
In the
Supreme Court
of the
State of California

ROBERT MARTINEZ, et al.,

Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT · CASE NO. C054124
SUPERIOR COURT OF YOLO COUNTY · HON. THOMAS E. WARRINER · NO. CV052064

[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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INTRODUCTION

An introduction to, and expressed interest of, *Amici Curiae* is fully set forth in the application for leave to file, which accompanies this brief. *Amici*, comprised of educational advocacy groups, immigrant rights groups and individual Professors and Academics, join in this brief. *Amici* feel that Plaintiffs' attack on California Education Code Section 68130.5 is not only unwarranted and unsupported by the law, but also threatens to erect an insurmountable barrier for high achieving high school graduates from pursuing a college education in hopes of bettering themselves and benefiting their communities as a whole.

This potential barrier not only threatens California's high school graduates but could also extend to all areas of the country where states have legitimately and lawfully enacted statutes similar to Section 68130.5, as well as to those states that are strongly considering enacting such laws. Plaintiffs, who can show no harm suffered as a result of laws such as Section 68130.5, should not be allowed to supplant the will of the California State Legislature for the purpose of advancing their own agenda. *Amici*, who come from states that have taken the initiative to enact laws that give high school graduates the chance to afford college, believe that providing all students, U.S. citizens as well as undocumented immigrants, the opportunity to go to college is a positive step towards promoting education throughout the United States, while at the same time taking a step towards eliminating a perpetual underclass in our country.

Amici set forth the following arguments in this brief:

- 1) Plaintiffs' preemption arguments, which attempt to mischaracterize and rewrite Sections 1623 and 1621, fail because a straight reading of the unambiguous, plain language of both federal statutes makes clear that undocumented immigrants are permitted to receive postsecondary education benefits as long as certain conditions are met and Section

68130.5 complies with these conditions; 2) Plaintiffs' Privilege and Immunities argument not only fails at the threshold, but even if Plaintiffs could advance a Privileges and Immunities argument, under the correct rational basis analysis, California has a substantial interest in providing in-state tuition for all of its high school graduates, including undocumented immigrants, and Section 68130.5 is rationally related to this interest; and 3) while not aimed specifically at benefiting undocumented immigrants, Section 68130.5 benefits these students, which in turn benefits the state as a whole.

ARGUMENT

I. EDUCATION CODE SECTION 68130.5 (AB 540) IS NOT PREEMPTED BY 8 U.S.C. 1623 OR 1621

For all of the discussion and analysis of whether Section 68130.5 is preempted by Sections 1623 and 1621, the answer is clear assuming this Court adheres to the basic principles of statutory construction, namely that without ambiguity the plain language of a statute controls. A straight reading of the unambiguous, plain language of 1623 and 1621 reveals that under certain conditions, states are absolutely free to pass laws that provide for in-state tuition for undocumented immigrants.

Section 68130.5 abides by the unambiguous, plain language of Sections 1623 and 1621 and meets the conditions necessary to enable California to offer any student, whether a U.S. citizen or an undocumented immigrant, the opportunity to be eligible for in-state tuition at institutions of higher education. Faced with this reality, Plaintiffs had no choice but to wholly ignore the plain language of the federal statutes and attempt to rewrite the statutes to fit their case, while at the same time incorrectly interpreting Section 68130.5 in a way that is completely inconsistent with the plain language of that statute. The Court of Appeal's adoption of Plaintiffs' misinterpretation and rewrite of the statutes not only ignored

the fundamental principles of statutory construction, but thwarted the will of the California Legislature to the detriment of students who are only able to afford a college education because of Section 68130.5. Accordingly, this Court should reverse the Court of Appeal and hold that Section 68130.5 is not preempted by 8 U.S.C. 1623 or 1621.

A. Section 1623 Does Not Expressly Preempt Section 68130.5

In a federal preemption challenge, if the language of the statute is unambiguous, the plain meaning of the actual words in the statute controls and the Court need not look any where else to determine the intent of Congress in drafting the statute. *See Miklosy v. Regents of the University of California*, 44 Cal. 4th 876, 888 (2008) (“We begin with the statutory language because it is generally the most reliable indication of legislative intent. If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls.”) (citations omitted). The relevant provision of 1623 states:

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

8 U.S.C. § 1623(a) (emphasis added). As will be demonstrated below, a straight reading of Section 1623 reveals that this statute is unambiguous on its face, and the plain language of Section 1623 does not expressly preempt Section 68130.5.

1. Section 1623 Does Not Foreclose an Undocumented Immigrant From Being Eligible For a Postsecondary Education Benefit

Contrary to Plaintiffs’ misguided belief that Section 1623 completely forecloses an undocumented immigrant from ever being eligible

for a postsecondary education benefit, the use of the word “unless” in Section 1623 clearly establishes that Congress merely enacted a condition precedent for states who might pass a law making an undocumented immigrant eligible for a postsecondary education benefit.¹ In other words, the use of the word “unless” means that states can make an undocumented immigrant eligible for a postsecondary education benefit as long as the conditions set forth in Section 1623 are met. Simply put, if Congress intended to enact a flat bar on undocumented immigrants’ eligibility for a postsecondary education benefit, Congress would not have used the modifier “unless.”² Thus, given that Section 1623 does not completely foreclose an undocumented immigrant from being eligible for a postsecondary education benefit, the California Legislature was free to enact a law providing such a benefit, so long as the law met the conditions set forth in Section 1623. The two conditions in Section 1623 that must be met are: 1) an undocumented immigrant must not be eligible for a postsecondary education benefit on the basis of residence; and 2) if an undocumented immigrant is eligible for a postsecondary education benefit, a U.S. citizen must also be eligible for that benefit.

2. Section 68130.5 Complies With Section 1623 Because Eligibility For In-State Tuition is Not Based on Residence

Section 68130.5 is in accord with the first condition set forth in Section 1623 because a California student’s eligibility for in-state tuition

¹ See Letter from Professor Michael Olivia et al. to the Texas Attorney General (October 30, 2008), <http://lawprofessors.typepad.com/immigration/2008/10/letter-from-pro.html>.

² See *id.*

is not based on residence, the criteria clearly established in the plain language of Section 1623. It is undeniable that under Section 68130.5, students are eligible for in-state tuition only if they meet the following requirements:

- (1) High school attendance in California for three or more years;
- (2) Graduation from a California high school or attainment of the equivalent thereof;
- (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-2002 academic year; and
- (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

AB 540 ch. 814, § 2(a).

These four requirements are the only requirements for a student to be eligible under the plain language of Section 68130.5. Thus, despite Plaintiffs' strained interpretation of Section 68130.5, nowhere in the statute is residence a requirement or a condition for eligibility for in-state tuition. Instead, a student's eligibility for in-state tuition under Section 68130.5 is entirely based on attendance at, and graduation from, a California high school. Accordingly, Section 68130.5 has met the first condition of Section 1623 for making an undocumented immigrant eligible for in-state tuition by not basing the eligibility on the basis of residence.

