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,
Defendants and Respondents.

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs agree this case warrants Supreme Court review. They nevertheless oppose Defendants' petition seeking review of the Court of Appeal's central holdings: that Education Code Section 68130.5 is preempted by federal law, and that it violates the Privileges or Immunities Clause of the Fourteenth Amendment. The various grounds Plaintiffs offer for that position lack merit.

I.

PLAINTIFFS' CONTENTION THAT REVIEW IS FORECLOSED LACKS MERIT.

Plaintiffs' primary contention is that Defendants purportedly have "forfeited" the opportunity to seek review of the Court of Appeal's "implied preemption holding," and that for that reason, review by this Court would be "pointless." Ans. at 1-4. Plaintiffs' contention is groundless, for several reasons.

First, Plaintiffs' contention that Defendants somehow "forfeited" any challenge to the Court of Appeal's decision by limiting their petitions solely to its express preemption rulings is simply wrong. In fact, Defendants' petitions squarely posed the overarching question whether Section 68130.5 is preempted by federal law, without limiting the scope of the issues presented. Indeed, it is difficult to imagine how the Attorney General could have framed the question more broadly than he did:

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

AG Pet. at 1. That should be the end of the matter.

Second, Plaintiffs' repeated contention that the Court of Appeal independently reached "three preemption holdings" (Ans. at 17) cannot survive a fair reading of that opinion. In fact, the Court of Appeal did not squarely hold, as an independent ground for its ruling, that Section 68130.5 is impliedly preempted by 8 U.S.C. §1601. Ans. at 1-2.[1] While the Court

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[1]Section 1601 is a legislative statement of policy found at the beginning (continued . . .)

of Appeal did refer to that statute in a brief discussion of "obstacle" preemption (slip op. at 64-66), that discussion was subsumed in the court's overall discussion of whether Section 68130.5 is preempted by Section 1623, as the headings in the court's opinion indicate. *Id.* at 61 ("Section 68130.5 is Preempted by Title 8 U.S.C. Section 1623"). Likewise, the conclusion the Court of Appeal reached immediately following that discussion, and its principal holding, was that "plaintiffs have stated a viable claim that title 8 U.S.C. section 1623 preempts sections 68130.5." *Id.* at 67. Defendants have squarely sought review of that holding.

Moreover, contrary to Plaintiffs' position, the Court of Appeal did not clearly distinguish between express and implied theories of preemption. Rather, that court interchangeably used language that could be read as grounding its opinion on either express or "conflict" preemption. *See id.* at 4 (opining that "the most significant issue" in the case is whether Section 68130.5 "violates" Section 1623); *id.* at 63 (concluding that "[i]t is impossible for *defendants* to comply with both state and federal requirements, because section 68130.5 conflicts with title 8 U.S.C. section 1623").[2] Defendants have sought review of that key holding.

Third, in all events, this Court "may decide any issues that are raised or fairly included in the petition or answer." CAL. R. CT. 8.516(b)(1). Thus, all grounds for the Court of Appeal's preemption ruling are properly before this Court. *People v. Perez*, 35 Cal. 4th 1219, 1228 (2005) ("While this precise statutory issue was not part of the People's petition for review, we may consider all issues fairly embraced in the petition").

(. . . continued)
of the same chapter that contains both Sections 1621 and 1623. It was enacted in 1996 as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA" or "PRWORA").

[2]Conflict preemption is found "when simultaneous compliance with both state and federal directives is impossible." *Viva! Int'l Voice for Animals v. Adidas Prom. Retail Ops., Inc.*, 41 Cal. 4th 929, 935 (2007). That doctrine is closely related to, and often lumped together with, "obstacle" preemption. *Id.* at n.3 ("the categories of preemption are not rigidly distinct," and both this Court and the United States Supreme Court "have often identified only three species of preemption, grouping conflict preemption and obstacle preemption together in a single category") (citations and internal quotations omitted).

II.

PLAINTIFFS DO NOT DISPUTE THAT THE COURT OF APPEAL'S DECISION PRESENTS IMPORTANT QUESTIONS OF LAW.

