IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT MARTINEZ, ET AL., Appellants, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., Respondents.	S167791 (Court of Appeal No. C054124) (Yolo County Superior Court No. CV 052064)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AND THE NATIONAL IMMIGRATION LAW CENTER FILED IN SUPPORT OF RESPONDENTS REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

On Review From The Court of Appeal, Third Appellate District,
Case No. C054124
Honorable Rick Sims, Acting Presiding Justice
Honorable Vance Raye, Justice
Honorable Harry E. Hull, Jr., Justice
After An Appeal From The Yolo County Superior Court No. CV 052064
Honorable Thomas E. Warriner

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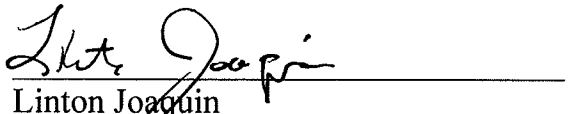
CERTIFICATE OF INTERESTED ENTITIES

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that he represents the following entities, each of which is an organization joining in the attached application and amici brief:

- AMERICAN CIVIL LIBERTIES UNION
- THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA
- THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA
- THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES
- THE NATIONAL IMMIGRATION LAW CENTER

Dated: October 2, 2009



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To the Honorable Ronald M. George, Chief Justice of California, and to the Honorable Justices of the Supreme Court of the State of California:

Pursuant to Rule 8.520(f) of the California Rules of Court, the American Civil Liberties Union – including the American Civil Liberties Union Foundation, the American Civil Liberties Union of Northern California, the American Civil Liberties Union of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties – and the National Immigration Law Center (collectively, "Amici") hereby apply for permission to file the attached amici curiae brief in support of Petitioners, University of California, The California State University System, and the Board of Governors of the California Community Colleges et al.

Each of Amici has a long history of defending the civil and constitutional rights of immigrants under both state and federal law. The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. Within California, the three ACLU affiliates combined have approximately 100,000 members. Defending and expanding the rights of immigrants was one of the founding principles of the ACLU and continues as one of its core missions, carried out by ACLU national and state affiliate offices throughout the country. ACLU attorneys have developed significant expertise in immigrants' rights under state and federal law, litigating cases to protect the historic guarantee to judicial review, challenge draconian enforcement and detention practices, enjoin unconstitutional state and local laws targeting immigrants, and promote the equal treatment and civic integration of immigrants. This application and accompanying brief are filed on behalf of the following ACLU entities: the American Civil Liberties Union of Northern California, the American Civil

Liberties Union of Southern California, the American Civil Liberties Union of San Diego and Imperial Counties, and the national ACLU.

The National Immigration Law Center ("NILC") is a leading public interest organization dedicated to protecting and promoting the rights of low income immigrants and their family members. Since its establishment in 1979, NILC has earned a national reputation as a leading expert on immigration, public benefits, and employment laws affecting immigrants and refugees. NILC has litigated extensively in the area of immigrants' rights, developing comprehensive knowledge of the complex interplay between immigrants' legal status and their rights under federal and state law. NILC is a partner in the California Immigrant Policy Center, a collaboration among four immigrants' rights groups in California, including NILC. NILC provides technical assistance to government agencies, community-based organizations, and health care, education, legal and social service providers on the rules governing immigrant access to public benefits and education across the country.

Amici have a strong interest in the continuing viability of Section 68130.5, which provides various students, including undocumented immigrants, with access to an affordable post-secondary education. Protecting students' rights under that statute, in line with principles of fundamental fairness and equal opportunity, advances the goals of ACLU and NILC. In light of the influential nature of this Court's jurisprudence, Amici also have an interest in urging the correct application of federal preemption principles in this timely and important case, as such application will help ensure the viability of other state statutes that promote equal treatment of immigrants without conflicting with federal law. Such statutes include but – particularly in light of the Court of Appeal's expansive

interpretations of federal law – are not limited to other in-state tuition statutes.[1]

As stated above, Amici have amassed technical expertise in relevant areas of law, litigating dozens of immigrants' rights cases across the country. In particular, Amici have litigated cases involving federal preemption challenges to state and local laws and are well-versed in this area of law. *See, e.g.*, *Sturgeon v. Bratton*, 174 Cal.App.4th 1407 (June 17, 2009); *Langfeld v. City and County of San Francisco*, Superior Court of San Francisco, Case No. 508-341 (November 18, 2008); *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) (counsel for interveners); *Gray v. City of Valley Park, Mo.*, 567 F.3d 976 (8th Cir. 2009); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 851 (N.D. Tex. 2008); *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007); *Garrett v. City of Escondido*, 465 F.Supp.2d 1043 (S.D. Cal. 2006). The brief accompanying this application focuses on the preemption questions and presents arguments not fully briefed by the parties. In particular, Amici argue that the Court of Appeal below used an erroneous analysis to find that in-state tuition rates charged to students constitute a "public benefit" triggering

[1] Of note, ten other states have passed laws similarly providing for undocumented immigrants' eligibility for in-state tuition rates. They are: Texas, *see* H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), *amended by* S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005); Utah, *see* H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); New York, *see* S. B. 7784, 225th Leg., 2001 NY Sess. (N.Y. 2002); Washington, *see* H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); Illinois, *see* H.B. 60, 93rd Leg., Reg. Sess. (Ill. 2003); Kansas, *see* K.S.A.76-731a (Kan. 2004); Nebraska, *see* L.B. 239 (April 13, 2006); New Mexico, *see* N.M.S.A. 1978, Ch. 348, Sec. 21-1-1.2, 47th Leg. Sess. (N.M. 2005); Oklahoma, *see* S.B. 596, 49th Leg., 1st Sess. (OK 2003), *amended by* H.B. 1804, 51st Leg., 1st Sess. (Okla. 2007)); and Wisconsin, *see* AB 75, § 743, 2009 Leg. Sess. (Wis. 2009). No court has found any of the in-state tuition provisions of these statutes invalid under federal law.

application of 8 U.S.C. § 1621, enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or "the welfare law"). Their brief explains how that analysis is in conflict with the interpretation of PRWORA used by the federal agency with principal responsibility for implementing the welfare law. Amici also explore other express and implied preemption issues implicated by this case. Amici believe that their analysis will provide additional guidance for this Court and therefore respectfully request permission to file their brief.

