**No. B264487**

# IN THE COURT OF APPEAL

## OF THE STATE OF CALIFORNIA

### SECOND APPELLATE DISTRICT, DIVISION SEVEN

---

Earl De Vries,

*Plaintiff and Appellant,*

vs.

Regents of the University of California,

*Defendant and Respondent*.

---

Appeal from the Superior Court of California, County of Los Angeles
The Hon. Gail Feuer; The Hon. Elizabeth Allen White
Superior Court Case No. BC555614

---

## APPELLANT'S OPENING BRIEF ON APPEAL

---

Chris Fedeli (Admitted *Pro Hac Vice*)
Sterling E. Norris (SBN 040993)
**JUDICIAL WATCH, INC.**
425 Third Street SW, Suite 800
Washington, DC 20024
Tel: (202) 646-5185
Fax: (202) 646-5199
cfedeli@judicialwatch.org

*Attorneys for Plaintiff-Appellant Earl De Vries*

Dated: November 9, 2015

**No. B264487**

## STATEMENT REGARDING CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208(d)(1) of the California Rules of Court, a copy of Appellant's Certificate of Interested Entities or Persons filed with this Court on July 13, 2015 is being included as an attachment to this brief. There are no interested entities or persons required to be listed.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**State Cases**



**Federal Cases**

**California Statutes, Rules, and Constitutional Provisions**

**Federal Statutes, Rules, and Constitutional Provisions**



**Other Authorities**

## STATEMENT OF THE CASE

This case concerns tuition, financial aid, and student loan benefits provided to unlawfully present aliens attending the University of California ("UC"). Federal immigration law makes unlawfully present aliens eligible for state or local public benefits "only through the enactment of a State law … which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d) ("Section 1621" or "1621"). No State law affirmatively provides unlawfully present aliens enrolled at UC schools with eligibility for the benefits at issue, and yet UC's Board of Regents ("Regents") is providing these benefits to the students.

Federal law is explicit that a State law must "affirmatively provide" eligibility for a benefit to an unlawfully present alien before the benefit can be extended. Federal law also specifies that "only… the enactment of a State law" can "affirmatively provide" eligibility for benefits to unlawfully present aliens – not the adoption of state administrative rules, regulations, or policies. Under the California Constitution however, the Legislature lacks authority over UC and its Regents. The Regents are "subject only to such legislative control as may be necessary to ensure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute." Cal. Const., art. IX, § 9(a). So while the Legislature has enacted "state laws" providing unlawfully present aliens with tuition, financial aid, and student loan benefits to attend California State University ("CSU") and California Community Colleges ("CCC"), it did not and

could not do so with respect to UC students. California chose to place UC and the Regents beyond ordinary legislative controls. The State cannot now have it both ways. The Regents' benefits are illegal.

The lower court opinion errs in finding that the Regents may award the benefits without an affirmative enactment by the Legislature. The lower court held that, under California state law, the Regents issue "laws" of equal standing as statutes enacted by the Legislature, and therefore the Regents' policies must satisfy Section 1621 of Title 8, the federal immigration code. This interpretation of California law is wrong, but even if it were not, it would put California's Constitution into conflict with federal law, subjecting the former to federal preemption. Congress specified that only State laws, by which it meant affirmative enactments by State legislatures, can award state or local public benefits to unlawfully present aliens. The Court should reverse the ruling of the trial court and remand this case for further proceedings.

## STATEMENT OF FACTS AND LAW

This lawsuit was brought by Plaintiff Earl De Vries, a resident and taxpayer of the State of California who has paid taxes to the State. *See* Appellant's Appendix ("AA") at AA-12, ¶ 4. Plaintiff alleged that the Regents are spending his tax dollars in violation of federal law, causing him injury, and requested declaratory and injunctive relief against the Regents. AA-11 to 12, ¶ 2; AA-19 to 21, ¶¶ 33, 38, and 43; AA-21 to 22. The lower court sustained Defendant's

demurrer against Plaintiff's complaint (AA-565 to 568) and entered an order of judgment and dismissal with prejudice. AA-570 to 571.