Still, Plaintiffs argue, mistakenly, that Congress intended to stop states from offering in-state tuition to undocumented immigrants

altogether, and therefore the Regents' argument that the statute allows states to offer in-state tuition using some criteria other than residence is nonsensical. Plaintiffs' Answering Brief ("P.A.B.") 17. It is Plaintiffs turning a blind-eye to the plain language of Section 1623, however, that is truly nonsensical. It is simply unfathomable that Congress did not intend to make residency the criteria for restricting a state's ability to make undocumented immigrants eligible for a postsecondary educational benefit. Congress would not have specifically inserted "on the basis of residence" immediately following the word "eligible" if the legislative intent was to completely foreclose a state's ability to make an undocumented immigrant eligible for a postsecondary education benefit. If Congress truly intended to make an undocumented immigrant ineligible for a post-secondary benefit under any circumstance, Congress could have done this by simply drafting the statute to read: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States **shall not be eligible for any postsecondary education benefit.**" Period. Instead, Congress chose to specifically identify, by using "on the basis of residence," the specific criteria upon which a state could not make an undocumented immigrant eligible for a postsecondary education benefit. Consequently, within the plain meaning of Section 1623, states are able to make an undocumented immigrant eligible for a postsecondary education benefit on a neutral basis other than residence, such as attendance at and graduation from high school within the state, just as California did with Section 68130.5.

Of course, Plaintiffs would like for the conservative Congressman and Senator who made statements about the law to be the mouth piece for the entire Congress. A couple of isolated comments by these men giving their view on the law, however, cannot speak for all of Congress. This is especially true when, as here, Congress has spoken clearly in the text of the statute. *See Green v. Bock Laundry Mach. Co.*,

490 U.S. 504, 528 (1989) (Scalia, J. concurring) (“The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is ... most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it)...”) (emphasis in original).³ Thus, because the plain language of Section 1623 is clear and unambiguous, it is entirely unnecessary to look at these extraneous statements for Congressional intent; the intent is clear in the ordinary meaning of the words used in the statute. *See Ardestani v. INS*, 502 U.S. 129, 135-36 (1991) (Unless “a contrary legislative intent is clearly expressed...the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used.”) (citations omitted).

Ironically, Plaintiffs argue that the Defendants are “faced with the plain language of 8 U.S.C. 1623” (P.A.B. 19), but then retreat from this position when the plain language works against them, as is the case with the phrase “on the basis of residence.” Handcuffed by the fact that Congress did indeed choose to add in the qualifying language “on the basis of residence” instead of simply outright denying undocumented immigrants eligibility for postsecondary education benefits, Plaintiffs have attempted to put their own spin on the meaning “eligible on the basis of residence.” According to Plaintiffs, “eligible on the basis of residence” really means “eligible for resident tuition rates.” P.A.B. 22. This wholly untenable

³ The fact that select Senators or Representatives do not speak for the entire Congress holds true for the amicus brief submitted by Representative Lamar Smith and Representative Steven King.

proposition not only changes the actual wording of the statute, but conveniently wipes “on the basis of” right out of the written law. This position simply strains all credibility and flies in the face of the most basic principles of statutory construction. Plaintiffs are not just misinterpreting the statute, they are removing key words and adding language that is clearly not there. Plaintiffs cannot be permitted to rewrite the statute in places where the plain language cannot be squared with their arguments.

The fact is, the plain language of Section 1623 clearly establishes that Congress did not enact a complete bar on making undocumented immigrants eligible for a postsecondary benefit, but instead simply prohibited a state from making an undocumented immigrant eligible for a postsecondary benefit on the basis of residence. As mentioned above, if Congress wanted to unequivocally make undocumented immigrants ineligible for resident tuition rates, it would have written the law to say just that. It did not, and Plaintiffs cannot now rewrite the law to circumvent the plain language of the statute in an attempt to resuscitate their failed claim.

For all the faults with the Court of Appeal’s decision, at least the Court understood that residence—and residence alone—was the restriction placed on states when making an undocumented immigrant eligible for a postsecondary educational benefit. Where the Court of Appeal went off course, however, is reading a “de facto” residency requirement into Section 68130.5.⁴ The Court of Appeal clearly could not

⁴ The Court of Appeal also incorrectly determined that Section 68130.5 was enacted to benefit undocumented immigrants. *See* Slip op. 57. The Court’s attempt to string together snippets from the Legislative history is unavailing to support this proposition. But even assuming, *arguendo*, that this was the intent of the California Legislature, this would not prove fatal to Section 68130.5. Section 1623 does not in any way prohibit states from enacting legislation that would benefit undocumented immigrants. As stated above, Section 1623 only has two conditions: an undocumented

find a residence requirement in the plain language of Section 68130.5, so the Court interpreted the requirement of attendance at a California high school for three years as a de facto residence requirement because “[a] reasonable person would assume that a person attending a California high school for three years also lives in California.” Slip op. 48. This analysis is just plain wrong. What a reasonable person would assume, first and foremost, is that the requirements for eligibility found in the unambiguous, plain text of Section 68130.5 was the intended requirements for eligibility without having to try to figure out if there are alternative meanings to the words in the statute. Indeed, the Court of Appeal noted at the outset that the Court assumes that Plaintiffs were denied an exemption from non-resident tuition because they did not attend a California high school for three years and attain a California high school diploma or the equivalent. Slip op. 7, fn. 5. This was a sound assumption given that attendance and graduation from a California high school is the requirement of Section 68130.5, not residency. A reasonable person would also assume, based on a straightforward reading of 68130.5, that any student who attended and graduated from a California high school would be eligible for an exemption for nonresident tuition, regardless of whether that student’s residency was in Arizona or Mexico or anywhere else.

Nevertheless, the court applied the wrong standard—what a reasonable person assumes is not the analysis for ascertaining the meaning of a statute. Instead, the Court must look to the statutory language and presume that the plain meaning of the statute controls. *See Miklosy*, 44 Cal.

immigrant must not be eligible for a postsecondary education benefit on the basis of residence and if an undocumented immigrant is eligible for a postsecondary education benefit, a U.S. citizen must also be eligible for that benefit.

4th at 888; *see also Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737 (2004) (“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.”). The Court of Appeal understood Section 1623 prohibited states from making undocumented immigrants eligible on the basis of residence, but the Court erred in not giving the plain, unambiguous words of the statute their ordinary meaning and by reading into Section 68130.5 a “de facto” residence requirement.

3. Section 68130.5 Complies with Section 1623 Because U.S. Citizens Are Eligible For In-State Tuition in the Same Way Undocumented Immigrants Are Eligible

As mentioned above, along with the condition that undocumented immigrants not be eligible for a postsecondary education benefit on the basis of residence, Section 1623 also expressly conditions undocumented immigrants’ eligibility for postsecondary education benefits on United States citizens being *eligible* for the same benefit. By definition, eligible means fitted or qualified to be chosen or used.⁵ Eligible does not mean that one automatically receives the benefit even if he or she does not qualify for it. Thus, the words “also eligible” in Section 1623 simply mean that all U.S. citizens must have the same opportunity to qualify to participate in the benefit if undocumented immigrants are given the opportunity to qualify to participate in or be chosen for the benefit. Section 68130.5 comports with this second condition because all United States citizens are eligible for in-state tuition if they meet the requirements of

⁵ Webster’s Third New International Dictionary (2002).