Dated: October 2, 2009

Respectfully submitted,

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AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AND THE NATIONAL IMMIGRATION LAW CENTER IN SUPPORT OF RESPONDENTS REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

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INTRODUCTION

In October 2001, after months of careful deliberation, the California legislature passed A.B. 540, permitting in-state tuition rates to thousands of students who graduated from California high schools, but who, for various reasons, do not qualify for in-state rates on the basis of residence. These students include undocumented immigrants as well as many other non-resident students. In passing this law eight years ago, the Legislature determined that a tuition policy that increased State high school graduates' access to public colleges and universities would foster economic productivity and growth. *See* A.B. 540 ch. 814, §1 (2001) (legislative findings). It also recognized the academic merits of students who completed high school in California and gained acceptance into California colleges and universities. *Id.*

Thus, Section 68130.5 of the California Education Code, codifying A.B. 540, exempts students – other than non-immigrants as defined by 8 U.S.C. § 1101(a)(15) – from paying nonresident tuition if they: (1) attend high school in California for three or more years; (2) graduate from a California high school or attain the equivalent thereof; and (3) register at an accredited State institution of higher education during or after the 2001-02 academic year. Cal. Educ. Code § 68130.5(a)(1)-(3). In addition, Section 68130.5 expressly provides that "[i]n the case of a person without lawful immigration status," such student shall receive in-state tuition rates if he or she meets the aforementioned criteria and also files "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." Cal. Educ. Code § 68130.5(a)(4).

Section 68130.5 reflects the Legislature's valid conclusion that increasing access to affordable post-secondary education for thousands of

California high school graduates advances the vital interests of the State. Individuals who receive in-state tuition under that Section are not limited to undocumented individuals, but rather include many U.S. citizens and documented immigrants who do not qualify for in-state rates on the basis of residence.

In deciding to provide in-state tuition rates to undocumented California high school graduates, the Legislature understood that restricting their access to affordable college education would be short-sighted – as such individuals are likely to remain in California and many will regularize their immigration status under current or future federal laws. *See* Section I(B), *infra*. Indeed, in recent years, bills have been introduced in Congress that would allow undocumented students who were brought into the United States as children – as well as broader categories of undocumented individuals residing in the United States – to become lawful permanent residents and eventually citizens of the United States. *See, e.g.*, The Development, Relief, and Education for Alien Minors (DREAM) Act of 2005, S.2075, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

The California in-state tuition laws also promote principles of fundamental fairness. Undocumented individuals who benefit from the bill are, by and large, talented high achievers who were brought to California as children through no fault of their own. These students grew up in the State of California and persevered against the odds to graduate from high school and secure admission to a California college or university. In today's society, denying these children access to higher education (similar to the denial of primary education) "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." *Plyler v. Doe*, 457 U.S.

202, 218-19 (1982). In passing A.B. 540, the California legislature properly considered the compelling needs of these children as well as the interests of the State as a whole.

The Court of Appeal decision misconstrues this statute and erroneously holds it preempted by federal law, jeopardizing vital State interests and contravening principles of fundamental fairness. As explained below, neither 8 U.S.C. § 1621 nor 8 U.S.C. § 1623, nor any other express or implied action by Congress, preempts Section 68130.5. Accordingly, this Court should reverse the decision below.

I. FEDERAL LAW DOES NOT PREEMPT SECTION 68130.5.

Under the Supremacy Clause of the U.S. Constitution, art. V, cl. 2, Congress has the power to preempt state law via express or implied action. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). A state or local law is *expressly* preempted if federal law so provides; *conflict* preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or makes it "impossible for a private party to comply with both state and federal law"; and *field* preempted if it operates in an area that Congress intends federal law to occupy. *Crosby*, 530 U.S. at 372-73; *see also Olszewski v. Scripps Health*, 30 Cal. 4th 798, 814-15 (2003) (describing express, conflict, and field preemption); *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 533, 540 (2005) (same). Preemption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily

by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal citation omitted).[2]

Crafted carefully by the California legislature, Section 68130.5 constitutes a permissible exercise of traditional state police power, fully compliant with federal law. As explained in Part A below, Section 68130.5 does not contravene the express dictates of 8 U.S.C. §§ 1621, 1623. Nor, as set forth in Parts B and C, does it otherwise conflict with federal law or occupy a field exclusive to Congress.

A. Section 68130.5 is not expressly preempted by federal law.

The Court of Appeal erroneously found Section 68130.5 expressly preempted by 8 U.S.C. § 1621 and 8 U.S.C. § 1623. As explained below, the California in-state tuition statute fully complies with the express language of these federal provisions.

1. 8 U.S.C. § 1621 does not preempt Section 68130.5.

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (August 22, 1996) ("PRWORA"), including the provision now codified at 8 U.S.C. § 1621. While subsection (a) of 1621 restricted states' ability to provide public benefits to immigrants who are not "qualified," including undocumented immigrants, subsection (d) contained a sweeping

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[2] Even absent legislation by Congress, certain state or local enactments may be invalid under the federal Constitution if they amount to an attempt to regulate immigration. *See De Canas v. Bica*, 424 U.S. 351, 354-56 (1976). However, the exclusive federal power to regulate immigration does not render every state law "which in any way deals with aliens" constitutionally impermissible. *Id.* at 355. Where a local law has at most "some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration." *Id.* at 355-56. The Court of Appeal correctly concluded that Section 68130.5 does not constitute a regulation of immigration, 166 Cal. App. 4th 1121, 1152, and Plaintiffs do not challenge this holding. *See* Pls.' Ans. Br. at 47-48.

authorization permitting states to provide benefits to such immigrants – so long as states do so affirmatively in legislation post-dating August 22, 1996. The statutory text – as well as subsequent authoritative federal guidance – narrowly defined the term "public benefit" to include only specified categories of benefits that entail payments or assistance to individuals, households, or family eligibility units by a governmental agency or appropriated government funds.

