No. _____

In The
Supreme Court of the United States

ROBERT MARTINEZ, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY
OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state statute that defies the congressional intent behind 8 U.S.C. § 1623 by providing resident tuition rates at public postsecondary institutions to illegal aliens and declaring that it is granting those benefits to illegal aliens not on the basis of "residence" in the state, but on the basis of attending a high school in the state, is expressly preempted.

2. Whether a court must undertake conflict preemption analysis after concluding that an express preemption provision does not apply in a case involving both types of preemption claims.

PARTIES TO THE PROCEEDING BELOW

In the California Supreme Court, Plaintiffs and Appellants were Robert Martinez, Cory McMahon, Onson Luong, Scott Nass, Justin Rabie, Mark Hammes, Steven Hammes, David Hammes, Ash Caloustian, Aaron Dallek, Soleil Teubner, Mara McDermott, Adam Anderson, Demyan Drury, Casey Meguro, Chaning Jang, Kyle Dozeman, Kellan Didier, James Deutsch, Patrick Bilbray, Briana Bilbray, Brian Bilbray, Cory Robertson, Daniel Alameda, Dan Goldberg, Tim Kozono, Joseph Konrad, David Taylor, Suzanne Kattija-Ari, Justine Smith, Amanda Hildebrand, Aaron Malone-Stratton, Pamela Stratton, Michal Bulmash, Jimmy DaVault, III, Matt Bittner, Antwann Davis, Arrington Dennison, Kathryn Jelsma, Emily Grant, Peter Shea, and Adam Thomson.

Defendants and Respondents were Regents of the University of California, Trustees of the California State University System, Board of Governors of the California Community Colleges, Robert C. Dynes, Charles B. Reed, and Marshall Drummond.

Amici supporting Plaintiffs and Appellants below were Eagle Forum Education & Legal Defense Fund; United States Representatives Lamar Smith and Steve King, and Washington Legal Foundation and Allied Educational Foundation; and Pacific Legal Foundation.

PARTIES TO THE PROCEEDING BELOW
– Continued

Amici supporting Defendants and Respondents below were Californians Together, The Association of Mexican American Educators and the California Association for Bilingual Education; Asian Pacific American Legal Center and 80 Asian Pacific American organizations; Los Angeles Community College District; San Jose/Evergreen Community College District; Orange County Dream Team; Alicia A., Gloria A., Marcos A., Mildred A., Enrique Boca, Nicole Doe, Collin Campbell, Alex Ortiz, Linda Lin Qian, Cesar Rivadeneyra, Jennifer Seidenberg, Improving Dreams, Equality, Access and Success at University of California, Davis, Improving Dreams, Equality, Access and Success of University of California, Los Angeles, and National Immigration Law Center; San Diego Community College District; New York State Youth Leadership Council, The New York State Association for Bilingual Education, New York Latino Research and Resources Network, New York Immigration Coalition, Long Island Immigrant Alliance, Northern Manhattan Coalition for Immigrant Rights, Hispanic Resource Center of Larchmont and Mamaroneck, Hispanic Federation, Committee for Hispanic Children & Families, Hispanic Association of Colleges and Universities, Hispanic College Fund, Hispanic National Bar Association, Asian American Legal Defense & Education, Professional Staff Congress, California Faculty Association, Dr. Pedro Caban, Dr. Marcelo Suarez-Orozco, Dr. Carola Suárez-Orozco, Dr. Regina Cortina, Catherine J. Crowley and Dr. Kevin Dougherty; American

PARTIES TO THE PROCEEDING BELOW
– Continued

Civil Liberties Union, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego and Imperial Counties, and the National Immigration Law Center; and Peralta Community College District.

RULE 29.6 STATEMENT

The Immigration Reform Law Institute is a nonprofit organization, exempt from federal taxation under Internal Revenue Code Section 501(c)(3), based in Washington, D.C. working exclusively to protect the legal rights, privileges, and property of United States citizens and their communities from injuries and damages caused by unlawful immigration. It has no stockholders and no parent company; it is a supporting organization under Internal Revenue Code § 509(a)(3) to another § 501(c)(3) organization: the Federation for American Immigration Reform.

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The Opinion in the Yolo County Superior Court of California is unpublished and reproduced below at App. 110-123. The Opinion of the Court of Appeal for the Third Appellate District of California is partially published and reproduced below at App. 38-109. The Opinion of the California Supreme Court is published and reproduced below at App. 1-37.

JURISDICTION

The judgment of the California Supreme Court, reversing the judgment of the California Court of Appeal for the Third Appellate District, was entered on November 15, 2010. This Court possesses jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Statutory Provisions

8 U.S.C. § 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits

(a) In general. 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. § 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local benefits

(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not –

(1) a qualified alien (as defined in section 431 [8 USCS § 1641]),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 USCS § 1182(d)(5)] for less than one year,

is not eligible for any state or local public benefit (as defined in subsection (c)).

8 U.S.C. § 1601. Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

* * *

(2) It continues to be the immigration policy of the United States that –

(A) aliens with the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

* * *

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

State Statutes

Cal. Ed. Code. § 68130.5. Requirements for exemption from nonresident tuition

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges;

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

* * *

(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.

INTRODUCTION

This case involves a question of great national importance: whether a state may defy Congress's clear statutory prohibition against providing in-state (or "resident") tuition rates to illegal aliens unless the state also provides the same benefit to all United States citizens regardless of their states of residence. In the absence of guidance from this Court, numerous states have circumvented federal law in this area with impunity. They have done so by urging a reading of federal law that reduces it to a dead letter and is contrary to every expression of congressional intent on the matter.