Section 68130.5. Section 68130.5 does not automatically make undocumented immigrants eligible for in-state tuition. Like everyone else, undocumented immigrants have to attend and graduate from a California high school. Thus, Section 68130.5 is in line with the plain language of Section 1623 because all U.S. citizens are in fact eligible for this in-state tuition rate, even those who are not residents of California, if they attend and graduate from a California high school.

Plaintiffs argue, however, that Section 1623 requires that all United States citizens actually receive the benefit, not just be eligible for it. P.A.B. 35. As before, Plaintiffs' interpretation requires removing actual words from the statute, in this case, the word "eligible." If it was the intent of Congress to require that United States citizens receive the benefit and not just be eligible for it, Congress would not have included the word "eligible," but instead would simply have written the statute to read: "unless a citizen or national of the United States **receives** such a benefit (in no less an amount, duration and scope)..." Congress did not do this, but rather included the word "eligible" to signal that U.S. citizens only have to have the same opportunity as an undocumented immigrant to qualify for the benefit.

Plaintiffs also endeavor to support their interpretation by claiming that including the words "in no less an amount, duration and scope" must mean that the benefit has to be given, not just the opportunity to be eligible for the benefit. These words, however, offer no support for this proposition. All that these words convey is that United States citizens must have the same opportunity to qualify for the same benefit, i.e. a benefit in the same amount, duration and scope that an undocumented immigrant has the opportunity to qualify for. In other words, eligible undocumented immigrants cannot receive a benefit that is greater in

amount, duration or scope than the benefit received by eligible United States citizens.

Finally, the Court of Appeal took issue with Section 68130.5 because according to the Court it “makes illegal aliens eligible for in-state tuition without affording in-state tuition to out-of-state U.S. citizens without regard to California residence.” Slip op. 37. The Court of Appeal goes on to say that Section 68130.5 conflicts with Section 1623 because the statute allows the benefit to U.S. citizens only if they attend a California high school for three years and therefore the statute “does not afford the same benefit to U.S. citizens ‘without regard to’ California residence, as required by title 8 U.S.C. section 1623.” The Court of Appeal’s reasoning is flawed for the same reasons stated above, namely all that Section 1623 requires is that U.S. citizens have the same opportunity as an undocumented immigrant to qualify for the benefit.⁶

Further, the Court of Appeal’s reasoning is flawed because, as previously stated, attending a California high school does not require a student to be a California resident. As the Regents correctly pointed out, there are a large number of students who are not California residents but nevertheless may be eligible for resident tuition under Section 68130.5. These students include: U.S. citizens who attended high school in California but have resided in another state after completing high school and before enrolling in college or graduate school; students who attend

⁶ Interestingly, the Court of Appeal seemingly agreed with this in the equal protection portion of its opinion. There, the Court of Appeal stated: “Section 68130.5 does not, on its face, allow illegal aliens a benefit denied to U.S. citizens from sister states. U.S. citizens, like illegal aliens, can obtain the benefit of section 68130.5 by attending a California high school for three years and obtaining a high school diploma or its equivalent.” Slip op. 72.

boarding school for part of the year in California while maintaining a permanent residence in another state; students living in an adjoining state which is contiguous to a California school district who attend the California school; and students whose actual and legal residence is in a foreign country adjacent to this state, and who regularly return within a twenty-four-hour period to said foreign country. *See Regents Op. Br. 28-29.*

Lastly, the Court of Appeal's reasoning is flawed because the Court misconstrued the "without regard to residence" language in Section 1623. The "without regard to residence" language in Section 1623 simply means that a U.S. citizen must be eligible for the benefit if an undocumented immigrant is eligible for the benefit, regardless of the state of residency of the U.S. citizen.

In sum, when reviewing only the unambiguous, plain language of Section 1623, it is clear that Section 1623 does not expressly preempt Section 68130.5. In a straightforward analysis of the plain language of both Sections 1623 and 68130.5, the trial court held:

Section 68130.5 does not conflict with 8 U.S.C. § 1623 because Section 68130.5 does not confer a benefit based on residency within California. The requirement of high school attendance in California set forth in Section 68130.5 does not require residency in California because non-California residents may attend high school in this State.

Superior Court Order on Demurrers ("Demurrer") 5. The trial court's analysis was accurate. Plaintiffs' argument that Section 68130.5 is preempted by Section 1623 is nothing more than Plaintiffs' attempt to completely ignore the plain, unambiguous language of the statutes and rewrite the statutes to fit their argument. This is an impermissible rewriting of history, and the Court of Appeal erred in overturning the trial court and deciding in favor of Plaintiffs' flawed preemption argument.

B. Section 1621 Does Not Expressly Preempt Section 68130.5

Plaintiffs' argument that Section 68130.5 is preempted by Section 1621 is even more tenuous than their preemption argument for Section 1623. Like Section 1623, Section 1621 does not foreclose an undocumented immigrant from ever receiving or being eligible to receive a postsecondary education benefit. Indeed, Section 1621 has a specific "safe harbor" provision or "saving clause" which expressly allows states to provide in-state tuition to undocumented immigrant students. This saving clause, found in Section 1621(d), states:

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 enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility.

8 U.S.C. §1621(d). There is no dispute that Section 1621(d) explicitly allows states to pass laws such as Section 68130.5 so long as: 1) the law is enacted after August 22, 1996; and 2) the law affirmatively provides that undocumented immigrants are eligible for the benefit. That is all that is required. No additional words, phrases or definitions are necessary. Section 68130.5 complies with these straightforward requirements: Section 68130.5 was enacted after August 22, 1996 and Section 68130.5 clearly states that undocumented immigrants are eligible to receive in-state tuition by specifically referring to "a person without lawful immigration status" in subsection (4) of the statute.

Faced again with the fact that the plain language of Section 1621 completely contradicts their argument, Plaintiffs once more attempt to rewrite the statute and add in language or requirements that are simply not there. According to Plaintiffs, in order for Section 68130.5 to comply with Section 1621(d), Section 68130.5 is required to specifically use the words

“illegal alien” and must reference Section 1621 by name. One can read Section 1621(d) a thousand times and still never see these alleged requirements in the plain, unambiguous text of the statute. Section 1621(d) simply does not say that Section 1621 has to be explicitly referenced in a state law such as 68130.5, nor is there any requirement that the statute use the words “illegal alien.”⁷ If it was Congress’ intent to include these requirements, once again, Congress could have written Section 1621(d) to say: “... only through enactment of a State law after August 22, 1996 **that specifically references this statute by name and uses the words ‘illegal alien’.**” Section 1621(d) was not written this way and attempting to read these requirements into the statute is tantamount to attempting to write an entirely new law.

