No. S167791
(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' REPLY BRIEF ON THE MERITS

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

ETHAN P. SCHULMAN (No. 112466)
eschulman@flk.com
TRINA D. MCALISTER (No. 253139)
FOLGER LEVIN & KAHN LLP
275 Battery Street, 23rd Floor
San Francisco, California 94111
Telephone: 415/986-2800
Facsimile: 415/986-2827

Attorneys for Defendants and Respondents
The Regents of the University of California and
Mark G. Yudof

[Additional counsel listed on the following page.]

No. S167791
(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' REPLY BRIEF ON THE MERITS

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

ETHAN P. SCHULMAN (No. 112466)
eschulman@flk.com
TRINA D. MCALISTER (No. 253139)
FOLGER LEVIN & KAHN LLP
275 Battery Street, 23rd Floor
San Francisco, California 94111
Telephone: 415/986-2800
Facsimile: 415/986-2827

Attorneys for Defendants and Respondents
The Regents of the University of California and
Mark G. Yudof

[Additional counsel listed on the following page.]

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

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

TABLE OF CONTENTS

Page

ARGUMENT 1

I. PLAINTIFFS' POSITION IS IRRECONCILABLE WITH CONTROLLING PRINCIPLES OF JUDICIAL REVIEW OF STATE LEGISLATION. 1

A. A Strong Presumption Against Preemption Applies. 2

1. That Congress Had The Constitutional Authority To Enact The IIRIRA and the PROWRA Is Irrelevant To The Preemption Inquiry. 2

2. There Is No History Of Significant Federal Regulation Of Higher Education And Student Fees, Which Are Areas Of Traditional State Concern. 4

B. Plaintiffs Improperly Rely On Extra-Record Evidence. 5

II. SECTION 68130.5 IS EXPRESSLY AUTHORIZED BY SECTION 1621. 6

A. The Plain Language of Section 1621 Controls. 6

B. Plaintiffs' Interpretation Of Section 1621(d) Is Untenable. 10

C. Plaintiffs' Interpretation Is Not Supported By The Legislative History 12

III. SECTION 68130.5 IS NOT PREEMPTED BY SECTION 1623 13

A. Plaintiffs' Interpretation Of Section 1623 Is Inconsistent With Its Plain Language And With Fundamental Canons of Statutory Construction. 14

1. The Clause "On The Basis of Residence In a State" Limits The Permissible Bases for Eligibility Rather Than Defining The Benefit. 16

TABLE OF CONTENTS
(continued)

Page

2. Section 1623's Legislative History Does Not Justify Ignoring The Statutory Language 18

B. Plaintiffs' Alternative Argument That Section 68130.5 Contains A "De Facto" Or "Surrogate" Residence Requirement Is Erroneous. 20

IV. EDUCATION CODE SECTION 68130.5 IS NOT IMPLIEDLY PREEMPTED BY FEDERAL LAW 23

A. Section 68130.5 Is Not An Impermissible "Regulation Of Immigration." 23

B. Congress Logically Could Not Have Intended To Impliedly Preempt State Legislation That It Expressly Authorized. 26

C. Plaintiffs' Conflict Preemption Arguments Are Meritless. 27

V. EDUCATION CODE SECTION 68130.5 DOES NOT VIOLATE NONRESIDENT STUDENTS' RIGHTS UNDER THE PRIVILEGES OR IMMUNITIES CLAUSE. 29

A. The Privileges or Immunities Clause of the Fourteenth Amendment Does Not Govern States' Legislative Decisions Regarding In-State Tuition. 30

B. There Is No Federal Right To Be "Treated No Worse Than An Illegal Alien" Under State Law 31

1. Plaintiffs Misread *Saenz*, Which Recognized No Such Right. 32

2. Plaintiffs Forfeited Their Statutory Claims. 35

C. Section 68130.5 Treats Undocumented Immigrants and Citizens Equally. 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

Cases

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 7

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 17

Asgrow Seed Co. v. Winterboer,
513 U.S. 179 (1995) 8

Astoria Federal Savings & Loan Ass'n v. Solimino,
510 U.S. 104 (1991) 16

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 19

Barnhart v. Thomas,
540 U.S. 20 (2003) 17

Board of Educ. of Westside Comty. Schs. v. Mergens,
496 U.S. 226 (1990) 5, 19

Bronco Wine Co. v. Jolly,
33 Cal. 4th 943 (2004) 1, 2

Coalition of Concerned Communities, Inc. v. City of Los Angeles,
34 Cal. 4th 733 (2004). 8

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 15

Day v. Bond,
500 F.3d 1127, *reh'g and re'hg en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008) 35

De Canas v. Bica,
424 U.S. 351 (1976) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

De Lancie v. Superior Court,
31 Cal. 3d 865 (1982) 35

Dean v. United States,
129 S. Ct. 1849 (2009) 7, 18

Dep't of Health v. Rodriguez,
5 So. 3d 22 (Fla. App. 2009) 12

Deubert v. Gulf Fed. Sav. Bank, 820 F.2d 754 (5th Cir. 1987), *overruled in part on other grounds*, *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (en banc) 31, 36

Doers v. Golden Gate Bridge, Highway, & Transp. Dist.,
23 Cal. 3d 180 (1979) 6

Dowhal v. SmithKline Beecham Consumer Healthcare,
32 Cal. 4th 910 (2004) 26

Farm Raised Salmon Cases, 42 Cal. 4th 1077 (2008), *cert. denied sub nom. Albertson's v. Kanter*,
129 S. Ct. 896 (2009) 1, 2

Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.,
133 Cal. App. 4th 533 (2006) 28

Fonseca v. Fong,
167 Cal. App. 4th 922 (2008) 3, 24, 25

Garcia v. United States,
469 U.S. 70 (1984) 19

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 26

Hamilton v. Regents of the University of California,
293 U.S. 245 (1934) 31

In re Jose C., 45 Cal. 4th 534 (2009), *cert. denied*,
129 S. Ct. 2904 (2009) 1, 3, 24, 27

Incalza v. Fendi N. Am., Inc.,
479 F.3d 1005 (9th Cir. 2007) 27, 28

TABLE OF AUTHORITIES
(continued)

Page

Kimbrough v. United States,
128 S. Ct. 558 (2007) 10

Kirk v. Board of Regents,
273 Cal. App. 3d 430 (1969) 31

Kleindienst v. Mandel,
408 U.S. 753 (1972) 34

Lamie v. United States Tr.,
540 U.S. 526 (2004) 7

League of United Latin Am. Citizens v. Wilson ("LULAC I"),
908 F. Supp. 775 (C.D. Cal. 1995) 24, 25

League of United Latin Am. Citizens v. Wilson ("LULAC II"),
997 F. Supp. 1244 (C.D. Cal. 1997) 24, 25, 27

Lockyer v. City and County of San Francisco,
33 Cal. 4th 1055 (2004) 29

Maxwell v. Dow,
176 U.S. 581 (1900) 34

Merrifield v. Lockyer,
547 F.3d 978 (9th Cir. 2008) 30, 36

Mora v. Hollywood Bed & Spring,
164 Cal. App. 4th 1061 (2008) 8

Paul v. Virginia,
75 U.S. 168 (1869) 33

People v. Arias,
45 Cal. 4th 169 (2008) 16

Plyler v. Doe,
457 U.S. 202 (1982) 28

Ratzlaf v. United States,
510 U.S. 135 (1994) 7

TABLE OF AUTHORITIES
(continued)

Page

Reyes v. Van Elk, Ltd.,
148 Cal. App. 4th 604 (2007) 28

Rosario v. INS,
962 F.2d 220 (2d Cir. 1992) 21

S&E Contractors, Inc. v. United States,
406 U.S. 1 (1972) 20

Saenz v. Roe,
526 U.S. 489 (1999) ..... *passim*

Shannon v. United States,
512 U.S. 573 (1994) 13, 19

Simpson v. United States,
435 U.S. 6 (1978) 19

Slaughter-House Cases,
83 U.S. 36 (1873) 30, 31, 34

Sprietsma v. Mercury Marine,
537 U.S. 51 (2003) 16

Sturgeon v. Bratton,
174 Cal. App. 4th 1407 (2009) 3, 18, 22

Taha v. INS,
828 F. Supp. 362 (E.D. Pa. 1993) 4

Tobe v. City of Santa Ana,
9 Cal. 4th 1069 (1995) 22, 37

United States v. 475 Martin Lane,
545 F.3d 1134 (9th Cir. 2008) 20

United States v. Gonzales,
520 U.S. 1 (1997) 13

United States v. Oloyede,
982 F.2d 133 (4th Cir. 1993) 29

TABLE OF AUTHORITIES
(continued)