In 1996, as part of the Illegal Immigration and Immigrant Responsibility Act, P.L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) ("IIRIRA"), Congress enacted a variety of measures to discourage illegal immigration and strengthen the enforcement of federal immigration laws. One of the provisions of that Act, codified at 8 U.S.C. § 1623, is a one-sentence prohibition that

forbids a state from providing resident tuition rates to any illegal alien unless that state provides resident tuition rates to all United States citizens, regardless of their states of residence:

> 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.

This congressional bar did not sit well with state legislators in a handful of states who disagreed with federal immigration policy and wanted to make in-state tuition rates at their public postsecondary institutions available to illegal aliens. One of the first states to do so was California. Indeed, some California public universities had been providing in-state tuition rates to illegal aliens without express statutory authorization as early as 1985.[1]

Four years after IIRIRA was enacted, the California legislature passed a bill providing in-state tuition rates to certain illegal aliens. *See* A.B. 1197,

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[1] *See* David Holley, *Decades of Doubt: Law's New "Registry" Date can End Uncertainty for Longtime Illegal Aliens*, L.A. TIMES, Mar. 2, 1987, at 3.

1999-2000 Leg., Reg. Sess. (Cal. 2000). However, Governor Gray Davis vetoed the bill, stating that 8 U.S.C. § 1623 "would require that all out-of-state legal residents be eligible for this same benefit" and that providing the benefit to all United States citizens attending California public colleges and universities would cost the state too much money.[2] The following legislative session, the California legislature passed virtually the same bill again.[3] On October 12, 2001, Governor Davis signed the bill into law, without explaining why his concerns regarding 8 U.S.C. § 1623 no longer applied.[4] The law is codified at California Education Code § 68130.5.

Concerned with the conflict between 8 U.S.C. § 1623 and Cal. Ed. Code § 68130.5, the California

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[2] Governor's veto message to Assembly on Assembly Bill No. 1197 (1999-2000 Reg. Sess.) (Sept. 29, 2000). *See* App. 15 [pages 8-9 of Ca. Sup. Ct. slip opinion].

[3] The second bill was A.B. 540, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (which became Cal. Ed. Code § 68130.5). It differed from A.B. 1197 in two minor respects: (1) A.B. 1197 required beneficiaries to enroll at a California postsecondary institution within one year of graduation, whereas A.B. 540 allowed beneficiaries to enroll at anytime, and (2) an illegal alien beneficiary of A.B. 1197 had to present evidence that an "application" for lawful status had been initiated, whereas an A.B. 540 beneficiary only had to sign an affidavit expressing an intent to apply for lawful status if and when such application ever became possible.

[4] The bill number was A.B. 540. For a full account of the legislative history of Cal. Ed. Code § 68130.5 and similar laws in other states, *see* Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. OF LEGIS. AND PUBLIC POLICY, 473, 478-496 (2007).

legislature then attempted to immunize itself from liability by enacting Cal. Ed. Code § 68130.7, which provides,

> If a state court finds that Section 68130.5 . . . is unlawful, the court may order, as equitable relief, that the administering entity that is the subject of the lawsuit may terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or any other retroactive relief, may be awarded.

California is not the only state that has defied the express requirements of 8 U.S.C. § 1623 and provided in-state tuition rates to illegal aliens. Since 2001, nine other states have done so.[5] Action by this Court is needed to ensure that more states do not follow California's policy of calculated defiance and thwart Congress's intent to deny residence-based postsecondary education benefits to illegal aliens.

The debate over whether illegal aliens should receive the public benefit of resident tuition rates is a matter of intense national interest and controversy. Nearly every year since 2001, advocates of resident tuition benefits for illegal aliens have proposed in Congress the so-called "Development, Relief and Education

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[5] *See* 110 Ill. Comp. Stat. Ann. § 305/7e-5; K.S.A. § 76-731a; Neb. Rev. Stat. § 85-502; N.M. Stat. Ann. § 21-1-4.6; N.Y. Educ. Law § 6301.5; Tex. Educ. Code Ann. §§ 54.052-54.053; Utah Code Ann. § 53B-8-106; Wash. Rev. Code Ann. § 28B.15.012. Oklahoma has repealed its in-state tuition provision. *See* 70 Okl. Stat. §§ 3242, 3242.2.

for Alien Minors (DREAM) Act," which would repeal 8 U.S.C. § 1623.[6] To date, none of these attempts to repeal 8 U.S.C. § 1623 have succeeded. However, their failure to change federal law has not dissuaded some state legislatures from taking an alternative path: simply circumventing federal law.

STATEMENT OF THE CASE

This case is a challenge to Cal. Ed. Code § 68130.5, which provides the benefit of in-state (or "resident") tuition rates to certain illegal aliens.