As explained below, Section 68130.5 does not trigger Section 1621's limitations because in-state tuition rates do not constitute a "benefit" under that Section. The analysis utilized by the Court of Appeal to reach the opposite conclusion directly conflicts with guidance issued by the U.S. Department of Health and Human Services ("HHS"), the federal agency with principal responsibility for interpreting PRWORA. Moreover, there was no need for the Court of Appeal to engage in this complicated analysis, since even if in-state tuition were considered a "benefit" for purposes of § 1621, the California legislature fully complied with subsection (d) in passing Section 68130.5.

a. In-state tuition is not a "State or local public benefit" within the meaning of 8 U.S.C. § 1621.

Because in-state tuition rates charged to students do not meet the statutory definition of a public benefit, Section 68130.5 is not subject to restrictions under PRWORA. The Court of Appeal's conclusion to the contrary contravenes both the express definition contained in the statute and published federal regulatory guidance. Subsection (1)(B) of § 1621(c) provides as follows:

> (1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means–

[...]

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621(c)(1)(B). Thus, in order to be subject to PRWORA's governance of "State or local public benefit[s]," a program, including a post-secondary education program, must (1) provide "*payments or assistance* to an individual, household, or family eligibility unit" and (2) make such provision via a state or local agency or appropriated funds. *Id.* (emphasis added).

Federal guidance provides further support for this reading. PRWORA contains a parallel definition of "Federal public benefit," identical to § 1621(c)(1)(B)'s definition of "State or local public benefit," save for the substitution of "United States" in place of "State or local government." *See* 8 U.S.C. § 1611(c)(1)(B).[3] The U.S. Department of Health and Human Services ("HHS"), interprets "public benefit" under PWRORA as requiring the two aforementioned elements: "First, the benefit

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[3] Also enacted as part of PRWORA, 8 U.S.C. § 1611(c)(1)(B) states:

(1) Except as provided in paragraphs (2), for purposes of this chapter the term "Federal public benefit" means–

[...]

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

must be one of those enumerated in section 401(c)(1)(B), that is, a 'retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit,' or be a 'similar benefit.' Second, a program's benefits or assistance must be provided to an 'individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United States.'" Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Public Benefit," 63 Fed. Reg. 41658, 14659 (Aug. 4, 1998) (hereinafter "HHS Public Benefit Interpretation"). Programs failing to satisfy *both* of these conditions are not subject to PRWORA's restrictions on immigrant eligibility for "public benefits." *Id.*; *see also* Department of Justice, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, A.G. Order No. 2353-2001, 66 Fed. Reg. 3613 (Jan. 16, 2001) (stating DOJ's policy of deferring to benefit-granting agencies' interpretations of "public benefit" under PRWORA); Letter from U.S. Immigration and Customs Enforcement to North Carolina Special Deputy Assistant Attorney General (July 9, 2008), *available at* http://www.nilc.org/immlawpolicy/DREAM/DHS-letter-re-undoc-students-2008-07-9.pdf ("Section 411(c)(l)(B) of PRWORA, codified at 8 U.S.C. § 1621(c)(1)(B), addresses benefits 'for which payments or assistance are provided'"); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (PRWORA addressed "only post-secondary monetary assistance paid to students or their households . . . .").

In concluding that in-state tuition rates charged to students constitute "State or local public benefit[s]," the Court of Appeal's decision contravenes this federal guidance as well as PRWORA's plain language and principles of statutory construction. The Court of Appeal erroneously determined that the clause "payments or assistance . . . to an individual,

household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government," as used in § 1621(c)(1)(B), modifies only the term "any other similar benefit," and not the prior list of "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit." 166 Cal. App. 4th at 1140-42. This interpretation fails to abide by standard rules of statutory construction, which require courts to "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The term "other similar" would be superfluous if the previously listed benefits were not also subject to the qualifying phrase. When read to give that term effect, § 1621(c)(1)(B) clearly requires any "postsecondary education . . . benefit" under PRWORA to entail payments and assistance by a government agency or appropriated funds. Applying this proper interpretation of a "public benefit" under § 1621, programs covered by PRWORA would include those providing financial aid or welfare payments to individuals and households. By contrast, in-state tuition falls outside of the statutory definition, as students receive neither payments nor assistance from the government or appropriated funds in being charged tuition rates. *Accord* Resp'ts' Opening Br. at 17-18 n.8.[4]

[4] Allowing the Court of Appeal panel's interpretation to stand would have serious implications for other programs that have been determined by federal, state and local agencies to fall outside of the definition of "public benefit." If the clause regarding "payments or assistance provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government" were found to modify only the "other similar" benefits and not the previously listed benefits, this would nullify many decisions regarding whether a benefit is restricted by PRWORA. HHS determined, for example, that Maternal and Child Health Block grants and LIHEAP weatherization funds for multi-unit buildings are not "public benefits" because, although they may involve health, housing or other listed services,

Plaintiffs further argue – and the Court of Appeal agreed – that in-state tuition rates charged to students constitute "assistance." *See* 166 Cal. App. 4th 1121, 1140-1141; Pl. Ans. Br. at 38-41. However, the position that a rate charged for a good or service amounts to "assistance," simply because a higher rate may be charged to other individuals, or because the good or service is allegedly subsidized by taxpayers, *see* Pls.' Ans. Br. at 38, finds no support in the statutory text and would be untenable if adopted. Under Plaintiffs' broad definition of the word "assistance," the term could encompass a transit authority charging "non-qualified" immigrants a discounted senior subway fare; a municipal zoo charging city school children a subsidized student admissions rate; a parks service collecting a $10 entrance fee to a state-subsidized forest preserve; etc.[5] But by

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they are not provided to an individual, household or family, but rather to a community or specified sectors of the population (e.g., persons with particular disabilities or physical conditions, gender, or general age groups such as youth or elderly). 63 Fed. Reg. 41658, 41659-60 (Aug. 4, 1998). *See also* HHS Information Memorandum to State Community Services Block Grant Program Administrators (Sept. 30, 1998) (confirming that Community Services Block Grants are not "public benefits" under PRWORA's definition). The U.S. Department of Housing and Urban Development similarly determined that benefits provided under the Lead Hazard Control Program are not "public benefits" under PRWORA's definition. *See* Letter from David E. Jacobs, Director of Office of Lead Hazard Control of the U.S. Department of Housing and Urban Development, to Timothy Dayonot, Director of California Department of Community Services and Development (March 20, 2000) (Attached as Ex. A.)