Page

USLIFE Savings & Loan Ass'n v. Nat'l Surety Corp.,
115 Cal. App. 3d 336 (1981) 6

Van Valkenburg v. Brown,
43 Cal. 43 (1872) 34

Vasquez v. State,
45 Cal. 4th 243 (2008) 10

Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.,
41 Cal. 4th 929 (2007) 1

Vlandis v. Kline,
412 U.S. 441 (1973) 31

White v. County of Sacramento,
31 Cal. 3d 676 (1982) 17

Constitutional Provisions

U.S. CONST.
art. IV, §2 ..... 32, 33, 34
amendmt. XIV, §1 ..... *passim*

Statutes

8 U.S.C.
§ 1101(a)(33) 21
§ 1252c(a)(1) 11
§ 1324(a)(1)(A)(iv) 28
§ 1601(6) 29
§ 1621 ..... *passim*
§ 1621(a) 6, 11
§ 1621(b) 28
§ 1621(d) ..... *passim*
§ 1623 ..... *passim*
§ 1641(a) 21

TABLE OF AUTHORITIES
(continued)

Page

20 U.S.C.
§1091(a)(5) 4

42 U.S.C.
§1983 35

EDUC. CODE
§ 48050 21
§ 48051 21
§ 48054 21
§ 68130.5 ..... *passim*
§ 68130.5(a)(4) 25
§ 68130.7 22

Legislative Materials

AB 540 ch. 814, Stats. 2001 ..... 4, 5, 9, 22

AB 1197, as amended Jan. 4, 2000 (vetoed by Governor Sept. 29, 2000) 5, 20

H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS. (1996) 6, 8, 9, 12

H.R. CONF. REP. 104-863, 104TH CONG., 2D SESS. (Sept. 28, 1996), 1996 WL 526036 18

Other Authorities

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) 31

John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385 (1992) 34

Joseph Story, COMMENTARIES ON THE CONSTITUTION §1098 (1833) 34

Laurence H. Tribe, *American Constitutional Law* (2000) 30

ARGUMENT

I.

PLAINTIFFS' POSITION IS IRRECONCILABLE WITH CONTROLLING PRINCIPLES OF JUDICIAL REVIEW OF STATE LEGISLATION.

As Defendants have shown,[1] there is a strong presumption that Section 68130.5 is not preempted by federal law, a presumption that applies with particular force because Section 68130.5 concerns higher education and student fees, an area of traditional state regulation. Op. Br. 12-17. Plaintiffs do not cite a single decision in which any court declined to apply the presumption against preemption, and they all but ignore this Court's key precedents in the area. In several recent cases, the Court applied the presumption and unanimously rejected the claim that a challenged state law was preempted by federal law. *In re Jose C.*, 45 Cal. 4th 534, 551 (2009), *cert. denied*, 129 S. Ct. 2804 (2009); *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008), *cert. denied sub nom. Albertson's v. Kanter*, 129 S. Ct. 896 (2009); *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 956-59 (2004); *cf. Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.*, 41 Cal. 4th 929, 938-39 (2007) (finding no basis for preemption even without applying presumption). Plaintiffs do not mention those cases.[2] Further, they advance positions that are inconsistent with fundamental principles governing preemption and statutory construction, and they improperly rely on extra-record evidence that was specifically excluded by the lower courts.

---

[1]Inexplicably, Plaintiffs assert that the California State University defendants did not seek review by this Court and have not appeared in this Court. Ans. Br. 4 n.4, 5 n.7. Plaintiffs are wrong on both counts.

[2]Although Plaintiffs cite this Court's decision in *In re Jose C.* (Ans. Br. 48, 81), they do not refer to its holding or acknowledge that it applied the presumption against preemption to uphold a state statute affecting the rights of undocumented immigrants.

A. A Strong Presumption Against Preemption Applies.

Plaintiffs acknowledge that "[i]t is of course correct that there is a presumption against preemption" (Ans. Br. 10), but insist the presumption should be regarded as "weak" here for two reasons: "because Congress was exercising its plenary federal authority to regulate immigration generally," and because before enacting the federal statutes involved here, the IIRIRA and the PRWORA, Congress previously had enacted a single federal statute limiting certain federal financial assistance to students who are U.S. citizens or permanent residents. *Id.* at 10-12. Neither contention has merit.

1. That Congress Had The Constitutional Authority To Enact The IIRIRA and the PROWRA Is Irrelevant To The Preemption Inquiry.

Plaintiffs' first contention is that the presumption against preemption should apply only weakly, if at all, because both federal laws at issue were enacted pursuant to Congress's plenary authority to regulate immigration. Ans. Br. 11. However, any discussion of preemption assumes congressional authority to enact the federal statutes since, by definition, an unconstitutional federal statute could not have any preemptive effect. Accordingly, the presumption against preemption applies not because Congress lacked authority to enact the federal law at issue, but because of important principles of federalism and state sovereignty. Accordingly, "a strong presumption against preemption" applies "with particular force" wherever Congress has legislated in a field which the states have traditionally occupied or that is within the states' historic police powers. *Farm Raised Salmon Cases*, 42 Cal. 4th at 1088.

Plaintiffs contend that because Congress has the power to regulate immigration, including the provision of public benefits to aliens, any state statute such as Section 68130.5 that trenches on the rights of aliens should be regarded as an area of "long-established federal authority." Ans. Br. 11. But as we pointed out (Op. Br. 14), in *De Canas v. Bica*, 424 U.S. 351 (1976), the Supreme Court

squarely rejected a nearly identical argument.[3] Plaintiffs do not respond.

Likewise, this Court recently rejected the very same contention, holding squarely that the presumption against preemption applies unless a state law is an impermissible regulation of immigration. In *In re Jose C.*, 45 Cal. 4th 534 (2009), the Court held unanimously that a Welfare and Institutions Code section authorizing state juvenile courts to adjudicate alleged violations of federal immigration law was not preempted by Congress's exclusive power to regulate immigration. The Court observed that "[w]hile the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted." 45 Cal. 4th at 550. The Court determined first that the statute is not a "regulation of immigration," i.e., "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* (quoting *De Canas*, 424 U.S. at 355).[4] That is the only circumstance in which preemption is "structural and automatic." *Id.* As a result, the Court applied "the usual rules of statutory preemption," including "the general presumption against preemption," which it specifically observed "applies even in the context of immigration law," and upheld the state statute. *Id.* at 550-51; *accord, Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1422 (2009) (because policy governing interactions with illegal immigrants "is a regulation of police conduct and not a regulation of immigration, there is no structural preemption and the assumption of nonpreemption applies").

---

[3]*De Canas* is "the seminal case on the question whether state or local policy or action dealing in any way with aliens impermissibly intrudes upon the exclusive federal power to regulate immigration." *Fonseca v. Fong*, 167 Cal. App. 4th 922, 939 n.17 (2008).

[4]Likewise, as discussed below, Section 68130.5 does not constitute a "regulation of immigration." *See* Part IV(A), *infra*.

2. There Is No History Of Significant Federal Regulation Of Higher Education And Student Fees, Which Are Areas Of Traditional State Concern.

Virtually since the founding of the state, California (like other states) has regulated the levels of tuition and fees to be charged to students in its public colleges and universities. *See* Op. Br. 15-17. Indeed, until the passage of the federal statutes at issue in 1996, Defendants are unaware of any attempt by the federal government to interfere with that traditional state power. *Id.*

Plaintiffs do not dispute that history or offer any contrary understanding. Instead, they insist that because in 1980, Congress enacted a statute "in the field of postsecondary education benefits for aliens," that area should be regarded as one of "long-established federal authority." Ans. Br. 11-12. However, the statute in question, an amendment to Title IV of the federal Higher Education Assistance Act of 1965, did *not* regulate or interfere with states' authority to set tuition and fees at public colleges and universities, but merely established eligibility criteria for certain *federal* financial assistance. 20 U.S.C. §1091(a)(5); *see Taha v. INS*, 828 F. Supp. 362, 364-65 & n.7 (E.D. Pa. 1993) (listing federal grant, loan, and work study programs). Because public university tuition and fee policy falls squarely within the province of traditional state authority, a strong presumption against preemption applies.

As discussed below, Plaintiffs' entire approach is irreconcilable with the presumption against preemption: Plaintiffs purport to identify "ambiguities" both in the federal statutes and in AB 540, and then urge that all of those ambiguities be resolved so as to invalidate the state legislation rather than to support its validity. The governing burdens and presumptions mandate precisely the opposite approach.

Plaintiffs' disregard for these principles is evident in their deplorable accusations that when the Legislature enacted Section 68130.5, it was "aware of [a] conflict with federal law," and was "play[ing] semantic games." Ans. Br. 8, 21. As we have shown,

precisely the opposite is true: the Legislature was well aware of the provisions of federal law on which Plaintiffs rely, and it carefully drafted Section 68130.5 to *avoid* any conflict with those provisions. Op. Br. 6-10. Plaintiffs' derogatory characterization of the legislators' motives and objectives is entirely inappropriate. States are free to enact laws making available public benefits, so long as they do so without violating federal law. *Cf. Board of Educ. of Westside Comty. Schs. v. Mergens*, 496 U.S. 226, 241 (1990) ("To the extent that a school chooses to structure its course offerings and existing student groups to avoid the [Equal Access] Act's obligations, that result is not prohibited by the Act").