[6] DREAM Act of 2010, S. 3827 (111th Congress), § 3, 156 Cong. Rec. S3827, S7353-61 (daily ed. Sep. 22, 2010); DREAM Act of 2010, S. 729 (111th Congress), § 3, 155 Cong. Rec. S3930-2 (daily ed. Mar. 26, 2009); American Dream Act, H.R. 1751 (111th Congress), § 3, 155 Cong. Rec. E797 (daily ed. Mar. 26, 2009); Comprehensive Immigration Reform Act of 2010, S. 3992 (111th Congress), § 533, 156 Cong. Rec. S8301-4, S8668 (daily ed. Nov. 30, 2010, introduced) (daily ed. Dec. 9, 2010, failed cloture vote); DREAM Act of 2009, S. 729 (111th Congress), § 3, 155 Cong. Rec. S3930 (daily ed. Mar. 26, 2009); DREAM Act of 2007, S. 1639 (110th Congress), § 616, 153 Cong. Rec. S8641-2 (daily ed. June 28, 2007); Comprehensive Immigration Reform Act of 2007, S. 1348 (110th Congress) §§ 621-632 (2007) (as amended by S.A. 1150 §§ 612-619, 153 Cong. Rec. S6007-8 (daily ed. May 11, 2007); American Dream Act, H.R. 1275 (110th Congress), § 3, 153 Cong. Rec. H2118 (daily ed. Mar. 1, 2007); Comprehensive Immigration Reform Act of 2006, S. 2611 (109th Congress) § 623, 152 Cong. Rec. S4530-4549, S5189-90 (daily ed. Apr. 7, 2006); DREAM Act of 2005, S. 2075 (109th Congress), § 3, 150 Cong. Rec. S1291 (daily ed. Feb. 12, 2004) (passed Senate but not taken up in the House); DREAM Act, S. 1545 (108th Congress), § 3, 149 Cong. Rec. 20551-2 (July 31, 2003); DREAM Act, S. 1291 (107th Congress), § 2, 147 Cong. Rec. 15361-2 (Aug. 1, 2001).

Approximately 25,000 illegal aliens in California receive this taxpayer-subsidized tuition rate every year, while the same tuition benefit is denied to tens of thousands of United States citizens who attend California public postsecondary institutions as nonresidents. *See* App. 77. The cost of this benefit to California taxpayers is immense. California spends in excess of $208 million each year subsidizing the tuition of illegal aliens under § 68130.5.[7]

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[7] This cost estimate was provided to the courts below and was derived by using the resident and nonresident tuition rates from the 2008-09 academic year at the schools in the University of California, California State, and California Community College systems and the number of illegal aliens benefiting under Cal. Ed. Code § 68130.5. For the UC system, undergraduate tuition and fees for in-state students totaled $8,383 a year, compared to $28,003 for nonresidents. http://registrar.berkeley.edu/Registration/feesched.html#undergrad. The taxpayer-subsidized portion of in-state tuition roughly equals the difference between the tuition amounts ($19,620). The number of illegal aliens enrolled system-wide (430) was multiplied by $19,620 to reach an $8,436,600 subsidy a year for the UC system. In the California State University system, the difference between the tuition amounts for resident and nonresident tuition payers was approximately $11,000 per year. Joyce Howard Price, *Students Sue for Tuition Parity with California Illegals*, WASH. TIMES (Dec. 15, 2005), p. A3. Using CSU's estimate of 10,000 illegal aliens receiving in-state tuition rates through § 68130.5, the total subsidy was $110,000,000 per year. In the community college system of California, the average tuition differential was approximately $6,000 a year. *Id*. Multiplying this figure by the number of illegal aliens receiving the subsidy (15,000) yielded a system-wide subsidy of $90,000,000. Thus, the total taxpayer subsidy in the three systems combined was approximately $208,436,600 for the 2008-09 academic year.

Petitioners challenging § 68130.5 are class representatives of the United States citizen students at California postsecondary educational institutions who are denied resident tuition rates and are instead required to pay out-of-state (or "nonresident") tuition prices to attend college. App. 7. The benefit of resident tuition rates is among the most valuable of all public benefits bestowed by the state of California. For example, the difference between resident and nonresident tuition rates for undergraduates at the University of California at Berkley is $11,439.50 per semester, resulting in a total benefit of $91,422 per student over the course of four years of study.[8]

The central issue in the express preemption aspect of this case is whether Congress intended the phrase "on the basis of residence" in 8 U.S.C. § 1623 to describe the criterion on which the benefit is bestowed (thereby allowing a state to circumvent the prohibition on resident tuition for illegal aliens by simply choosing a proxy criterion) or whether Congress was instead intending to describe the *kinds* of benefits that are typically given "on the basis of residence."

Cal. Ed. Code § 68130.5 grants illegal aliens an "exemption" from paying nonresident tuition to public postsecondary institutions, provided that they have

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[8] The cost of resident tuition is $6,230.75 per semester and the cost of nonresident tuition is $17,670.25 per semester. http://registrar.berkeley.edu/Registration/feesched.html

attended a California high school for three years and have satisfied certain other criteria to qualify for that benefit.[9] Some United States citizens can qualify for this benefit as well, if they attend a California high school for three years and graduate from a California high school. App. 18. The exact number of United States citizens receiving the benefit of Cal. Ed. Code was not established in the court proceedings below. However, Petitioners maintained that regardless of how many United States citizens are permitted to receive the benefit, Cal. Ed. Code § 68130.5 fails to meet the requirement of 8 U.S.C. § 1623 that *every* United States citizen be afforded the "benefit" (not merely an opportunity to qualify for the benefit) if a single illegal alien is provided the benefit.

The California Supreme Court held that Cal. Ed. Code § 68130.5 escaped express preemption under 8 U.S.C. §§ 1621 and 1623. App. 6, 17-29. After disposing of Petitioners' express preemption claims, the California Supreme Court declined to directly address the several conflict preemption claims in the case, as described below. App. 30-31; *see infra* at 28-36.

The second question presented for this Court's review is whether the California Supreme Court has contradicted the precedents of this Court which hold that a reviewing court must still consider conflict

[9] The criteria include attending a California high school for three years, graduating from a California high school, and submitting an affidavit stating that the illegal alien will attempt to become lawfully present in the United States as soon as he or she possibly can. Cal. Ed. Code § 68130.5.

preemption challenges to a law even if it concludes that express preemption does not apply.