The federal law at issue, Section 1621 of Title 8, the federal immigration code, makes unlawfully present aliens ineligible for state or local public benefits. 8 U.S.C. § 1621(a). The law provides one exception, however: a state "may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit… only through the enactment of a State law... which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

Congress enacted Section 1621 as a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In enacting Section 1621, Congress decided to allow states to extend state or local public benefits to unlawfully present aliens, but only if the highest and most politically accountable levels of state governments did so affirmatively. Section 1621 is a "stand up and be counted" law. It does not allow States to hide their policy choices behind administrative bureaucracies, or to bury them in obscure board meetings. An institution like the Regents – the vast majority of whom are appointed officials – lacks the political accountability and visibility that Congress intended to require and did require when it enacted Section 1621. AA-37. In enacting Section 1621, Congress created a single, clear standard applicable to the entire nation – if States wish to provide state or local public benefits to unlawfully present aliens, they may do so as long as they enact State laws affirmatively providing for such eligibility.

The Legislature has passed three laws extending college-related public benefits to unlawfully present aliens: AB 540 (in-state tuition benefits), AB 131 (state-administered financial aid benefits), and SB 1210 (student loan benefits). Each of these statutes affirmatively makes unlawfully present aliens attending CSU and CCC schools eligibility for tuition and other public benefits. AA-14. Under California's Constitution, the Regents are not subject to legislative control except on the limited matters of insolvency, endowment, and the awarding of contracts, none of which are relevant to this lawsuit. Cal. Const., art. IX, § 9(a); AA-12 to 13, ¶¶ 6-7. Consequently, the Legislature was constitutionally prohibited from passing a law affirmatively providing eligibility for these same benefits to UC students.

Following the enactment of AB 540, the Regents adopted Policy 3106.1.C purportedly making unlawfully present aliens attending UC schools eligible to apply for and receive the same in-state tuition benefits that AB 540 extends to CSU and CCC students. AA-16, ¶ 19. After Plaintiff filed suit, the Governor of California signed SB 1210, which purportedly makes unlawfully present aliens attending CSU and CCC schools eligible for student loan benefits. AA-14, ¶ 12. Plaintiff amended his Complaint to challenge these additional benefits. AA-16 to 17, ¶¶ 20-21. Thereafter, the Regents adopted additional policies purportedly making unlawfully present aliens attending UC schools eligible to apply for and participate in the same state-administered financial aid programs authorized by AB 131 and SB 1210. AA-361 to 363. The Regents are now illegally providing all

three public benefits (in-state tuition, financial aid, and student loans) to unlawfully present aliens attending UC schools. AA-361 to 363.

## STANDARD OF REVIEW

In reviewing a trial court's decision to sustain a demurrer, the appellate court must reverse if the factual allegations in the complaint state a cause of action on *any* available legal theory. *Adelman v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 352, 359 (2001). Moreover, the appellate court must "review *de novo* questions of statutory construction." *Lee v. Hanley*, 61 Cal.4th 1225, 1232 (2015). In doing so, the court's role is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Id.* The court should "begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. We give the language its usual and ordinary meaning, and if there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." *Lee*, 61 Cal.4th at 1232-1233 (internal quotes omitted). "If, however, the statutory language is ambiguous, we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." *Lee*, 61 Cal.4th at 1233 (internal quotes omitted).

## SUMMARY OF THE ARGUMENT

This case turns on the proper construction of a federal statute, 8 U.S.C. § 1621(d). Accordingly – and because the lower court erred by incorrectly applying this statute – part 1 of this brief begins by explaining the statute at issue and how it must be read under all applicable canons of statutory construction. Specifically, part 1 explains that Section 1621 requires a state law making unlawfully present aliens eligible for state or local public benefits be explicit in its text, and that any such state law must be an enactment of a state legislature – *not* a gubernatorial executive order, administrative regulation or policy, or local ordinance. Part 2 demonstrates that the three California statutes extending public benefits to CSU and CCC students do not affirmatively provide these same benefits to UC students and therefore do not authorize the Regents' actions, making those actions illegal under Section 1621. Part 3 explains that the lower court's decision puts the California Constitution in conflict with federal law, and therefore must be reversed.