B. Plaintiffs Improperly Rely On Extra-Record Evidence.

Plaintiffs improperly cite to and quote evidence that was excluded by the trial court in evidentiary rulings affirmed by the Court of Appeal. In particular, Plaintiffs repeatedly quote from a letter to the Regents of the University of California from then-General Counsel James E. Holst that addressed the "risk" that a reviewing court might construe AB 540 as conflicting with federal law. Ans. Br. 16, 31, 35-36.[5] However, the trial court refused to take judicial notice of that letter, and the Court of Appeal affirmed that ruling. 23 CT 6538-39; slip op. at 26. Likewise, Plaintiffs quote Governor Davis' veto message in response to earlier legislation, AB 1197. Ans. Br. 6, 31. The trial court also refused to take judicial notice of that veto message. 23 CT 6539; slip op. 59 n.22.

This Court should disregard those extra-record materials. "Facts, events, documents or other matters urged by a party which are not admitted into evidence cannot be included in the record on appeal. They are outside the scope of review." *USLIFE Savings &*

---

[5]Plaintiffs' assertion that the University's General Counsel "opined" that Section 68130.5 violated federal law (Ans. Br. 31) is erroneous, as their partial quotation from that letter reveals on its face.

Loan Ass'n v. Nat'l Surety Corp., 115 Cal. App. 3d 336, 343 (1981) (citation omitted); *see also Doers v. Golden Gate Bridge, Highway, & Transp. Dist.*, 23 Cal. 3d 180, 184 n.1 (1979) (same).

II.

SECTION 68130.5 IS EXPRESSLY AUTHORIZED BY SECTION 1621.

A. The Plain Language of Section 1621 Controls.

As discussed in our opening brief (Op. Br. 17-24), while Section 1621(a) generally provides that undocumented aliens are ineligible for certain state and local public benefits, Section 1621(d), the so-called "safe harbor" or savings clause, expressly *authorizes* states to enact legislation making undocumented immigrants eligible for such benefits:

> 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).[6] Thus, by the plain terms of Section 1621(d), state legislation conforms to that section so long as it satisfies two requirements: (i) it is enacted after August 22, 1996 (the effective date of Section 1621) and (ii) it "affirmatively provides for such eligibility." *Id.* Section 68130.5 meets both requirements: it was enacted after August 22, 1996, and it affirmatively provides that "an alien who is not lawfully present in the United States" is eligible for the statutory exemption, since it refers on its face to "a person without lawful immigration status." Op. Br. 18.

---

[6]The legislative history is to the same effect: "States may, however, pass laws after the date of enactment that specify that illegal aliens may be eligible for certain State or local benefits that otherwise would be denied under this section." H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS., pg. 1 (1996) (6 CT 1415).

Plaintiffs assert that in addition to those statutory requirements, Section 68130.5 must overcome two additional hurdles that appear nowhere in the text of Section 1621: that to comply with the savings clause, Section 68130.5 must also reference Section 1621 by name, and must use the magic words "illegal alien," Plaintiffs' preferred term for undocumented immigrants. Ans. Br. 41-47.

Plaintiffs' argument for importing these requirements into the text of Section 1621 suffers from a fundamental analytical flaw: it puts the cart (legislative history) before the horse (plain statutory language). In contrast to Plaintiffs' approach, courts are directed to begin their analysis of any question of statutory construction at the beginning: "We start, as always, with the language of the statute." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (citation and internal quotation marks omitted). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations omitted). Likewise, "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean*, 129 S. Ct. at 1853 (citation and internal quotation marks omitted).

Here, the statute is clear on its face, and Plaintiffs' interpretation would require reading words into it that do not appear on its face. Further, "reading the legislative history in the manner suggested by [Plaintiffs] would create a direct conflict with the statutory text . . . . In such a contest, the text must prevail." *See Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear"); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 n.6 (2009); *see also* cases cited, Op. Br. 21, 23-24, 27, 37.

Plaintiffs rest their argument entirely on the premise that the phrase "affirmatively provides for such eligibility" in Section 1621(d) is ambiguous, thereby requiring resort to the legislative history to divine its meaning. Ans. Br. 41. However, they offer no

authority for that dubious proposition.[7] Moreover, they never specify the "different interpretations" (*id.*) to which that phrase supposedly is subject. Their argument therefore fails at the threshold.

Contrary to Plaintiffs' contention, there is nothing ambiguous about the routine requirement that state legislation must "affirmatively provide" that undocumented aliens are eligible for public benefits. To be sure, the words "affirmatively provided" are not defined, but that hardly renders the statute ambiguous. "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (citation and internal quotation marks omitted).[8] The ordinary meaning of "affirmatively provides" is readily ascertained: in order to comply, the state statute must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.[9] By referring in the codified and uncodified

---

[7]Plaintiffs insist that *Mora v. Hollywood Bed & Spring*, 164 Cal. App. 4th 1061 (2008), which construed the similar phrase "affirmative instruction" and found no such ambiguity, is inapposite because it involved a statute that applied to employers rather than state governments. Ans. Br. 42-43. That is a distinction without a difference: precisely the same principles of statutory construction apply in both cases.

[8]This Court applies the same principle. "We first examine the statutory language, giving it a plain and commonsense meaning. . . . If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." *Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal. 4th 733, 737 (2004).

[9]Plaintiffs insist that if that had been Congress' intent, it would have said "specifically provides" rather than "affirmatively provides." Ans. Br. 43. However, the legislative history on which they rely conclusively establishes that Congress viewed the two terms as synonymous. "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) (emphasis added). *See also*

(continued . . .)

text of the legislation to "a person without lawful immigration status" and to "undocumented immigrant students," that is precisely what the Legislature did in AB 540. *See* Op. Br. 5-6.

Defendants do not contend, as Plaintiffs sarcastically suggest, that Section 1621(d) was enacted because "Congress was worried about states offering public benefits by mistake." Ans. Br. 42. Rather, it is evident that Congress wished to ensure that if states intended to make undocumented aliens eligible for public benefits, they should not rely on existing state or local laws to do so, but should instead do so transparently and affirmatively by enacting new state legislation after the effective date of the PRWORA, and by specifying in that new legislation that undocumented aliens would be among those benefited. Indeed, the statute's legislative history makes Congress's intent in this regard explicit:

> No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens.

H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS., pg. 1 (1996) (6 CT 1415). By enacting AB 540, the Legislature complied with the plain terms of Section 1621(d), as did other states that enacted similar legislation.[10]

(. . . continued)
n.6, *supra*.

[10]As we observed in our opening brief, none of the ten state legislatures that have enacted legislation similar to AB 540 found any ambiguity in Section 1621, far less reading it as imposing either of the requirements which Plaintiffs now urge. Op. Br. 21 n.11. Plaintiffs have no response.

B. Plaintiffs' Interpretation Of Section 1621(d) Is Untenable.

Plaintiffs' interpretation of Section 1621(d), in contrast, is not even a remotely credible reading of the statutory language. Plaintiffs would have the Court read the phrase "affirmatively provides for such eligibility" as imposing two distinct requirements, neither of which appears in the text of the statute itself: that conforming state legislation must expressly reference Section 1621(d), and that it must use the term "illegal alien." Ans. Br. 42. But the phrase cannot reasonably be read to impose *either* such requirement, much less both.[11]

First, "affirmatively provides for such eligibility" cannot reasonably be read to mean "specifically refers to this subsection." As noted in our opening brief, there are numerous federal statutes that authorize the enactment of state or federal legislation conditioned upon a specific reference to the authorizing federal statute. Op. Br. 20-21 & nn. 9, 10. *None* of those statutes uses language remotely comparable to "affirmatively provides," and for good reason, since nothing about that phrase connotes a specific statutory reference. Reading that requirement into Section 1621(d) would be particularly inappropriate in light of the existence of those laws, in which "Congress has shown that it knows how to [adopt such provisions] in express terms." *Kimbrough v. United States*, 128 S. Ct. 558, 571 (2007); *accord, Vasquez v. State*, 45 Cal. 4th 243, 252 (2008) (observing that "the Legislature clearly knows how to require [such a provision] unambiguously when that is what it wishes to do").[12] Plaintiffs, who do not mention any of these statutes, have no response.

---

[11]The point bears emphasis: Plaintiffs never explain how a single phrase could possibly be read to impose *two* separate and distinct requirements.

[12]Plaintiffs attempt to distinguish these cases on the ground that they declined to read new requirements into a statute that was silent on the subject. Ans. Br. 46-47. However, that is precisely what Plaintiffs ask the Court to do here: Section 1621(d) does not mandate any express

(continued . . .)