Plaintiffs oppose Defendants' petition for review on the ground that "Defendants have failed to demonstrate the existence of any judicial disagreement or controversy on any of these questions." Ans. at 1; *see also id.* at 13 ("no judicial disagreement" on issues); *id.* at 17, 20 (same). But as Plaintiffs undoubtedly know, the need for uniformity of decision is not the sole basis for review by this Court. Plaintiffs do not deny – nor could they credibly do so – that review by this Court is necessary "to settle an important question of law" (CAL. R. CT. 8.500(b)(1)): the constitutionality of Section 68130.5, a state statute that affects thousands of students in the state's public college and university systems.

This Court repeatedly has recognized that where a Court of Appeal decision raises substantial questions bearing on the constitutionality of a state statute, review by this Court to resolve the issues is appropriate.[3] Likewise, where, as here, the ground for a challenge to state legislation is that it is preempted, expressly or impliedly, by federal law, that issue is particularly suitable for resolution by this Court.[4] Consistent with this body of authority, this Court should have the final word on whether an important state statute conflicts with federal law, which almost by definition presents an important question of law.

Finally, Plaintiffs nowhere respond to Defendants' showing that no fewer than nine other states have enacted substantially similar legislation, the validity and enforceability of which may be called into question by the

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[3] *See, e.g., In re Marriage Cases*, 43 Cal. 4th 757 (2008) (constitutional validity of California marriage statutes); *Marine Forests Soc'y v. California Coastal Comm'n*, 36 Cal. 4th 1 (2005) (constitutional challenge to provisions of California Coastal Act); *In re Marriage of Harris*, 34 Cal. 4th 210 (2004) (constitutionality of Family Code provision on visitation rights).

[4] *See, e.g., Farm Raised Salmon Cases*, 42 Cal. 4th 1077 (2008), *petition for cert. filed sub nom. Albertson's, Inc. v. Kanter*, No. 07-1327 (Apr. 18, 2008); *Viva! Int'l Voice for Animals v. Adidas Promotional Retail*, 41 Cal. 4th 929 (2007); *Jevne v. Superior Court*, 35 Cal. 4th 935 (2005); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910 (2004).

Court of Appeal's decision. *See* Pet. at 9-10 & Appendix; *see also Day v. Bond*, 500 F.3d 1127, *reh'g and reh'g en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008) (affirming dismissal of challenge to similar Kansas statute). The Court of Appeal's decision therefore presents issues of both statewide and national importance that warrant review by this Court.

III.

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER SECTION 68130.5 IS PREEMPTED BY FEDERAL LAW.

Plaintiffs' discussion of the merits of the Court of Appeal's decision repeatedly fails to grapple with key facts and authorities discussed in Defendants' Petitions for Review.

A. Plaintiffs Ignore The Fundamental Presumption Of Constitutionality.

As we showed in our Petition for Review, the Court of Appeal's holding that Section 68130.5 is preempted by federal law is inconsistent with the presumption of constitutionality to which state legislation is entitled. Pet. at 10-11. That is because the Court of Appeal, having found the language of Section 68130.5 to be "ambiguous" (slip op. at 49), ignored its duty to resolve any ambiguity in favor of a construction that would have rendered the statute constitutional, but instead took the opposite approach. *Id.* The Attorney General emphasized a closely related point in his own petition for review, arguing that the Court of Appeal improperly rewrote Section 68130.5 by imputing an intent to the Legislature that is expressly contradicted by the plain words of the statute, thereby violating its duty to resolve all doubts in favor of the statute's constitutionality. AG Pet. at 6-9.

The presumption of constitutionality is a key aspect of our system of government. As this Court has observed, "one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1086

(2004); *accord*, *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1302 (2006) ("Unconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity") (citations omitted).

Revealingly, Plaintiffs say not one word about this fundamental principle. Indeed, Plaintiffs barely address the plain language of Section 68130.5 at all, which necessarily must be the starting point for any analysis of that statute, and they are entirely silent as to its legislative history. Yet both the plain statutory language and the legislative history establish that Section 68130.5 does not confer a benefit on undocumented immigrants "on the basis of residence." *See* Pet. at 15-20.

Rather than address the statutory language and legislative history that are at the heart of this facial attack on the constitutionality of Section 68130.5, Plaintiffs instead improperly, and repeatedly, rely on a misreading of letters that the trial court *excluded* in evidentiary rulings affirmed by the Court of Appeal. *See* Ans. at 6 (quoting November 9, 2001 letter from General Counsel of the Regents of the University of California); *id.* at 11 (quoting same letter); *cf.* slip op. at 26-27 (affirming trial court's ruling denying judicial notice of various letters, including same "letter from General Counsel to the UC Regents"); 23 CT 6538-39 (trial court ruling).

