No. 10-1029

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 Supreme Court of California**

**BRIEF OF U.S. REPS. LAMAR SMITH,
JOHN CAMPBELL, ELTON GALLEGLY, STEVE KING,
TOM MCCLINTOCK, SUE MYRICK, TED POE,
DANA ROHRABACHER, ED ROYCE,
WASHINGTON LEGAL FOUNDATION,
AND ALLIED EDUCATIONAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

A federal statute, 8 U.S.C. § 1623, prohibits a State from providing in-state college tuition rates to illegal aliens "on the basis of residence" within the State, unless the State also offers those in-state rates to all U.S. citizens. California generally reserves its lowest, in-state tuition rates for "domiciliary residents" of the State, a category that does not include any illegal aliens. Notwithstanding that general rule, a California statute, California EDUCATION CODE § 68130.5, provides that in-state tuition rates are available to anyone (including illegal aliens) who has attended a California high school for three or more years and has graduated from a California high school (or has attained the equivalent of graduation). The questions presented are as follows:

(1) Does EDUCATION CODE § 68130.5 provide preferential in-state tuition rates to illegal aliens "on the basis of residence," and is it thus preempted by 8 U.S.C. § 1623?

(2) Where the California Supreme Court determined that the purpose of EDUCATION CODE § 68130.5 was to benefit illegal aliens living within California, can California nonetheless avoid the strictures of 8 U.S.C. § 1623 by basing § 68130.5's eligibility criteria on a factor (high school attendance) that is not synonymous with "residence" but nonetheless correlates highly with "residence?"

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INTERESTS OF *AMICI CURIAE*

Reps. John Campbell (Cal.), Steve King (Iowa), Elton Gallegly (Cal.), Tom McClintock (Cal.), Sue Myrick (N.C.), Ted Poe (Tex.), Ed Royce (Cal.), Dana Rohrabacher (Cal.), and Lamar Smith (Tex.) are Members of the U.S. House of Representatives.[1] Smith is Chairman of the House Judiciary Committee. In 1996, he played a leading role in adoption of 8 U.S.C. § 1623 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Gallegly is Chairman of the Judiciary Committee's Subcommittee on Immigration and Enforcement, King is Vice-Chairman, and Poe is a Member of the Subcommittee.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in California. WLF's members include United States citizens who are not California residents and who attend or are interested in attending (or whose dependent children attend or are interested in attending) public postsecondary education institutions within the State of California. WLF filed a brief in this matter when it was before the California Supreme Court.

The Allied Educational Foundation (AEF) is a

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties consent to the filing; letters of consent have been lodged with the Court.

non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that California has adopted a policy that discriminates against U.S. citizens in favor of aliens who are in this country illegally and are not domiciliary residents of California. *Amici* are also concerned that the U.S. Department of Homeland Security in not currently taking steps to enforce 8 U.S.C. § 1623, the federal statute that expressly prohibits such discrimination. In light of that inaction, *amici* believe that it is particularly important for the Court to review the decision of the California Supreme Court.

STATEMENT OF THE CASE

The petition seeks review of the California Supreme Court's decision to sustain a demurrer filed by Respondents (referred to herein collectively as "the Universities"). California courts treat a demurrer "as admitting all properly pleaded facts." *Shirk v. Vista Unified School Dist.*, 42 Cal. 4th 201, 205 (2007). Under California law, all factual allegations included in Petitioners' complaint "must [be] assume[d] to be true." *Fox v. Ethicon Endo-Surgery*, 35 Cal. 4th 797, 819 (2005); Pet. App. 8.

Institutions of higher education operated by the State of California offer reduced tuition rates to some of their students. In general, the reduced rates are available only to those who are domiciliary residents of

the State. *See, e.g.,* EDUC. CODE §§ 68040, 68050, 68052. As the Universities concede and as the California Supreme Court found, those who are physically present in California in violation of federal immigration laws (referred to herein as "illegal aliens") are not domiciliary residents of the State and thus historically have not been eligible for in-state tuition rates. Pet. App. 17 (citing EDUC. CODE § 68062).