Second, the language of Section 1621(d) is no more susceptible to Plaintiffs' second contention: that "affirmatively provides for such eligibility" means "employs the term 'illegal alien.'" That contention is particularly dubious because *the text of Section 1621 itself never uses that term*. Section 1621(d) uses the phrase "an alien who is not lawfully present in the United States." 8 U.S.C. §1621(d). The section's general title is "Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits." Likewise, Section 1621(a) refers to "an alien who is not . . . a qualified alien . . . , a nonimmigrant . . . , or an alien who is paroled into the United States . . . ." *Id.* §1621(a). The term "illegal alien" appears only in the title of Subsection 1621(d) ("State authority to provide for eligibility for illegal aliens for State and local public benefits"), but not in its text or elsewhere in the statute. If, as Plaintiffs contend, Congress attached such talismanic significance to the term "illegal alien" that it intended to invalidate any state law that did not employ it, surely Congress would have used the term in the very statute at issue. *See* Op. Br. 22.[13] Plaintiffs again have no response.[14]

Plaintiffs criticize Defendants for failing to mention a recent decision by a Florida appellate court, which they contend held that Section 1621(d) "requires a state legislature to use the term 'illegal alien.'" Ans. Br. 45. Plaintiffs are wrong. That decision held only

---

(. . . continued)
statutory reference or use of the term "illegal alien," and "affirmatively provides" cannot reasonably be read to impose either requirement.

[13]Plaintiffs point out that *other* statutes in Title 8 use the undefined term "illegal alien." Ans. Br. 45. That only underlines the point: Congress is perfectly capable of using the term, but it chose not to do so in the text of Section 1621(d). Moreover, one of those statutes, like Section 1621, used the term interchangeably with a different phrase conveying the same meaning. *See* 8 U.S.C. §1252c(a)(1) ("an alien illegally present in the United States").

[14]Plaintiffs' related assertion that the term "undocumented immigrant" is "legally-meaningless" (Ans. Br. 1 n.1) ignores the courts' common use of that and similar terms. *See* Op. Br. 23 & n.12.

that the Florida Legislature had not affirmatively provided that illegal aliens were eligible for a state program, which the legislature created in 1994 and limited to legal residents, because it had not enacted legislation satisfying the statutory safe harbor requirements. *Dep't of Health v. Rodriquez*, 5 So. 3d 22 (Fla. App. 2009). The reason was *not* because the legislature had not employed the term "illegal alien," but because it had not enacted a law *after the effective date of the PRWORA*:

> At no time since August 22, 1996, the date provided for in section 1621(d), has the Legislature enacted a law specifying that illegal aliens are eligible for the BSCI Program. While the Legislature is certainly free to do so in the future, the law as it currently stands does not affirmatively provide for such eligibility.

Id. at 26. Thus, *Rodriquez* holds that Section 1621(d) means exactly what it says: to enact conforming legislation, a state need only enact a law after August 22, 1996 "specifying that illegal aliens are eligible." *Id.*

C. Plaintiffs' Interpretation Is Not Supported By The Legislative History.

For these reasons, there is no reason to resort to Section 1621's legislative history: the statute is clear on its face, and Plaintiffs' suggested alternative construction is not even plausible. But even if it were proper for the Court to resort to that legislative history, it does not support Plaintiffs' strained reading of the statute.

Plaintiffs rely exclusively on two sentences that follow the portion of the legislative history quoted above:

> Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section. The phrase "affirmatively provides for such eligibility" means that the State law enacted must specify that illegal aliens are eligible for State or local benefits.

H.R. CONF. REP. 104-725, 104TH CONG., 2D SESS., pg. 1 (1996) (6 CT 1415). However, this snippet of legislative history is internally

inconsistent: while the first sentence suggests that "affirmatively provides" means that conforming state law must "reference" Section 1621, the second states that the same phrase means only that the state law "must specify that illegal aliens are eligible for State or local benefits." *Id.* The phrase cannot simultaneously mean both things. Nor does the language requiring the state legislation to "specify that illegal aliens are eligible" convey any unambiguous mandate that it employ any particular term. Thus, "far from clarifying the statute, the legislative history only muddies the waters." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

In short, these two isolated sentences from the legislative history cannot displace the plain statutory language, which is silent as to both of the requirements that Plaintiffs would have the Court add. *See id.* at 7 (refusing to give effect to "snippet of legislative history" that injects into statute "an entirely new idea" that is 'in no way anchored in the text of the statute'") (citation omitted). Plaintiffs seek to turn the appropriate use of legislative history on its head by employing ambiguous legislative history to change the meaning of unambiguous legislative text. But "courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (citation and internal quotations omitted).

III.

SECTION 68130.5 IS NOT PREEMPTED BY SECTION 1623.

Plaintiffs rest their main express preemption challenge to Section 68130.5 on a second federal statute, 8 U.S.C. §1623. Plaintiffs again urge the Court to ignore the plain language of the statute, this time by disregarding that it prohibits only benefits provided "on the basis of residence." Plaintiffs' alternative contention that Section 68130.5 should be read as imposing a "de facto" residence requirement is irreconcilable with undisputed

provisions of California law, with that statute's findings and legislative history, and with the presumptions discussed in Part I, *supra*.

A. Plaintiffs' Interpretation Of Section 1623 Is Inconsistent With Its Plain Language And With Fundamental Canons of Statutory Construction.

Plaintiffs seek to reinterpret Section 1623 in a manner that is inconsistent with its plain language. 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. Thus, the statute qualifies the prohibition against states' making undocumented aliens eligible for postsecondary education benefits in two ways: (1) it prohibits a state from conferring such eligibility only "on the basis of residence within a State"; and (2) it provides further that a state *may* confer eligibility on the basis of residence if "a citizen or national of the United States is eligible for such a benefit" without regard to that person's residence. *Id.* Congress' evident intent was to bar states from reclassifying undocumented immigrants as state residents, not to prevent them from enacting legislation that might apply generally without regard to the citizenship or residence of those subject to it. Thus, Congress prohibited states from granting undocumented immigrants eligibility for benefits on the basis of their residence in the state, but did not preclude the states from offering benefits *without regard to residence*, through neutral laws that apply equally to residents and nonresidents, citizens and non-citizens alike.[15]

---

[15]Plaintiffs insist that Defendants' interpretation "creates a semantic loophole so large that it swallows the rest of the statute," arguing that a state could avoid Congressional intent by "simply (continued . . .)

Plaintiffs effectively ignore or misread both qualifying phrases and urge the Court to read Section 1623 as an *absolute* prohibition on eligibility. *E.g.*, Ans. Br. 1, 2, 10. Further, Plaintiffs would have the Court read the phrase "unless *a citizen or national of the United States is eligible* for such a benefit" to mean "*all* U.S. citizens must *receive* in-state tuition rates if a state confers that benefit on any illegal alien." *Id.* at 34 (emphases added).[16] Those interpretations violate at least two fundamental canons of statutory construction.

First, Plaintiffs' construction violates the plain meaning rule. Of all the canons of statutory interpretation, the plain meaning rule is the "one, cardinal canon before all others":

> [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also* cases cited, Op. Br. 23-24, 27, 37. Section 1623 by its terms prohibits states from extending eligibility for postsecondary benefits to an undocumented immigrant "on the basis of residence." Appellant's assertion that the statute should be read as a broad, unconditional prohibition on eligibility, *without regard to residence*, contradicts the statute's plain meaning.

Plaintiffs' construction of Section 1623 also violates the familiar canon against construing statutory language as mere surplusage. It is a basic principle of statutory interpretation that courts should give effect, if possible, to every clause and word of a statute, avoiding a construction that would render any statutory

---

(. . . continued)
choosing a criterion synonymous with residing in California." Ans. Br. 20-21. As shown below, however, that is an inaccurate characterization of Section 68130.5, which sets forth neutral criteria that are in no way "synonymous with" residence in California. *See* Part III(B), *infra*.

[16]Plaintiffs explicitly argue that contrary to the plain language of the statute, which speaks in terms of eligibility, "[a]ll U.S. citizens must be entitled to the benefit itself, not merely an opportunity to qualify for the benefit." Ans. Br. 35.

language superfluous. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *see also People v. Arias*, 45 Cal. 4th 169, 189 (2008); cases cited, Op. Br. 35. In violation of this principle, Plaintiffs' primary construction would render the phrase "on the basis of residence within a State" mere surplusage.[17]

1. The Clause "On The Basis of Residence In a State" Limits The Permissible Bases for Eligibility Rather Than Defining The Benefit.

Attempting to explain away Section 1623's limiting language, Plaintiffs assert that the "most plausible explanation" is that Congress intended the phrase "on the basis of residence within a State" to mean "eligible for resident tuition rates." Ans. Br. 22. In short, Plaintiffs contend, "Congress chose the phrase 'on the basis of residence within a State' to *define the benefit*," not to limit the permitted bases for extending eligibility for the benefit. *Id.* at 23. But far from being the "most plausible" reading of the statutory language, Plaintiffs' interpretation is based on a tortured, ungrammatical reading of Section 1623 that is inconsistent with the provision's wording and structure and with yet another fundamental rule of statutory construction.