PROCEDURAL HISTORY

On, December 14, 2005, Petitioners filed a Complaint in the Yolo County, California, Superior Court alleging that Cal. Ed. Code § 68130.5 is expressly preempted, field preempted, conflict preempted, and preempted as a regulation of immigration. Petitioners claimed that Cal. Ed. Code § 68130.5 was not only expressly preempted by 8 U.S.C. § 1623 but also expressly preempted by 8 U.S.C. § 1621, which prohibits states from affording "public benefits" to illegal aliens. App. 112, 115-117. Petitioners' conflict preemption claims were that the valuable subsidy of resident tuition rates encourages illegal aliens to remain in the United States in violation of federal law, stands as an obstacle to the achievement of the congressional objective spelled out in 8 U.S.C. §§ 1601(6) and 1623, conflicts with the objective of 8 U.S.C. § 1324(a)(1)(A)(iv), and that Cal. Ed. Code § 68130.5 uses terms that conflict with the classifications of federal immigration laws. App. 88-89.

Petitioners also claimed that Cal. Ed. Code. § 68130.5 violated their rights under the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment of the United States Constitution. App. 117-118. In addition, Petitioners brought claims that Cal. Ed. Code § 68130.5 violated their

rights under California constitutional and statutory provisions.

The superior court granted Respondents' demurrer on October 4, 2006. App. 110. Petitioners timely appealed to the California Court of Appeal.

The California Court of Appeal issued a unanimous opinion on September 15, 2008, reversing in part and affirming in part the decision of the superior court. App. 38. The Court of Appeal specifically reversed the trial court's grant of a demurrer to Petitioners' preemption and Fourteenth Amendment Privileges and Immunities Claims. App. 91, 96, 101. The Court of Appeal granted Petitioners leave to amend their Fourteenth Amendment Equal Protection claim. App. 99. The Court of Appeal affirmed the superior court's demurer as to all of Petitioners' state law claims. App. 101-108.

The Court of Appeal examined whether § 68130.5 was expressly preempted under 8 U.S.C. § 1623 and found that the appropriate question concerning the application of the 8 U.S.C. § 1623 express preemption language was "whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred." App. 71. The Court of Appeal then explained that the "exemption" from paying nonresident tuition based on three years attendance and graduation at a California high school "create[d] a de facto residence requirement" or a "surrogate criterion for residence." App. 78. The Court of Appeal also pointed out that "[a] reasonable

person would assume that a person attending a California high school for three years also lives in California." App. 77. As a result, the Court of Appeal held that "Section 68130.5 manifestly thwarts the will of Congress expressed in 8 U.S.C. § 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." App. 78.

The Court of Appeal observed that Cal. Ed. Code § 68130.5 could not evade express preemption under 8 U.S.C. § 1623 by making the benefit available to only some United States citizens. App. 76-78. The Court of Appeal therefore held that Cal. Ed. Code § 68130.5 fails to meet the requirement of the last clause of 8 U.S.C. § 1623 because "the state statute allows the benefit to United States citizens from other states only if they attend a California high school for three years," and thus "does not afford the same benefit to United States citizens 'without regard to' California residence." App. 87.

The Court of Appeal also ruled in favor of Petitioners on their second express preemption claim, that Cal. Ed. Code § 68130.5 was preempted by 8 U.S.C. § 1621, which prohibits states from affording "public benefits" to illegal aliens. App. 92-96. The Court of Appeal held that Cal Ed. Code § 68130.5 did not "affirmatively provide" that illegal aliens were entitled to receive the public benefits in question as required by 8 U.S.C. § 1621(d). App. 95.

The Court of Appeal also held that Cal. Ed. Code § 68130.5 was conflict preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App. 89 (*citing De Canas v. Bica*, 424 U.S. 357 (1976)). The Court of Appeal noted that Congress actually codified its objective in 8 U.S.C. § 1601 to remove the "incentive for illegal immigration" caused by the availability of public benefits to illegal aliens. App. 89.

The Court of Appeal also held that § 68130.5 was field preempted, observing that "Congress manifested a clear purpose to oust state power with respect to the subject matter which [Cal. Ed. Code § 68130.5] attempts to regulate." App. 87.

Respondents timely appealed to the California Supreme Court. On November 15, 2010, the California Supreme Court reversed the California Court of Appeal and held that Cal. Ed. Code § 68130.5 was not expressly preempted by either 8 U.S.C. §§ 1621 or 1623. App. 6-7. Specifically, the California Supreme Court held that rather than basing the benefit on "residence," "section 68130.5's exemption from paying out-of-state tuition . . . is based on *other* criteria, specifically that persons possess a California high school degree or equivalent . . . " App. 17 (emphasis in original).

Turning to Petitioners' implied preemption arguments the California Supreme Court reversed the California Court of Appeal's holding that Cal. Ed. Code § 68130.5 was field preempted. App. 31-32. The

California Supreme Court declined to directly analyze whether or not conflict preemption applied. *See* App. 30-32. Instead, the Court reasoned, "Critical to the implied preemption analysis is the existence of two express preemption statutes, namely sections 1621 and 1623." App. 30. The Court concluded, "'Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.'" App. 31 (*quoting Viva! Internat'l Voice for Animals v. Adidas Promotional Retail Operations*, 41 Cal. 4th 929, 944-945 (2007)).

Petitioners timely filed this Petition for Writ of Certiorari on February 14, 2011.

REASONS FOR GRANTING THE WRIT

I. Review is Warranted Because the California Supreme Court's Decision, if Allowed to Stand, Permits a State to Ignore the Manifest Intent of Congress and Renders an Act of Congress a Dead Letter.