Petitioners allege that the California legislature in 2001 adopted legislation "intended" to permit illegal aliens living within the State to enroll in California colleges and universities at in-state tuition rates, while denying those same reduced rates (in the vast majority of cases) to U.S. citizens who are not domiciliary residents of California. Complaint, ¶ 5. Petitioners allege that the legislation (codified at EDUC. CODE § 68130.5) violates 8 U.S.C. § 1623, which prohibits States from offering in-state tuition rates to illegal aliens "on the basis of residence," unless the same rates are also offered to all U.S. citizens.[2]

Petitioners are U.S. citizens who attend or have attended colleges or universities in California and (because they are not domiciliary residents of

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[2] 8 U.S.C. § 1623 provides in pertinent part:

> 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.

California) have been paying tuition at higher, out-of-state rates. Their complaint sought declaratory, injunctive, and monetary relief based on claims that § 68130.5, *inter alia*: (1) violated their rights under § 1623 (Count I); (2) violated their rights under 42 U.S.C. § 1983, which creates a federal right of action against those who, acting under color of state law, deprive another of rights protected by a federal law – in this instance § 1623 (Count III); and (3) violated their rights under federal law because § 68130.5 is preempted by § 1623 and other provisions of federal law (Count VI).

The trial court granted the Universities' demurrer with respect to all ten counts of the complaint, without leave to amend. Pet. App. 110-123. In 2008, the Court of Appeal reversed in significant part. *Id.* at 38-109. The appeals court held that Petitioners had not adequately preserved their appeal with respect to Counts I and III and on that basis upheld the demurrer as to those two counts. *Id*. at 55; Slip Op. 17-23. It held that Petitioners were nonetheless entitled to raise their § 1623 claim by means of their assertion (in Count VI) that § 68130.5 conflicted with (and thus was preempted by) § 1623 and other provisions of federal law. Pet. App. 86-91. The court reversed and remanded, stating, "[T]he demurrer was improperly sustained as to the preemption . . . claims." *Id*. at 109.

The Universities then sought (and were granted) review in the California Supreme Court. The Universities argued that the Court of Appeal had misconstrued 8 U.S.C. § 1623 and that, properly understood, the federal statute did not preempt EDUC. CODE § 68130.5. The Universities did not assert (and

thereby waived) any argument that Petitioners were not entitled under federal law to maintain a right of action based on their claim that § 1623 preempted § 68130.5. Nor did the California Supreme Court address whether Petitioners were so entitled.

In November 2010, the California Supreme Court reversed, finding *inter alia* that § 68130.5 was neither expressly nor impliedly preempted by federal law. Pet. App. 1-37. The court reasoned that although § 68130.5 granted reduced tuition rates to many illegal aliens living within California, it did so not "on the basis of residence" (within the meaning of § 1623) but rather on the basis of attendance at and graduation from California high schools. *Id*. at 17. The court said that the high-school-attendance provision should not be deemed an award of reduced tuition "on the basis of residence" because it benefitted at least some citizens who have no claim to California residency (*e.g.*, out-of-state students who attended a California boarding school). *Id*. at 18.

The court concluded that the California legislature most likely was motivated to adopt the high-school-attendance provision by a desire "to give unlawful aliens who live in California the benefit of resident tuition in a way that does not violate section 1623." *Id*. at 23. But the court deemed that motivation irrelevant in determining whether § 68130.5 conflicts with the provisions of § 1623. *Id*. at 24. It held that § 68130.5 could not be deemed to conflict with § 1623 in light of § 68130.5's reliance on a criterion (high school attendance) that was not synonymous with residency in California. Nor should the high-school-attendance criterion be deemed a "de facto or surrogate residency

requirement," the court held. *Id.* at 19-20.

REASONS FOR GRANTING THE PETITION

This case raises issues of exceptional importance. In an effort to discourage unauthorized immigration to this country, Congress has adopted legislation that severely restricts the authority of state and local governments to provide public benefits to illegal immigrants. That legislation has engendered considerable confusion, particularly in the area of higher education. Many States have interpreted federal law as prohibiting them from providing virtually any higher education benefits to illegal aliens living within their borders. Others (including California) have discerned virtually no such restrictions. The Court's guidance is desperately needed to clear up the confusion.