B. The Court of Appeal's Holding That Section 68130.5 Is Preempted By 8 U.S.C. §1621 Is Inconsistent With The Statutory Savings Clause.

As we showed in our Petition, the Court of Appeal's holding that Section 68130.5 is preempted by 8 U.S.C. §1621 is contradicted by the plain language of the savings clause found in that statute, by which Congress expressly *authorized* states to enact precisely such legislation. Pet. at 12-15. Plaintiffs acknowledge the existence of this savings clause or "safe harbor." Ans. at 14 ("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)"). They nevertheless insist that the Court of Appeal's contorted reading of the federal statute is the only possible reading and is supported by "two prior decisions on the subject." *Id.* at 14-17. Plaintiffs are wrong on both counts.

First, in contending that the Court of Appeal correctly concluded that Section 68130.5 does not "affirmatively provide" for eligibility of undocumented immigrants, Plaintiffs conveniently ignore the statute's reference to "person[s] without lawful immigration status" (EDUC. CODE §68130.5(a)(4)), which does just that. Nor do they mention the Court of Appeal's own admission that Section 68130.5 "*does* indicate that illegal aliens are eligible." Slip op. at 70 (emphasis added). Plaintiffs then insist that Defendants have not offered "a shred of case support or statutory support" for their position (Ans. at 16), but they do not respond to the multiple citations in our Petition for the proposition that Congress knows how to mandate that a law expressly cite a statute when it wishes to do so. *See* Pet. at 14. Instead, Plaintiffs rely exclusively on the legislative history of Section 1621, which is internally inconsistent, as it contains two successive sentences that appear to supply varying definitions of the phrase "affirmatively provides for such eligibility." *See* Pet. at 15 n.9. Notably, as we observed in our Petition (*id.* at 14), not one of the ten state legislatures to have enacted similar legislation understood Section 1621 to impose any requirement that it expressly reference that statute, as the Court of Appeal erroneously concluded. Plaintiffs have no response.

Second, neither of the decisions Plaintiffs cite supports the Court of Appeal's holding. Plaintiffs erroneously contend that *League of United Latin Am. Citizens v. Wilson ("LULAC")*, 997 F. Supp. 1244 (C.D. Cal. 1997) "applied 8 U.S.C. §1621 consistently with the Court [of Appeal] below." Ans. at 16. In fact, that case neither "applied" nor construed Section 1621(d). In the portion of that opinion relied upon by Plaintiffs, the court held only that certain benefits denial provisions of Proposition 187 were preempted because the PRA had occupied the field of regulation of public benefits to aliens. *Id.* at 1253-58. In describing the PRA, all the court said about Section 1621(d) was that "a state may override the general bar in Section 1621(a) only by enacting a state law after August 22, 1996 that provides state or local benefits to aliens not 'qualified' under the PRA." *Id.* at 1255. However, because Proposition 187 was an initiative measure which was submitted to the voters in the November 1994 general election

(*id.* at 1249), there was no contention that it fell within Section 1621(d), nor did the court apply that provision.

Similarly, *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004) held that the PRA "does not consider mere admission or attendance at a public post-secondary institution to be a public benefit." *Id.* at 605 n.18; *id.* at 605 ("Simply put, access to public higher education is not a benefit governed by PRWORA"). Accordingly, the court rejected plaintiffs' argument that defendants' policy of denying admission to illegal aliens was preempted by the PRA. *Id.* at 605. While that court also mentioned Section 1621(d) in passing (*id.*), it did not construe that savings clause, much less address or resolve any claim that a state statute such as Section 68130.5 fell within it. Thus, nothing in either case remotely "supports" the Court of Appeal's decision.

C. The Court of Appeal's Holding That Section 68130.5 Is Preempted By 8 U.S.C. §1623 Is Inconsistent With Its Plain Language And Legislative History.

Plaintiffs' defense of the Court of Appeal's holding that Section 68130.5 is preempted by 8 U.S.C. §1623 (Ans. at 4-13) suffers from the same shortcoming: Plaintiffs ignore the facts and authorities that contradict their position.