Read in a vacuum, the text of 8 U.S.C. § 1623 permits two possible interpretations. Either it was intended to prevent states from offering resident tuition rates to illegal aliens, or it was only intended to prevent states from offering resident tuition rates to illegal aliens using a "residence" criterion. Read in the context of contemporaneous statutes and legislative history, only the first interpretation is plausible.

Under the first interpretation, the phrase "on the basis of residence within a state" defines the benefit, not the criterion by which the benefit is rewarded. As is explained below, Congress intended to prevent states from providing resident tuition rates to illegal aliens. *See infra* at 18-22. Rather than using the shorter phrase "eligible for resident tuition rates," Congress chose a phrase that conveyed the same meaning, but was more encompassing, in order to prevent states from circumventing federal law by offering illegal aliens resident tuition rates using a different category of benefit (such as "grants" or "scholarships"). By choosing the phrase "eligible on the basis of residence within a State . . . for any post-secondary education benefit," the drafters selected language that was broad enough to encompass resident tuition rates, resident fee rates, resident tuition discounts, and scholarships for state residents. In other words, 8 U.S.C. § 1623 refers to "residence" in defining the *benefit* because Congress was concerned about states offering illegal aliens a particular benefit – *resident* tuition rates or the functional equivalent thereof.

Under the second interpretation, that adopted by the California Supreme Court, Congress chose the phrase "on the basis of residence within a State" not to define the benefit, but to define a mechanism through which the benefit could not be offered. However, nothing in the legislative history of 8 U.S.C. § 1623 offers the slightest support for this interpretation.

A. All Evidence of Congressional Intent Contradicts the California Supreme Court's Interpretation of 8 U.S.C. § 1623.

This Court has long held that legislative intent is the "ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In determining that intent, a court must look to the "structure and purpose of the statute as a whole." *Id*. at 486.

The text of 8 U.S.C. § 1623 is best understood if placed in the context of related statutory provisions that were passed within weeks of its enactment. Six weeks prior to enacting the IIRIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (August 22, 1996).

In passing the PRWORA, Congress took the unusual step of expressly codifying its objective: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). Congress made clear its belief that the breakdown of the rule of law in immigration had been exacerbated by the availability of public benefits for illegal aliens. The statutory text makes clear that Congress intended to cut off such benefits in order to increase compliance with federal immigration laws.

To achieve this purpose, the PRWORA included a provision intended to stop the flow of state and local public benefits to illegal aliens. Now codified at 8 U.S.C. § 1621, that provision prohibits the offering of "State or local public benefit[s]" to aliens unlawfully present in the United States. 8 U.S.C. § 1621(a). The proscribed "public benefits" include "any . . . postsecondary education . . . or any other similar benefit. . . ." 8 U.S.C. § 1621(c). However, Congress did create a savings clause: if a state nevertheless wanted to give a public benefit to illegal aliens, Congress would not stop the state from doing so, as long as the state enacted a new law that "affirmatively provided" the public benefit to illegal aliens, to assure accountability to state taxpayers. 8 U.S.C. § 1621(d). A parallel PRWORA provision, codified at 8 U.S.C. § 1611, prohibited the federal government from providing public benefits to illegal aliens.

Six weeks later, Congress took a third and decisive step. When it enacted the IIRIRA (an omnibus act that covered multiple aspects of illegal immigration), Congress singled out for additional restriction one, and only one, category of public benefits – postsecondary education benefits. Congress made clear that for this one type of public benefit, providing it to illegal aliens would be especially difficult. Under 8 U.S.C. § 1623, Congress would only allow a state to provide postsecondary education benefits to illegal aliens if the state also gave the same postsecondary education benefits to every United States citizen attending public universities in the state.

Every shred of legislative history confirms that § 1623 was intended to define the types of post-secondary education benefits that are typically distributed on the basis of residence, and then stop their distribution to illegal aliens, rather than define the criterion on which they are bestowed. A Court may look to a statute's legislative history when a statute is susceptible of two possible interpretations. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989) ("Concluding that the text is ambiguous . . . we then seek guidance from legislative history . . . "). This is particularly true with respect to preemption, which necessarily turns on congressional intent. *Lohr*, 518 U.S. at 485.

In passing 8 U.S.C. § 1623, Congress sought to make it practically impossible for states to grant in-state tuition to illegal aliens. The Conference Committee Report[10] states: "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996) (emphasis added), 6 CT 1412.

Every Member of Congress who made a recorded statement concerning the text that would become

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[10] This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying the proposed legislation.'" *Eldred v. Ashcroft*, 537 U.S. 186, 209-210 n.16 (2003) (citations omitted).

8 U.S.C. § 1623 agreed with the description contained in the Committee Report. Senator Alan Simpson, the principal sponsor of the Senate version of the bill, summarized the provision as, "Illegal aliens will no longer be eligible for reduced in-State college tuition." 142 Cong. Rec. S11713 (1996). Senator Simpson reiterated this statement, "Without the prohibition on States treating illegal aliens more favorably than United States citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges. That is in Title V . . . " 142 Cong. Rec. S11508 (1996).

Representative Christopher Cox, a leading proponent of the measure in the House, stated, "Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools." 142 Cong. Rec. H 25264 (1996). Representative Cox also explained that this provision would not be dropped in order to get President Clinton to sign the IIRIRA: "The President wants to drop the provision that says . . . that when somebody comes from Thailand, when somebody comes from Russia, when somebody comes from you name it . . . into your State, they will not get in-State tuition benefits at your State college. Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition." *Id*. at 25263-25264. Plainly, Congress intended to deny illegal aliens in-state tuition benefits at state colleges and universities. There is

not a scintilla of evidence in the legislative record to the contrary. *See United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009) (rejecting a party's interpretation of a statute's text where the legislative record supported a contrary understanding and "contain[ed] no suggestion" supporting the party's interpretation).