Plaintiffs’ only hope for ignoring the plain language of the statute is by arguing that the words “affirmatively provides for such eligibility” are ambiguous, thereby requiring another retreat to the legislative history. As has been made clear, however, the legislative history cannot replace the legislative purpose as expressed by the ordinary meaning of the words used. *See Ardestani* 502 U.S. at 135-36. The trial court correctly saw right through Plaintiffs’ thinly veiled attempt to rewrite the statute to their liking under the pretext of ambiguity. The trial court easily dismissed Plaintiffs’ argument by holding: “Subdivision (d) of 8 U.S.C. 1621 does not require a state statute to use the words ‘illegal alien’ or to reference the federal statute.” Demurrer 5. This succinct treatment of

⁷ Ironically, “illegal alien” is nowhere to be found in Section 1621(d). Section 1621(d) uses “an alien who is not lawfully present in the United States” which is much more similar to “a person without lawful immigration status” used in Section 68130.5.

Plaintiffs' completely untenable argument was all that was required to hold that Section 68130.5 was not preempted by Section 1621.

Unfortunately, the Court of Appeal took the Plaintiffs' bait and agreed that "affirmatively provides for such eligibility" was ambiguous. While the Court of Appeal did not insist that state statutes use the words "illegal aliens," the Court nevertheless found that Section 68130.5 does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens. Slip op. 71. The Court of Appeal reasoned that "[a]lthough Section 68130.5 does indicate that illegal aliens are eligible for in-state tuition, it does so in a convoluted manner." Slip op. 70. In other words, the Court of Appeal recognized that Section 68130.5 actually complies with the requirements of Section 1621(d), but the Court of Appeal did not like the way Section 68130.5 was written. Section 68130.5, however, specifically states that a person without lawful immigration status is eligible for in-state tuition. In fact, that statute has its own section on what a person without lawful immigration status must do to be eligible under Section 68130.5, and this includes requirements in addition to what any U.S. citizen must do to be eligible for in-state tuition. Thus, contrary to the Court of Appeal opinion that the statute is somehow convoluted, Section 68130.5 clearly puts the public on notice that persons without lawful immigration status are not only eligible for in-state tuition, but must meet additional requirements for this eligibility.

The fact is, regardless of whether the Court of Appeal likes how the statute was written, the Court's authority is limited to determining whether Section 68130.5 met the requirements of Section 1621(d). As mentioned above, Section 68130.5 was enacted in 2001, long after August 22, 1996. In addition, as the Court of Appeal itself recognized, Section 68130.5 does indicate that undocumented immigrants are eligible for in-state tuition. That is all that Section 1621(d) requires. Accordingly, the

Court of Appeal erred in finding that Section 68130.5 was preempted by Section 1621.

II. SECTION 68130.5 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

As the Respondents clearly established in both their opening and reply briefs, Plaintiffs' Privileges and Immunities claim fails because when a plaintiff asserts an infringement of a right that is a "creature of state law," there is no basis for a claim under the Privileges and Immunities Clause. Regents Op. Br. 42 (citing *In re Demergian*, 48 Cal. 3d 284, 292-93 (1989)). The Respondents have aptly pointed out that there is no federal right to attend California state universities or to pay in-state tuition. Regents Reply Br. 31 (citing *Hamilton v. Regents of the University of California*, 293 U.S. 245, 261 (1934) and *Vlandis v. Kline*, 412 U.S. 441, 445 (1965)). Accordingly, without a federal right to in-state tuition, Plaintiffs simply cannot assert a valid cause of action under the Privileges and Immunities Clause.

Plaintiffs cannot deny that in-state tuition is a "creature of state law" but they attempt to create a federal right by making the novel argument that U.S. citizens always have to be treated better than undocumented immigrants in the distribution of public benefits. P.A.B. 62-63. There is no basis in law, however, to support Plaintiffs' sweeping argument. The fact is, Plaintiffs simply cannot avoid the inevitable conclusion that they have failed to allege any federal right under the Privileges and Immunities Clause that has been violated by Section 68130.5.

But even assuming Plaintiffs could allege a violation of a right protected under the Privileges and Immunities Clause, Plaintiffs' Privileges and Immunities claim undoubtedly fails. The Plaintiffs, as U.S. citizens, are not a suspect class and paying in-state tuition is not a

fundamental right. As such, strict scrutiny does not apply. *See In re Demergian*, 48 Cal. 3d at 291 (“At the federal level, strict scrutiny applies only if a legislative classification involves a suspect classification or significantly infringes on a fundamental right.”). Instead, a rational basis is all that is necessary. *Id.* at 292 (applying rational basis where no suspect classification or fundamental right is involved).⁸ California need only show that providing in-state tuition to those students who meet the qualifications under Section 68130.5 is rationally related to a legitimate government purpose.

A. Section 68130.5 is Rationally Related to California’s Valid State Interests in Promoting Postsecondary Education, Increasing Productivity of Its Workforce and Strengthening Its Economy

In enacting Section 68130.5, the California Legislature determined that this legislation would further the state’s interest of educating students graduating from its secondary schools, increasing the productivity of the work force and growing the economy. As the trial court stated, California’s interests serve a legitimate government purpose and Section 68130.5 is rationally related to the State’s valid interests. Demurrer 6.

1. California Has a Legitimate Interest in Promoting Postsecondary Education to Strengthen the State Economy

Education has long been understood to be the foundation of our modern society. Indeed, the United States Supreme Court stated not only that education “is perhaps the most important function of state and local governments” but that it also “provides the basic tools by which

⁸ Although the rational basis test applies, Section 68130.5 would survive an intermediate scrutiny analysis as well for the reasons stated below.

individuals might lead economically productive lives to the benefit of us all.” *Plyler v. Doe*, 457 U.S. 202, 222 (1982). In addition to the economic advantages, “public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.” *Id.*

A primary education, however, is no longer enough. Postsecondary education has become a practical necessity to achieve both personal and professional success in today’s economy. The most recent data from the Bureau of Labor Statistics estimates that individuals without a high school diploma earn \$426 per week and have a 9% unemployment rate whereas individuals with a bachelor’s degree earn \$978 per week and have a 2.8% unemployment rate.⁹ In California, “[t]he state’s economic potential alone is vastly reduced when 20 percent of the population makes less than \$12,000 and 1 percent makes over \$850,000 annually.”¹⁰ As such, California has a substantial interest in ensuring the continued education of students graduating from California high schools which will then translate into higher wages and increased economic success for both the individual and the state.

Further, because education is so closely tied to economic success, “a broadly educated populace will bring California closer to bridging the two-tiered economy that has been leaving poorer residents

⁹ Bureau of Labor Statistics, Education pays (2008), <http://www.bls.gov/emp/emptab7.htm>.

¹⁰ Letter from Senator Richard Alarcon, California State Senate Majority Whip (May 2002), <http://sor.govoffice3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/%7BAB98C7B1-7769-4A29-AC91-598FBB55B885%7D.PDF>.

behind.”¹¹ As the Supreme Court noted in *Plyler v. Doe*, “We cannot ignore the significant social costs born by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” *Plyler*, 457 U.S. at 221. To that end, the California Senate Select Committee on College and University Admissions and Outreach recently recommended that “California should establish a college-going culture in its high schools...to help overcome patterns that otherwise threaten the long term socioeconomic wellbeing of all residents, especially underrepresented minorities.”¹² In addition to economic benefits, a unified, but well diversified, student population enhances students’ educational experience as well because they are exposed to different ways of thinking and are therefore more likely to be critical thinkers and develop better interpersonal skills.¹³

Section 68130.5 is rationally related to California’s legitimate interest in promoting postsecondary education for all high school graduates because Section 68130.5 allows all students who attended high school in California the opportunity to pursue a postsecondary education by making this pursuit affordable through in-state tuition rates, which in turn will benefit both the students and strengthen California’s economy.