## ARGUMENT

### 1. Federal Law Prohibits State or Local Benefits for Unlawfully Present Aliens Absent Enactment of a State Statute Affirmatively Providing Eligibility for Such Benefits

Section 1621 allows state or local public benefits to be extended to unlawfully present aliens "only through the enactment of a State law... which affirmatively provides" eligibility for the benefits. 8 U.S.C. § 1621(d). This unambiguous statute sets forth two requirements. First, the state law must make

unlawfully present aliens' eligibility for benefits explicit in the text of the statute. Second, the law providing the eligibility must be a statewide legislative enactment, not an executive order of a governor, or a rule, regulation, or policy of a state agency or other subdivision. As explained in this section, it is not possible for a court to find that Section 1621 permits the Regents' actions without a wholesale judicial revision of the text of this federal statute.

Every relevant principle of statutory construction confirms both of these requirements of Section 1621. First, any interpretation of Section 1621 altering the requirement for an explicit authorization of benefits would read the words "affirmatively provide" out of the statute. *Quarry v. Doe I*, 53 Cal.4th 945, 989 (2012) (courts may not "read into the statute that which the Legislature has excluded, or read out that which it has included") (internal citation omitted); *Goodman v. Lozano*, 47 Cal.4th 1327, 1334 (2010) ("[W]e must give effect to [words in statute] according to the usual, ordinary import of the language employed.") (internal citations and punctuation omitted); *Lowe v. Securities and Exchange Comm'n.*, 472 U.S. 181, 207 n. 53 (1985) ("[W]e must give effect to every word that Congress used in the statute.").

Second, any judicial interpretation of Section 1621 lessening the requirement that eligibility for benefits be established by state legislative action also would read the words "only through the enactment of a State law…" out of the statute. *Kirkwood v. Bank of America Nat'l Trust & Sav. Assoc*., 43 Cal.2d 333, 341 (1954) ("[I]t is the function of the courts to construe and apply the law as

it is enacted and not to add thereto nor detract therefrom."); *Lucchesi v. State Board of Equalization*, 137 Cal.App. 478, 482 (1934) ("courts are not authorized to insert omitted provisions or read out of the statute the language therein contained."). If Congress wanted to authorize states to make unlawfully present aliens eligible for public benefits by issuing administrative rules, regulations, or policies or by county or municipal statutes or ordinances, it obviously could have said so. Instead, it used the words "only through the enactment of a State law." The word "only" indicates Congress' intent to exclude other governmental actions, and the words "enactment of a State law" indicates Congress meant legislative action. To construe this sentence otherwise would impermissibly omit these words and change the meaning of the statute. *See Quarry*, *Goodman*, *Lowe*, *supra*.

Finally, any judicial interpretation of Section 1621 disregarding the requirement that eligibility for benefits be established by state legislative action not only would omit the words "only through the enactment of a State law" from the statute, but also would impermissibly *add* words that are not present in the statute. *Garvey v. Byram*, 18 Cal.2d 279, 287 (1941) (The California Supreme Court "has no authority to write anything into a statute which the legislature has omitted therefrom"); *Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."); *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (deliberately omitted word changes meaning of statute); *Elbert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus*

*omission* does not justify judicial legislation."); *In re Estate of Barnett*, 97 Cal.App. 138, 142 (1929) ("Judicial interpretation should never be judicial legislation. We may not, therefore, under the guise of interpretation, read into a statute matters which have been omitted by the legislature particularly where it appears that the omission might have been intentional."). This axiom is not just a sound canon of statutory interpretation, it is the law of California, enacted by the Legislature and binding on the courts. Cal. Code. Civ. Proc. § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted"); *accord*, Cal. Civ. Code § 3530 ("That which does not appear to exist is to be regarded as if it did not exist").

Section 1621 does not say "state law or administrative rule, regulation or policy." It says "State law." This means an enactment of the state legislature. *Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 919 (2015) ("*MacLean*") (if Congress writes "law" in one section of the U.S. code and also uses the phrase "law, rule, or regulation" in the same section, the former phrase must be interpreted to include only legislative statutes). Just as in *MacLean*, Congress uses the phrase "state law and regulation" elsewhere in Title 8. For instance, Section 1182 specifies that aliens who violate "any **law or regulation** of a State, the United States, or a foreign country relating to a controlled substance" are ineligible for visas. 8 U.S.C. § 1182(a)(2)(A)(i)(II) (bold added). Identical language in Section 1227 provides that aliens violating "any law or regulation of a

State" related to controlled substances should be deported. 8 U.S.C. § 1227(a)(2)(B)(i).