Section 1623 focuses on undocumented aliens' *eligibility* for specified benefits. Its opening language directs that "an alien who is not lawfully present in the United States *shall not be eligible* on the basis of residence within a State." In the following clause, Congress specified one "basis" on which such eligibility could not be conferred. Following the phrase "eligible for," Congress specified the *benefit* it sought to regulate: "any postsecondary education

---

[17]Plaintiffs acknowledge this canon. Ans. Br. 24. In light of their failure to attribute any meaning to the key statutory phrase, Plaintiffs' reliance on the "whole act rule" (*id.* at 21), which requires reading a statutory provision in context, is misplaced. That doctrine's caution against "focusing on terms in isolation" (*id.*) cannot justify ignoring them entirely.

benefit." Thus, the plain language of Section 1623 limits the bases on which states can extend eligibility, not the benefits they can grant. The statute's title supports the same conclusion: "*Limitation on eligibility* for preferential treatment of aliens not lawfully present *on basis of residence* for higher education benefits." 8 U.S.C. §1623 (emphasis added).[18]

Plaintiffs' strained interpretation is at odds with this straightforward and grammatically consistent reading of the statute.[19] If Congress had meant the phrase "on the basis of residence within a State" to modify the term "postsecondary education benefit," it would have placed it immediately after that term, not after the term "eligible." Plaintiffs would have the Court construe the statute as if it read in pertinent part,

> [A]n alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit granted on the basis of residence within a State (or a political subdivision) . . . .

Plaintiffs' construction of Section 1623 violates the last antecedent rule, one of "the most fundamental rules of statutory construction." *White v. County of Sacramento*, 31 Cal. 3d 676, 680 (1982). "A longstanding rule of statutory construction – the 'last antecedent rule' – provides that 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.'" *Id.* (citations omitted); *see also Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (rule states that "a limiting clause or

---

[18]The title of a statute and the heading of a section can aid in resolving doubts about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

[19]The statute's legislative history supports the same conclusion. The original Senate bill, titled "BENEFITS OF RESIDENCE," prohibited state and local government entities from "consider[ing] any ineligible alien as a resident." Ans. Br. 19 n.18 (quoting S. 1664 and S. REP. NO. 104-249 at 22). As that earlier version of the legislation makes clear, Congress's intent was to prohibit states from reclassifying undocumented immigrants as residents. AB 540 does no such thing.

phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows") (citations omitted). Thus, the qualifying clause "on the basis of residence within a State" modifies "eligible," the immediately preceding word, rather than, as Plaintiffs contend, the following term, "any postsecondary education benefit." It is Plaintiffs' construction, not Defendants', that is "unsupportable" and "strained." Ans. Br. 19, 20; *see Sturgeon*, 174 Cal. App. 4th at 1421-22 (in preemption challenge to policy governing interaction with illegal immigrants, rejecting "strained interpretation" of federal statute that "would render provisions of the statute nugatory").

2. Section 1623's Legislative History Does Not Justify Ignoring The Statutory Language.

Plaintiffs again rely almost exclusively on the legislative history of Section 1623, rather than on its text. Ans. Br. 13-20. As discussed above, Plaintiffs stand the proper approach on its head: the interpretation of any statute must begin with its text, not with its legislative history, and the latter cannot be used to contradict or cloud statutory language that is clear. *See* pp. 7, 13, *supra*; *Dean*, 129 S. Ct. at 1853.

But even if it were appropriate to consult Section 1623's legislative history, the limited available legislative history provides no helpful guidance as to the precise meaning of the statute. The legislative history on which Plaintiffs rely consists in its entirety of (i) a single sentence in a conference committee report on predecessor legislation (*id.* at 14);[20] (ii) a passage in the Congressional Record

---

[20]Plaintiffs do not dispute that H.R. 2002 was not enacted into law. *See* Op. Br. 35-36; Ans. Br. 18. While its language was incorporated into H.R. 3610, the omnibus appropriations bill that was enacted by Congress, the conference report on that legislation does not contain any commentary on Section 1623, but merely restates the statutory language. H.R. CONF. REP. 104-863, 104TH CONG., 2d SESS. 1996 (Sept. 28, 1996), 1996 WL 526036 at *688. Plaintiffs' further assertion that "President Clinton signed the Conference Report" (Ans. Br. 18) is confused: the President signed the legislation, not the conference report.

reflecting remarks by Rep. Cox (*id.* at 15); and (iii) two nearly identical such remarks by Senator Simpson. *Id.* at 16.[21] However, these excerpts from the legislative history cannot overcome the plain language of the statute. "Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002); *see also, e.g., Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) (declining "to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact"); *Simpson v. United States*, 435 U.S. 6, 13 (1978) ("the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history").

The legislative history excerpts on which Plaintiffs rely are particularly unconvincing because none of them mentions or attributes any meaning whatever to *either* of the two critical qualifying phrases: "on the basis of residence within a State," or the "unless" clause that ends the statute. As such, they provide no useful guidance as to Congress' intent in enacting those provisions. "We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." *Shannon*, 512 U.S. at 583; *see also, e.g., Board of Educ. of Westside Comty. Schs.*, 496 U.S. at 242-43 ("We think that reliance on legislative history is hazardous at best, but where 'not even the sponsors of the bill knew what it meant,' such reliance cannot form a reasonable basis on which to

---

[21]The Court of Appeal affirmed the trial court's exclusion of a declaration by Senator Simpson Plaintiffs offered below, holding it was "insufficient to establish congressional intent" to create a private right of action to enforce Section 1623. Slip op. 24-26. As the Court of Appeal observed, "if the statutory language was clear, as claimed by the former Senator, then there would be no need for his declaration at all." *Id.* at 25.

interpret the text of a statute") (citation omitted); *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 14 n.9 (1972) ("In construing laws we have been extremely wary . . . of debates on the floor of Congress *save for precise analyses of statutory phrases* by the sponsors of the proposed laws") (citations omitted and emphasis added); *United States v. 475 Martin Lane*, 545 F.3d 1134, 1144 (9th Cir. 2008) (principle that court need not consult legislative history where it resolves a question of statutory interpretation by examining the plain language of the statute, its structure, and purpose is "especially true" when "legislators' published statements do not squarely address the question presented") (citation omitted).[22]

B. Plaintiffs' Alternative Argument That Section 68130.5 Contains A "De Facto" Or "Surrogate" Residence Requirement Is Erroneous.

Plaintiffs argue in the alternative that even if Section 1623 means what it says – "that Congress was only concerned with prohibiting a state from using residency as a criterion when offering this benefit to illegal aliens" (Ans. Br. 26) – Section 68130.5 would still be preempted. In particular, Plaintiffs contend that the statute, although it contains no reference to residence, nevertheless should be regarded as containing a "de facto" or "surrogate" residence requirement. Ans. Br. 26-31. Plaintiffs' arguments again lack merit.[23]

---

[22]Another portion of Section 1623's legislative history, the original Senate bill, undermines these brief summary statements. That bill demonstrates that Congress was seeking to prohibit states from considering or treating undocumented immigrants as state residents, not from enacting general legislation that might happen to affect some undocumented immigrants together with both legal residents and nonresidents. *See* Ans. Br. 18 n.18. That legislative history directly contradicts Plaintiffs' argument that construing Section 1623 to prohibit states from classifying undocumented immigrants as residents under state law would render it "superfluous." *See id.* at 24-26.

[23]Two of Plaintiffs' arguments are based entirely on extra-record materials not before the Court: Governor Davis's veto message in response to the prior legislation, AB 1197, and the University General

(continued . . .)

Echoing the Court of Appeal's analysis, Plaintiffs contend that high school attendance and residence in the state are "linked" because the Education Code generally requires that a pupil attend school in the district where the parent resides. Ans. Br. 27. Plaintiffs similarly argue that Section 68130.5 makes high school attendance and graduation "a surrogate requirement for residence in the state" because students who attend high school in California are "physically present in the classroom." Ans. Br. 28. For undocumented immigrants, Plaintiffs argue, such "physical presence is the *de facto* equivalent to 'residence' in California." *Id.* at 28-29.

There are at least three flaws in these related arguments. *First*, they are inconsistent with the statutory definition of "residence," which refers to a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. §§1101(a)(33), 1641(a); *see Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992). Under this definition, mere physical presence in the classroom, or in the state, does not equate to residence.

Second, Plaintiffs' arguments are inconsistent with provisions of the Education Code that expressly permit *nonresidents* of a district – indeed, nonresidents of the state and even of the United States – to attend high school in California. *See* Op. Br. 28-29 (discussing EDUC. CODE §§48050, 48051 & 48054). While Plaintiffs urge the Court to disregard those provisions as "unusual deviations" because they supposedly apply to relatively small numbers of students (Ans. Br. 28), it is undisputed that both the Legislature and the Legislative Counsel relied on them, in part, in concluding that Section 68130.5 does not confer a benefit on the basis of residence. *See* Op. Br. 8-10, 29-30. In this facial challenge to the validity of a state law, Plaintiffs' factually-based argument is inconsistent with their burden to prove that "the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional

---

(. . . continued)
Counsel's letter to the Regents. Ans. Br. 31; *see* Part I(B), *supra*.

prohibitions." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (citations omitted); *see also Sturgeon*, 174 Cal. App. 4th at 1418-22 (2009) (rejecting facial preemption challenge to policy governing police interaction with illegal immigrants).