Despite the clear link between higher education and economic success to both the individual and the state, Plaintiffs argue that there can

¹¹ California Senate Select Committee on College and University Admissions and Outreach, *Increasing Access and Promoting Excellence: Diversity in California Higher Education* (May 2002) p. i, <http://sor.govoffice3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/%7BAB98C7B1-7769-4A29-AC91-598FBB55B885%7D.PDF>.

¹² *Id.* at p. iii.

¹³ *Id.* at p. 1.

be no legitimate government interest in improving educational access to undocumented students who cannot legally work after graduation or contribute to the economy of the state. P.A.B. 79. Plaintiffs' argument is nonsensical for several reasons. First, this argument was clearly rejected by the U.S. Supreme Court which stated that the "benefits of education are not reserved to those whose productive utilization of them is a certainty." *Plyler*, 457 U.S. at 221. Increased education undoubtedly provides many different benefits and the possibility that an individual, undocumented or otherwise, may not use it to obtain employment does not detract from its importance. *Id.* at 222 ("Although a non-citizen may be barred from full involvement in the political arena, he may play a role-perhaps even a leadership role-in other areas of import to the community.").

Second, Plaintiffs rely on the fallacy that undocumented immigrants do not contribute to the state and can be deported at any time and, therefore, a state cannot have a legitimate interest in the education of those without lawful immigration status. Plaintiffs appear to ignore the fact that California has the largest population of undocumented immigrants in the country, comprised of hard-working men, women and families. The U.S. government does not have the desire or the resources to deport an entire population of people who are members of the community and contributing millions of dollars in tax revenue and social security benefits every year.¹⁴ *See Plyler*, 457 U.S. at 219, fn. 17. If California were to simply ignore this entire subset of its population, currently estimated at 2.7

¹⁴ Eduardo Porter, *Illegal Immigrants are Bolstering Social Security with Billions*, The New York Times (April 5, 2005), available at <http://www.nytimes.com/2005/04/05/business/05immigration.html>.

million,¹⁵ the state would be engaged in promoting and keeping a perpetual underclass. Undocumented immigrants have an average income of \$12,000 per person annually, more than 40% below the average income of either legal immigrant or native families.¹⁶ Thus, high non-resident tuition rates are an insurmountable barrier for many to attend college and therefore prevent high school graduates from achieving any upward mobility and contributing more to the economy of the state.

2. California Has a Legitimate Interest in Increasing Productivity of Its Work Force to Meet the Future Demands of Its Economy

Not only does California have a legitimate interest in promoting the benefits that a postsecondary education can provide to its high school graduates, California also has a legitimate interest in increasing the number of students that go to college to meet the future demands for a college-educated workforce, which in turn would benefit the California economy as a whole. The California Senate Office of Research recently recommended that K-12 and higher education no longer be treated as separate issues, but instead, educational reform should be considered a K-16 issue in light of the growing need for a college-educated workforce.¹⁷

¹⁵ Jeffrey S. Passel and D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Washington, DC: Pew Hispanic Center (April 14, 2009) p. ii, <http://pewhispanic.org/files/reports/107.pdf>.

¹⁶ Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Washington, DC: Pew Hispanic Center (June 14, 2005) p. 30, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Hispanics_in_America/PHC_immigrants_0605.pdf.

¹⁷ Rona Levine Sherriff and Marlene Linares Garcia, *Lessons from the California Experience* (January 2007) p. 10, <http://sor.govoffice3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/%7B951E350E-6340-4F7F-8DE9-A16AC370A0F7%7D.PDF>.

As mentioned above, in today's society, a high school education alone is not enough to succeed economically. Both the failure of California's economy to create new low-skill jobs coupled with the rise in demand for jobs requiring a college-degree, are creating a skills gap.¹⁸ If current trends persist, only 35 percent of California's working-age adults will have a college degree by 2025, whereas 41 percent of jobs will require one.¹⁹ This translates into a shortfall of more than 3 million college-educated workers in California by 2025.²⁰

California currently has one of the lowest college enrollment rates in the country.²¹ In addition, if current trends persist, California will be unable to fill the need for highly-skilled workers through increased migration of college-educated workers from other states.²² Therefore, it is vital that California increase the number of high school graduates that continue on to college. Because postsecondary education is largely a public

¹⁸ Kevin F. McCarthy and Georges Vernez, *Immigration in a Changing Economy: California Experiences, Questions and Answers* (1998) p. 26, http://www.rand.org/pubs/monograph_reports/MR854.1/index.html.

¹⁹ Public Policy Institute of California, *California 2025* (July 2009) p. 38, http://www.ppic.org/content/pubs/report/R_709BKR.pdf.

²⁰ Hans P. Johnson and Deborah Reed, *Can California Import Enough College Graduates to Meet Workforce Needs?*, Public Policy Institute of California (May 2007) p. 14, http://www.ppic.org/content/pubs/cacounts/CC_507HJCC.pdf.

²¹ *California 2025* at p. 38-39; Hans Johnson, *Educating California: Choices for the Future*, Public Policy Institute of California (June 2009) p. 12, http://www.ppic.org/content/pubs/report/R_609HJR.pdf.

²² Johnson, *Can California Import Enough College Graduates to Meet Workforce Needs?* at p. 14-17.

endeavor in California,²³ the state has more than a substantial interest in increasing access to college opportunities for all of its high school graduates and strive to bring the number of high school graduates who attend college up to the national average. It is paramount to the vitality of California's economy itself that it establish a college-going culture to ensure that the most talented high school students have the ability and opportunity to go to college. The members of the California Legislature thus identified the need for a fair college tuition policy that would encourage all California high school graduates to attend college thereby increasing "the state's collective productivity and economic growth." AB 540 ch. 814, §1(a)(3). Section 68130.5 is clearly rationally related to California's interest because it provides students who graduated from a California high school with the ability to afford a college education, which in turn will assist the state in meeting the demands for a college-educated workforce.

In sum, California clearly has a legitimate interest in providing high school graduates with access to postsecondary education which in turn will strengthen California's economy. Section 68130.5 is undoubtedly rationally related to these interests because it affords California's high school graduates the ability to pay for a postsecondary education. Thus, because this is all that is needed for Section 68130.5 to pass constitutional muster, even if Plaintiffs could assert a valid federal

²³ California has three public education systems: University of California (UC), California State University (CSU) and California Community Colleges (CCC). More than 4 out of every 5 California college students is enrolled in one of the three public postsecondary education systems. Of the bachelor's degrees awarded in the state every year, 75% come from the UC and CSU systems. California 2025 at p. 39.

right, which we submit they cannot, Plaintiffs' Privileges and Immunities claim would still fail.