The principal federal statute at issue, 8 U.S.C. § 1623, prohibits a State from providing postsecondary education benefits to illegal aliens "on the basis of residence" within the State, unless the State also offers those same benefits to *all* U.S. citizens. The lower courts agreed that reduced, in-state college tuition rates constitute a "postsecondary education benefit" within the meaning of § 1623. But they disagreed as to the meaning of the phrase "on the basis of residence." The Court of Appeal unanimously concluded that California provided a benefit "on the basis of residence" when it adopted legislation that was *intended* to benefit illegal aliens living in California, regardless that its eligibility criteria did not correlate 100% with residency within California. The California Supreme Court interpreted the phrase in a markedly different fashion. It held that

a State does not provide a benefit "on the basis of residence" if its eligibility criteria are not synonymous with "residence" – even if the State adopts the criteria for the purpose of benefitting illegal aliens living within the State and even if the vast majority of those who qualify for the benefit are illegal aliens living within the State.

The California courts' conflicting interpretations of § 1623 have been replicated across the country. At least ten other States share California's understanding of § 1623 and have adopted statutes that grant reduced, in-state tuition rates to those (including illegal aliens) who have graduated from a high school within the State. Other States have rejected legislation similar to California's, with legislators often citing § 1623's restrictions as their reason for rejection. Still other States have adopted legislation explicitly barring administrators at public universities from awarding in-state tuition rates to illegal aliens, or have issued legal opinions stating that § 1623 prohibits universities from making such awards. Numerous state legislatures are actively considering, during their 2011 sessions, legislation addressing the issue. Review is warranted to provide States with desperately needed guidance regarding the meaning of § 1623's "on the basis of residence" provision.

Review is also warranted because the California Supreme Court's construction of § 1623 is so clearly incorrect. It attributed to Congress a willingness to permit States to evade § 1623's prohibition against residency-based education benefits for illegal aliens, by the simple expedient of relying on some other criterion that correlates closely with "residence." It did so even

while conceding that Petitioners "may be right" that benefitting illegal aliens "living in the state" was the legislature's "primary motivation" in enacting § 68130.5. Pet. App. 23. Moreover, the Complaint (whose allegations are accepted as true for purposes of the demurrer) alleged that that was the legislature's purpose, ¶ 5; and the Court of Appeal determined that § 68130.5 "does, and was intended to, benefit illegal aliens on the basis of residence in California." Pet. App. 85.

The California Supreme Court's construction of § 1623 conflicts sharply with this Court's approach in numerous cases raising similar issues. Where a State has been shown to have been motivated by a desire to evade a federal statutory or constitutional norm, the Court repeatedly has struck down the State's legislation – even where the legislation uses terminology that makes no direct reference to the disfavored classification. For example, the Court held that the Fifteenth Amendment prohibited use of "grandfather clauses" in connection with voter qualifications, based on findings that the clauses were designed to prevent blacks from voting – even though they made no reference to the race of voters. *Guinn v. United States*, 238 U.S. 347 (1911). More recently, the Court invoked the Fifteenth Amendment to strike down a Hawaii statute that limited voting in certain special elections to those descended from individuals who were present on the islands before 1778. *Rice v. Cayetano*, 528 U.S. 495 (2000). Although the statute made no reference to race, the Court determined that the Hawaii legislature adopted the voting criterion as a proxy for Polynesian heritage and thus deemed it a prohibited race-based criterion. The decision below – by construing § 1623 as

authorizing a State to adopt legislation *intended* to extend postsecondary educational benefits to illegal aliens living in the State, so long as it employs eligibility criteria that are not *precisely* synonymous with "residence" – conflicts sharply with this Court's decisions. Review is warranted to resolve that conflict.