Third, Plaintiffs' contention that high school attendance equates to residence ignores the fact that the statute contains absolutely no requirement that a qualifying student *currently* reside in California. The statute requires only that a qualifying student have attended and graduated from a California high school, not that the student have remained in the state following graduation. Thus, it applies, both on its face and in fact, to numerous students who, although they may have been California residents in the past while they were attending high school, *no longer reside* in the state. Op. Br. 28, 33 & n.19. Plaintiffs offer no response to this critical point. Even if "physical presence" were the equivalent of "residency," eligibility under Section 68130.5 cannot be claimed to be based on "physical presence" in California since many students "physically present" in California will not be eligible (because they did not attend high school here) and many students who did attend high school here will be eligible, even though they may now be "physically present" in other states.

Plaintiffs also argue that the Legislature's "stated intent" was to provide in-state tuition rates to undocumented immigrants on the basis of residence because selected snippets of the legislative history of Section 68130.5 and of the later-enacted immunity statute, Section 68130.7, loosely refer to "residents." Ans. Br. 29-31. However, surely the best indication of the Legislature's "stated intent" is its express finding that AB 540 "does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623." *See* Op. Br. 9-10, 31.[24] Moreover,

---

[24]Plaintiffs argue that "[a] state legislature cannot simply make federal preemption go away through legislative fiat." Ans. Br. 32. While that sweeping assertion is undisputed, it hardly follows, as Plaintiffs contend, that the Legislature's finding is a mere "legal (continued . . .)

Plaintiffs improperly ignore other portions of the legislative history that contradict their position. *See id.* at 8-9, 29-31. That the legislative history may contain some arguably inconsistent use of terminology cannot negate either its overall thrust or the Legislature's finding.

IV.

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

In Sections 1621 and 1623, Congress squarely authorized the states to enact legislation conferring benefits on undocumented immigrants, and therefore logically could not have intended impliedly to preempt such legislation. *See* Op. Br. 38-39. Undaunted, Plaintiffs argue at length that even if Section 68130.5 is not expressly preempted by Section 1621 or Section 1623, it is impliedly preempted by other, more general provisions of federal law. Ans. Br. 47-61. Plaintiffs' implied preemption arguments add nothing to their express preemption claims, and lack merit in any event.

A. Section 68130.5 Is Not An Impermissible "Regulation Of Immigration."

Plaintiffs argue that Section 68130.5 is a "regulation of immigration" within the meaning of *DeCanas* "because it creates new classifications and because it requires state officials to make independent judgments of immigration status." Ans. Br. 59-61. That argument, which the Court of Appeal rejected (slip op. 62), is entirely without merit.

A state statute impermissibly invades the exclusive power of the federal government to regulate immigration only if it requires

---

(. . . continued)
conclusion" entitled to no deference whatever. Further, the statutory finding clearly debunks Plaintiffs' assertions about the California Legislature's motivations.

state or local officers to make "a determination of who should or should not be admitted into the country, and [defines] the conditions under which a legal entrant may remain." *In re Jose C.*, 45 Cal. 4th at 550 (quoting *DeCanas*, 424 U.S. at 355). However, Section 68130.5, like the Welfare and Institutions Code provision involved in that case, does not "regulate[] who may enter or remain in the United States" (*id.*), and therefore is not an impermissible "regulation of immigration." *Id.*; *accord, Fonseca v. Fong*, 167 Cal. App. 4th 922, 936-39 (2008) (Health and Safety Code provision requiring state law enforcement agents to notify appropriate federal agency when there is reason to believe that an arrestee may not be citizen was not an impermissible regulation of immigration).

Plaintiffs contend that the Proposition 187 cases support their position (Ans. Br. 60), but they do not discuss their complete holding. There, the district court held that certain benefit denial provisions of Proposition 187 were *not* preempted as an impermissible regulation of immigration because "they do not amount to determinations of who may and may not remain in this country," and because they were "tied to federal standards rather than to an impermissible state classification scheme." *League of United Latin Am. Citizens v. Wilson ("LULAC I")*, 908 F. Supp. 775, 770, 774 (C.D. Cal. 1995); *see also League of United Latin Am. Citizens v. Wilson ("LULAC II")*, 997 F. Supp. 1244, 1253 (C.D. Cal. 1997) (same). In contrast, the court found that other provisions were preempted only because they required state agents "to make *independent* determinations of who is subject to the initiative's benefits denial, notification and cooperation/reporting provisions *and who may lawfully remain in the United States*," or because they would "create an entirely *independent* set of criteria by which to classify individuals based on immigration status." *LULAC I*, 908 F. Supp. at 769-70 (second emphasis added). "Thus, the state has

created its *own* scheme setting forth who is, and who is not, entitled to be in the United States." *Id.* at 772.[25]

Section 68130.5 creates no such scheme, and therefore does not constitute a prohibited "regulation of immigration." The statute does not create any independent criteria by which to classify individuals based on immigration status. The undefined statutory term "a person without lawful immigration status" can only refer to students' immigration status under federal law. *See LULAC I*, 908 F. Supp. at 774 (upholding benefits provisions of Proposition 187 that were "tied to federal standards rather than to an impermissible state classification scheme"). Moreover, the statute does not require state educational officials to classify students' citizenship or immigration status *at all* (other than as necessary to exclude nonimmigrant aliens holding federal visas); in any event, the mere requirement that they *verify* students' federal immigration status would not be impermissible. *Id.* The only duties the statute imposes relating to the affidavit that it requires an undocumented immigrant student to file (EDUC. CODE §68130.5(a)(4)) fall on the student; it does not require the institution to verify the accuracy of that affidavit or to take any action based on it. Institutions may implement the affidavit provision merely by requiring all applicants for exemption to certify that they have met all requirements of Section 68130.5, without the need even to verify any student's immigration status.

In short, "because [Section 68130.5] does not require any state actor to determine who is and who is not present in the United States unlawfully" (*Fonseca*, 167 Cal. App. 4th at 941), it is not an impermissible regulation of immigration.

---

[25]The portion of *LULAC II* Plaintiffs rely upon (Ans. Br. 60) found certain sections of Proposition 187 preempted not as a regulation of immigration, but because they contained a definition which had referred to the separate state classification scheme the court struck down, which presented a conflict with the classifications in the PROWRA. 997 F. Supp. at 1257. There is no such separate classification scheme here.

B. Congress Logically Could Not Have Intended To Impliedly Preempt State Legislation That It Expressly Authorized.

The fatal logical flaw in all of Plaintiffs' implied preemption arguments is that Congress could not have intended impliedly to preempt the very state legislation that it expressly authorized in Sections 1621 and 1623. Plaintiffs' implied preemption arguments therefore add nothing to their express preemption claims.

As Plaintiffs concede, Section 1621(d) provides a statutory savings clause that authorizes states to enact legislation conferring benefits on illegal aliens, subject to two statutory prerequisites. Likewise, there is no dispute that, at a minimum, under Section 1623 a state could confer a public benefit on an illegal alien on the basis of residence, so long as it conferred the same benefit on U.S. citizens without regard to residence. Having expressly *authorized* the states to enact certain legislation conferring benefits on undocumented immigrants, Congress could not have intended to impliedly preempt the very same legislation. Plaintiffs' implied preemption argument therefore has no independent force. *See Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 924 (2004) (improper to find conflict preemption if doing so would "nullify the savings clause"); Op. Br. 38.[26]

This point is dispositive of Plaintiffs' brief "field preemption" argument. Plaintiffs argue that Section 68130.5 is preempted because in the PRWORA and the IIRIRA, Congress occupied the field of "alien eligibility for public postsecondary education

---

[26]Plaintiffs ignore this Court's precedents, and cite only a single case in support of their argument. Ans. Br. 47. However, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) held that a federal law requiring auto manufacturers to equip certain vehicles with air bags preempted a state common-law tort action only because the wording of the particular statutory savings clause involved there did not foreclose ordinary conflict preemption principles. *Id.* at 869-71. Neither that nor any other case supports Plaintiffs' extraordinary contention here: that state legislation that has been expressly authorized by Congress can nevertheless be impliedly preempted by other, more general provisions of federal law.

benefits." Ans. Br. 48-49. However, field preemption, "i.e., Congress' intent to pre-empt all state law in a particular area, applies where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *In re Jose C.*, 45 Cal. 4th at 551 (citations omitted). Here, in contrast, both Section 1621(d) and Section 1623 expressly *authorize* state regulation in this area; as a result, Section 68130.5 exemplifies "the limited instances in which states have the right to determine alien eligibility for state or local public benefits." *LULAC II*, 997 F. Supp. at 1255. "[R]ather than evidence that Congress 'has unmistakably . . . ordained' exclusivity of federal regulation in this field," Sections 1621 and 1623 constitute "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law." *DeCanas*, 424 U.S. at 361, 363; *see also In re Jose C.*, 45 Cal. 4th at 551-53 (Congress, far from occupying the field, preserved state and local authority to enforce federal immigration laws).

C. Plaintiffs' Conflict Preemption Arguments Are Meritless.

Even if there were any independent basis for Plaintiffs' conflict preemption arguments (Ans. Br. 50-59), they lack merit. Conflict preemption occurs only when either (1) it is not possible to comply with the state law without triggering federal enforcement action, or (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1009-10 (9th Cir. 2007). The test is a stringent one:

> Tension between federal and state law is not enough to establish conflict preemption. We find preemption only in "those situations where conflicts necessarily will arise."