III. WHILE NOT AIMED AT SPECIFICALLY BENEFITING UNDOCUMENTED IMMIGRANTS, STATUTES LIKE SECTION 68130.5 THAT PROVIDE FOR IN-STATE TUITION RATES BENEFIT THESE STUDENTS AND THE STATE AS A WHOLE

A. Section 68130.5 Allows the State of California to Realize a Return on its Investment in K-12 Education for Undocumented Immigrants

Under *Plyler v. Doe*, a child of undocumented parents cannot be denied a basic public K-12 education. It stands to reason that a state would have an obvious interest in reaping the benefits of its initial investment in a student's primary education rather than have it go wasted because of artificial financial blocks placed upon certain successful California high school students. It is inconsistent for a state to promote a student's education through high school only to cut off any chance for additional education. In fact, to impede students' academic progress after high school is to create an uneducated populace with little chance of economic success or upward mobility. California has the largest public higher-education system in the nation with more than 2 million students.²⁴ The state, therefore, has a vested interest to ensure that its high school graduates have adequate access to postsecondary educational opportunities in order to ensure that the state realizes a return on its investment of providing all students with a K-12 education, which in turn ensures the continued vitality and growth of its economy.

²⁴ Sherriff, *Lessons from the California Experience* at p. 10.

B. Section 68130.5 in Fact Increases Revenue and Reduces Costs

As studies have found, increasing the pool of students eligible for postsecondary education increases revenue for the state and results in a decrease in state payouts for other public services.²⁵ Indeed, the value of the non-resident tuition exemptions given to students under 68130.5 pales in comparison to the costs to a state associated with students who drop out of school.²⁶ The benefits to the state from increasing the number of high school graduates attending college enormously outweigh any short term costs, if any, that may exist. As stated above, education is clearly the key to an individual's success and prosperity as well as the economic stability of the entire state. California cannot afford to ignore an entire subpopulation after investing in their K-12 education as required under *Plyler*. Clearly a system that operates not to promote education, but to maintain a poorly educated and low-wage earning underclass, would threaten the financial vitality of the entire state.

Plaintiffs' arguments to the contrary are simply not based on facts. Plaintiffs use contrived data either concocted on their own or produced by The Federation for American Immigration Reform ("FAIR"),

²⁵ Roberto Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students* (October 2007) p. 5-6, <http://www.immigrationpolicy.org/images/File/infocus/Wasted%20Talent%20and%20Broken%20Dreams.pdf>; Basic Facts about In-State Tuition for Undocumented Immigrant Students, National Immigration Law Center, February 2009, <http://www.nilc.org/immlawpolicy/DREAM/instate-tuition-basicfacts-2009-02-23.pdf>.

²⁶ For example, a report from Texas found that by 1998, the number of dropouts from Texas public schools reached 1.2 million with the costs estimated at \$319 billion. National Conference of State Legislatures, *College Tuition and Unauthorized Immigrant Students* (August 2008), <http://www.ncsl.org/default.aspx?tabid=12876>.

an organization that believes no tax dollars should be spent on undocumented immigrants for any purpose,²⁷ as support for their biased and misguided arguments.

1. Increasing Access to Postsecondary Education Does Not Create an Incentive for Illegal Immigration

Plaintiffs' argument that Section 68130.5 induces illegal immigration has no basis in fact. The U.S. Supreme Court clearly stated in *Plyler* that "[t]he dominant incentive for illegal entry...is the availability of employment; few if any illegal immigrants come to this country...in order to avail themselves of a free education." *Plyler*, 457 U.S. at 228. If illegal entry is not induced by a *free* education, it would seem even more implausible that paying for an education (since of course students still must pay in-state tuition rates) would then induce a greater influx of illegal immigrants. The data clearly shows that undocumented youths are far less likely to continue their education than legal immigrants or citizens.²⁸ In fact, the high drop out rate among undocumented youths is partly due to the fact that the drop out rate includes all undocumented immigrants of high school age not currently enrolled in school, which includes those who never actually attend school in the U.S.²⁹ Education, free or otherwise, does not induce illegal immigration and Plaintiffs simply have no factual support for this argument.

²⁷ *Id.*

²⁸ Passel, Unauthorized Migrants: Numbers and Characteristics at p. 22.

²⁹ *Id.*; McCarthy, Immigration in a Changing Economy: California Experiences, Questions and Answers at p. 17.

2. Increasing Access to Postsecondary Education Does Not Create a “Colossal” Tax Burden

Plaintiffs’ method of calculating the alleged “colossal tax burden” of Section 68130.5, and therefore their arguments attached to it, is disingenuous at best. It is estimated that 65,000 undocumented students graduate from U.S. high schools every year.³⁰ Approximately 40% of these students, or roughly 26,000, graduate from California high schools.³¹ Of the undocumented students that graduate high school in the U.S., only a small fraction actually continue on to college.³² Of the three different public postsecondary educational systems in California, only the UC system, the smallest of the three, actually tracks the number of undocumented students that apply for waivers under Section 68130.5.³³ Both the CSU and CCC systems do not keep such information and therefore, there is no state tally for the number of undocumented students currently enrolled in California’s public colleges. Published estimates of the total number of students (both citizens and undocumented students) who qualified for the tuition break under Section 68130.5 suggest that in 2005 there were 1,620 students enrolled in the UC and CSU systems and

³⁰ Jeffrey S. Passel, Further Demographic Information Relating to the DREAM Act, The Urban Institute (October 21, 2003) p. 2, http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

³¹ *Id.*

³² *Id.*

³³ In the 2006-2007 academic year, 265 undocumented students received tuition exemptions under AB 540. University of California Office of Personnel, Annual Report on AB 540 Tuition Exemptions 2006-07 Academic Year, (March 2008), http://www.ucop.edu/sas/sfs/docs/ab540_annualrpt_2008.pdf.

18,000 either full-time or part-time enrolled in the CCC system.³⁴ Even assuming that all of these students were undocumented immigrants, 20,000 students amounts to less than 1% of the total student population in California's public colleges and universities. Despite this, Plaintiffs argue that an increase of less than 1% in the student population amounts to a "colossal" tax burden to taxpayers. Plaintiffs' only support for this contention is their calculation of the differential between the in-state tuition these students pay and the non-resident tuition rate. This type of calculation, however, is flawed considering that most undocumented students cannot afford to pay the non-resident fees. Plaintiffs' calculation assumes that if undocumented students were not allowed to pay in-state tuition rates, they would instead pay the non-resident rates. This is simply inaccurate. The reality is, most, if not all, of these students would not attend college (and therefore not pay any tuition to the state colleges) if their only option was to pay non-resident rates.

As an example of Plaintiffs' faulty premise, the Massachusetts Taxpayers Foundation analyzed the impact of allowing undocumented students in Massachusetts to pay in-state tuition rates. The "independent watchdog of state and local finances" concluded that the state would *gain* millions of dollars in revenue by providing in-state tuition rates to undocumented students.³⁵ Specifically, the Foundation concluded that

³⁴ Gonzales, *Wasted Talent and Broken Dreams* at p. 9; Migration Policy Institute, *New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act* (October 2006) p. 8, http://www.migrationpolicy.org/pubs/Backgrounder1_Dream_Act.pdf.

