibility criteria, exemption from out-of-state tuition rates.

B. All Citizens Are Not Entitled to Receive the Benefit, but All Citizens Are Able to Become Eligible by Attending Public or Private California High Schools.

Plaintiffs' next attempt to rewrite federal law by replacing "*a* citizen or national" with "all" citizens or nationals. (Plfs.' Answer Brief, p. 35.) In addition, they also change "*eligible* for such a benefit" to *all* citizens must be *entitled to* or *receive* the exemption, not merely given the opportunity to qualify. (*Ibid.*) Plaintiffs argue that if even one undocumented student receives the exemption, then all citizens should receive the same.

Yet section 1623's use of the phrase "eligible for" merely creates an opportunity to qualify, but does not require that states "ensure that all U.S. citizens receive at least as much as illegal aliens are provided" as plaintiffs wrongly assert. (Plfs.' Answer Brief, p. 71.)

If a nonresident citizen can, but chooses not to attend a California high school, that is his or her choice. The state must only make the opportunity available, but does not need to guarantee receipt of a benefit where plaintiffs do not qualify. Here, anyone can attend California high schools. The exemption is available to residents and nonresidents alike.

A nonresident citizen who attends and graduates from a California high school is similarly eligible for the exemption as an undocumented student who does the same. Likewise, a nonresident citizen who does not attend and graduate from a California high school is treated the same as an undocumented student who does not attend and graduate from the same.

Eligibility is what section 1623 requires, and what section 68130.5 provides.

V. IT IS POSSIBLE TO COMPLY WITH BOTH FEDERAL AND STATE LAW

It is possible to comply with Congress' prescription in section 1623. This is so because Congress explicitly allowed states to provide public benefits to undocumented immigrants after passing a law that affirmatively provides for such benefits, so long as a nonresident citizen could also be eligible. (8 U.S.C. §§ 1621, 1623.) To entertain plaintiffs' impossibility analysis would render meaningless Congress's permission to states to give undocumented immigrants public benefits. In other words, Congress gave express authority to states to grant public benefits to undocumented immigrants. According to plaintiffs, however, providing any benefits to undocumented immigrants constitutes encouraging their continued presence in violation of federal law. (Plfs.' Answer Brief, pp. 54-55 [citing to criminal statute prohibiting "encouraging" alien to enter or remain in United States unlawfully].) But Congress, itself, created the exception, not California. California's exemption was merely enacted pursuant to the authority Congress granted the states.

Second, plaintiffs' cited cases are distinguishable. Plaintiffs rely on the proposition that implied conflict preemption occurs "where the state law mandates or places irresistible pressure on the subject of the regulation to violate federal law . . . ." (Plfs.' Answer Brief, p. 51, citing *Planned Parenthood v. Sanchez* (5th Cir. 2005) 403 F.3d 324, 336 fn. 57, which quotes *Wells Fargo Bank of Tex. NA v. James* (5th Cir. 2003) 321 F.3d 488, 491, fn. 3.) There is no irresistible pressure to violate federal law here. In *Wells Fargo*, a state banking law prohibited banks from charging a fee to non-account holders for cashing that bank's checks, whereas federal law allowed such a charge. The banks were subject to a penalty if they did not comply with the prohibition in state law. Whereas here, the state law is optional. There is no requirement imposed on students that they must take

advantage of the exemption from out-of-state tuition. What is required of undocumented students is that they sign an affidavit stating that the student has filed an application to legalize his or her immigration status, or will do so as soon as eligible. Thus, *Wells Fargo* is inapposite.

Then plaintiffs cite *Incalza v. Fendi* (2007) 479 F.3d 1005, for the notion that conflict preemption occurs if adhering to state law is likely to trigger federal enforcement action. (Plfs.' Answer Brief, p. 52.) The fundamental flaw in this analysis is that it is not the state law that would trigger federal enforcement action, because the undocumented immigrant is subject to federal enforcement regardless of whether s/he applies for the exemption.