In order for the California Supreme Court to hold that Cal. Ed. Code § 68130.5 was not expressly preempted, it had to find a way to ignore this uncontradicted and unequivocal evidence of congressional intent. *There was only one way to do so: insist that the meaning of the statutory text was unambiguous and therefore consideration of legislative intent was unnecessary.* This is exactly what the California Supreme Court did. App. 20-24, insisting that there was no doubt that 8 U.S.C. § 1623 only applied to the provision of resident tuition to illegal aliens if the formal criterion of "residence" was used in the state statute. App. 17, 19-20. In so doing, the California Supreme Court committed multiple interpretive errors.

B. The California Supreme Court Created an Exception that Swallowed the Rule.

By ignoring Congressional intent, the California Supreme Court did exactly what this Court has cautioned against: It has "create[d] a loophole in the statute that Congress simply did not intend to create." *United States v. Naftalin*, 441 U.S. 768, 777 (1979); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S.

457, 468 (2001) (Congress "does not hide elephants in mouseholes."); *see also United States v. Hayes*, 129 S. Ct. at 1087 (taking "[practical considerations]" into account in reading a statute's language so as not to read it in a way that would "frustrate Congress' manifest purpose."); *United States v. Turley*, 352 U.S. 407, 416-17 (1957) (recognizing that "Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion."). Congress intended to prevent illegal aliens from receiving in-state tuition rates. Conference Report 104-828, H.R. 2202 (Sept. 24, 1996), 6 CT 1412. The California Supreme Court opinion opened a loophole that completely eviscerates the underlying provision.

According to the California Supreme Court, a state may grant postsecondary education benefits to illegal aliens while denying the benefits to many United States citizens, so long as the state uses some other phrase that effectively equates to "residence." Under this view, Congress was only worried about states using *residence in the state* as a criterion when providing in-state tuition rates to illegal aliens. App. 17, 19-20. Under the court's view, Congress was perfectly happy to allow states to extend in-state tuition rates to illegal aliens using some other criterion. App. 20. In other words, if a state were willing to play semantic games and use a surrogate criterion that roughly equates to living in the state, that would be perfectly fine. This interpretation is difficult to

sustain. Not surprisingly, there is no legislative history to support it.

Such surrogate criteria might, for example, include attendance at a high school in the state, graduation from a high school in the state, possession of a driver's license from the state, or intent to work in the state. The Court of Appeal pointed out that a state could intentionally evade 8 U.S.C. § 1623 by simply "granting in-state tuition to every illegal alien whose parents maintained a post office box in California." App. 78. In other words, the California Supreme Court held that Congress was only concerned with semantic choices made by a state legislature. A state statute merely had to avoid expressly giving a benefit "on the basis of residence," even if that benefit is functionally a residence-based benefit.

The resulting interpretation of 8 U.S.C. § 1623 is implausible. Congress could not have intended to allow states to play semantic games in order to give resident tuition to illegal aliens. Congress intended to deny illegal aliens resident tuition rates, and attempted to accomplish this end by making it financially impossible for states to give illegal aliens that benefit.[11]

[11] One may reasonably ask why Congress did not simply declare that no state shall provide resident tuition rates to illegal aliens. Indeed, the California Supreme Court pointed out that Congress could "have simply provided . . . that 'an alien who is not lawfully present in the United States shall not be eligible' for a postsecondary education benefit." App. 19. Why Congress did not simply enact a flat prohibition is unclear, but it may have been due to concerns of comity and federalism. Instead of

(Continued on following page)

Congress required states to give that same benefit to all United States citizens, like Petitioners, if the state wanted to give the benefit to even one illegal alien.

II. Review is Warranted Because the California Supreme Court's Interpretation of "On the Basis of Residence" Conflicts with that of the Eastern District of Virginia.

Although, the California Supreme Court is the only state high court to rule on the meaning of 8 U.S.C. § 1623, one federal court has examined its meaning and reached a contrary conclusion. The United States District Court for the Eastern District of Virginia came to the opposite conclusion of the California Supreme Court in 2004. In *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004), alien plaintiffs challenged Virginia universities' implementation of a Virginia Attorney General's Memorandum stating that illegal aliens should not be admitted to the state's public postsecondary educational institutions. The plaintiffs claimed that because "the [IIRIRA] provides that a public postsecondary educational institution may not grant in-state tuition benefits to illegal aliens unless such an institution also grants in-state tuition to out-of-state United States citizens," that Congress implicitly recognized and tacitly accepted

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an outright prohibition, Congress offered the states an alternative course of action, albeit an unattractive one – requiring a state to give residence-based postsecondary benefits to all United States citizens if the state gives the benefits to illegal aliens.

that illegal aliens might be attending public post-secondary institutions. *Id.* at 606.

The court rejected the claim that public universities had to admit illegal aliens, and explained that "[t]he more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit." *Id.* at 607. The Eastern District of Virginia did not choose the interpretation offered by the California Supreme Court in the instant case – that illegal aliens can receive in-state tuition as long as a criterion other than residence in the state is used in selecting eligible illegal aliens.

III. Review is Warranted Because the California Legislature has Recently Attempted to Expand the Postsecondary Educational Benefits Given to Illegal Aliens, Which Would Further Violate 8 U.S.C. § 1623.

Review must be granted by this Court to prevent California and other states from taking additional steps in violation of 8 U.S.C. § 1623. On August 31, 2010, the California legislature passed two bills, A.B. 1413, 2009-2010 Leg., Reg. Sess. (Cal. 2010) and S.B. 1460, 2009-2010 Leg., Reg. Sess. (Cal. 2010) which would have granted residence-based financial aid to illegal aliens using California's "exemption" from residence-based tuition model. Both bills died without the

signature of California Governor Arnold Schwarzenegger on September 30, 2010.