Id. at 1010 (citations omitted). It is not remotely met here.

First, Plaintiffs argue that Section 68130.5 is "a textbook case of conflict preemption" because, in order to receive its benefits, an undocumented immigrant must remain in the United States in

violation of federal law. Ans. Br. 50-54. This argument must be rejected as drastically overbroad: it would invalidate *any* law, federal or state, under which an undocumented immigrant receives *any* benefit – from a state law implementing immigrant children's constitutional right to a public elementary school education (*Plyler v. Doe*, 457 U.S. 202 (1982)), to the benefits that Congress expressly excepted from the general prohibition in Section 1621. *See* 8 U.S.C. §1621(b). It is also irreconcilable with a large body of California and federal authority that rejects similarly sweeping attacks on laws conferring a range of benefits and protections on undocumented immigrants. *See, e.g., Incalza*, 479 F.3d at 1009-10 (California labor laws forbidding employers from firing employee without good cause);[27] *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 617-18 (2007) (state statutes making persons' immigration status irrelevant to liability under state labor, employment, civil rights, and employee housing laws), *cert. denied*, 128 S. Ct. 1222 (2008); *Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 533, 540 (2005) (workers' compensation awards).

Second, Plaintiffs repeat the ludicrous claim that when state educational officials implement Section 68130.5, they commit a federal crime. Ans. Br. 54-56. That argument is based on a statute that makes it a crime to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. §1324(a)(1)(A)(iv). The criminal statute applies only to conduct, such as supplying fraudulent documents and immigration papers, that knowingly or recklessly "encourages" or "induces" specific aliens to enter or remain in this country illegally. *See, e.g., United States v. Oloyede*, 982 F.2d 133, 137 (4th Cir.

---

[27]Although Plaintiffs cite *Incalza* (Ans. Br. 52), they do not address its holding, which *rejected* a similar preemption challenge. Nothing about Section 68130.5 is likely to "trigger[] federal enforcement action" against an undocumented student who qualifies for in-state tuition. 479 F.3d at 1009-10.

1993). However, as discussed above, Section 68130.5 does not even require state officials to inquire into or determine the immigration status of any student. Regardless, Plaintiffs' contention that public officials' implementation of a validly enacted state law could ever violate a federal criminal statute or conflict with its objectives is baseless.[28]

Third, Plaintiffs contend that Section 68130.5 is impliedly preempted because it conflicts with another provision of the PRWORA. Ans. Br. 56-59. However, that provision, entitled "Statements of national policy concerning welfare and immigration," merely summarizes Congress' general intent in enacting the PRWORA. 8 U.S.C. §1601(6). The operative provisions of the PRWORA clarify how Congress elected to *implement* that national policy, namely by establishing a framework that limited but did not prohibit the provision of public benefits to undocumented immigrants. 8 U.S.C. §1621. If, as shown above, Section 68130.5 is expressly authorized by Section 1621(d), it cannot possibly be impliedly preempted by the general statement of policy found in the same statutory scheme.

V.

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

Plaintiffs devote more than one-quarter of their brief to the novel claim that by enforcing Section 68130.5, Defendants violated the constitutional rights of nonresident students under the Privileges or Immunities Clause of the Fourteenth Amendment. Ans. Br. 61-

---

[28]It is settled law in this State that "an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, regardless of the official's personal view of the constitutionality of the statute." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1119 (2004).

86. That ill-founded contention is based on a misreading of controlling Supreme Court precedent, on Plaintiffs' continued confusion between two different constitutional clauses, and on statutory claims that Plaintiffs forfeited below, and is unsupported by any pertinent authority.

A. The Privileges or Immunities Clause of the Fourteenth Amendment Does Not Govern States' Legislative Decisions Regarding In-State Tuition.

The Privileges or Immunities Clause of the Fourteenth Amendment does not apply to states' legislative decisions regarding who may attend or pay in-state tuition at state universities. In its seminal decision in the *Slaughter-House Cases*, 83 U.S. 36 (1873), the United States Supreme Court categorically rejected the notion that the Privileges or Immunities Clause of the Fourteenth Amendment gives the courts the power as a matter of federal law to adjudicate rights established by state law. *Id.* at 76. Instead, the Court held that the only privileges and immunities protected by the Fourteenth Amendment are those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. Because the right the plaintiffs asserted did not owe its existence to the Constitution or to federal law, the matter was beyond the purview of the Privileges or Immunities Clause.

The courts have recognized that the *Slaughter-House Cases* "drew tight boundaries" around the Privileges or Immunities Clause. *Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008).[29] Thus, the

---

[29]*See also Saenz v. Roe*, 526 U.S. 489, 522, 527 (1999) (the *Slaughter-House Cases* "all but read the Privileges or Immunities Clause out of the Constitution" and "sapped the Clause of any meaning" by making it clear that very few privileges or immunities are protected by the Clause) (Thomas, J., dissenting). Scholars similarly have described that decision as "constru[ing] the Privileges or Immunities Clause so narrowly as to pave the way for its virtual elimination from the body of the Constitution," Laurence H. Tribe, *American Constitutional Law* (2000), and as "strangling the privileges and immunities clause in its crib." Akhil Reed Amar, *The Bill of*
(continued . . .)

Clause narrowly protects "only uniquely federal rights such as the right to petition Congress, the right to vote in federal election, the right to interstate travel, the right to enter federal lands, or the rights of a citizen while in federal custody." *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 760 (5th Cir. 1987) (citation omitted), *overruled in part on other grounds*, *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (en banc).

No such federal right is implicated here. Rather, just as in the *Slaughter-House Cases*, the State of California made a policy decision to extend a state benefit – the right to pay in-state tuition for attending its public colleges and universities – to some while withholding it from others. Just as there is no federal right to exercise a trade, there is no federal right to attend California state universities or to pay in-state tuition. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 261 (1934) (the privilege "of attending [] university as a student comes not from federal sources but is given by the State"); *see also Vlandis v. Kline*, 412 U.S. 441, 445 (1973) (states may charge nonresident students higher tuition and fees than residents); *Kirk v. Board of Regents*, 273 Cal. App. 3d 430, 444-45 (1969) (such preferential tuition policies do not violate article IV Privileges and Immunities Clause).[30] Because no privilege of national citizenship is implicated by California's legislative policy concerning in-state tuition, the Clause does not apply.

B. There Is No Federal Right To Be "Treated No Worse Than An Illegal Alien" Under State Law.

In an attempt to recast what is plainly an issue of state law as a privilege of federal citizenship, Plaintiffs assert there is a constitutional "privilege of being treated no worse than an illegal

---

(. . . continued)
Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1258-59 (1992).

[30]"Plaintiffs agree completely." Ans. Br. 71 ("there is no constitutional right to resident tuition").

alien in the allocation of public benefits." Ans. Br. 62-63, 70-72. That purported privilege has never been recognized in any reported case, and is contrary to the purpose and history of the Privileges or Immunities Clause.

1. Plaintiffs Misread *Saenz*, Which Recognized No Such Right.

Plaintiffs assert first that the novel "privilege" they assert was "specifically recognized" in *Saenz v. Roe*, 526 U.S. 489 (1999). Ans. Br. 62-63. But as we showed in our opening brief (Op. Br. 43), that contention is based on a misreading of that case, and confuses two different clauses of the Constitution.

Saenz held that a California statute limiting the maximum welfare benefits available to newly arrived state residents was an invalid restriction on the constitutional right to travel protected by the Privileges or Immunities Clause. In its discussion, the Court found that the right to travel has three different components:

> It protects the right of a citizen of one State to enter and to leave another State, *the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State*, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

526 U.S. at 500 (emphasis added). Plaintiffs misplace their repeated reliance on the italicized language describing the second component (Ans. Br. 62, 75) as a source of the purported "privilege" they assert here, for at least two reasons.

First, *Saenz* made clear that the second component of the right to travel is protected *not* by the Privileges or Immunities Clause of the Fourteenth Amendment, but rather by the Privileges and Immunities Clause of Article IV, Section 2. 526 U.S. at 501. But Plaintiffs repeatedly have expressly disclaimed any reliance on that distinct constitutional provision, asserting that their claim is based

exclusively on the former Clause. *See* Op. Br. 43; Ans. Br. 61.[31] Thus, *Saenz* provides no support for Plaintiffs' claim.

Second, contrary to Plaintiffs' weak assertion that the Court's language is "susceptible to various interpretations" (Ans. Br. 75), there can be no serious question that in referring to "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State" (526 U.S. at 500), the Court was referring to citizens of other *states*, not of foreign countries. Article IV, Section 2, which is also referred to as the Entitlement Clause, was designed to govern the relations among citizens of the several states, not to distinguish between citizens and non-citizens:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. CONST., art. IV, §2. Immediately after quoting that language, the Court explained,

> 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."

Saenz, 526 U.S. at 501 (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)).