Furthermore, Congress provided that only a duly enacted "State law" can make aliens eligible for benefits in Section 1621, and yet in Section 1625 Congress stipulated that "a State **or political subdivision of a state** is authorized to require an applicant… for public benefits… to provide proof of eligibility." 8 U.S.C. § 1625. Both Section 1621 and Section 1625 are in Chapter 14 of Title 8, "Aliens and Nationality." Chapter 14 is titled "Restricting Welfare and Public Benefits for Aliens." Indeed, both Section 1621 and Section 1625 are in the same *subsection* of Chapter 14, subtitled "Eligibility for State and Local Public Benefits Programs." Section 1625's language demonstrates that the omission of any qualifiers to "State law" in Section 1621 was intentional. Similarly, Section 1624, which also is in the same chapter and subsection as Section 1621, says "[A] State or **political subdivision of a State** is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State." 8 U.S.C. § 1624. Since Sections 1621, 1624, and 1625 are in the same subsection of Title 8, Chapter 14, under *MacLean*, Congress' choice of the words "only through the enactment of a State law" and the omission of any reference to State agencies or subdivisions or their rules, regulations, or policies must be construed as intentional. *MacLean*, 135 S. Ct. at 919 ("…Congress did not use the phrase "law, rule, or regulation" in the statutory language at issue here; it used the

word "law" standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). Because Congress omitted the words "State agencies or subdivisions" and "rules, regulations, or policies" from Section 1621, the Court must find that only the enactments of a state legislature satisfy this provision. "It is a settled principle of statutory interpretation that if a statute contains a provision regarding one subject, that provision's omission in the same *or another statute regarding a related subject* is evidence of a different legislative intent." *People v. Arriaga*, 58 Cal.4th 950, 960 (2014) (italics added); *accord*, *In re Ethan C.*, 54 Cal.4th 610, 638 (2012); *Posters 'N' Things v. United States*, 511 U.S. 513, 520 (1994) ("This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's Model Drug Paraphernalia Act, on which § 857 was based, includes [these factors].").

Finally, a review of the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," which enacted Section 1621, shows that Congress used the phrases "State agency" and "State or political subdivision of a State" multiple times, but not in the language that became Section 1621.[1] This again shows that Congress intended Section 1621 to require enactments of state legislatures – statutes – not rules, regulations or policies of state agencies or subdivisions. Accordingly, Section 1621 may not be read to include such rules,

[1] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Government Printing Office, available at http://www.gpo.gov/fdsys/pkg/BILLS-104hr3734enr/pdf/BILLS-104hr3734enr.pdf

regulations, or policies in interpreting "only through the enactment of a State law." *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 169 (1993) ("To supply omissions transcends the judicial function."), *quoting Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.)); *see also In re Miller*, 31 Cal.2d 191, 199 (1947) ("Words may not be inserted in a statute under the guise of interpretation").

In enacting Section 1621, Congress plainly decided to allow the states a small measure of authority in an area – immigration and naturalization – that otherwise is reserved almost entirely to the federal government. Specifically, Congress decided to allow states to extend eligibility for state and local public benefits to unlawfully present aliens, but only if the highest and most visible, politically accountable levels of state government do so affirmatively. Section 1621 is a "stand up and be counted" law designed to ensure politically accountability should states wish to enter an area otherwise reserved to the federal government. *See* H.R. Rep. No. 104-725, 2d Sess., p. 383 (1996) ("Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act … will meet the requirements of [Section 1621].")[2]; *see also* AA-418 to 419; *see also* Reporter's Transcript at 2:25-3:3 ("Essentially, [Section 1621] is a standup and be counted law. Congress said you can give state benefits to unlawfully-present aliens, but only if you do it out in the public with the General Assembly affirmatively saying, yes, we're going to do

[2] H.R. Rep. No. 104-725, available at https://www.congress.gov/104/crpt/hrpt725/CRPT-104hrpt725.pdf.

this, so the representatives can be held accountable for that decision. It's a political accountability law.").

Congress must be presumed to mean what it says. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress's choice of words is presumed to be deliberate"); *Dodd v. United States*, 545 U.S. 353, 357 (2005) ("We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there,'" *quoting Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Section 1621 is not ambiguous. And as demonstrated above, the statute's text, read in the context of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the other federal immigration laws in Title 8, demonstrates Congress' purpose was political accountability when it wrote "only through the enactment of a State law" in Section 1621. "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." *Green v. California*, 42 Cal.4th 254, 260 (2007); *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.").