This case presents a particularly good vehicle for addressing the § 1623 issue. Petitioners' standing to raise their claims is not open to serious question. They are U.S. citizens who have suffered injury directly traceable to California's violation of § 1623: they have been forced to pay tuition at a rate far higher than that paid by illegal aliens who are the beneficiaries of § 68130.5. And their requested relief (reimbursement of excess tuition payments and an injunction against further inequitable tuition charges) will provide relief from their injuries. Nor does this case raise any question regarding Petitioners' right to maintain an action based on their preemption claim. Respondents waived the right to raise that objection in this Court by failing to raise it in the California Supreme Court. The only issue raised by the Petition goes to the merits of Petitioners' claim: do § 68130.5 (and similar statutes in ten other States) provide preferential in-state tuition rates to illegal aliens "on the basis of residence," within the meaning of § 1623? By answering that question, the Court will provide much needed guidance to education officials in all 50 States.

I. REVIEW IS WARRANTED TO RESOLVE WIDESPREAD CONFUSION REGARDING THE MEANING OF § 1623

Congress adopted 8 U.S.C. § 1623 in 1996 as part of a broad-ranging effort to prevent illegal immigrants from receiving public benefits – both to discourage them from remaining in the country and to eliminate incentives that might encourage further illegal immigration. *See* 8 U.S.C. § 1601(6) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.") Other immigration statutes adopted in 1996 provided that illegal aliens are ineligible to receive non-emergency public benefits for which at least a portion of the funding comes from the federal government, 8 U.S.C. § 1611, and in most instances are also ineligible to receive public benefits financed exclusively by state and local governments. 8 U.S.C. § 1621.[3]

Adopted by Congress several weeks after § 1621, § 1623 imposes a further restriction on the authority of States to provide postsecondary education benefits to illegal aliens. It provides that illegal aliens are ineligible for such benefits awarded "on the basis of residence" unless all U.S. citizens (without regard to their State of residence) are afforded identical eligibility. As a practical matter, that provision means that illegal aliens are never eligible for state-funded postsecondary benefits – such as reduced (*i.e.*, state-subsidized) tuition

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[3] Congress created a limited exception to the latter prohibition, whereby a State is permitted to declare illegal aliens eligible to receive public benefits paid for out of its own funds if, after 1996, it adopts legislation "which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

rates – awarded "on the basis of residence."[4]

States charged with administering § 1623 have ascribed widely different meanings to the phrase "on the basis of residence." California and ten other States (Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, Washington, and Wisconsin) have concluded that reduced tuition rates are not being awarded "on the basis of residence" if they are awarded on the basis of attendance at a high school in the State. While each of those States traditionally has restricted eligibility for reduced, in-state tuition rates to those who are domiciliary residents of the State (a category that does not include illegal aliens), each has adopted legislation extending eligibility for reduced tuition rates to those who have attended and/or graduated from a high school located in the State.[5]

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[4]It is uncontested that neither California nor any other State is willing to offer reduced, in-state tuition rates to *all* U.S. citizens without regard to their State of residency. As explained in the Petition, U.S. citizens from outside California pay considerably more to attend public universities in the State than do California residents. Accordingly, extending in-state tuition rates to all U.S. citizens would result in a precipitous and politically unacceptable decline in tuition revenues.

[5] While the eligibility requirements imposed by the 11 statutes are not precisely identical, California's are fairly typical. California law provides that a student (other than a "nonimmigrant alien," *e.g.,* an alien in this country on a student visa) is eligible for in-state tuition rates if he: (1) attended high school in California for three or more years: (2) graduated from a California high school or attained "the equivalent thereof"; (3) enrolled in college no earlier than the fall of 2001; and (4) (applicable to illegal aliens only) submits an affidavit promising to apply for legalized immigration status if he ever becomes eligible. EDUC. CODE § 68130.5. Citations