Third, undocumented students can come into compliance by legalizing their status in a number of ways. Undocumented immigrants can legalize their status through marriage to a U.S. citizen or permanent resident (8 U.S.C. § 1255(d)), others may qualify for other immigration relief through 10-years of residence in the United States coupled with extreme hardship (8 U.S.C. § 1182(a)(9)(C)(ii)), or a relative who is a citizen or permanent resident can petition for the students to adjust to legal status (8 U.S.C. § 1255(i)). Any relative can petition to legalize their status, and then petition for a hardship waiver for their immediate relatives. "One of the principal objectives of the Immigration and Nationality Act (INA) is family reunification. . . . many forms of relief from removal are available only to close relatives of United States citizens and permanent residents." (Fragomen & Bell, Immigration Fundamentals: A Guide to Law and Practice (2007) § 3.1, pp. 3-1 to 3-2.)

Although, certain classes of aliens are inadmissible (see 8 U.S.C. § 1182), including those who entered the United States without detection, the United States Attorney General may waive such inadmissibility to allow for the undocumented immigrants to adjust their status. (See *Acosta v.*

Gonzales (9th Cir. 2006) 439 F.3d 550, 554 -555 [illegal aliens with requisite family ties and who pay the requisite fee may adjust status].)[6] Moreover, 8 U.S.C. section 1182(h) provides discretionary relief for undocumented immigrants currently present who are seeking to become lawfully present, even those deemed inadmissible for criminal history or unlawful entry. (8 U.S.C. § 1182(h)(1)(A)(i-iii) [inadmissible aliens may obtain discretionary relief if triggering crime is sufficiently remote and the alien has been rehabilitated]; 8 U.S.C. § 1182(h)(1)(B) [alien with significant familial ties to United States citizens or lawful permanent residents and denial of admission would result in "extreme hardship" for alien's family].)

Notably absent in plaintiffs' attempt to distinguish these immigration laws, was any mention of the United States Attorney General's authority to waive the inadmissibility provisions cited in Community Colleges' Opening Brief. (Plfs.' Answer Brief, pp. 82-84; See Community Colleges' Opening Brief, p. 20, fn. 11 [waiver of inadmissibility permitted due to health (8 U.S.C. § 1182(g)), criminal acts (8 U.S.C. § 1182(h)), misrepresentation or false citizenship (8 U.S.C. § 1182(i)(1)), smugglers (8 U.S.C. § 1182(d)(11)), civil penalty (8 U.S.C. § 1182(d)(12)), documentation requirements (8 U.S.C. § 1182(d)(4) & (k)), unlawfully present or previously removed (8 U.S.C. § 1182(a)(9)(B)(v))].) Thus, plaintiffs' bald assertion that it is a "myth" or "fiction" that undocumented immigrants will eventually become lawfully present is inaccurate. (Plfs.' Answer Brief, p. 82.)

---

[6] Although the adjustment of status with payment of penalty provision in section 245(i) of the INA has not been extended, those who did benefit may still petition for waivers and adjustment of status of their immediate relatives even if those relatives entered the United States unlawfully.

VI. SECTION 68130.5 PRESENTS NO OBSTACLE TO ENFORCEMENT OF FEDERAL IMMIGRATION LAWS BUT REFLECTS CONGRESSIONAL INTENT FOR UNDOCUMENTED IMMIGRANTS TO LEGALIZE THEIR STATUS AND BECOME SELF-SUFFICIENT

California's exemption statute promotes an educated and productive society that reduces immigrants' reliance on public benefits. Education is the "'essential step in providing the . . . tools necessary to achieve economic self-sufficiency.'" (*Hartzell v. Connell* (1984) 35 Cal.3d 899, 908, quoting *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 115, fn. 74 (dis. opn. of Marshall, J.).) This goal is consistent with Congress's intention for immigrants to use "their own capabilities" and become self-reliant. (8 U.S.C. § 1601(2)(A).) In addition, the exemption requires undocumented students to sign an affidavit stating that they have filed an application to legalize their status or will do so as soon as they are eligible. (Ed. Code, § 68130.5, subd. (a)(4).) Legalizing status is consistent with Congressional goals to reduce the population of illegal immigrants. Nor does the mere possibility of qualifying for a college discount serve to frustrate Congress's objective of reducing benefits as an incentive for illegal immigration because Congress expressly allowed undocumented students to be eligible for higher education benefits. (8 U.S.C. §§ 1621, 1623.)