Nevertheless, Congress' intent in enacting Section 1621 is further confirmed by the provision's legislative history. The report accompanying Section 1621 confirms that Congress intended this section as a political accountability law by requiring action by the people's elected representatives –

their state legislators and governors. AA-18 at ¶ 28. The Conference Agreement accompanying the bill describes the effect of Section 1621 as follows:

> No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens…. Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.[3]

This legislative history shows that the omission of phrases such as "administrative regulation or policy," "State agency or political subdivision of a State" and "executive order" from Section 1621 was deliberate. *Director, Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 46-47 (1979) (the "legislative history of the 1972 Amendments convinces us that the omission was intentional. Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said").

**2. The California Legislature Has Not Passed Any Statutes Affirmatively Providing Eligibility for Benefits to Unlawfully Present Alien UC Students**

Neither AB 540, AB 131, nor SB 1210 make unlawfully present aliens attending UC schools eligible for tuition, financial aid, or student loan benefits. The California Supreme Court found as much when it refused to strike down AB 540 on federal preemption grounds. In 2010, the California Supreme Court held that the Legislature's enactment of AB 540 was consistent with Section 1621 for

[3] H.R. Rep. No. 104-725, 2d Sess., p. 383 (1996), available at https://www.congress.gov/104/crpt/hrpt725/CRPT-104hrpt725.pdf

purposes of making unlawfully present aliens eligible for in-state tuition at CSU and CCC schools. *Martinez v. Regents of the Univ. of California*, 50 Cal.4th 1277, at 1296 (2010). However, the Court expressly declared that, by its text, AB 540 "applies only to the California State University and California Community Colleges, and not to the University of California." *Martinez*, 50 Cal.4th at 1287, fn. 1. The Court further quoted AB 540 as stating that "[n]o provision of this part shall be applicable to the University of California unless the Regents of the University of California, by resolution, make such provision applicable." *Id.* While the Court took note of the parties' stipulation that the Regents had, by resolution, made AB 540 applicable to UC, the Court never addressed whether the Regents' resolution and actions satisfied Section 1621; it only considered whether AB 540 was preempted by Section 1621. Plaintiff brought this suit in his capacity as a taxpayer to challenge whether the Regents' resolutions and actions satisfied Section 1621, not to challenge the legality of AB 540.

Furthermore, the Legislature's language demonstrates that it was well aware of Section 1621's requirement to "affirmatively provide" eligibility for state or local public benefits. The Legislature affirmatively provided such eligibility, but only with respect to CSU and CCC students in the three statutes in question. The Legislature included no such eligibility with respect to UC students. The statutes themselves recognize that the Legislature cannot require the Regents to provide eligibility for the benefits.

Consider the text of AB 540, which expressly extended eligibility for in-state tuition benefits to unlawfully present aliens attending CSU and CCC schools:

> A student... who meets all of the following requirements *shall be exempt from paying nonresident tuition* at the *California State University* and the *California Community Colleges*.

Cal. Ed. Code § 68130.5(a) (italics added). No mention is made of students at UC schools. The only reference to UC or the Regents is a limitation on the types of relief available in the event the Regents adopt their own version of AB 540 and litigation results:

> A state court may award only prospective injunctive and declaratory relief to a party in any lawsuit interpreting Section 68130.5 of the Education Code... or any lawsuit interpreting *similar requirements adopted by the Regents of the University of California.*

2001 Cal. Stats. ch. 814, § 1(b)(1) (italics added). The Legislative Counsel's Digest to AB 540 also notes, "These provisions are applicable to the University of California only if the Regents of the University of California act to make them applicable."[4] AA-15 at ¶ 15.

Similarly, AB 131 expressly makes students at CSU and CCC schools eligible for state-administered financial aid if they meet the requirements of AB 540:

> [A] student who meets the requirements of subdivision (a) of Section 68130.5 [governing CCC and CSU students]… is eligible to apply for, and participate in, any student financial aid program

[4] AB 540 Legislative Counsel's Digest, Feb. 21, 2001, available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_bill_20011013_chaptered.html.

> administered by the State of California *to the full extent permitted by federal law*.