Other States have concluded that extending eligibility to illegal aliens living within the State is prohibited by § 1623 because doing so constitutes awarding an educational benefit "on the basis of residence." For example, Arizona adopted a statute in 2006 that prohibits public universities from granting reduced, in-state tuition rates to illegal aliens. Ariz. Rev. Stat. 15-1803(B). The statute states that the prohibition was adopted "in accordance with [IIRIRA]," of which § 1623 was a part. *Id.* Similarly, a 2006 Georgia statute prohibits state officials from granting illegal aliens any "state or local public benefits"[6] and explicitly requires state education officials to adopt policies to ensure compliance with, *inter alia*, 8 U.S.C. § 1623. Ga. Code Ann. 50-36-1 & (c)(7). Policies later adopted by the Board of Regents of the University System of Georgia provide that illegal aliens are not eligible for in-state tuition rates. Bd. of Regents Policy Manual §§ 4.3.4, 7.3. South Carolina in 2008 adopted a statute nearly identical to the Georgia statute, including a prohibition against granting state or local benefits to illegal aliens and an explicit reference to 8 U.S.C. § 1623. S.C. Code § 8-29-10. Colorado law, without making reference to § 1623, prohibits state officials from granting state or local benefits (including postsecondary education benefits) to illegal aliens, and requires officials to verify that the applicant is not an illegal alien before granting any such benefits. Colo.

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to nine of the other States' statutes are set forth in the Petition, at 7 n.5. The Wisconsin statute is Wisc. Stat. § 36.27(cr).

[6] The statute incorporates the federal definition of "state or local public benefits." Federal law includes "postsecondary education benefits" within that definition. 8 U.S.C. § 1621(c)(1)(B).

Rev. Stats. 24-76.5.

Several other States – in accordance with advice from their Attorneys General that granting in-state tuition rates to illegal aliens living in the State would violate § 1623 – prohibit such grants. *See, e.g.,* Va. Atty Gen'l Op. No. 06-018 (2006) (concluding that if Virginia were to adopt legislation granting in-state tuition rates to all (including illegal aliens) who graduate from a Virginia high school, 8 U.S.C. § 1623 would require Virginia to extend those same rates to all U.S. citizens, without regard to residence); Miss. Atty Gen'l Op. No. 2007-461 (2007) (same opinion, with respect to proposed legislation granting in-state tuition rates to all Mississippi high school graduates); Ark. Atty Gen'l Op. No. 2005-69 (2005) (similar proposed legislation in Arkansas would "run afoul" of § 1623 if a court deemed the Arkansas high school attendance requirement "a de facto residence requirement."). The Texas Attorney General stated, "This office cannot predict with certainty" whether Tex. Educ. Code Ann. §§ 54-052-54.053 (which entitle all Texas high school graduates to in-state tuition rates) violates § 1623, noting that while the California Court of Appeal had discerned a conflict between § 1623 and the analogous California statute, no Texas court had so held. Tex. Atty Gen'l Op. No. GA-732 (2009). States have been unable to look for guidance to the federal government, because it has issued no regulations interpreting § 1623. Nor can they look to a body of case law for guidance: the only two courts that have rendered opinions regarding the meaning of § 1623 are the courts below, and they

reached diametrically opposed results.[7] If the Court does not grant review here, it is unlikely to have another opportunity to resolve the widespread confusion regarding the meaning of § 1623 – *amici* are unaware of other similar cases likely to come before the Court in the foreseeable future.

In the meantime, state legislatures across the country continue to debate whether to grant reduced, in-state tuition rates to illegal immigrants living in the State, with much of the debate focusing on whether such grants run afoul of § 1623. Maryland, Oregon, and Rhode Island are considering legislation that would make illegal aliens eligible for in-state tuition rates. *See*, Shanker Vedantam, "Md. Senate Weighs Bill to Give In-State Tuition to Undocumented Immigrants," *Washington Post* at B1 (Mar. 10, 2011)("Giving undocumented immigrants in-state tuition benefits at Maryland colleges would violate federal law, . . . state legislators opposed to the measure said Wednesday."); Peter Wong, "Immigrant Education Bill Gains Support," *Oregon Statesman Journal* (Feb. 15, 2011); Karen Lee Ziner, "R.I. Bill Would Grant Illegal Immigrants In-state Tuition," *Providence Journal* (Feb. 16, 2011). Conversely, legislators in Nebraska, Oklahoma, and Texas are considering bills to repeal their current tuition-break statutes. *See* Stacy Teicher Khadaroo, "Tuition Breaks for Illegal Immigrants?," *Christian Science Monitor* (Jan. 28, 2011) ("States that have passed tuition-benefits laws say they are based on

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[7] A § 1623 challenge to Kansas's tuition policy reached the Tenth Circuit several years ago. The court dismissed the case for lack of standing, without ever addressing the merits. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *cert denied*, 554 U.S. 918 (2009).

high school attendance or graduation, not residence. Opponents of such laws say that's a de facto form of residency and therefore violate the federal law."); Kyle Daly, "Texas Republicans Look to Repeal State DREAM Act," *Texas Independent* (Mar. 7, 2011).