Specifically, A.B. 1413, § 1(a) would have granted eligibility for "any student financial aid program administered by the state of California," to any "person who meets the requirements of subdivision (a) of Section 68130.5." S.B. 1460, § 4 allowed any "student . . . exempt from paying nonresident tuition under Section 68130.5" to be eligible to receive scholarship that is derived from nonstate funds received, for the purpose of scholarships . . . " The Legislature declared that its purpose in enacting S.B. 1460 was to ensure that "all students who are exempt from nonresident tuition pursuant to Section 68130.5 of the Education Code and that are deemed to be in financial need shall be eligible for all financial aid." Thus, the California Legislature has attempted to expand the scope of postsecondary education benefits available to illegal aliens under § 68130.5, by subsidizing illegal aliens with scholarships and financial aid, in addition to in-state tuition, which would otherwise be reserved for California residents who are United States citizens or lawful permanent resident aliens.

IV. Review is Warranted Because the California Supreme Court's Decision Conflicts with Precedents of this Court Requiring Conflict Preemption Analysis Even if an Express Preemption Clause is Found Not to Apply.

As explained above, the California Supreme Court held that the Cal. Ed. Code § 68130.5 was not expressly preempted. The California Supreme Court then declined to address Petitioners' conflict preemption claims because it believed that conflict preemption could not occur when an express preemption clause did not apply. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." App. 31. (*citing Viva! Internat'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 944-945 (2010)). The California Supreme Court cited *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1994) in support of its holding. App. 30. However, by refusing to consider Petitioners' conflict preemption challenges, the California Supreme Court contradicted a decade of this Court's precedents holding that the presence of an express preemption clause does not limit the ordinary workings of conflict preemption. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

As this Court recently reiterated:

> If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.

Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (*citing Freightliner*, 514 U.S. at 287). The California Supreme Court completely ignored this Court's instructions.

In reaching its conclusion that it could skip over the conflict preemption issues in this case, the California Supreme Court committed several errors. First, the court ignored this Court's precedents. In looking to an earlier California Supreme Court holding in *Viva! Internat'l*, the court below relied on an "inference" that this Court has rejected. *See Viva! Internat'l*, 41 Cal. 4th at 945 (*citing Freightliner Corp.*, 514 U.S. at 289). In *Viva! Internat'l*, the California Supreme Court stated that when "Congress ha[d] expressly identified the scope of the state law it intend[ed] to preempt," the court could "infer Congress intended to preempt no more than that absent sound contrary evidence." *Id.* at 945 (*citing Freightliner Corp.*, 514 U.S. at 289).

Although claiming to follow *Freightliner Corp.*, the underlying problem with the earlier *Viva! Internat'l* opinion and the opinion of the California Supreme Court in the instant case is that both opinions actually adopt a standard that *Freightliner Corp*. rejected:

> The fact that an express definition of the pre-emptive reach of a statute 'implies' – i.e, supports a reasonable inference – that Congress did not intend to pre-empt other matters *does not mean that the express clause entirely forecloses any possibility of implied pre-emption.* Indeed, just two paragraphs after the quoted passage in *Cipollone* [*v. Liggett Group, Inc.*, 505 U.S. 504 (1992)], we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act[.]

Freightliner Corp., 514 U.S. at 288-289 (emphasis added). This Court further explained that its decisions following *Cipollone* likewise did not "obviate the need for analysis of an individual statute's pre-emptive effects." *Id.* (*citing CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673, n.12 (1993) ("We reject petitioner's claim of implied 'conflict' pre-emption . . . on the basis of the preceding analysis.").

After *Cipollone* and *Freightliner Corp.*, other state supreme courts made the same error as the California Supreme Court. *See Minton v. Honda of Am. Mfg.*, 80 Ohio St. 3d 62, 75-76 (1997) ("[G]iven the fact that [*Freightliner Corp.*] did not overrule *Cipollone*, and applying the principles set forth in *Cipollone*, we

agree with appellant that an implied preemption analysis is not required in this case."); *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 514 (1996); *Wilson v. Pleasant*, 660 N.E.2d 327, 336 (1995); *Munroe v. Galati*, 189 Ariz. 113, 117 (1997).

However, this Court's decision in *Geier v. Am. Honda Motor Co.* in 2000 should have ended the confusion as to whether an express preemption clause and a savings clause foreclose conflict preemption. "[T]he saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. In *Geier*, this Court expressly rejected what the California Supreme Court has done – dispensing with a conflict preemption analysis because of an express preemption and savings clause. *Id.* at 869 (Petitioners unsuccessfully argued that "the saving clause has th[e effect]" of "foreclos[ing] 'any possibility of implied conflict preemption.' ").

In *Geier* itself, this Court reviewed whether *Freightliner Corp.* allowed courts to dispense with the conflict preemption analysis based on express pre-emption clauses and savings clauses, stating that in *Freightliner*, "[t]his Court did not hold that . . . a [special] burden necessarily arises from the limits of an express pre-emption provision . . . The Court has thus refused to read general 'saving provisions' to tolerate actual conflict *both* in cases involving impossibility . . . *and* in 'frustration-of-purpose' cases." *Id.* at 873-74 (emphasis in original) (*citing American Telephone & Telegraph Co. v. Central Office Telephone,*

Inc., 524 U.S. 214, 228 (1998); *United States v. Locke*, 529 U.S. 89 (2000); *Internat'l Paper Co. v. Ouellette*, 479 U.S. 481, 493-494 (1987); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331 (1981). This Court saw "no grounds . . . for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case" because it "would engender legal uncertainty . . . when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or as here, both." *Id.* at 874.