Cal. Ed. Code § 69508.5(a) (italics added). The law even states, "The Legislature finds and declares that this section is a state law within the meaning of Section 1621(d) of Title 8 of the United States Code." *Id.* AB 131 makes clear that its terms do not apply to UC students. It expressly states that UC students' eligibility for state-administered financial aid is contingent upon the students meeting "equivalent requirements adopted by the Regents of the University of California." *Id.* Like the Legislative Counsel's Digest to AB 540, the Legislative Counsel's Digest to AB 131 also states that "[t]his provision would apply to the University of California only if the regents, by appropriate resolution, act to make it applicable."[5] AA-15 at ¶ 16.

SB 1210, which concerns student loan benefits, contains language similar to the language of AB 131. It "affirmatively provides" that students at CSU and CCC schools are eligible for student loans if they are "exempt from paying nonresident tuition under Section 68130.5," in addition to other criteria. Cal. Ed. Code § 70033(a)(1). Like AB 131, it also states, "The Legislature finds and declares that this section is a state law within the meaning of Section 1621(d) of Title 8 of the United States Code." *Id.* at § 70033(d). Also like AB 131, SB 1210 makes clear that it does not apply to UC students, instead expressly referencing

[5] AB 131 Legislative Counsel's Digest, Jan. 11, 2011, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_131_bill_20110527_amended_asm_v95.html.

"equivalent requirements adopted by the Regents of the University of California." Cal. Ed. Code § 70033(a)(1). Another provision of SB 1210 states: "This section shall not impose any requirements upon the University of California unless the Regents of the University of California, by resolution, make this section applicable." Cal. Ed. Code § 70037(d).

The three statutes demonstrate that the Legislature is fully capable of writing laws that "affirmatively provide" eligibility for benefits in compliance with Section 1621. *See In re Garcia*, 58 Cal.4th 440, 457-58 (2014) (a state statute which affirmatively provides a benefit explicitly is consistent with Section 1621). The Legislature did affirmatively provide benefits for CSU and CCC students. The Legislature's failure to "affirmatively provide" eligibility for those same benefits to UC students was deliberate. It did not provide the benefits because it cannot do so under the California Constitution. Cal. Const., art. IX, § 9(a); *see also* Reporter's Transcript at 3:12-27.

In sum, providing tuition, financial aid, and student loan benefits to unlawfully present aliens at UC schools is unlawful regardless of whether AB 540, AB 131, and SB 1210 are valid, enforceable statutes. None of the statutes affirmatively provides eligibility for such benefits to UC students. Given UC's unique status, any act of the Legislature that made unlawfully present aliens attending UC schools eligible for benefits would violate California's Constitution. And since *only* the affirmative enactment of a State law passed by the Legislature can extend eligibility for state or local public benefits to unlawfully present aliens,

the Regents cannot satisfy this clear federal standard. Since there is no "State law" enacted by the California legislature "affirmatively providing" eligibility for tuition, financial aid, and student loan benefits to unlawfully present aliens attending UC schools, the Regents' provision of such benefits violates Section 1621.

### 3. The Lower Court's Decision Puts the California Constitution in Conflict With Federal Law

The lower court held that the Regents' policies themselves (not the statutes) are the "state laws" which affirmatively provide the benefits to UC students in satisfaction of Section 1621. AA-567 to 568. However, the Regents do not enact the "State laws" Congress contemplated in enacting Section 1621. While the lower court makes much of certain language in *Campbell v. Regents of the Univ. of California*, 35 Cal.4th 311 (2005) to hold that Regents' polices are the same as statutes, it does not focus on the parts of that decision in which the Court observed that the Regents resemble "a statewide administrative agency" in possession of "general rule-making or policy-making power." *Campbell*, 35 Cal.4th at 321. At issue in *Campbell* was whether a former UC employee was required to exhaust administrative remedies as a jurisdictional prerequisite to filing suit against the Regents for an allegedly retaliatory firing. The case has no bearing on whether the Regents' policies may or should be treated as enactments of "State law" under any number of various and different circumstances. It certainly has no bearing on the proper interpretation of Section 1621, and any finding otherwise would be

contrary to the well-established principles of statutory construction addressed herein.

Even if Regents' policies carry the "force of statute" in California, that is not the standard that Congress intended in enacting Section 1621. Indeed, virtually any properly issued administrative agency regulation carries the "force of statute," in that both statutes and regulations constitute binding, positive law. This similarity does not make regulations identical to statutes. The lower court therefore erred in classifying the Regents' policies as "state laws" that satisfy Section 1621.

