No. S167791

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

ROBERT MARTINEZ et al.,

Plaintiffs and Appellants,

v.

THE REGENTS OF THE UNIV. OF CALIF. et al.,

Defendants and Respondents.

No. S167791

Court of Appeal,
Third Appellate District
No. C054124

Yolo County Superior
Court No. CV052064

ANSWER OF PLAINTIFF MARTINEZ, ET AL. TO PETITIONS FOR REVIEW FILED BY DEFENDANTS THE REGENTS OF U. C. AND COMMUNITY COLLEGES

After A Decision By The Court Of Appeal,
Third Appellate District
Filed September 15, 2008

On Appeal From the Superior Court
of California, In and for the County of Yolo
Case No. CV052064

Honorable Thomas E. Warriner

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ROBERT MARTINEZ ET AL.

No. S167791

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INTRODUCTION

In their Petitions for Review, Defendants ask this Court to review three holdings of the Court of Appeal below, concerning: (1) whether § 68130.5 is expressly preempted by 8 U.S.C. 1623, (2) whether § 68130.5 is expressly preempted by 8 U.S.C. 1621, and (3) the Privileges and Immunities Clause of the Fourteenth Amendment. UC Pet. 3. Defendants have failed to demonstrate the existence of any judicial disagreement or controversy on any of these questions. More importantly, by forfeiting their opportunity to seek review of the Court's implied preemption holding, Defendants have rendered their own Petitions pointless. Consequently, this Court should deny Defendants' Petitions.

I. DEFENDANTS HAVE FORFEITED THEIR OPPORTUNITY TO SEEK REVIEW OF THE COURT'S IMPLIED PREEMPTION HOLDING

Defendants ask this Court to review the *express* preemption holdings of the Court of Appeal—namely, that two federal statutes, 8 U.S.C. § 1623 and 8 U.S.C. § 1621, expressly preempt § 68130.5. See UC Pet. 10-22, CCC Pet. 6-9. However, Defendants fail to mention that the Court of Appeal also held § 68130.5 to be *impliedly* preempted by other provisions of federal law. The Court of Appeal held that § 68130.5 was preempted in *not two, but three* independent ways: (1) express preemption under 8 U.S.C. § 1623, (2) express preemption under 8 U.S.C. § 1621, and (3) implied conflict preemption under 8 U.S.C. § 1601 and other federal

statutes. Defendants' failure to address the third form of preemption renders their Petitions for Review inadequate to dispose of the holdings in the Court below that bar implementation of § 68130.5. Assuming for the sake of argument that this Court were to agree with Defendants on both of the express preemption claims, *the implied preemption holding of the Court of Appeal would nevertheless remain in place*. Thus, § 68130.5 would still be in conflict with federal law. Defendants' omission in this regard is a fatal one.

As the Court of Appeal explained, there are three distinct forms of preemption: express preemption, implied field preemption, and implied conflict preemption. Slip Op. at 33-36; see *Gade v. Nat'l Solid Wastes Mgmt. Ass'n* (1992) 505 U.S. 88, 98 (plurality opinion). The Court of Appeal spent three full pages explaining the standards by which an implied preemption claim must be adjudicated. *Id.* at 34-36. In so doing, the Court of Appeal correctly cited the controlling Supreme Court precedent in any implied preemption case involving federal immigration laws—*De Canas v. Bica* (1976) 424 U.S. 351; Slip Op. at 35-36. "[A] state law is preempted if it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 36 (*quoting De Canas*, 424 U.S. at 363).

After laying out the standards for adjudicating an implied preemption claim, the Court of Appeal then proceeded to apply those

standards, holding that § 68130.5 is impliedly preempted (in addition to being expressly preempted). Slip Op. 64-66. The Court stated the following:

> Section 68130.5 also falls within the principle of implied preemption in that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*De Canas v. Bica, supra*, 424 U.S. at p. 357 [47 L.Ed.2d 43].) The Congressional objective was stated in title 8 U.S.C. section 1601:
>
> 'The Congress makes the following statements concerning national policy with respect to welfare and immigration:...
>
> 'It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.'"

Slip Op. at 64-65. The Court of Appeal went on to distinguish other preemption cases involving immigration, in which implied conflict preemption had *not* been found. The Court correctly noted the difference:

> However, those cases indicated the state statutes—which were designed for purposes such as discouraging unscrupulous employers from hiring illegal aliens—were *consistent* with the ultimate goal of federal immigration law to control illegal immigration. (*Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 617-618; *Farmers Bros. Coffee v. Workers' Compensation Appeals Bd.* (2006) 133 Cal. App.4th 533, 540.) The same cannot be said of section 68130.5.