Plaintiffs criticize California's exemption as "penaliz[ing] the [nonimmigrant] alien who complies with federal law, while rewarding the alien who violates federal law." (Plfs.' Answer Brief, p. 58.) Plaintiffs reference section 68130.5's exclusion of a nonimmigrant alien from qualifying for the exemption. (Ed. Code, § 68130.5, subd. (a).) However, plaintiffs lack standing to assert the rights of nonimmigrant aliens, despite plaintiffs' allegation that they "have been classified under California law as 'nonimmigrant aliens.'" (CT, p. 3.) As the appellate court concluded:

> This allegation does not make sense. U.S. citizens are not "aliens" at all. (8 U.S.C. § 1101(a)(3) ["The term 'alien' means any person not a citizen or national of the United States"].) Nothing in California law defines "alien" differently. . . .Under the federal law, "nonimmigrant aliens" are generally aliens admitted to this country for temporary periods, including students, diplomats and their servants, etc., who intend to return to their homeland. (8 U.S.C. § 1101(a)(15).) Thus, given the allegation that plaintiffs are U.S. citizens, plaintiffs are not nonimmigrant aliens.

(Opn. at p. 7, fn. 5.) Plaintiffs are not nonimmigrant aliens and lack standing to assert any alleged injury under section 68130.5.

Next, in support of their obstacle preemption argument, plaintiffs assert that section 68130.5's reference to a "person without lawful immigration status" is an impermissible federal classification because it is not identical to "alien who is not lawfully present in the United States." (Plfs.' Answer Brief, pp. 59-61.) This argument is of no moment because the federal law uses similar terminology. (See 8 U.S.C. §§ 1255a(a)(2) ["unlawful status"], 1373, ["immigration status, lawful or unlawful, of any individual"]; *DeMore v. Kim*, *supra,* 538 U.S. 510, 552 ["no lawful immigration status"].) The only difference is that section 68130.5 refers to an undocumented student as a "person" rather than an "alien." But that is insignificant because even the federal law refers to aliens as individuals. (See 8 U.S.C. § 1373.)

Moreover, plaintiffs' reliance on *League of United Latin American Citizens v. Wilson* (C.D. Cal 1995) 908 F.Supp. 755 (*LULAC I*) is misplaced because that state statute required school districts to check the legal status of each child enrolling in public elementary and secondary schools against specified categories and report them to state and federal authorities. (See Ed. Code, § 48215.) Whereas, here, no such classification or federal reporting is required.

Finally, plaintiffs reference *Lewis v. Thompson* (2d Cir. 2001) 252 F.3d 567, 583-584, in support of their obstacle preemption argument. (Plfs.' Answer Brief, pp. 58-59.) The irony in plaintiffs reliance on this case is that the federal law expressly denied prenatal care to unqualified aliens. Whereas here, Congress expressly allows states to provide postsecondary education benefits to undocumented immigrants.

Indeed, where state law requires compliance with federal law — the mandate to file an affidavit that the undocumented student has filed an application to legalize his/her status or will do so as soon as able — there can be no obstacle preemption. (See *In re Manuel P.* (1989) 215 Cal.App.3d 48, 64 [state law which mandates compliance with federal immigration laws and regulations, cannot be said to stand as an obstacle to congressional objectives embodied in the INA].)

VII. CONGRESS DID NOT PREEMPT THE FIELD OF POSTSECONDARY EDUCATION BENEFITS

Plaintiffs rely on *League of United Latin American Citizens v. Wilson* (C.D. Cal 1997) 997 F.Supp. 1244 (*LULAC II*) for the proposition that Congress occupied the field of regulating post-secondary education benefits to aliens. (Plfs.' Answer Brief, pp. 48-49.) Notably, plaintiffs fail to address *LULAC II's* qualifying language that acknowledged there were "limited instances in which states have the right to determine alien eligibility for state or local public benefit[s]." Plaintiffs completely ignore this issue despite defendants raising this point in their Opening Brief on the Merits. (Defendants Board of Governors of the California Community Colleges and Chancellor Marshall Drummond's (collectively Community Colleges) Opening Brief on the Merits, p. 22.) This is precisely one of those limited instances where Congress granted states the right to determine alien eligibility for public benefits.