Moreover, as Petitioners point out, Pet. App. 7-8 & n.6, unsuccessful efforts to repeal § 1623 have been mounted in every session of Congress since 2001.[8] The fact that immigration-rights supporters have been pushing so hard for repeal is a good indication of widespread uncertainty regarding the meaning of § 1623. If, as the Universities contend, a State can evade the restrictions of § 1623 by the simple expedient of basing eligibility on high school attendance within the State, there would be little reason to push for repeal, since as so construed the statute presents no impediment to educators wishing to provide reduced tuition rates to illegal aliens. Accordingly, the persistence of DREAM Act supporters is a strong indication that they harbor serious doubts regarding whether § 68130.5 and similar state statutes conflict with § 1623.

In sum, review is warranted to resolve the widespread confusion, particularly among state officials, regarding the meaning of § 1623. They are in desperate need of guidance regarding the extent to which § 1623 restricts their authority to establish tuition rates at

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[8] Proponents of repeal have dubbed their legislation the DREAM ("Development, Relief, and Education for Alien Minors") Act. In 2010, it was passed by the House of Representatives but died in the U.S. Senate. *See* DREAM Act of 2010, S. 3827 (111th Congress).

public colleges and universities.

II. THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF § 1623 IS CLEARLY WRONG AND ATTRIBUTES TO CONGRESS AN INTENT TO PERMIT STATES TO ROUTINELY EVADE THE STATUTE'S RESTRICTIONS

Review is also warranted because the California Supreme Court's interpretation of § 1623 is so clearly wrong. Its interpretation attributes to Congress an intent to permit States to routinely evade congressional restrictions on the provision of postsecondary education benefits to illegal aliens. Nothing in either the text or legislative history of § 1623 supports a conclusion that Congress intended such a toothless statute.

A. Section 68130.5 Conflicts with § 1623 Because It Provides Preferential Treatment to Illegal Aliens "On the Basis of Residence"

EDUC. CODE § 68130.5(a) provides that an individual enrolled at a California college or university is entitled to in-state tuition rates, notwithstanding that the individual is not a domiciliary resident of California, if he or she meets four criteria set forth in the statute (and listed at Note 5, *supra*). The statute's disparate impact on U.S. citizens living outside California is self-evident. The vast majority of nonresident U.S. citizens do not attend or graduate from a California high school and thus do not qualify for reduced tuition. On the other hand, virtually all college-bound illegal aliens who have

been physically present in California during their teenage years do qualify because they have attended and graduated from a California high school.[9] Accordingly, in determining whether § 68130.5 violates the mandate of § 1623, the central question is whether § 68130.5's discrimination in favor of illegal aliens constitutes discrimination "on the basis of residence." Moreover, as the Court of Appeal stated, "[T]he question is whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred." Pet. App. 71.

Section 68130.5 imposes four conditions that must be met before someone who is not a domiciliary resident of California can quality for tuition at in-state rates. But the only substantial requirement is the first one: enrollment for at least three years in a California high school.[10] One would be hard-pressed to come up

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[9] Which groups benefit the most from § 68130.5 is a factual issue disputed by the parties. Figures cited in the court below by Respondent CCC indicate that more than 90% of students eligible to benefit from § 68130.5 are illegal aliens who live in California. CCC Opening Br. at 11-12. For purposes of the Petition (which comes to the Court from a decision sustaining Respondents' demurrer to the complaint), Petitioners' allegation that the overwhelming percentage of those benefitted by § 68130.5 are illegal aliens must be accepted as true. The Court of Appeal also construed the complaint as alleging that "the vast majority of students attending California high schools for three years live in California." Pet. App. 77.