Furthermore, even if the lower court is correct that, under California law, the Regents' policies are the equivalent of statutes enacted by the Legislature, the Regents' policies still do not satisfy Congress' express language that eligibility be established "only through the enactment of a State law." Accordingly, the lower court ruling – to the extent it is a proper interpretation of *Campbell* and California law – would put California law into direct conflict with federal law. The lower court decision would therefore result in federal preemption of the California constitutional provision relied on in *Campbell*.

The federal government has broad powers to establish immigration laws that the states must follow. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (U.S. 2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of

Naturalization," U. S. Const. art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations."). State laws may not undermine federal authority generally, nor particularly in the area of immigration. *Id.* at 2500; *See also De Canas v. Rica*, 424 U.S. 351, 358 (1976) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States … [and] the regulation of their conduct before naturalization… Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.") (internal quotes omitted).

Any state law that is inconsistent with federal law (and particularly federal immigration law) is preempted. U.S. Const., art. VI, cl. 2. As the Supreme Court recently explained:

> [S]tate laws are preempted when they conflict with federal law. This includes cases … where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Arizona,* 132 S. Ct. at 2501. Here, the lower court's ruling – if allowed to stand – thwarts the precise purpose of Congress in enacting Section 1621(d). Congress intended to ensure the utmost political accountability when it specified that "only" the "enactment of a State law" would do. The Regents, and the lower court, would revise this federal statute to permit less-politically accountable state entities to also award benefits to aliens. The overwhelming majority of the members of the Board

of Regents are appointed, not elected. AA-37. By constitutional design, the Regents are heavily insulated from accountability to the people of California. *See* Cal. Const., art. IX, § 9(f) (the University of California "shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs.").

The lower court ruling relies on *Campbell*, which in turn relied on Article IX, Section 9(a) of the California Constitution. 35 Cal.4th at 320. The lower court's decision therefore puts this section of the California Constitution in conflict with federal immigration law, making it subject to preemption. As a result, Section 9 of Article IX of the California Constitution, "so far as the conflict extends, ceases to be operative." *Arizona v. Inter Tribal Council of Ariz., Inc*., 133 S. Ct. 2247, 2254 (2013); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("Preemption will be found where ... the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. What is a sufficient obstacle is a matter of judgement to be informed by examining the federal statute as a whole and identifying its purpose and intended effects ....") (internal quotes omitted); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) ("State law is naturally preempted to the extent of any conflict with a federal statute.") (internal quotes omitted).

## CONCLUSION

The Court should reverse the lower court decision and remand this case for further proceedings. First, the three California statutes in question do not "affirmatively provide" that unlawfully present aliens attending UC schools are eligible for tuition, financial aid, or student loan benefits, as is required by Section 1621. Second, Section 1621's requirement that such eligibility be established "only through the enactment of State law" means that the law must be passed by the state legislature. Sound policy reasons support Congress' decision to require that such eligibility be "affirmatively provided" by the highest, most democratically accountable branches of state government. Third, even if the Regents' actions have the "force of statute" under California law, Congress' intent was to ensure the highest level of state political accountability when making benefits available to aliens, not to arbitrarily prescribe a certain class of laws. Whatever force Regents' policies have, the Regents themselves are not accountable directly to the people of California. Any interpretation of California Constitution which conflicts with this purpose of Section 1621 is preempted as a matter of law.

For all of the foregoing reasons, the Regents' actions are illegal under Section 1621. The Court should reverse the lower court ruling and remand this matter for further proceedings.

Dated: November 9, 2015

Respectfully submitted,

*s/ Chris Fedeli* *

Chris Fedeli, Admitted *Pro Hac Vice*
**JUDICIAL WATCH, INC.**
425 Third Street SW, Suite 800
Washington, DC 22204
Tel: (202) 646-5172
Fax: (202) 646-5199
cfedeli@judicialwatch.org

Sterling E. Norris, SBN 040993
**JUDICIAL WATCH, INC.**
2540 Huntington Drive, Suite 201
San Marino, CA 91108
Tel: (626) 287-4540
Fax: (626) 237-2003
jw-west@judicialwatch.org

*Attorneys for Plaintiff*

* Signed pursuant to Cal. Rules of Court 8.77(b) and 8.204(b)(9).

## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,962 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: November 9, 2015

*s/Chris Fedeli*
Chris Fedeli

# Attachment

**TO BE FILED IN THE COURT OF APPEAL**

**APP-008**

| **COURT OF APPEAL,** SECOND **APPELLATE DISTRICT, DIVISION** Pre-Div | Court of Appeal Case Number: B264487 |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*<br>Sterling E. Norris (SBN 40993)<br>Judicial Watch, Inc., 2540 Huntington Drive, Suite 201<br>San Marino, CA 91108<br>TELEPHONE NO.: (626) 287-4540 FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* Earl De Vries | Superior Court Case Number: BC555614<br>***FOR COURT USE ONLY*** |
| APPELLANT/PETITIONER: Earl De Vries<br>RESPONDENT/REAL PARTY IN INTEREST: Regents of the University of California | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**<br>*(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE | |

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party *(name)*: Earl De Vries

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

| | **Full name of interested entity or person** | **Nature of interest *(Explain):*** |
|---|---|---|
| (1) | | |
| (2) | | |
| (3) | | |
| (4) | | |
| (5) | | |

☐ Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: 7/13/2015

Sterling E. Norris
(TYPE OR PRINT NAME)

▶ Earle Norris /CAF
(SIGNATURE OF PARTY OR ATTORNEY)



Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

## PROOF OF SERVICE

I am employed in the City of Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 425 Third Street SW, Suite 800, Washington, DC 20024.

On July 13, 2015, I served the foregoing document described as:

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

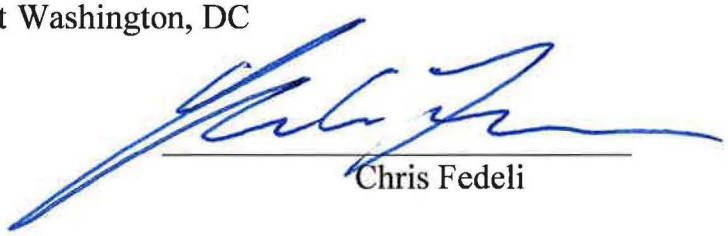
on the parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

*Counsel for Defendant in Earl De Vries v. Regents of the University of California,* Appeal No. B264487

Benjamin J. Horwich
Munger, Tolles & Olson LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, CA 94105-2907
Tel: (415) 512-4000
Fax: (213) 687-3702

I delivered said documents to an authorized courier or driver authorized to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person to whom it is to be served on the next business day.

I declare under penalty of perjury of the laws of the State of California that I am employed in the office of a member of the bar of this Court at whose direction the service was made, that the foregoing is true and correct, and that this declaration was executed on July 13, 2015, at Washington, DC



Chris Fedeli

**Chris Fedeli**

---

**From:** esub1, 2d1 <2d1.esub1@jud.ca.gov>
**Sent:** Monday, July 13, 2015 3:36 PM
**To:** Chris Fedeli
**Subject:** RE: E-File Case B264487, De Vries v. Regents of the, Submitted 07-13-2015 12:34 PM

Thank you. We have received your Certificate of Interested Entities or Persons.

A clerk will contact you if there are problems with filing this document.

**CALIFORNIA COURT OF APPEAL**
**SECOND APPELLATE DISTRICT**

## PROOF OF SERVICE

I am employed in the City of Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 425 Third Street, SW, Suite 800, Washington, DC 20024. On November 6, 2015, I served the foregoing documents:

**APPELLANT'S OPENING BRIEF ON APPEAL** and
**APPELLANT'S APPENDIX**

on the parties in this action and on the lower court by placing true and correct copies thereof in sealed envelopes addressed as follows:

Benjamin J. Horwich
Munger, Tolles & Olson LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, CA 94105
Tel: (415) 512-4000

The Hon. Gail Feuer, c/o Clerk of Court
Superior Court of California, Los Angeles County
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012
Tel: (213) 830-0878

I delivered said documents to a courier or driver authorized to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person to whom it is to be served on the next business day.

I declare under penalty of perjury of the laws of the State of California that I am employed along with a member of the bar of this Court at whose direction the service was made, that the foregoing is true and correct, and that this declaration was executed on November 6, 2015 in Washington, DC.

*s / Chris Fedeli*

_____

Chris Fedeli *

* Pursuant to Cal. Rules of Court 8.77(a), a copy of the original signed, printed form of this document will be kept on file.