Slip Op. at 66 (emphasis added). Thus the Court of Appeal held that § 68130.5 was impliedly conflict preempted.

Defendants' failure to address the issue of implied preemption under 8 U.S.C. § 1601 in either of their Petitions for Review constitutes forfeiture of the issue. Cal. Rules of Court, rule 29(b)(1); *see also People v. Standish*

(2006) 38 Cal. 4th 858, 888; *PLCM Group v. Drexler* (2000) 95 Cal. 2d 198, 205. Consequently, Defendants' omission has rendered their Petitions for Review pointless; § 68130.5 would remain preempted even if this Court were to accept Defendants' express preemption arguments. Because of Defendants' forfeiture and their inability to continue implementation of § 68130.5 without first obtaining a reversal of the implied preemption holding of the Court of Appeal, this Court need read no further. However, in an abundance of caution, Plaintiffs will now explain why review is not warranted with respect to the issues that Defendants do raise.

II. THE COURT OF APPEAL CORRECTLY HELD § 68130.5 TO BE EXPRESSLY PREEMPTED BY 8 U.S.C. § 1623

In addition to holding § 68130.5 to be impliedly preempted, the Court of Appeal also held it to be expressly preempted under 8 U.S.C. § 1623. Slip Op. 37-63. In so doing, the Court came to the unremarkable conclusion that 8 U.S.C. § 1623 means exactly what it says. In 1996, in an effort to prevent any state from offering in-state tuition rates to illegal aliens, Congress enacted the following provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA):

> 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. In so doing, Congress barred any state from offering in-state tuition rates to illegal aliens, unless the state was willing to give in-state tuition rates to *every* US citizen attending a public postsecondary institution in the state.

Counsel for Defendants had a difficult task in the Court below—defending a statute that was designed to evade this federal law. The California Legislature first attempted this evasion in 2000, by passing AB 1197, a bill that was virtually identical to § 68130.5 in all of its substantive provisions. Governor Gray Davis vetoed this precursor to § 68130.5 because it clearly violated 8 U.S.C. § 1623: "Undocumented aliens are ineligible to receive postsecondary education benefits based on state residence.... IIRIRA would require that all out-of-state legal residents be eligible for this same benefit." Governor's Veto Message, I C.T. 59. A year later, the California Legislature tried again, passing AB 540, which would become § 68130.5. As the Court of Appeal correctly noted, "[T]he bill which became section 68130.5 was a second attempt to overcome a perceived conflict with federal law. *Yet the content of section 68130.5 is not significantly different from the content of Assembly Bill 1197....*" Slip Op. 60 (emphasis added).[1] Inexplicably, and despite his own veto message

[1] UC Defendants misleadingly describe AB 1197 as "a different bill that had been introduced in a prior legislative session." UC Pet. 6. The substantive provisions were virtually identical to those of § 68130.5, the only difference being that AB 1197 required an alien to already be in the

to the contrary, the Governor would eventually sign the legislation without comment. Interestingly, before this litigation commenced, the General Counsel of the UC Regents also agreed that in-state tuition eligibility constituted a prohibited "postsecondary education benefit" under 8 U.S.C. § 1623. "The legislative history of the IIRIRA, the official statement of the intent of Congress, makes it clear that permitting an individual to pay resident fees, rather than non-resident tuition, is considered a 'postsecondary education benefit' under the statute." James E. Holst, General Counsel, Letter to the UC Regents, Nov. 9, 2001, p. 4, VI C.T. 1586.

Defendants contend that § 68130.5 successfully skirts the requirements of federal law because it requires an illegal alien beneficiary to show three years of "high school attendance *in California*," § 68130.5(a)(1) (emphasis added). Defendants assert without support that referring to physical presence at a high school rather than to residence in the state somehow allows them to evade the plain requirements of federal law. The Court of Appeal correctly rejected this distinction. "The wording of the California statute, requiring attendance at a California high school for three or more years, creates a de facto residence requirement." Slip Op. 53.

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process of attempting to obtain legal status (an impossibility under current federal law), while § 68130.5 required the illegal alien to seek to obtain legal status as soon as it becomes possible. See the text of AB 1197 at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_bill_20000831_enrolled.pdf.