[5] In fact, since all student tuition rates at public colleges and universities in California are effectively subsidized to one degree or another, by the Court of Appeal's broad reading, *all* tuition rates – and by logical extension, college admission itself – would constitute "assistance." Federal caselaw and guidance, however, make clear that college admission does not fall within the ambit of "assistance" as defined by PRWORA. *See Merten*, 305 F.Supp.2d at 605 ("In the area of post-secondary education, PRWORA addresses only post-secondary monetary assistance paid to students or their households, not admissions to college or university."); Letter from U.S.

requiring that assistance be "provided by" a governmental agency or appropriated funds to an individual or household, PRWORA clearly contemplates direct and affirmative conveyance of assistance – not merely the charging of a set price or fare.

The California Education Code similarly distinguishes between "assistance" or "aid" provided directly to a student, on the one hand, and varying tuition rates charged to classifications of students, on the other. Section 69813 defines "state financial aid" to mean "*any assistance* given or guaranteed by the state that is predicated on attendance at an institution of higher education." Cal. Educ. Code § 69813 (emphasis added). By contrast, the lower tuition rate paid by California residents and certain other students is not considered "state financial aid" and thus is not considered to fall within the meaning of "any assistance" as used in this statute.[6] *Id.*

Immigration and Customs Enforcement to North Carolina Special Deputy Assistant Attorney General ¶2 ("Please note that admission to public post-secondary educational institutions is not one of the benefits regulated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and is not a public benefit under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).").

[6] Likewise, Oklahoma law draws a clear distinction between "resident tuition," on the one hand, and "[a]ny postsecondary education benefit, including, but not limited to, scholarships or financial aid," on the other. *See* 70 Okla. St. § 3242.2 (codifying H.B. 1804, 51st Leg., 1st Sess. (OK 2007)) (explicitly listing "resident tuition" and "post secondary education benefit" as separate numbered categories).

The Oklahoma legislature also imposed more stringent qualifications for undocumented students seeking state financial aid than those seeking in-state tuition. 70 Okla. St. § 3242 (codifying H.B. 1804, 51st Leg., 1st Sess (OK 2007)). Undocumented students who have graduated from an Oklahoma high school, and who lived with a parent or legal guardian in Oklahoma for at least two years while attending an Oklahoma high school, may qualify for in-state tuition if they: (1) provide schools with a copy of an application to the U.S. Citizenship and Immigration Services ("USCIS") to regularize their legal status; or (2) submit an affidavit stating that they will file such an application to USCIS as soon as they are eligible. *Id.*

In sum, because paying tuition at a standard level does not entail "payments or assistance," in-state tuition laws do not trigger § 1621(a)'s restrictions on immigrant eligibility.

b. Even assuming that in-state tuition is a "public benefit," the California Legislature fully complied with the safe harbor in subsection (d) of § 1621.

There was no need for the Court of Appeal to engage in its flawed analysis of § 1621(a), because even if a tuition rate charged were considered a "public benefit" under subsection (a), § 1621(d) contains a safe harbor that expressly authorizes California to grant such benefits to "non-qualified" immigrants "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). In other words, a state need only indicate its intent to provide benefits to undocumented immigrants in legislation post-dating August 22, 1996, in order to make such provision in full compliance with PRWORA.

Section 68130.5 meets the two criteria of the subsection (d) safe harbor. First, the California law was enacted after August 22, 1996 – in 2001. Second, it affirmatively provides on its face for eligibility for "person[s] without lawful immigration status." Cal. Educ. Code § 68130(a)(4). Contrary to the Court of Appeal's conclusion, 8 U.S.C. § 1621(d) does not require a state to include a specific citation to trigger the

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§ 3242(B). Undocumented students who provide a copy of their application to USCIS – but not those who supply only an affidavit asserting intent to file such an application – also qualify for financial aid. *Id.* § 3242(C); *see also* Oklahoma State Regents for Higher Education, Undocumented Immigrant Students: Information for the Oklahoma State System of Higher Education (January 2, 2008), *available at* http://www.law.uh.edu/ihelg/undocumented/2008-1-2-guidancetoinstitutions.pdf.

safe harbor. *See* 166 Cal. App. 4th at 1156-57. When Congress wishes to require that a law expressly cite a statute, it knows how to do so. *See, e.g.*, 25 U.S.C. § 2719(d)(2) ("The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.").[7]

To buttress its novel interpretation of the federal statute, the Court of Appeal relied inappropriately on a few sentences in a conference report, for the notion that a statute enacted pursuant to 8 U.S.C. § 1621(d) must contain specific words or references to that section. 166 Cal. App. 4th at 1156-57. The plain language of § 1621(d), however, contains no ambiguity that would justify consulting the legislative history. *See Ardestani v. INS*, 502 U.S. 129, 136 (1991) (the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used); *Ex parte Collett*, 337 U.S. 55, 61 (1949) (a court may not look to legislative history in an effort to construe a statute unambiguous on its face); *see also Fitch v. Select Prods. Co.*, 36 Cal. 4th 812, 818 (2005). The plain words "affirmatively provide" mean simply that a legislature must expressly state or pro-actively establish its intent to make undocumented immigrants eligible for benefits. Moreover, even if