³⁵ Mass. Taxpayers Foundation, *Massachusetts Public Colleges Would Gain Millions of Dollars from Undocumented Immigrants* (January 5, 2006), <http://www.masstaxpayers.org/files/MTF%20Undocumented%20Immigrant%20Education%20News%20Release.pdf>.

the “tuition and fee payments represent net new revenues for public colleges, since the campuses would incur virtually no new costs from the small number of undocumented students who would attend for the first time.”³⁶

The fact is, none of the states that have enacted this type of law have reported any such “colossal” tax burden as Plaintiffs suggest. Indeed, the available data actually shows quite the opposite.³⁷ Plaintiffs’ only support for their allegation is their own erroneous calculation. Thus, this is simply another illogical argument put forth by Plaintiffs which is not based on the facts. Even if Plaintiffs’ tax burden argument was true, which we submit it is not, a rational legislature could still act to pass this type of law by deciding that the obvious benefits outweighed the burden.

C. Other State Legislatures Have Determined That Enacting Laws to Make College More Affordable For High School Graduates, Including Undocumented Immigrants, Benefits the State as a Whole

1. Ten Other States Have Enacted Legislation Similar to Section 68130.5

To date, eleven states, including California, have enacted legislation allowing their high school graduates, including undocumented immigrants, to pay in-state tuition rates. These states encompass over half of the estimated 12 million undocumented immigrants currently in the U.S. and include 3 out of the 4 states with the highest populations of undocumented immigrants.³⁸ These states clearly have a vested interest in increasing access to postsecondary education to all high school graduates.

³⁶ *Id.* at p. 1.

³⁷ Gonzales, *Wasted Talent and Broken Dreams* at p. 9.

³⁸ Passel, *A Portrait of Unauthorized Immigrants in the United States* at p. 2 Table 3.

New York, Texas and Washington are additional examples of fair tuition policies designed by these states to encourage the continued academic success of high school graduates for the benefit of the entire state.

a. New York

On August 1, 2003, New York enacted legislation which had the effect of allowing undocumented students to pay in-state tuition rates. After California and Texas, New York has the third highest undocumented immigrant population.³⁹

The Center for an Urban Future recently published a report discussing the increased importance of New York City's community colleges in boosting more New Yorkers into the middle class. The report notes that with the disappearance of the once abundant "blue collar" jobs, "higher education has become the single most important ticket to the middle class" for "longtime residents with limited education and newcomers with poor English skills."⁴⁰

Spurred in part by this report and in keeping with the state policy of increasing access to postsecondary education already in place, Mayor Michael Bloomberg announced his "Gateway to the Middle Class" plan, an initiative to devote \$50 million over four years to New York City's community colleges.⁴¹ The proposal is intended as a way to bring immigrants and low-wage workers into the middle class. Mayor Bloomberg's pledge is also in accordance with the goal recently set by President Obama to graduate an additional 5 million from community

³⁹ *See id.*

⁴⁰ Center for an Urban Future, *A Platform for Mobility* (2009) p.1, <http://nycfuture.org/APlatformForMobility.pdf>.

⁴¹ Mike Bloomberg's *Gateway to the Middle Class* (2009) p. 2, <http://mikebloomberg.com/middleclassgateway.pdf>.

colleges by 2020.⁴² Mayor Bloomberg’s plan calls for graduating 120,000 students by 2020 or an additional 40,000 students. “While community colleges serve everyone, they are frontline institutions for working women, middle class workers in need of retraining, and our city’s hard-working immigrants. A community college degree or training is their ticket to climbing into New York City’s middle class.”⁴³ The plan is also being used as a way to close the skills gap in New York for healthcare and green jobs that will continue to be in high demand and require a college degree.

The importance of community colleges is undeniable. Approximately 46% of all undergraduates in the nation are enrolled in community colleges.⁴⁴ Increasing access to postsecondary education and training for all, including hard working immigrants, through a statute that makes undocumented immigrants eligible for in-state tuition and through initiatives to increase attendance in colleges demonstrates New York’s recognition of the importance of postsecondary education to the continued vitality of the state economy.

b. Texas

Texas was the first state to enact legislation allowing undocumented students to pay in-state tuition rates. Texas is estimated to have the second highest undocumented immigrant population after California.

⁴² See The White House - Blog Post, Investing in Education: The American Graduation Initiative (2009), <http://www.whitehouse.gov/blog/Investing-in-Education-The-American-Graduation-Initiative/>.

⁴³ Mike Bloomberg’s Gateway to the Middle Class (2009) p. 2.

⁴⁴ Center for an Urban Future, A Platform for Mobility at p.2.

Texas is the only state that has done an extensive financial analysis on the impact of undocumented immigrants on a state's economy. The report, published in 2006, found that undocumented immigrants contributed \$17.7 billion to Texas's economy.⁴⁵ The report also found that undocumented immigrants contribute more to the economy than the state spends on them by \$424.7 million.⁴⁶ The findings of the Texas Comptroller directly contradict a similar report from FAIR, which claimed that undocumented immigrants cost Texas taxpayers more than \$4.7 billion per year.⁴⁷

The Texas Comptroller's report confirms that undocumented immigrants are undoubtedly contributing to the communities in which they work and live. Plaintiffs' argument that a state has no substantial interest in investing in the education of immigrants who do not contribute in any way to the benefit of the state is not based on fact and devoid of any rational sensibility. Clearly in the three states with the highest populations, undocumented immigrants are working and contributing to the overall

⁴⁵ Carole Keeton Strayhorn, Office of the Texas Comptroller, *Undocumented in Texas: A Financial Analysis of the Impact to the State Budget and Economy* (December 2006) p.1, <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf>.

⁴⁶ *Id.*

⁴⁷ Plaintiffs appear to only rely on data created by FAIR to support many of their arguments. *See* Plaintiffs' Response to Brief Filed by Alicia A., et al. FAIR's data, however, is routinely shown to be over-inflated and generally inaccurate or misleading. The Texas Comptroller's report noted that FAIR includes U.S. born children in its estimates, greatly increasing the reported costs. FAIR's estimates of educational costs also include federal spending as opposed to just costs to the state. Strayhorn, *Undocumented in Texas: A Financial Analysis of the Impact to the State Budget and Economy* at p. 2.

economic vitality of these states. They are members of the community that, without a fair tuition law, are denied access to the benefits of a system in which they pay into and help support.

c. Washington

The state of Washington also provides undocumented immigrants the opportunity to pay in-state tuition rates. When Washington's law was enacted in 2003, then Governor Locke, himself the son of Chinese immigrants, stated that "[t]he American Dream belongs to all of our Washington children" and that the intent of the legislation was to give "all Washington residents...an equal chance at quality higher education."⁴⁸ The sponsor of the bill, Representative Phyllis Gutierrez Kenney, stated that the law does not "provide a special right...But rather it addresses fairness and equity." The legislative testimony in favor of the bill provides further clarity with respect to its intent and purpose:

The bill would make college attendance affordable to all students who have achieved academically in Washington's high schools. Many children in this state have lived here with their parents for years, some since infancy or early childhood, and had no control over the circumstances that brought them here. Students who are the children of these laboring families should be given the opportunity for an affordable education and the opportunity to compete on the basis of academic potential. Many of them have achieved in high school despite significant obstacles. Fairness and equity require that we recognize the great drive and potential of these students to succeed and become taxpayers and positive role models.