Moreover, if Defendants' strained interpretation were correct, then Congress was apparently determined to deny in-state tuition to illegal aliens who "resided" in California, but quite happy to allow in-state tuition to be given to illegal aliens who attended high school in California. The Court of Appeal reached the obvious conclusion: "Section 68130.5 manifestly thwarts the will of Congress expressed in title 8 U.S.C. section 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." *Id.* at 54.

A. Every Word Of Congressional Legislative History Supports The Holding Of The Court Of Appeal

Congressional intent is the cornerstone of preemption analysis. The U.S. Supreme Court has consistently reiterated that "'the purpose of Congress is the ultimate touchstone'" of preemption analysis. *Malone v. White Motor Corp.* (1978) 435 U.S. 497, 504 (*quoting Retail Clerks v. Schermerhorn* (1963) 375 U.S. 96, 103). The intent of Congress is evident on the face of 8 U.S.C. § 1623: to prohibit any state from offering in-state tuition rates to any illegal alien unless the state also opens up in-state tuition rates to all U.S. citizens (regardless of their circumstances)—an option that no state would be likely to choose.

The Court of Appeal correctly held that the meaning of 8 U.S.C. § 1623 is clear, and § 68130.5 violates its terms. "Section 68130.5... makes

illegal aliens eligible for in-state tuition without affording in-state tuition to out-of-state U.S. citizens with regard to California residence." Slip Op. 37. However, assuming, *arguendo,* that there were any ambiguity in 8 U.S.C. § 1623 with respect to its applicability to a statute like § 68130.5, then it would be appropriate to consider its legislative history. "Concluding that the text is ambiguous ... we then seek guidance from legislative history ...." *Green v. Bock Laundry Mach. Co.* (1989) 490 U.S. 504, 508-09. And when a court considers legislative history, the primary source of legislative history *must* be the committee report. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation.'" *Eldred v. Ashcroft* (2003) 537 U.S. 186, 210 n.16 (*quoting Garcia* v. *United States* (1984) 469 U.S. 70, 76 and *Zuber* v. *Allen* (1969) 396 U.S. 168, 186).

The Conference Committee Report accompanying Section 507 of H.R. 2202 (which would become 8 U.S.C. § 1623) is unequivocal: "This section provides that illegal aliens *are not eligible for in-state tuition rates* at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996) (emphasis added), C.T. Vol. VI, p. 1412.

This Conference Committee Report is consistent with the recorded statements of every Member of Congress who addressed the issue. The recorded statements are as follows. Rep. Christopher Cox, one of the leading proponents of the measure, explained Congress's intent in unambiguous terms:

> What else does title V do? What else does he want dropped from the bill after it was passed by a historic bipartisan margin in this House of 305 to 123? The President wants to drop the provision that says that—now listen carefully to this because it is a shocker—that the President would be in favor of this kind of public benefit to illegal aliens, people who have broken the law here in this country. He wants to drop the part of the bill that says that when somebody comes from Thailand, when somebody comes from Russia, when somebody comes from you name it, it is a big world, into your State, they will not get in-State tuition benefits at your State college. Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition. *Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools.*

142 Cong. Rec. H 11376-77 (1996)(emphasis added), C.T. Vol. VI, pp. 1429-30. The legislative understanding of 8 U.S.C. § 1623 in the U.S. Senate was the same. Senator Alan Simpson, principal sponsor of the Senate version of the bill, summarized the provision in the same way: "Illegal aliens will *no longer be eligible* for reduced in-State college tuition." 142 Cong. Rec. S11713 (1996) (emphasis added), C.T. Vol. VI, p. 1420. Senator Simpson reiterated this clear statement of legislative intent:

"Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges. That is in Title V, together with all the stuff to clean up their use of unemployment compensation, their use of the Social Security system, and much, much more." 142 Cong Rec S11508 (1996), C.T. Vol. VI, p. 1425. The congressional intent of 8 U.S.C. § 1623 was plainly to ensure that "illegal aliens will no longer be eligible" for in-state tuition. Every document in the legislative history of 8 U.S.C. § 1623 supports the congressional intention to make it effectively impossible for a state to offer in-state tuition rates to illegal aliens. Before the Court of Appeal, and in their Petitions for Review, Defendants *do not present a single shred of legislative history to the contrary. That is understandable, because no legislative history exists that would support an alternative interpretation.*

When the intent of Congress is clear, a statute must be interpreted to advance the congressional agenda *unless the language of the statute absolutely precludes such an interpretation.* See *Johnson v. United States* (2000) 529 U.S. 694, 710 n.10 ("Our obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result."). Clearly, the language of 8 U.S.C. § 1623 does not preclude Congress's stated intent: prohibiting states from offering in-state tuition rates to illegal aliens.