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[7] The ten other states that have passed laws similarly providing for undocumented immigrants' eligibility for in-state tuition rates are: Texas, *see* H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), *amended by* S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005); Utah, *see* H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); New York, *see* S.B. 7784, 225th Leg., 2001 NY Sess. (N.Y. 2002); Washington, *see* H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); Illinois, *see* H.B. 60, 93rd Leg., Reg. Sess. (Ill. 2003); Kansas, *see* K.S.A.76-731a (Kan. 2004); Nebraska, *see* L.B. 239 (Neb. April 13, 2006); New Mexico, *see* N.M.S.A. 1978, Ch. 348, Sec. 21-1-1.2, 47th Leg. Sess. (2005); Oklahoma, see S.B. 596, 49th Leg., 1st Sess. (OK 2003), *amended by* H.B. 1804, 51st Leg., 1st Sess. (Okla. 2007)); and Wisconsin, *see* A.B. 75, § 743, 2009 Leg. Sess. (Wis. 2009).

reliance on legislative history were appropriate in this context, the conference report cited by the Court of Appeal is internally inconsistent and provides, at best, conflicting guidance. While the report does state, "only the affirmative enactment of a law . . . that references this provision, will meet the requirements of this section," it then clarifies that "[t]he phrase 'affirmatively provides for such eligibility' means that the State law enacted must specify that illegal aliens are eligible for State or local benefits." H.R. Conf. Rep. 104-725, 2d Sess., p. 1 (1996). By explicitly providing for eligibility for "person[s] without lawful immigration status," Section 68130.5(a)(4) squarely meets the report's articulated meaning of "affirmatively provides."

The Court of Appeal also erroneously superimposed a "public notice" requirement upon § 1621(d) – a condition that appears nowhere in the text or history that subsection. 166 Cal. App. 4th at 1156-57. Even assuming the validity of a requirement so patently unsupported by plain language, public notice would be more than adequate here, where the express language of the statute in Section 68130.5(a)(4), the legislative findings of A.B. 540, bill analyses, and newspaper articles clearly indicated the Legislature's intent to provide undocumented students with access to in-state tuition. *See, e.g.*, A.B. 540 ch. 814, § 1(a)(4) (legislative findings declaring that the statute "allows all persons, including undocumented immigrant students who meet the requirements set forth in [the statute] to be exempt from nonresident tuition in California's colleges and universities"); Tanya Schevitz, Illegal immigrant college tuition bill faces funding test; New version limited to California students, The San Francisco

Chronicle (Aug. 27, 2001) at A3; Jake Henshaw, Bill cutting tuition for illegal immigrants advances, The Desert Sun (Sept. 12, 2001) at 1B.[8]

In enacting § 1621(d), Congress evidenced an intent to prevent the passive or inadvertent override of § 1621(a). That did not happen in California. As A.B. 540's express language and legislative history make clear, the California legislature was quite aware that it was debating whether to provide the in-state tuition rate to students, including undocumented immigrants who had attended California high schools. If in-state tuition is subject to the restrictions of 8 U.S.C. § 1621, California has fully complied with § 1621(d).

Because the California has so clearly satisfied the requirements of § 1621(d), the Court need not decide the "public benefit question" and should reserve that for another day when its resolution is necessary. That is particularly so given the far-reaching implications of that issue, beyond the education context of this case.[9]

2. 8 U.S.C. § 1623 does not preempt Section 68130.5.

8 U.S.C. § 1623, passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C (Sept. 30, 1996)("IIRIRA"), places certain restrictions upon states that wish to deem undocumented individuals eligible for "postsecondary education

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[8] The Court of Appeal's analysis on this point, moreover, is inconsistent with earlier portions of its opinion that cite to legislative history to demonstrate the legislature's explicit intent to benefit undocumented students. *See* 166 Cal. App. 4th at 1147 (noting that "an Enrolled Bill Report of the Office of the Secretary For Education . . . estimated that 5,000 to 6,000 'undocumented' students would qualify for section 68130.5's exemption from nonresident tuition").

[9] *See* note 3, *supra.*

benefits"[10] "on the basis of residence within a State (or a political subdivision)." 8 U.S.C. § 1623(a). Specifically, it mandates that any state that grants postsecondary education benefits to "an alien who is not lawfully present in the United States" "*on the basis of residence*" in the state must grant the same benefit to all United States citizens and nationals "without regard to whether the citizen or national is such a resident." *Id.* (emphasis added). 8 U.S.C. § 1102(a)(33) defines residence as "the place of general abode, ...mean[ing] [a person's] principal, actual dwelling place in fact, without regard to intent."

Of critical importance here, § 1623 does *not* impose conditions for postsecondary education benefits granted on any basis other than residence. Moreover, by using the present tense – i.e., the term "is such a resident" rather than the phrase "is or was such a resident" – the statute as drafted controls only the award of postsecondary education benefits based on current residence, and not past residence.

In its analysis, the Court of Appeal misinterprets this federal law, erroneously characterizing "the will of Congress expressed in 8 U.S.C. section 1623" as an intent "that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." 166 Cal. App. 4th at 1148. Elsewhere throughout its analysis, the Court of Appeal also appears to assume incorrectly that past residence, or any criterion that may often *coincide* with

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[10] Although 8 U.S.C. § 1621's definition of "public benefit" is expressly modified by the requirement that "payments or assistance" be provided to an individual, household, or family eligibility unit, 8 U.S.C. § 1623 has no such limitation, and rather applies to "*any* postsecondary education benefits" (emphasis added). Thus, § 1623 includes a broader range of benefits than those within the scope of the earlier passed law. Plaintiffs' argument that "benefit" must be construed identically under § 1621 and § 1623, Pls.' Ans. Br. at 40-41, ignores the different language modifying the term in each of the two statutes and is therefore unavailing.

past or current residence – and not solely residence itself – would suffice to establish a violation of § 1623. *See* 166 Cal. App. 4th at 1147 ("[I]t could also be said such a student receives the benefit of Section 68130.5 based on prior California residence."); *id.* (citing plaintiffs' allegation that "the vast majority of students attending California high schools for three years live in California"). As drafted by Congress, however, § 1623 permits states to grant in-state tuition to undocumented students living within their borders without limitation, so long as actual current residence is not a criterion for eligibility.