VIII. CONGRESS CREATED NO FEDERAL RIGHT IN SECTIONS 1621 OR 1623 ENFORCEABLE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

Plaintiffs' privileges or immunities clause argument rests on the notion that Congress in enacting section 1623 created a right in a citizen to be "treated no worse than an illegal alien in the distribution of public benefits." (Plfs.' Answer Brief, pp. 63, 71.) The privileges or immunities entitled to constitutional protection are only those that are fundamental, basic or essential to the maintenance and vitality of the Union. (*Alerding v. Ohio High School Athletic Assn.* (1985) 779 F.2d 315, 317, citing *United Building & Construction Trades Council of Camden County v. Mayor & Council of Camden* (1984) 465 U.S. 208 and *Baldwin v. Montana Fish & Game Comm'n.* (1977) 436 U.S. 371.)

The trial court ruled that there is no federal right created by either section 1621 or 1623. (CT, pp. 6542-6543, Order on Demurrers, Motion to Strike and Motions by Proposed Intervenors) The failure of plaintiffs to appeal that ruling is now law of the case. (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434 ["law of the case" rule precludes multiple appellate review of same issue in single case and applies to Supreme Court even where prior review by appellate court].)

The appellate court decided that "plaintiffs, by failing to address the matter in their opening brief, have forfeited any claim that they have a private right of action to enforce title 8 U.S.C. section 1621 or section 1623. . . . because plaintiffs, as appellants, bore the burden of demonstrating grounds for reversal in their opening brief." (Opn. at p. 18.) The appellate court noted the finality of the trial court's ruling:

> [T]he court dismissed the title 42 U.S.C. section 1983 count as to all defendants on the ground . . . that the federal immigration statutes (8 U.S.C. §§ 1621, 1623) conferred no private right of action in plaintiffs and therefore could not support a federal civil rights claim.

(Opn. at p. 21.) The parties are bound by the trial court's ruling that neither section 1621 nor 1623 evinces legislative intent to confer any right or benefit on the plaintiffs. (CT, pp. 6542-6543, Order on Demurrers, Motion to Strike and Motions by Proposed Intervenors.) Thus, plaintiffs cannot now assert, contrary to the trial court's ruling that Congress created a federal right in either section 1621 or 1623.

Nor can plaintiffs cite any authority[7] that the privileges or immunities clause protects the right of citizens to be treated no worse than an illegal alien:

> Since the *Slaughter House Cases* [citation omitted], the reach of the privileges and immunities clause has been narrow. The clause protects only uniquely federal rights such as the right to petition Congress, the right to vote in federal election, the right to interstate travel, the right to enter federal lands, or the rights of a citizen while in federal custody. [Citation omitted.] While the clause supports congressional legislation prohibiting impairment of federal rights, [citation omitted], we have found no authority holding that the clause, absent legislation, supports a private cause of action for infringement of a right it secures.
>
> . . . we conclude that an implication of a private cause of action based on the privileges and immunities clause in this case would be a substantial and unprecedented expansion of that clause's effect. We decline to take such a step.

(*Deubert v. Gulf Federal Savings Bank* (1987) 820 F.2d 754, 760.) Without a federal right created in citizens through the passage of sections 1621 or 1623, plaintiffs can assert no right under the privileges or immunities clause. Nor does the declaratory relief statute afford plaintiffs a cause of action that does not otherwise exist. (*Cal. Assn. of PSES v. Cal.*

---

[7] Plaintiffs mischaracterize references to "alienage" in *Paul v. Virginia* (1869) 75 U.S. 168. (Plfs.' Answer Brief, p. 63.) The court was referring to nonresidents as opposed to undocumented immigrants.

Dept. of Ed. (2006) 141 Cal.App.4th 360, 377.) Plaintiffs cannot state a valid cause of action for violation of their alleged privileges or immunities.