Prior to this litigation, even the General Counsel of the UC Regents acknowledged that it was the intent of Congress to prevent states from enacting statutes like § 68130.5. "*Given the apparent intent of Congress*, we believe there is a substantial risk that a court would conclude that AB 540 provides undocumented students eligibility for resident fees *on the basis of state residence* and that the effect of the IIRIRA is to require that all U.S. citizens must also be eligible for resident fees without regard to their state residence." James E. Holst, General Counsel, Letter to the UC Regents, Nov. 9, 2001, p. 4 (emphasis added), C.T. Vol. VI, p. 1586. General Counsel Holst was correct in 2001. Nothing has changed in the intervening seven years. Review of the issue by this Court would serve no illuminating purpose.

B. Defendants Obscure The Requirements Of 8 U.S.C. § 1623

Attempting in vain to create the impression that the Court of Appeal somehow misread federal law, Defendants suggest that the fact that some U.S. citizens may meet the requirements of § 68130.5 somehow brings it into compliance with 8 U.S.C. § 1623. UC Pet. 21-22. However, this argument ignores the phrasing of 8 U.S.C. § 1623, which makes clear that *all* U.S. citizens must receive in-state tuition rates if a state confers that benefit on an illegal alien. Conferring the benefit on a few U.S. citizens who meet certain requirements is not enough. 8 U.S.C. § 1623 bars states

from offering in-state tuition rates to illegal aliens "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."

Two aspects of the statute's phrasing confirm that *all* U.S. citizens must be eligible for in-state tuition rates in order to satisfy 8 U.S.C. § 1623. First, Congress made clear that a state would have to cease considering the state residency of U.S. citizens altogether when determining tuition rates. "Without regard to whether the citizen or national is such a resident" plainly conveys that condition. 8 U.S.C. § 1623. The Court of Appeal correctly noted this requirement. Slip Op. at 37. Second, the text of 8 U.S.C. § 1623 indicates that all U.S. citizens must be entitled to the "benefit" itself, not merely an opportunity to meet certain criteria in order to qualify for the benefit. Indeed only a benefit can possess "an amount, duration, and scope." An opportunity to meet certain criteria in order to receive a benefit does not have "an amount, duration, and scope." In other words, Defendants cannot satisfy federal law by saying that U.S. citizens have the opportunity to meet certain criteria laid out by § 68130.5. The Court of Appeal was correct.

C. The Court Of Appeal Holding Is Consistent With Relevant Case Law

The Court of Appeal analyzed this express preemption issue cogently and clearly in twenty-six pages of its opinion. Slip Op. 37-63. Not surprisingly, the Court's holding is entirely consistent with that of the only federal court to interpret the substantive meaning of 8 U.S.C. § 1623—the U.S. District Court for the Eastern District of Virginia. "The more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit." *Equal Access Educ. v. Merten*, (D. Va. 2004) 305 F. Supp. 2d 585, 606.[2] In their 36 combined pages of argument in their Petitions for Review, Defendants do not and cannot cite a single decision by any court that is contrary to the holding of the Court of Appeal below. There is simply no judicial disagreement on this issue. Review is therefore not warranted.

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[2]UC Defendants suggest that *Day v. Bond*, (10th Cir. 2007), 500 F.3d 1127, *rehearing and rehearing en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 3987 (2008), may somehow be relevant, UC Pet. 17, vaguely mentioning that it was decided "largely on procedural grounds." UC Pet. 9. They are not being forthright. *Day* was decided entirely on standing. Dismissing the plaintiffs challenge to a similar Kansas law for lack of standing, the Tenth Circuit never reached the merits on the substantive meaning of 8 U.S.C. § 1623. The Court of Appeal below correctly noted that *Day* was a standing decision, and therefore irrelevant to the case at bar.