[10] Section 68130.5 also requires those seeking in-state rates: (1) to enroll in an institution of higher learning not earlier than the fall of 2001; and (2) if the student is an illegal alien, to submit an affidavit promising to apply for legalized status if the

with a better proxy for California residency (in the sense of physical presence within the State) than attendance at a California high school for three years. There undoubtedly are some individuals who meet the high school attendance requirement but who have never lived in California (e.g., students living in an adjoining State who paid to be permitted to attend a California high school). Conversely, there may also be a few individuals seeking to enroll in a California college who are physically present in the State but do not qualify as domiciliary residents and who did not attend a California high school (*e.g.,* illegal aliens who moved to California after having attended high school elsewhere). But as the Court of Appeal concluded, it is "reasonable" to conclude that the set of college-bound individuals who attended a California high school (but are not California domiciliaries) correlates very closely with the set of college-bound individuals who have been living in California (but are not California domiciliaries). *Id.* at 73.

Moreover, that very close correlation is not happenstance. As the California Supreme Court conceded, Petitioners "may be right" that benefitting illegal aliens "living in the state" was the legislature's

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student ever becomes eligible for such status. As the appeals court concluded, "[T]hese supposed requirements add nothing." *Id.* at 72. Enrollment is necessarily a prerequisite to having to pay tuition at all, and the affidavit is "an empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur." *Id.* A third condition – obtaining a California high school diploma or its equivalent – adds little, because students generally are not eligible to enroll in college until they have acquired a high school diploma. *Id.*

"primary motivation" in enacting § 68130.5. *Id*. at 23. Furthermore, the Complaint alleges that that was the legislature's purpose, ¶ 5; and the Court of Appeal determined that § 68130.5 "does, and was intended to, benefit illegal aliens on the basis of residence in California." Pet. App. 85.

This Court's case law provides no support for the California Supreme Court's conclusion that Congress did not intend § 1623 to apply to state tuition policies that do not overtly rely on residency but instead reference factors highly correlated with residency. The Court's treatment of "grandfather clauses" is illustrative. Following the Civil War and the adoption of the Fifteenth Amendment, southern States adopted a series of measures designed to prevent blacks from voting. Among such measures were strict literacy tests that few could pass; but the literacy tests invariably included a "grandfather clause" designed to ensure that whites who could not pass would still be permitted to vote. For example, Oklahoma adopted a strict literacy test in 1910, but added the following provision: "[N]o person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote" because of failure to pass the literacy test. Okla. Const., art. 3 (1910 Amendment).

In response to a challenge to the provision, Oklahoma insisted that it did not violate the Fifteenth Amendment because the provision contained no language purporting to limit the right to vote on the basis of "race, color, or previous condition of servitude." U.S. Const., Amend. xv, § 1. The Court unanimously

rejected that argument in light of evidence that the provision rested "upon no discernable reason other than the purpose to disregard the provisions of the [Fifteenth] Amendment." *Guinn v. United States*, 238 U.S. 347, 363 (1915). Similarly, there is no reason to conclude that § 1623 distinguishes between, on the one hand, States that explicitly declare an intent to benefit illegal aliens living therein and, on the other hand, States like California that harbor such an intent but find a way to effectuate their intent through reliance on a different factor that correlates very closely with residence.[11]

More recently, the Court invoked the Fifteenth Amendment to strike down a Hawaii statute that limited voting in certain special elections to those descended from individuals who were present on the islands before 1778, even though no language in the statute purported to limit voting on the basis of race. *Rice v. Cayetano*, 528 U.S. 495 (2000). The Court determined that the Hawaii legislature adopted the voting criterion as a proxy for Polynesian heritage and thus deemed it a prohibited race-based criterion. *Id.* at 515. The Court rejected Hawaii's argument that the statute could not be deemed race-based because a handful of Polynesians living in Hawaii were ineligible

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[11] *Guinn* did not attach any significance to the less-than-100% correlation between the Oklahoma provision and a ban on voting by blacks (*e.g.*, a few blacks could qualify under the "grandfather clause" because they could demonstrate that at least one direct ancestor was entitled to vote in 1866). For similar reasons, it is immaterial to Petitioners' claims that a handful of nonresident U.S. citizens can qualify for in-state tuition rates under § 68130.5.

to vote (their ancestors had migrated to Hawaii from other Pacific islands *after* 1778), explaining, "Simply because a class defined by ancestry does not include all members of the race, does not suffice to make it race neutral." *Id.* at 516-17. Just as "[a]ncestry can be a proxy for race," *id.* at 514, so too enrollment in a California high school can be a proxy for residence/ physical presence in California.