Had Congress wished to impose the restrictions erroneously read into the statute by the Court of Appeal, it would have simply barred provision of post-secondary education benefits to any undocumented immigrant within a state's borders (unless the state also awarded the same benefits to all U.S. citizens and nationals), without adding the condition that such provision be made "on the basis of residence." Or, Congress would have chosen to bar provision of such benefits to any undocumented immigrant on any basis correlating with residence, rather than "on the basis of residence" itself. The Court of Appeal's interpretation of § 1623 at best rewrites – at worst deletes – the statute's crucial residence condition, and should be rejected by this Court.

Section 68130.5 fully complies with § 1623 as correctly construed. As explained, the California tuition law provides that students enrolled at accredited public colleges and universities during or after 2001 are eligible for in-state tuition on the basis of their (1) past attendance at a California high school and (2) receipt of a California diploma or equivalent. Thus, students who qualify for in-state tuition under Section 68130.5 – including

undocumented individuals – do so *irrespective* of their current (or indeed, even past) state of residence.[11]

In finding Section 68130.5 preempted, the Court of Appeal also misconstrued the state law, impermissibly substituting its own assumptions for the law's actual provisions. Disregarding the unambiguous plain language of Section 68130.5, the Court of Appeal looked to what "a reasonable person would assume" about the operation of the tuition law, then determined, "[a] reasonable person would assume that a person attending a California high school for three years also lives in California." 166 Cal. App. 4th at 1145. The Court of Appeal "therefore consider[ed] the language of section 68130.5 ambiguous as to whether it affords a benefit to illegal aliens based on residence," *id.* at 1146, and examined select provisions of legislative history to find an intent "to benefit illegal aliens." *Id.* at 1147-48. Finally, the Court concluded that Section 68130.5 "creates a de facto residence requirement." *Id.* at 1148.

The Court of Appeal's novel "reasonable person's assumption" standard – for which the lower court notably cites no authority – has no place amongst the principles of statutory construction accepted by this Court. Rather, it is well-established that "the plain language controls." *Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 888 (2008). A court's assumptions about a statute's operation simply may not be substituted for actual statutory language. Moreover, a court may "consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations." *Id.*; *accord Fitch v. Select Prods. Co.* 36 Cal. 4th at 818. Because Section 68130.5's eligibility provisions are

[11] In addition, as explained in Section I(A)(1)(b), *supra*, Section 68130.5 provides that a "person without lawful immigration status" must file an affidavit stating that he or she has applied to adjust federal immigration status, or intends to file such application upon becoming eligible for adjustment of status. Cal. Educ. Code § 68130.5(a)(4).

straightforward and unambiguous, the state law must be interpreted as written. Three years' California high school attendance, combined with California high school graduation, do not equate with state residence. Rather, on their face, these criteria can be – and in practice, are – met by numerous categories of persons who are not California residents, such as those who: (1) previously attended and graduated from a California high school but live and work in another state; (2) previously attended and graduated from a California high school, but left California and returned less than one year prior to college enrollment; (3) live in a bordering area of a neighboring state or country but attended and graduated from a California high school; or (4) who attended and graduated from a California boarding high school but whose parents reside elsewhere. Indeed, of the nearly 1500 students who qualified for in-state tuition under Section 68130.5 at the University of California in 2005-2006, only 360 students, or 26 percent, were undocumented immigrants.[12]

Even if resort to legislative history were appropriate in this case – which it is not – that history, contrary to the view of the Court of Appeal, fully supports the validity of Section 68130.5. In passing the state tuition law, the Legislature explicitly expressed its intent that eligibility for in-state rates be conferred *without* regard to residence, thereby encompassing many individuals living outside California. *See* Enrolled Bill Report on A.B. 540, Office of the Sec. for Educ. (2001-2002 Reg. Sess.) (Oct. 3, 2001) (stating that "any student who meets the specified criteria, without regard to residency [will] be eligible to receive the exemption" and that "border area

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[12] *See* Sen. Com. On Appropriations, Fiscal Summary of S.B. 160 (2007-08 Reg. Sess.) May 14, 2007, *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0151-0200/sb_160_cfa_20070514_113154_sen_comm.html (as of Dec. 1, 2008).

students in California" as well as nonresident "boarding school students who attend California schools" are expected to qualify). The fact that the Legislature also acknowledged that some undocumented students who live in California would also qualify and chose not to exclude them, *see* 166 Cal. App. 4th at 1148, does not transform Section 68130.5 into a preempted state statute. As explained above, Congress did not restrict states' ability to confer in-state rates to undocumented students living within their borders, so long as such conferral was made on a basis other than residence.

B. Section 68130.5 is not conflict preempted by federal law.

Conflict preemption occurs when a state law makes it impossible "to comply with both state and federal law" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby,* 30 U.S. at 372-73. Because Section 68130.5 does neither of these things, this Court should reverse the finding of conflict preemption below.

The Court of Appeal's erroneous finding relies primarily on its determination that Section 61830.5 violates the express terms of 8 U.S.C. § 1623, "making it impossible for [state officials] to comply with both state and federal requirements." 155 Cal. App. 4th at 1153 (emphasis omitted). As explained in Section I(A)(2), *supra*, however, § 1623 does not prohibit operation of Section 68130.5. Rather, that federal statute sets forth narrow limitations on the provision of postsecondary education benefits *on the basis of residence* but sets no restrictions upon – and thereby implicitly permits – state legislation granting benefits on other bases. Section 68130.5, awarding in-state tuition without regard to residence, falls within the bounds of this Congressional permission. *See* Part I(A)(2), *supra.* Contrary to the conclusion of the Court of Appeal, State officials may implement the California law while fully complying with § 1623; accordingly, Section 68130.5 avoids any problem under the "impossibility"

prong of conflict preemption.