III. THE COURT OF APPEAL CORRECTLY HELD § 68130.5 TO BE EXPRESSLY PREEMPTED BY 8 U.S.C. § 1621.

In addition to holding that 8 U.S.C. § 1623 expressly preempts § 68130.5, the Court of Appeal also correctly held that 8 U.S.C. § 1621 expressly preempts § 68130.5. Slip Op. 67-72. Enacted in 1996 as part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 8 U.S.C. § 1621 bars states from providing any "public benefit" to an illegal alien, including any "postsecondary education... benefit." 8 U.S.C. § 1621(a), (c)(1)(B). The only way that a state may provide any prohibited public benefit to an illegal alien is by meeting the requirements of the safe harbor provision of 8 U.S.C. § 1621(d). The safe harbor allows a state to provide an illegal alien a public benefit only through the enactment of a state law "which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). Defendants contend that they satisfy this requirement. UC Pet. 12-15.

Going straight to the crux of the matter, the Court of Appeal asked, "What is the meaning of 'affirmatively provides'?" Slip Op. 69. Since the most basic canon of statutory interpretation is that every word in a statute must be given meaning, "affirmatively provides" must mean more than simply "provides." The Court concluded that it is ambiguous and looked to the controlling (and only) legislative history on the provision—the

congressional Conference Committee Report. *Id.* As it happens, that Report spelled out exactly what "affirmatively provides" meant:

> 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 reverences this provision [8 U.S.C. § 1621], 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....

104th Cong., 2nd Sess., Conf. Report No. 104-725 on H.R. 3734, at 383 (July 31, 1996) (emphasis added). The Court of Appeal precisely followed this definition. Slip Op. 69-70. The Court noted that there are therefore two requirements that a state must satisfy in order to "affirmatively provide" benefits to illegal aliens: (1) the state must expressly refer to 8 U.S.C. § 1621, and (2) the state must clearly indicate that the public benefit is going to be given to "illegal aliens." *Id.*

The Court then proceeded to apply these requirements, pointing out the undeniable fact that "the California Legislature in enacting section 68130.5 did not expressly reference title 8 U.S.C. section 1621." *Id.* at 70. Therefore the first requirement was not satisfied, and "the California legislature has not met the requirements of title 8 U.S.C. section 1621's 'safe harbor' or 'savings clause.'" *Id.* at 71. Thus, § 68130.5 was preempted; and the Court concluded that it "need not address" the second requirement. *Id.*

In urging this Court to review the decision below, Defendants actually insist that the Conference Committee Report must be *ignored.* UC Pet. 13-14. They protest that "affirmatively provides" is unambiguous. However, they do not offer a shred of case support or statutory support suggesting that the various definitions that they offer are correct. See *Id.* The reasoning behind Defendants' contorted logic is transparent—knowing that § 68130.5 cannot possibly be squared with the Conference Committee Report, Defendants seek to pretend that it does not exist. Defendants ignore the U.S. Supreme Court's declaration that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill...." *Eldred v. Ashcroft*, 537 U.S. at 210 n.16. For this Court to continue Defendants' illogical and speculative exercise would serve no purpose.

Despite Defendants' attempts to manufacture a controversy, there is no judicial disagreement whatsoever concerning the meaning of 8 U.S.C. § 1621. Defendants offer up various contorted theories about how 8 U.S.C. § 1621 might conceivably be interpreted, but they cannot offer a shred of case law supporting their theories. The two prior decisions on the subject support the holding of the Court of Appeal. The U.S. District Court for the Central District of California applied 8 U.S.C. §1621 consistently with the Court below when it held that Proposition 187 was preempted. *League of United Latin American Citizens v. Wilson* (C.D. Cal. 1997) 997 F.Supp.

1244, 1255-56. So, too, did the U.S. District Court for the Eastern District of Virginia, in holding that a state policy denying illegal aliens admission to state universities was not preempted. *Equal Access Educ. v. Merten* (E.D. Va. 2004) 305 F. Supp. 2d 585, 605. In light of the fact that there is no disagreement between the courts that have reviewed this federal statute, review by this Court is unwarranted.

Finally, it must be remembered that each of the three preemption holdings of the Court of Appeal is entirely independent. For Defendants to prevail in this matter, they must seek reversal of all three preemption holdings. Given the thorough and detailed 84-page opinion below, the absence of any congressional legislative history supporting Defendants' interpretation, and the fact that there is no case law supporting Defendants' preemption theories, the likelihood of Defendants prevailing on all three preemption questions is extremely low. Granting review of this matter would result in a needless expenditure of this Court's time and resources.