Rather than first address the plain statutory language of Section 1623, Plaintiffs instead jump directly to its legislative history. Ans. at 7-10. Under well-accepted principles of statutory interpretation, however, Plaintiffs have the cart before the horse. "When faced with a question of statutory interpretation, we look first to the language of the statute." *Copley Press*, 39 Cal. 4th at 1284 (citation omitted). By its plain terms, Section 1623 provides that "an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence within a State* . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." 8 U.S.C. §1623(a) (emphasis added). Revealingly, Plaintiffs summarize Section 1623 as reflecting Congressional intent "to prohibit any state from offering in-state tuition rates to any illegal alien" (Ans. at 7),

thereby entirely *omitting* the qualifying phrase "on the basis of residence within a State." Plaintiffs' failure to attribute any meaning to that key phrase violates another key canon of statutory interpretation: "In interpreting that [statutory] language, we strive to give effect and significance to every word and phrase." *Copley Press*, 39 Cal. 4th at 1284 (citation omitted); *see also id.* at 1285 ("Well-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative" (internal quotations and citations omitted)).

As we have shown, Section 68130.5 does *not* condition eligibility for the exemption from nonresident tuition "on the basis of residence within a state": the statute does not mention residence, and both residents and nonresidents alike may and do qualify under the statute. *See* Pet. at 16-18. Likewise, the legislative history of Section 68130.5 establishes that the Legislature intended to provide tuition relief to California high school graduates *without regard to* residence, as it was well aware that the legislation would apply to, among others, border area students, boarding school students, and U.S. residents from other states. *See id.* at 18-20. Again, Plaintiffs have no response.

Because, as Plaintiffs again concede (Ans. at 7), the language of Section 1623 is unambiguous,[5] their nearly exclusive reliance on its legislative history is misplaced. "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also, e.g., Dept. of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) ("reference to legislative history is inappropriate when the text of the statute is unambiguous"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (same).

Even if resort to the legislative history of Section 1623 were appropriate, it does not support the Court of Appeal's analysis. In a one-line summary of Section 1623 contained in a much longer summary of the

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[5]Plaintiffs made the same concession below. *See* AOB at 8 ("Appellants maintain that the text [of Section 1623] is unambiguous on this matter").

entire immigration bill, a conference report stated briefly that Section 1623 "provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." 6 CT 1412. In addition, two senators made similar brief statements during debate on the floor. *See* Ans. at 9-10. However, none of these references mentioned or explained the key statutory phrase "on the basis of residence in a State." Nor did they refer to the "unless" clause at the end of the statute, which actually *permits* states to make undocumented immigrants eligible for in-state tuition rates if they also allow out-of-state U.S. citizens to qualify for those rates. So this limited legislative history is at best unhelpful, and at worst actually *contradicts* the statute. It is certainly not explicit and clear enough to override the plain language of the statute itself. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) ("While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the plain meaning of the statutory language" (internal quotations and citation omitted)).

Plaintiffs also contend that the Court of Appeal's holding is "entirely consistent with that of the only federal court to interpret the substantive meaning" of Section 1623. Ans. at 13 (citing *Equal Access Educ.*). Plaintiffs again misread that district court opinion. *See* pg. 7, *supra*. In the cited portion of its opinion, the court rejected the argument that Section 1623 reflected an implicit recognition by Congress that illegal aliens are entitled to attend post-secondary educational institutions, holding that Congress had not occupied the field of admission but had left that issue to the states. 305 F. Supp. 2d at 606-07. For that reason, the court had no occasion to construe the specific statutory language involved here, much less to determine whether a state statute granting certain benefits to students including undocumented immigrants was preempted by Section 1623. That is an issue of first impression that is presented by this case.

Finally, Plaintiffs contend that the record establishes that Section 68130.5 was "designed to evade this federal law" because Governor Davis had vetoed a precursor to AB 540 on the ground that it might conflict with Section 1623. Ans. at 5-6. But while Plaintiffs purport to find the same

Governor's later approval of AB 540 "[i]nexplicabl[e]" (*id.* at 5), what they fail to mention is that after the Governor initially raised that concern, lawmakers sought the opinion of California's Chief Legislative Counsel, who concluded there was no such conflict because Section 1623 only prohibited making undocumented immigrants eligible "on the basis of residence within a State," and the legislation did not condition eligibility for the exemption on residence. *See* Pet. at 6.[6] Likewise, Plaintiffs disregard the Assembly Committee's conclusion, in view of that opinion, that it was "unlikely" that the legislation was inconsistent with existing federal law. *See id.* Most significantly, they do not mention the express finding, by the Legislature as a whole, that "[t]his act . . . does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code." *See id.* at 5 (quoting AB 540 ch. 814, §1(a)(5) (6 CT 1666)).