Pre-*Geier*, the California Supreme Court might have been able to avoid conducting a conflict preemption analysis. However, it is eleven years later, and still the California Supreme Court has failed to adhere to this Court's precedents. By ignoring *Geier* and its progeny, the California Supreme Court has returned to the time when confusion existed over the applicability of *Freightliner Corp.* and *Cipollone*. *See Geier*, 529 U.S. at 869 ("We recognize that, when the Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations . . . ").

The instant case presents an opportunity for this Court to correct the clear error of the court below and clarify for other courts the rule enunciated in *Geier*. The context of this case illustrates perfectly why this

Court requires the "ordinary workings of conflict preemption" even when express preemption clauses and savings clauses exist. *Id*. at 871-74. Congress's statement of national immigration policy in 8 U.S.C. § 1601(6), its unmistakable intent behind 8 U.S.C. § 1623, as well as its prohibition of encouraging illegal aliens to remain in the United States, 8 U.S.C. § 1324(a)(1)(A)(iv), demonstrate a clear congressional objective – an objective that Cal. Ed. Code § 68130.5 plainly defeats. However, because the California Supreme Court opted not to review the conflict preemption challenges in this case, the California Legislature has been allowed to defeat the objectives of Congress. Such an approach is exactly what this Court warned against in *Geier*, stating that to the extent a court wrongly "reads into federal law toleration of a conflict that [ordinary preemption] principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Geier*, 529 U.S. at 872 (*quoting AT&T*, 524 U.S. at 228).

If California's Supreme Court decision is allowed to stand, this Court's post-*Geier* opinions will be undermined, and the pre-*Geier* confusion will return. Review by this Court is necessary to maintain uniformity in the preemption decisions rendered by state supreme courts and inferior federal courts.

V. Review is Warranted Because the California Supreme Court's Refusal to Conduct a Conflict Preemption Analysis is in Tension with Recent Federal Circuit Court Decisions that Undertake Conflict Preemption Analysis Even Where Express Preemption Does Not Apply.

Numerous recent Federal Appellate Court decisions have had the opportunity to interpret another express preemption clause and savings clause found in immigration law. 8 U.S.C. § 1324a(h)(2) preempts state and local governments from imposing "criminal and civil sanctions" on employers employing unauthorized aliens, but saves from preemption laws imposing sanctions "through licensing and similar laws." Three Federal Appellate Courts have reviewed this preemption provision of federal law, and all three determined that the state or local laws at issue were not expressly preempted by the statutory language. *See Lozano v. Hazleton*, 620 F.3d 170, 209 (3d Cir. 2010) *cert. filed* at *Lozano v. Hazleton*, No. 10-722 (Dec. 8, 2010) ("We therefore conclude that the IIRAO is a licensing law under IRCA's saving clause and saved from pre-emption."); *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) *cert. granted* at *Chamber of Commerce of the United States v. Candelaria*, 130 S. Ct. 3498 (2010) ("the Act is a 'licensing' measure that falls within the savings clause of IRCA's preemption provision"); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2009) (holding that two provisions of the Act were not expressly preempted

because the provisions did not condition sanctions on the employment of unauthorized aliens). All three courts then analyzed whether the various state and local laws nevertheless were conflict preempted. *See Lozano*, 620 F.3d at 210-219; *Napolitano*, 558 F.3d at 866-67; *Edmondson* 594 F.3d at 767-72.

As the Ninth Circuit correctly stated, "*Geier* recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the 'ordinary working of conflict preemption principles.'" *Chicanos Por La Causa v. Napolitano*, 558 F.3d at 866 (*quoting Geier*, 529 U.S. at 869). But the California Supreme Court ignored this holding from the Ninth Circuit.

Had the California Supreme Court followed *Geier* in the instant case, the California law would not have withstood conflict scrutiny. After acknowledging Congress's objective of removing the incentive for illegal immigration caused by the availability of public benefits, the California Supreme Court brushed such congressional statements aside, claiming that "[t]his general immigration policy would have supported an absolute ban on unlawful aliens' receiving the exemption . . . [t]he general policy in section 1601 cannot change section 1623's plain language or Congress's specific charge[.]" App. 20. In other words, the California Supreme Court erroneously concluded that if Cal. Ed. Code § 68130.5 could survive an express preemption challenge under 8 U.S.C. § 1623, it was immune from preemption based on congressional objectives manifest in related provisions of federal law.

It does not logically follow that Congress, by including an express preemption provision in a statute, surveyed all of the possible implied preemption scenarios not covered by the provision and rejected them. Under the California Supreme Court's standard of dispensing with conflict preemption analysis because "Congress [somewhere] said" that "matters beyond the scope of the statute are not preempted," App. 31, a lower court may ignore clear instances of conflict preemption or field preemption, by merely addressing an express preemption claim that is present in the same litigation. Review is necessary to correct this error and finish what this Court set out to achieve in *Geier*.

CONCLUSION

If this Court does not grant Petitioners' Writ, California and other states will be able to frustrate Congress's manifest intent as expressed in 8 U.S.C. § 1623 by granting resident tuition rates and other residency-based financial aid to illegal aliens. That federal statute will become a dead letter in any state where the legislature is willing to play semantic games to defeat the objectives of Congress. Additionally, if this Court does not grant Petitioners' Writ, California will continue to ignore this Court's

post-*Geier* preemption doctrine, reviving the confusion that this Court attempted to end a decade ago.

Respectfully submitted,

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