Our communities include a mix of both documented and undocumented students whose only home is Washington.

⁴⁸ David Ammons, *Locke OKs Tuition Break for Immigrants*, Seattle Times (May 8, 2003), available at <http://community.seattletimes.nwsourc.com/archive/?date=20030508&slug=immigrant08m>.

Immigrant families have been in these communities for years and this is a smart investment in the future of our state. Permitting high school graduates to continue their education at an affordable rate is a means of allowing individuals to break out of poverty and to return something to the community. Students currently in high school would be inspired to stay in school and to achieve academically if they knew they would be able to attend college afterward.

Providing education is one of the state's paramount duties, and the state makes a significant investment in the education of all students in the K-12 system. But when high schools send the message that college is important, it does not fit with the practice of charging non-resident tuition to the state's high school graduates. Many families can afford in-state tuition but cannot afford out-of-state tuition, which is sometimes two to three times as much. Students with no hope of ever affording college may have little incentive to do well in high school.

The bill would increase diversity and the quality of student populations at the colleges by broadening the ideas shared. Immigration laws often function as a barrier to these students becoming documented. Many families spend thousands of dollars and many years and still struggle with legal status.

House Bill Report, EHB 1079 (2003).⁴⁹

As these laws show, California is clearly not alone in its desire to provide access to affordable postsecondary educational opportunities to all of its high school graduates. These four states along with Utah,⁵⁰ Oklahoma, Illinois, Kansas, New Mexico, Nebraska and

⁴⁹ Available at <http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bill%20Reports/House/1079.HBR.pdf>.

⁵⁰ In 2006, Utah's Attorney General's office issued an opinion concluding that its law allowing undocumented immigrants to pay resident tuition rates is valid under federal law. Utah's law, drafted similarly to California's law, was determined to be valid because the financing of state supported education is a power reserved to the states and the benefit is not

Wisconsin have enacted an educational law to promote increased access to postsecondary education and fairness for all high school graduates for the benefit the state as a whole.

2. In Addition, States Like New Jersey That Are Considering This Type of Law Have Reached Similar Conclusions

At least 32 states have considered enacting legislation similar to Section 68130.5.⁵¹ Of these states, New Jersey, which has the fifth highest undocumented immigrant population, has done extensive research on the issue. In 2007, Governor Corzine created an advisory panel to make recommendations on how to integrate the state's immigrants into New Jersey's population.⁵² After a thorough analysis, the panel released its report in March 2009. Part of the panel's recommendations to the Governor included support for currently proposed legislation which would provide in-state tuition rates to certain New Jersey students regardless of their immigration status. The findings contained in the report include: students who obtain college degrees in New Jersey are more likely to stay in the state, join the formal labor force and pay taxes; increasing educational attainment increases individuals' lifetime earnings and hence makes them more productive members of society; and increasing the

based on residence. Letter from William T. Evans, Assistant Attorney General to Richard E. Kendell, Commissioner of Higher Education (January 31, 2006), http://www.utahsbr.edu/PressRelease/PR_2006/PR_Feb_01_2006.pdf.

⁵¹ Ashley Zaleski, *In-State Tuition for Undocumented Immigrants*, State Notes (March 2008), <http://www.ecs.org/clearinghouse/75/53/7553.htm>.

⁵² See Dream Activist, *Governor Corzine's Blue Ribbon Commission Report (2009)*, <http://www.dreamactivist.org/governor-corzines-blue-ribbon-commission-report/>.

educational attainment of the workforce may decrease unemployment rates, increase tax contributions from as many individuals as possible, and thus contribute directly to the support of in-state social services.⁵³ The report also indicated that some extended social benefits may include lower rates of incarceration and increased civic participation.⁵⁴

In its reasoning for recommending that New Jersey enact such a law, the panel noted the necessity of a college degree in today's economy and that states that currently have the law in place actually tend to see an *increase* in revenue as a result of the law.⁵⁵ Since most of the undocumented students that take advantage of the law cannot afford non-resident tuition rates, the inclusion of these additional students results in an increase in tuition-paying students in the school systems.

Plaintiffs often argue that undocumented students who pay resident tuition rates are a cost burden to California because the state is losing out on the higher non-resident tuition rate that should be charged. This argument, however, fails to address the fact that because the higher, non-resident tuition rate is largely an insurmountable barrier to these students to attend college, charging these students the higher non-resident tuition rate would result in most, if not all, of the students exiting the college systems, not paying the higher rate. Thus, in reality, the financial barriers imposed on these students through non-resident tuition rates results in a loss to the school systems of tuition paying students.

⁵³ Blue Ribbon Advisory Panel on Immigrant Policy, *In-State Tuition for Immigrant Students* (2009) p. 22-23, http://www.state.nj.us/publicadvocate/home/pdf/instate_tuition.pdf

⁵⁴ *Id.* at p. 23.

⁵⁵ *Id.* at p. 35.

CONCLUSION

Section 68130.5 gives children of predominately poor working families the opportunity to attend college in California by allowing those who have graduated from California high schools to pay in-state tuition rates. The small percentage of undocumented immigrant students, that Plaintiffs so vehemently attack and vilify, that qualify for the lower tuition rates under this law do not qualify for any state or federal aid to defray the cost of college. In-state tuition rates are, for most, the only way they can attend college. Plaintiffs would have the Court believe that they are being injured by this law because they must pay non-resident tuition to attend California colleges. Plaintiffs, however, have not been injured. Without Section 68130.5, those in Plaintiffs' position would not be eligible, as out-of-state residents, for California in-state tuition. With Section 68130.5, those in Plaintiffs' position are free to attend California high schools and receive the in-state tuition rate. In addition, Plaintiffs are eligible for both state and federal financial aid to attend the college of their choice.

With their untenable arguments that Section 68130.5 is preempted by federal law and that it violates the Privileges and Immunities Clause, and with no injury to speak of, Plaintiffs' only motivation appears to be to prevent a population they view as burdensome and without value from receiving an education and becoming productive members of society, despite the fact that most of these students did not make the choice to come to the United States, but have lived here all of their lives. But Plaintiffs did not graduate from California high schools and they have not contributed to the state of California in any way. Plaintiffs simply do not have the power, by making unsupportable attacks on Section 68130.5, to dictate how California, or any state for that matter, chooses to educate its students and strengthen the economic health of the state.

For all the foregoing reasons, *Amici Curiae* respectfully request that the judgment of the Court of Appeal be reversed.

Dated: October 5, 2009

Respectfully Submitted,

SIMPSON THACHER & BARTLETT LLP

A handwritten signature in cursive script, appearing to read "George R. Morris", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed **[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS** is produced using 13-point or greater Roman type, including footnotes, and contains 10,692 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 5, 2009

Respectfully Submitted,

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A handwritten signature in black ink, reading "George R. Morris", is written over a horizontal line.

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