IV. THE COURT OF APPEAL CORRECTLY HELD THAT PLAINTIFFS HAD STATED A CLAIM UNDER THE FOURTEENTH AMENDMENT'S PRIVILEGES AND IMMUNITIES CLAUSE

Plaintiffs maintain that § 68130.5 contravenes the Privileges and Immunities Clause of the Fourteenth Amendment, which states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." U.S. Const., Amend XIV, §

1. One of the protected privileges that the U.S. Supreme Court has identified is the privilege of being treated no worse than an alien under the laws of a state. *Saenz v. Roe* (1999) 526 U.S. 489, 500.

In assessing Plaintiffs' claim under the Privileges and Immunities Clause of the Fourteenth Amendment, the Court of Appeal correctly stated Plaintiffs' position: that § 68130.5 "placed U.S. citizen Plaintiffs in a legally disfavored position compared to that of illegal aliens." Slip Op. 75. The Court of Appeal then rejected Defendants' assertion that § 68130.5 "applies equally to U.S. citizens and illegal aliens," and overruled Defendants' demurrer on the question. *Id.* at 76.

The Court of Appeal holding is entirely consistent with the controlling U.S. Supreme Court precedent on the Fourteenth Amendment's Privileges and Immunities Clause—*Saenz v. Roe, supra*. In that decision, the Supreme Court specifically stated that the Privileges and Immunities Clause protects out-of-state U.S. citizens' "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz*, 526 U.S. at 500.

In their Petition, Defendants cannot point to any precedent supporting a contrary reading of the Fourteenth Amendment Privileges and Immunities Clause. U.C. Pet. 23-24. Tellingly, they resort to citing an irrelevant case concerning the Privileges and Immunities Clause of Article

IV, § 2, of the U.S. Constitution.[3] Defendants cite *Kirk v. Board of Regents* (1969) 273 Cal. App. 2d 430, for the well-established proposition that "the privileges and immunities clause does not guarantee to [nonresidents] the right to attend the universities for the same fee as that charged to persons [who qualify as state residents]." Id. at 444-45 (*cited in* UC Pet. 24). However, the *Kirk* Court was interpreting a claim brought under the Privileges and Immunities Clause of Article IV, § 2, not that of the Fourteenth Amendment. As such, it has no bearing on the case at bar. Desperate to find some case to cite (but not quote) on the subject of in-state tuition, Defendants then turn to *Vlandis v. Kline* (1973) 412 U.S. 441. What they fail to mention is that *Vlandis* was a case decided *under the Due Process Clause* of the Fourteenth Amendment. *Id.* at 454. The Privileges and Immunities Clause was never mentioned. See *Id., passim.*

Indeed the only case that Defendants cite that is even remotely connected to the U.S. Supreme Court's interpretation of the Privileges and Immunities Clause in *Saenz* is *Merrifield v. Lockyer* (9th Cir. 2008), 2008 U.S. App. LEXIS 19622. However, while that case actually dealt with the correct constitutional clause, the question that it addressed—whether the right to pursue one's chosen profession is a protected privilege or not—was irrelevant to the case at bar. See *id.* at *11-*13.

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[3] "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.

Because Defendants cannot identify a single decision in any jurisdiction that is even slightly contrary to the decision of the Court of Appeal, there is little reason for this Court to entertain Defendants' ruminations on the subject.

V. DEFENDANTS' POLICY ARGUMENTS ARE IRRELEVANT

Unable to show a single holding from any state or federal court that conflicts with the holding of the Court of Appeal below, Defendants resort to making policy arguments in support of § 68130.5. Indeed, approximately a fifth of the California Community Colleges Petition is devoted to such policy arguments. See CCC Pet. 2,9. While Defendants' policy arguments are certainly interesting, they have no place in a Petition for Review, much less in a brief. Defendants tried the same ploy before the Court of Appeal. As the Court rightly admonished the Defendants, "These policy arguments are beyond the scope of this court's authority in this appeal. Such arguments should be directed to Congress." Slip Op. 67. Nor need this Court adjudicate the various policy arguments that Defendants wish to make.

CONCLUSION

This Court should deny review of Defendants' petitions.