The Court of Appeal also incorrectly determined that Section 68130.5 stands as an obstacle to the Congressional objective expressed in 8 U.S.C. § 1601, passed as part of PRWORA.[13] Section 1601 contains general statements about immigrant self-sufficiency and the government's compelling interest in removing immigration incentives created by the availability of public benefits. Even assuming that in-state tuition is a public benefit under PRWORA, however (which, as explained in Part I(A)(2)(a), *supra*, it is not), these statements express Congress' reasons for imposing certain limitations on state provision of benefits to immigrants – they do not rewrite those specific, express limitations. The operative provisions of PRWORA, rather, set forth a careful, permissive scheme that restricts inadvertent grants of benefits to undocumented immigrants by states, but broadly authorizes express and intentional grants. *See* 8 U.S.C. § 1621(d). As explained in Part I(A)(2)(b), *supra*, Section 68130.5 falls within the bounds of § 1621(d)'s permission because it (1) was passed after August 22, 1996 and (2) affirmatively provides eligibility for undocumented immigrants.

In their Answer Brief, Plaintiffs set forth a host of additional arguments, beyond those accepted by the Court of Appeal, for a finding of conflict preemption. However, these arguments rely primarily on Plaintiffs' erroneous assumptions about the structure and operation of federal immigration law. For example, Plaintiffs incorrectly assert that undocumented immigrants are unable to adjust status and that the federal government seeks to remove all immigrants without status. *See, e.g.*, Pls.'

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[13] The Court of Appeal decision cites to 8 U.S.C. § 1601 in its analysis of preemption under 8 U.S.C. § 1623. *See* 166 Cal. App. 4th at 1154. The former federal provision, however, codifies PRWORA and the latter, IIRIRA.

Ans. Br. at 53. In fact, federal immigration law specifically provides avenues for various categories of persons who currently lack status to adjust to a lawful immigration status and remain in the United States. *See, e.g.*, 8 U.S.C. § 1255(i) (allowing certain persons, including persons who entered unlawfully, to adjust status to lawful permanent residence); 8 U.S.C. § 1229b (authorizing "cancellation of removal," a form of relief from deportation, to certain persons otherwise subject to removal); 8 U.S.C. § 1158 (authorizing asylum to refugees fleeing persecution abroad). Moreover, federal law also recognizes that numerous persons who currently lack lawful immigration status may nonetheless remain and work in the United States, often with the explicit knowledge or permission of the federal government. *See, e.g.*, 8 C.F.R. § 274a.12(c)(8)-(11), (14) (designating categories of persons lacking lawful status who are eligible to receive an Employment Authorization Document). Finally, the federal government decides to remove a particular individual from the country only through the formal procedures set out in the Immigration and Nationality Act ("INA") and associated regulations. *See* 8 U.S.C. §§ 1101 et seq. An individual whom the federal government seeks to remove is entitled to a pre-removal adversarial proceeding before a federal immigration judge, including notice and an opportunity to be heard.

Accordingly, Plaintiffs' claim that essentially *any* service or benefit provided to undocumented immigrants within United States borders creates an incentive to stay and is thereby preempted, Pls.' Ans. Br. at 51, finds no support in federal law. Indeed, were Plaintiffs correct in their view, any state statute passed pursuant to Congress' express authorization in 8 U.S.C. § 1621(d) would be preempted – rendering that subsection entirely meaningless. Conflict preemption principles would even bar officials from following numerous federal laws and regulations, as well as the directives

of federal courts.[14] *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); HHS Public Benefit Interpretation, 63 Fed. Reg. 41658, 14659. Congress' permissive scheme of regulation in the area of state and local public benefits clearly does not pose the conflicts manufactured by Plaintiffs.[15]

C. Section 68130.5 is not field preempted by federal law.

Finally, state and local laws are held field preempted if they "regulate[] conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). "Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that

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[14] Plaintiffs further assert that any such statute would conflict with the federal criminal harboring law, citing to a Fourth Circuit case sustaining a defendant's conviction for knowing sale of fraudulent citizenship documents to undocumented individuals. Pls.' Ans. Br. at 55-56. Contrary to Plaintiffs' assertion, the federal harboring law has been narrowly, rather than "broadly," construed by the federal courts. In particular, the Ninth Circuit requires specific criminal intent for convictions under 8 U.S.C. § 1324(a)(1)(A)(iv). *See United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) ("[T]o convict a person of violating section 1324(a)(1)(A), the government must show that the defendant acted with criminal intent, i.e., the intent to violate United States immigration laws."). Not surprisingly, Plaintiffs cite no case in which government educators, administrators or officials were indicted under the federal criminal harboring laws for bona fide administration of governmental programs – and such an outcome would be ludicrous.

[15] Plaintiffs also argue that Section 68130.5 is preempted for using classifications other than those found in federal immigration law. But Section 68130.5's eligibility provisions precisely track – and, indeed, explicitly cite – federal immigration classifications, excluding on the basis of immigration status only non-immigrant aliens within the meaning of 8 U.S.C. § 1101(a)(15). Cal. Educ. Code § 68130.5(a). While Section 68130.5 does require the filing of an affidavit by a "person without lawful immigration status," this term refers to federal status rather than creating new state-based classifications. Moreover, the term is substantially similar to the federal term, "alien who is not lawfully present in the United States," used at 8 U.S.C. § 1621.

Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Federal courts have found field preemption in such areas of overarching federal law and interests as automobile safety regulation, clean air quality, and foreign trade and relations. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (instructing that state or local laws imposing emissions standards varying from those in the federal Clean Air Act should be held preempted); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding state common law tort action preempted by federal auto vehicle safety laws); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding state law banning foreign trade preempted).[16]

By contrast, in the area of postsecondary education benefits – an area traditionally and presently occupied primarily by the states – Congress has imposed narrow restrictions on provision of benefits to certain immigrants but has otherwise fully condoned state legislation in the field. In other words, rather than "preclud[ing] enforcement of state laws on the same subject" and "le[aving] no room for the States to supplement federal laws," Congress merely set the parameters for relevant state legislation.