Even assuming, plaintiffs could allege violation of a right protected under the privileges or immunities clause, it only bars a state from treating its citizens better than nonresident citizens without substantial justification. (*Lunding v. New York Tax Appeals Tribunal* (1998) 522 U.S. 287, 298, quoting *Toomer v. Witsell* (1948) 334 U.S. 385, 396 [discussing privileges and immunities clause in tax context].) The fundamental flaw in plaintiffs' argument is that plaintiffs, as nonresident citizens, *are* being offered the opportunity to be treated the same as resident citizens, i.e. charged the same amount of tuition as residents. Thus, not only is there no federal right, there is also no discrimination here.

For this same reason plaintiffs' reliance on *Saenz v. Roe* (1999) 526 U.S. 489 is misplaced. In *Saenz*, the California welfare law treated U.S. citizens differently by imposing a one-year durational residency requirement upon non-California residents. The court concluded that residency requirement to be violative of a citizen's right to travel. Here, section 68130.5 treats all citizens the same. Any U.S. citizen can attend a California high school regardless of whether they live in California and regardless of whether they are a California resident.[8]

"[T]he Privileges and Immunities Clause of Art. IV . . . 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.' [Citation omitted.] The Clause is thus not applicable to this case." *Zobel v. Williams* (1982) 457 U.S. 55, 59 fn. 5 [Alaska enacted a dividend to be paid to citizens based on

---

[8] Section 1623 uses the term "resident" rather than "residence" when speaking of citizens being eligible for the postsecondary education benefit, "unless a citizen . . . is eligible for such a benefit . . . without regard to whether the citizen . . . is such a *resident*." (Emphasis added.)

the length of their residence but court found 14th amendment privileges or immunities clause inapplicable because law equally applied to state residents and newly arrived residents.] Any nonresident citizen is welcome to attend California public and private high schools.

Nor does plaintiffs' belated attempt to revive their complaint by alleging "that a number of public postsecondary institutions . . . have applied §68130.5 in *blanket fashion to completely exclude all U.S. citizens* from its benefits" defeat the lack of a federal right and lack of discrimination to support a privileges or immunities clause claim. (Plfs.' Answer Brief, p. 64.) Plaintiffs rely on a footnote in their trial court brief that cited to discovery responses that did not support their allegation. (See Opn. at p. 74, ["the cited discovery response does not support the allegation"].) Moreover, plaintiffs made this statement with respect to their equal protection claim which is not an issue presented in this petition. (See Opn. at p. 74; CT 1364, fn. 32.)

Without a federal right, and without discrimination between citizens and nonresident citizens, plaintiffs cannot state a privileges or immunities clause claim.

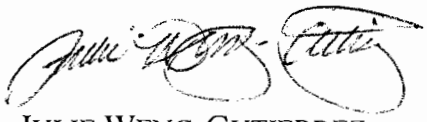
CONCLUSION

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

Dated: August 28, 2009

Respectfully submitted,

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



JULIE WENG-GUTIERREZ
Supervising Deputy Attorney General
Attorneys for Defendants and Respondents Community Colleges

SA2008305971
10484893.DOC

CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief of the Board of Governors of the California Community Colleges and Chancellor Marshall Drummond uses a 13 point Times New Roman font and contains 6365 words including footnotes pursuant to California Rules of Court, rule 8.520(c).

Dated: August 28, 2009

EDMUND G. BROWN JR.
Attorney General of California

JULIE WENG-GUTIERREZ
Supervising Deputy Attorney General
Attorneys for Defendants and Respondents

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Martinez, et al. v. Regents, et al.**
No.: **S167791**

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

On August 28, 2009, I served the attached **REPLY BRIEF OF THE BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES AND CHANCELLOR MARSHALL DRUMMOND** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT (GSO) AND FED-EX** addressed as follows:

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

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

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

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

Via Golden State Overnight Only
Steve Bruckman, Executive Vice Chancellor and General Counsel
Community Colleges
Office of the General Counsel
1102 Q Street
Sacramento, CA 95814 G-1
Defendants and Respondents

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

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

Via Golden State Overnight
Honorable Rick Sims
Acting Presiding Justice
Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 28, 2009, at Sacramento, California.

Wanda Thissen
Declarant

Wanda Thissen
Signature