B. § 68130.5 Is Preempted by § 1623

In the event of a conflict between California law and federal law, the Supremacy Clause of the U.S. Constitution, Art. vi, cl.2, mandates that federal law must prevail. Given that (as demonstrated above) § 68130.5 adopts a policy that conflicts with the federal policy established by § 1623, § 68130.5 is preempted by § 1623.

Petitioners assert that § 68130.5 is not only *impliedly* preempted (because it conflicts with § 1623) but also *expressly* preempted by § 1623. The California Supreme Court held that § 68130.5 was not expressly preempted by § 1623, and then declined to consider whether it was impliedly preempted – reasoning that when express preemption language in a federal statute does not prohibit a State's challenged conduct, it is inappropriate to consider whether preemption can be inferred from other language in the statute. Pet. App. 30-32. As Petitioners point out, that holding directly conflicts with several decisions of this Court. Pet. 28-33 (citing, *inter alia, Freightliners Corp. v. Myrick*, 514 U.S. 280 288-89 (1994)).

Moreover, the court's holding was particularly

unwarranted given that the implied preemption argument is actually considerably stronger than the express preemption argument. Indeed, the Court of Appeal relied exclusively on an implied conflict preemption argument to reinstate Petitioners' claims under Count VI. Pet. App. 86-91. Section 1623 does not employ language that *expressly* bars any conduct by States. Rather, § 1623 focuses on the "eligib[ility]" of illegal aliens to receive postsecondary educational benefits from a State; it declares illegal aliens ineligible to receive reduced tuition rates "on the basis of residence." The Court of Appeal reasoned that any state policy that declares illegal aliens eligible to receive reduced tuition rates on the basis of residence is *impliedly* preempted because it conflicts with § 1623. *Id*. The absence of federal statutory language *expressly* prohibiting States from adopting such a policy somewhat weakens Petitioners' express preemption claim. But at the same time, the absence of such language renders nonsensical the California Supreme Court's rationale for refusing to consider Petitioners' implied conflict preemption claim. The court was unjustified in concluding that Congress intended an express preemption clause to set forth the entirety of its preemptive intent, given that the court never even identified an express preemption clause.

Because § 68130.5 authorizes granting in-state tuition rates to illegal aliens "on the basis of residence," it conflicts with (and therefore is impliedly preempted by) § 1623. California may offer the same low tuition rate to *all* (citizens, resident aliens, and illegal aliens alike) or it may return to its former practice and limit in-state tuition rates to U.S. citizens and resident aliens who are domiciliary residents of California. But § 1623

prevents California from doing as it does now – favoring illegal aliens "who live in California" over non-resident U.S. citizens on the basis of residence.

Amici recognize that the phrase "on the basis of residence" somewhat narrows the scope of § 1623. In adopting the statute, Congress did not intend to limit illegal aliens' eligibility for *all* postsecondary education benefits, but only for those benefits granted "on the basis of residence." Thus, for example, § 1623 does not limit UCLA's authority to award a football scholarship to an illegal alien on the basis of athletic prowess.[12] But given the implausibility of interpreting § 68130.5 as anything other than an effort to render illegal aliens living in California eligible for in-state tuition rates "on the basis of residence," it conflicts with (and thus is impliedly preempted by) § 1623.

In sum, review is also warranted because the judgment below is based on an implausible interpretation of an important federal statute, one arrived at using interpretative methods that conflict sharply with those routinely employed by this Court in prior cases.

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[12] Awarding football scholarships to illegal aliens would, of course, still be subject to the limitations imposed by 8 U.S.C. § 1621.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

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