In short, the record establishes *not* that the Legislature and the Governor sought to "evade" federal law, but that they attempted to *comply with* federal law by carefully crafting legislation consistent with its strictures. Indeed, that inference, rather than Plaintiffs' unsupported accusation, is compelled by the presumption of constitutionality. The Court of Appeal's disagreement with the Legislature's determination that the resulting legislation is entirely consistent with federal law (and with similar determinations by the legislatures of nine other states) presents a significant interbranch conflict that warrants review by this Court.

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[6]Opinions of the Legislative Counsel are entitled to "great weight." *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 17 (1990) ("Indeed the rule is particularly compelling as to opinions of the Legislative Counsel, since they are prepared to assist the Legislature in its consideration of pending legislation").

IV.

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER SECTION 68130.5 VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE.

Finally, Plaintiffs also largely fail to respond to our discussion of the Court of Appeal's holding that Section 68130.5 violates the rights of nonresident students under the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Pet. at 23-25. Instead, they merely reiterate their assertion that the Clause was violated, without citing any pertinent authority that supports that novel claim. Ans. at 17-20. Their argument warrants only a brief response.

At the outset, Plaintiffs ignore the key defect in their claim: that Section 68130.5 treats U.S. citizens and undocumented immigrants alike, as the Court of Appeal itself expressly acknowledged. Slip op. at 72 ("section 68130.5 does not, on its face, allow illegal aliens a benefit denied to U.S. citizens from sister states"). *See* Pet. at 23-24. Plaintiffs offer no explanation for the Court of Appeal's self-contradiction on this key point.

Nor, critically, do Plaintiffs cite any pertinent authority that supports their claim, or respond to the authorities we cited which establish that the Privileges or Immunities Clause does not guarantee that U.S. citizens will always be treated more favorably than non-citizens. *See* Pet. at 25-26; *Matthews v. Diaz*, 426 U.S. 67, 79 n.12 (1976) ("Several statutes treat certain aliens more favorably than citizens" (citations omitted)).

Plaintiffs insist that *Saenz v. Roe*, 526 U.S. 489 (1999) is "controlling U.S. Supreme Court precedent on the Fourteenth Amendment's Privileges and Immunities Clause." Ans. at 18. However, Plaintiffs' reliance on *Saenz* is badly misplaced. In *Saenz*, the Court invalidated a durational residency requirement that limited the benefits that could be received by new residents who moved to California from other states. The Court said that the right to travel includes "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. That language described a component of the right to travel that *Saenz* held was "expressly protected" by the Privileges and Immunities Clause found in Article IV, § 2 of the Constitution, which provides that "[t]he Citizens of each State shall be entitled to all Privileges

and Immunities of Citizens in the several States." *Id.* at 501.[7] The Court's use of the word "aliens" thus referred to U.S. citizens of *other states*, *not* nationals of other countries:

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

Id. (quoting *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. Ed. 357 (1869) (footnote omitted)). *Saenz* has nothing to do with the rights of U.S. citizens compared to those of non-citizens, whether they are legally or illegally present in the country. The Privileges or Immunities Clause protects a citizen of the United States against actions by a state that abridge his or her federal rights as a citizen; it says nothing whatever about what those rights are in comparison to those of non-citizens.

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[7]Plaintiffs contend that cases decided under the Privileges and Immunities Clause of Article IV are "irrelevant." Ans. at 18-19. Not so: as *Saenz* itself noted, "[t]he Framers of the Fourteenth Amendment modeled [the Privileges or Immunities] Clause upon the 'Privileges and Immunities' Clause found in Article IV." 526 U.S. at 502 n.15.

CONCLUSION

For the foregoing reasons, Defendants' Petitions for Review should be granted.

Respectfully,

DATED: Nov. 24, 2008

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CONCLUSION

For the foregoing reasons, Defendants' Petitions for Review should be granted.

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

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the attached Reply in Support of Petition for Review contains 4,154 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: November 24, 2008.

By 

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PROOF OF SERVICE

I, Catherine A. Rogers, state:

My business address is Embarcadero Center West, 275 Battery Street, 23rd Floor, San Francisco, California 94111. I am over the age of eighteen years and not a party to this action.

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Catherine A. Rogers

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