Dated: November 14, 2008

ROPERS, MAJESKI, KOHN & BENTLEY

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KRIS W. KOBACH

RULE 14(c) CERTIFICATION

Pursuant to California Rules of Court, rule 14 (c) I hereby certify that the foregoing Answer to Petitions for Review (excluding the table of contents and table of authorities) is proportionately spaced in Times New Roman 13-point type and contains 4,639 words as counted by Microsoft word processing software.

Dated: November 14, 2008

ROPERS, MAJESKI, KOHN & BENTLEY

By: _____
MICHAEL J. BRADY
Attorneys for Defendants/Appellants
ROBERT MARTINEZ, et al.

KRIS W. KOBACH

CASE NAME: **ROBERT MARTINEZ et al. v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.**

ACTION NO.: **C054124**

PROOF OF SERVICE

METHOD OF SERVICE

☒ First Class Mail ☐ Facsimile ☐ Messenger Service

☐ Overnight Delivery ☐ E-Mail/Electronic Delivery

1. At the time of service I was over 18 years of age and not a party to this action and a Citizen of the United States.

2. My business address is 1001 Marshall Street, Suite 300, Redwood City, CA 94063.

3. On November 14, 2008, I served the following documents:

ANSWER OF PLAINTIFF MARTINEZ, ET AL. TO PETITIONS FOR REVIEW FILED BY DEFENDANTS THE REGENTS OF U. C. AND COMMUNITY COLLEGES

4. I served the documents on the persons at the address below (along with their fax numbers and/or email addresses if service was by fax or email):

Edmund G. Brown, Attorney General of the State of California Douglas M. Press, Senior Assistant Attorney General Julie Weng-Gutierrez, Supervising Deputy Atty General Department of Justice 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, CA 94244-2550	Attorney for defendants: Marshall Drummond, Chancellor, and the Board of Governors of the California Community Colleges Tel: 916-445-8223 Fax: 916-324-5567 julie.wenggutierrez@doj.ca.gov
Ms. Andrea M. Gunn Office of the Chancellor California State University 401 Golden Shore, 4th Floor Long Beach, CA 90802	Attorney for defendants Charles B. Reed, Chancellor and The California State University System agunn@calstate.edu Tel: 562-951-4478 Fax: 562-951-4956
Ethan Schulman Folger Levin & Kahn, LLP 275 Battery Street, 23rd floor San Francisco, CA 94111	Tel: 415-986-2800 Fax: 415-986-2827 eschulman@flk.com

Christopher Patti, Esq. Office of the General Counsel University of California 1111 Franklin Sreet, 8th Floor Oakland, CA 94607	Attorneys for defendants: Robert C. Dynes, U.C. President, and Regents of the University of California Tel: 510-987-9739 Fax: 510-987-9757 christopher.patti@ucop.edu
Bradley S. Phillips Fred A. Rowley, Jr. Gabriel P. Sanchez Mark R. Yohalem MUNGER, TOLLES & OLSON LLP 355 South Grand Avenue, 35th floor Los Angeles, CA 90071-1560	Attorneys for Amici Curiae Telephone: (213) 683-9100 Facsimile: (213) 687-3702
Robert Rubin LAWYERS' COMMITTEE FOR CIVIL RIGHTS 131 Steuart Street, Suite 400 San Francisco, CA 94105	Telephone: (415) 543-9444 Facsimile: (415) 543-0296
Sharon L. Browne Ralph W. Kasarda Pacific Legal Foundation 3900 Lennane Drive, Suite 200 Sacramento, CA 95834	Attorneys for Amicus Curiae Pacific Legal Foundation
Cynthia Valenzquela Nicholas Espiritu Kristina Campell MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND 634 South Spring Street, 11th Floor Los Angeles, CA 90014	Telephone: (213)-629-2512 Facsimile: (213)-629-0266
Clerk of the Court Yolo County Superior Court 725 Court Street, Rm 103 Woodland, CA 95695	
Clerk of the Court of Appeal Third Appellate District 900 N. Street, Suite 400 Sacramento, CA 95814-4869	
Kris W. Kobach University of Missouri Immigration Reform Law Institute 4701 N. 130th Street Kansas City, KS 66109	

5. I served the documents by the following means:

a. ☒ By United States mail: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses specified in item 4 and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business'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, in a sealed envelope with postage fully prepaid.

I am employed in the office of a member of the bar of this court at whose direction the service was made. I certify under penalty of perjury that the foregoing is true and correct.

Date: November 14, 2008

Cynthia Murphy
Type Name

Cynthia Murphy
Signature