The Court of Appeal's erroneous finding of field preemption relied largely on an entirely distinguishable federal district court decision. In that case, *LULAC v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997), plaintiff immigrants' rights groups and others challenged Proposition 187, a

[16] As discussed in note 1, *supra*, a state or local law is constitutionally preempted if it constitutes a "regulation of immigration" itself, but speculative and indirect impacts on immigration do not suffice to establish such preemption.

California constitutional amendment that predated the passage of PRWORA and IIRIRA and barred various categories of immigrants from receiving a range of public benefits and services. The court held as preempted provisions *excluding* immigrants from public post-secondary school enrollment. But the federal district court never assessed whether states' *inclusion* of certain immigrants in the grant of benefits or services – the issue central to the instant case – would trigger preemption concerns. And, because Proposition 187 dealt with enrollment rather than tuition rates, the court also did not address whether federal laws would have any impact on in-state tuition laws. Finally, although the *LULAC* court did find field preemption with respect to post-secondary education benefits to immigrants, its decision in fact acknowledges that states may pass legislation in the area so long as they comply with PRWORA and IIRIRA.[17] *See id.* at 1256 (describing Congress' instructions to states with respect to post-secondary education benefits in PWRORA and IIRIRA); *id.* at 1255 (explicitly stating that PRWORA provisions define the scope of "permissible state legislation in the area of regulation of government benefits and services to aliens").

In short, Congress did not oust state power to legislate in the area of post-secondary education – even with respect to enrollment or rates charged to immigrant students. Rather, Congress fully contemplated that states would continue to pass laws in the field and simply set certain limitations on those laws. Section 68130.5, falling squarely within the bounds of federal permission, is therefore not field preempted.

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[17] In light of this acknowledgement, what the district court in *LULAC* termed "field preemption" in fact more closely tracks the doctrinal tests for conflict preemption.

CONCLUSION

Amici respectfully urge this Court to reverse the decision of the Court of Appeal and uphold the constitutionality of Section 68130.5.

Dated: October 2, 2009

Respectfully submitted,

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EXHIBIT A

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-3000

Exhibit 2

OFFICE OF LEAD HAZARD CONTROL

MAR 20 2000

MAR 27 2000

Timothy Dayonot
Director
Department of Community Services and Development
700 North 10th Street
Room 258
Sacramento, CA 95814

Dear Mr. Dayonot:

This letter responds to inquiries from your predecessor, Michael J. Micciche, and from Stephen E. Ronfeldt, Co-Director of the Public Interest Law Project, concerning whether activities funded by the Department of Housing and Urban Development's Lead Hazard Control Program are "Federal public benefits" and therefore limited to "qualified aliens" as those terms are defined in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"), Pub. L. 106-73.

Section 404(a) of the Welfare Reform Act makes it the responsibility of "[e]ach Federal agency that administers a program" to communicate any changes in eligibility standards as a result of the Act. Accordingly, the Department must apply the language of the Act to its programs to determine whether a program is a "federal public benefit." *See* Department of Justice, Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility under Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61344, 61361 (Nov. 17, 1997) (directing interested parties to consult with the federal agency overseeing the program to determine applicability); Department of Justice/Immigration and Naturalization Service, Proposed Rule on Verification of Eligibility for Public Benefits, 63 Fed. Reg. 41662, 41664-65 (July 27, 1998). After reviewing the applicable statutes, regulations, and grant procedures, it is the Department's conclusion that the Welfare Reform Act restrictions are inapplicable to the Lead Hazard Control Program because the benefits under the program are not "Federal public benefits" within the meaning of § 401(c) of the Welfare Reform Act.

Benefits under the Lead Hazard Control Program are not grants, contracts, loans, professional licenses, or commercial licenses provided by an agency of the United States or by appropriated funds of the United States within the meaning of the Welfare Reform Act. *See* Department of Health and Human Services, Notice, "Personal Responsibility and Work Opportunity Reconciliation Act of 1996—Interpretation of Federal Public Benefit", 63 FR 41658, 41659 (Aug. 4, 1998); *see also* DOJ Interim Guidance, 62 FR at 61361.

Moreover, benefits under the Lead Hazard Control Program are not retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefits, or any other similar benefits within the meaning of the Welfare Reform Act. Accordingly, it is the position of the Department that procedures to verify the citizenship or

immigration status of families whose dwellings receive lead paint abatement services are not required or authorized by the Welfare Reform Act. The Department of Health and Human Services and the Department of Justice have similarly construed the Act. HHS Notice, 63 Fed. Reg. 41658; DOJ Interim Guidance, 62 Fed. Reg. 61344.

Please contact Kenneth A. Markison, Assistant General Counsel for GSE/RESPA, at (202) 708-3137, extension 5187, if you need any further information concerning this matter.

Very truly yours,

David E. Jacobs
Director, Office of Lead Hazard Control

cc: Stephen Ronfeldt, Esquire

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of California Rule of Court 8.204(c)(1). This brief is printed in 13 point Times New Roman font and, exclusive of the portions exempted by Rule 8.204(c)(3), contains 7, 436 words.

Linton Joaquin

PROOF OF SERVICE

I, Konny Huh, declare that I am employed in the City and County of New York, State of New York; I am over the age of 18 and not a party to the within action or cause; my business address is 125 Broad Street, 18th Floor, New York, New York 10004.

On October 2, 2009, I served a copy of the attached **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AND THE NATIONAL IMMIGRATION LAW CENTER FILED IN SUPPORT OF RESPONDENTS REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.** on each of the following by placing a true copy in a sealed envelope and depositing the sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the United States Postal Service in New York, New York, addressed as follows:

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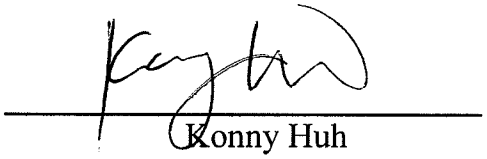
I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service was executed on October 2, 2009, at New York, New York.



Konny Huh