Indeed, Plaintiffs' novel contention is irreconcilable with the history and purpose of the Fourteenth Amendment. The Privileges

---

[31]Indeed, in their answer to Defendants' petitions for review, Plaintiffs asserted that cases decided under the Privileges and Immunities Clause of Article IV, §2, are "irrelevant" and have "no bearing on the case at bar." Ans. 18-19. Ironically, Plaintiffs now indiscriminately discuss cases arising under both clauses without paying any attention to the distinction. For example, Plaintiffs refer to *Paul v. Virginia*, 75 U.S. 168 (1869), as "[t]he very earliest U.S. Supreme Court interpretation of the Privileges and Immunities Clause" (Ans. Br. 63) without acknowledging that *Paul* was decided under article IV, §2.

or Immunities Clause and the Citizenship Clause were enacted following the Civil War to "guarantee[] the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship." *Saenz*, 526 U.S. at 503 n.15; *see generally* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385 (1992) (Clause was enacted to combat Black Codes adopted by southern states depriving newly freed slaves of the rights of citizenship). The focus of the Fourteenth Amendment and the Civil Rights Act of 1866 was on equality of rights among citizens; neither had anything whatever to do with the rights of citizens in comparison to those of illegal immigrants to the United States.[32] There is no basis for Plaintiffs' unprecedented request that the Court recognize a new "privilege" of national citizenship.[33]

---

[32]Indeed, the Privileges or Immunities Clause could not have been intended to address that subject: "Until 1875, alien migration to the United States was unrestricted." *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). Congress did not pass the first general immigration statute until 1882. *Id.* The Framers of the Fourteenth Amendment could not have intended it to create an inherent right of citizens to be treated no worse than illegal immigrants when they had not even enacted laws creating such a category of persons.

[33]Plaintiffs misplace their reliance on language taken out of context from various ancient decisions. Ans. Br. 65-66. This Court's 1872 decision in *Van Valkenburg v. Brown*, 43 Cal. 43 (1872), which predated the *Slaughter-House Cases*, held that the Privileges or Immunities Clause did not prevent the states from refusing the right to vote to women. Likewise, in *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court held that the Clause did not protect the right to a trial by jury on a state offense. Neither case remotely supports Plaintiffs' position.

Plaintiffs' citations to various secondary sources (*e.g.*, Ans. Br. 64-65, 66 n.29, 69 & n.31) are no more helpful to their position. The passage they quote from Story's Commentaries, for example (*id.* at 65), is taken from a discussion of Congress's power to regulate naturalization, not of the privileges and immunities of citizenship. Joseph Story, COMMENTARIES ON THE CONSTITUTION §1098 (1833) ("Power over Naturalization and Bankruptcy"). As Plaintiffs acknowledge, those Commentaries were written long before the (continued . . .)

2. Plaintiffs Forfeited Their Statutory Claims.

Plaintiffs also assert that the "privilege" they are seeking to enforce "was created through the enactment of 8 U.S.C. §§1621 and 1623," the same federal statutes that Plaintiffs assert preempt Section 68130.5. Ans. Br. 69. However, Plaintiffs cannot assert any rights under those statutes because they forfeited their statutory claims below.

In their complaint, Plaintiffs pled causes of action for violations of Sections 1621 and 1623, as well as a related claim under 42 U.S.C. §1983. Slip op. 9-11; 1 CT 26-30. The trial court dismissed those claims, holding that those federal statutes "conferred no private right of action in plaintiffs and therefore could not support a federal civil rights claim." Slip op. 21; 23 CT 6542-43. Plaintiffs failed to challenge that ruling in their opening brief on appeal, and thereby "forfeited any claim that they have a private right of action to enforce title 8 U.S.C. section 1621 or section 1623." Slip op. 18-23.

Having forfeited their claims of alleged statutory violations by failing to raise them below, Plaintiffs are foreclosed now from asserting that they have any rights under those statutes that could serve as a basis for their Privileges or Immunities Clause argument. Moreover, the only reported authority on that issue flatly contradicts Plaintiffs' position. *Day v. Bond*, 500 F.3d 1127, 1138-40, *reh'g and re'hg en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008) ("The text and structure of [Section] 1623 do not manifest a congressional intent to create private rights"). Finally, even if Plaintiffs could properly base their constitutional claim on those statutes, it would add nothing to their preemption claims, and the Court should decline to reach it on that ground alone. *De Lancie v. Superior Court*, 31 Cal. 3d 865, 877 n. 13 (1982) ("It is a well established principle that courts should avoid resolving constitutional issues if a case can be decided on statutory grounds").

(. . . continued)
ratification of the Fourteenth Amendment. Ans. Br. 64 n.27.

Thus, Plaintiffs have failed to establish any constitutional or statutory basis for their claim for violation of the Privileges or Immunities Clause. No court has ever recognized a private right of action for violation of that Clause. The Fifth Circuit found "no authority holding that the clause, absent legislation, supports a private cause of action for infringement of a right it secures." *Deubert*, 820 F.2d at 760. Accordingly, that court concluded that implying a right of action to enforce the Clause would be "a substantial and unprecedented expansion of that clause's effect," and declined to take such a step. *Id.* This Court should reach the same conclusion.

Because Plaintiffs have not pled a viable claim for violation of the Privileges or Immunities Clause, their extended argument that Section 68130.5 should be subject to strict scrutiny (Ans. Br. 77-86) lacks merit. *Saenz* held only that strict scrutiny governs the constitutionality of a state law or rule "that discriminates against some of its citizens" in violation of the right to travel. *Saenz*, 526 U.S. at 504. Because no such claim is or can be presented here, Plaintiffs' strict scrutiny argument fails. *Merrifield*, 547 F.3d at 984 ("Given the *Slaughter-House Cases* limitation on the Privileges or Immunities Clause of the Fourteenth Amendment, we cannot grant relief based upon that clause unless the claim depends on the right to travel. Merrifield's claim does not invoke that right, and therefore must be denied").

C. Section 68130.5 Treats Undocumented Immigrants and Citizens Equally.

Finally, even assuming that there were a federally cognizable right not to be treated worse than an undocumented immigrant under state law, Section 68130.5 would not violate that right, because it applies equally to citizens and undocumented immigrants. *See* Op. Br. 40-41. As we have shown, the statutory exemption is available to all students who meet the criteria, regardless of their citizenship or state residence. *Id.* at 4-5, 26-33.

Plaintiffs offer two responses, neither of which has merit. *First*, Plaintiffs assert that they belatedly alleged below (inaccurately) that certain postsecondary institutions have categorically excluded *all* U.S. citizens from receiving the benefits conferred under Section 68130.5. Ans. Br. 64, 73. However, the Court of Appeal gave Plaintiffs leave to amend their equal protection claim to pursue that allegation. Slip op. 74-75. That issue is not before the Court here, and it provides no independent support for Plaintiffs' Privileges or Immunities Clause claim.

Second, Plaintiffs assert that only a "minuscule" percentage of the beneficiaries of Section 68130.5 are U.S. citizens. Ans. Br. 74. But not only is that unsupported factual assertion contradicted by the limited evidence before the Court,[34] it cannot carry Plaintiffs' heavy burden on this facial attack on a state statute to "demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Tobe*, 9 Cal. 4th at 1084 (1995) (citations and internal quotations omitted).

---

[34]*See* Op. Br. 33 & n.19 (70 percent or more of students who qualified for exemption at University of California were U.S. citizens or legal permanent residents).

CONCLUSION

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

Respectfully,

DATED: Aug. 28, 2009

CHARLES F. ROBINSON
CHRISTOPHER M. PATTI
UNIVERSITY OF CALIFORNIA

ETHAN P. SCHULMAN
FOLGER LEVIN & KAHN LLP

By _____
ETHAN P. SCHULMAN

Attorneys for Respondents The Regents of the University of California and Mark G. Yudof

DATED: Aug. 28, 2009

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

By _____
ANDREA M. GUNN

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

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

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the attached RESPONDENTS' REPLY BRIEF ON THE MERITS contains 12,020 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: August 28, 2009 **FOLGER LEVIN & KAHN LLP**

By 
ETHAN P. SCHULMAN
Attorneys for Respondents
The Regents of the University of California
and Mark G. Yudof

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:

RESPONDENTS' REPLY BRIEF ON THE MERITS

on the following person(s) in this action:

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

Attorneys for Appellants

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

Attorneys for Appellants

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

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

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

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

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

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

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

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

☒ BY FIRST CLASS MAIL: I am employed in the City and County of San Francisco where the mailing occurred. I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, with postage fully paid. I placed the envelope or package for collection and mailing, following our ordinary business practice. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

☐ BY MESSENGER SERVICE: I served the document(s) identified above by placing them in an envelope or package addressed to the person(s) listed above and providing them to a professional messenger service for service.

☐ BY OVERNIGHT DELIVERY: I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, in an envelope or package designated by the overnight delivery carrier with delivery fees paid or provided for. I placed the envelope or package for collection and overnight delivery

at an office or a regularly utilized drop box of the overnight delivery carrier, or by delivering to a courier or driver authorized by the overnight delivery carrier to receive documents.

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

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

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

Executed on August 28, 2009, at San Francisco, California.

Catherine A. Rogers

78074\9002\661569.5