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SUPERIOR COURT

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By *J Garcia*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF YOLO

ROBERT MARTINEZ, et al.,

Plaintiffs,

vs.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et. al,

Defendants.

Case No.: CV 05-2064

**ORDER ON DEMURRERS, MOTION TO
STRIKE AND MOTIONS BY PROPOSED
INTERVENORS**

On Thursday, August 17, 2006, the court heard six motions filed in this matter: (1) the Regents of the University of California ("Regents") and Robert C. Dynes' demurrer to the complaint; (2) the Regents and Robert C. Dynes' motion to strike the request for tuition reimbursement; (3) the Trustees of the California State University System ("CSU"), the Board of Governors of the California Community Colleges ("Community Colleges Board"), Charles B. Reed and Marshall Drummond's demurrer to the complaint; (4) the plaintiffs Robert Martinez et al.'s request for judicial notice; (5) Alicia 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 UC Davis ("IDEAS UC Davis"), and Improving Dreams, Equality, Access and Success of UCLA's ("IDEAS UCLA") motion for leave to

1 intervene; and (6) Alicia A., Mildred A., Enrique Boca, and Nicole Doe's motion to proceed
2 under fictitious names. These motions were heard in Department Four.

3 Kris W. Kobach, Michael J. Brady and O. Antony Abdollahi appeared for the plaintiffs.
4 Ethan P. Schulman and Christopher M. Patti appeared for the Regents and Robert C. Dynes.
5 Julie Weng-Gutierrez appeared for the Community Colleges Board and Marshall Drummond.
6 Andrea M. Gunn appeared for the CSU and Charles B. Reed. Robert Rubin, Nicholas Espiritu
7 and Daniel Levin appeared for the proposed intervenors.
8

9 Having considered all matters submitted in the papers and on oral argument, all
10 admissible evidence, the file in this case and the applicable law, the court now rules as follows.
11

12 This case reflects the ongoing national debate concerning immigration policies, the roles
13 undocumented aliens and their children play in our communities, and effective access to post-
14 secondary education. The California Legislature debated such issues and passed Assembly Bill
15 540 in 2001. Governor Gray Davis signed the bill, which enacted Education Code section
16 68130.5.

17 At least nine other states have enacted similar legislation which entitles certain
18 undocumented students to in-state tuition at public universities and colleges. Nevertheless,
19 neither the United States Attorney General, the Secretary of Homeland Security, nor federal
20 agencies including the Department of Education and the U.S. Citizenship and Immigration
21 Services (formerly the U.S. Immigration and Naturalization Service) has rendered any opinion
22 on the issue of whether state laws like section 68130.5 violate federal laws.

23 The plaintiffs contend that section 68130.5 violates 8 U.S.C. §§ 1621 and 1623, 42
24 U.S.C. § 1983, the California Unruh Civil Rights Act, and the federal and State constitutions.

25 Education Code section 68130.5 exempts from the requirement of paying non-resident
26 tuition those persons who can establish (a) high school attendance in California for three or more
27 years, (b) graduation from a California high school or attainment of the equivalent thereof,
28 (c) registration as an entering student, or current enrollment, at an accredited institution of higher
education in California, not earlier than the fall semester or quarter of the 2001-2002 academic

1 year, and (d) in the case of a person without lawful immigration status, the filing of an affidavit
2 with the institution of higher education stating that the student has filed an application to legalize
3 his or her immigration status, or will file an application as soon as he or she is eligible to do so.

4 **1. Plaintiffs' Request for Judicial Notice**

5 Exhibits K through Z of the Request for Judicial Notice ("RJN") comply with the
6 requirements of *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005)
7 133 Cal.App.4th 26, 31.

8 The request for judicial notice of Exhibit F of the RJN is **DENIED**. Although the court
9 may take judicial notice of the fact that Senator Simpson and Representative Smith filed an
10 *amicus curiae* brief in the *Day v. Bonds* appeal (Tenth Circuit Court of Appeal Case No. 05-
11 3305) and that Senator Simpson submitted a declaration in support of such brief, it is not proper
12 for the court to take judicial notice of the truth of the matters asserted in the brief and the
13 Simpson declaration. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865.) The court does not
14 assume the truth of contentions, deductions or conclusions of law whether such appear on the
15 face of the pleading or exhibits thereto. (*Moore v. Regents of University of California* (1990) 51
16 Cal.3d 120, 125.) For the same reasons, the evidentiary objections to the Declaration of Senator
17 Simpson, which is Exhibit A to the Complaint, are **SUSTAINED**.

18 The request for judicial notice of Exhibits N, P and R-X of the RJN is **DENIED**. Letters
19 to legislators or the governor expressing support for or opposition to a bill are not the proper
20 subject of judicial notice, unless there is a showing that such letters were communicated to the
21 Legislature as a whole. (*Kaufman & Broad, supra*, 133 Cal.App.4th at 38.) There has been no
22 showing that Exhibits N, P and/or R-X of the RJN were presented to the entire Legislature.

23 The request for judicial notice of Exhibits G, H, I and J is **DENIED**. The plaintiffs failed
24 to cite any case in which a court, in ruling on a demurrer, took judicial notice of a defendant's
25 discovery responses.

26 The request for judicial notice of Exhibits O and Q is **DENIED**. There is no evidence
27 that either of James E. Holst's letters to the Regents' board was considered by the Legislature as
28

1 a whole. The cases the plaintiffs cite in support of their contention that Mr. Holst's letters
2 constitute "official acts" are inapposite.

3 The request for judicial notice of the bill analysis for AB 540 prepared by the Assembly
4 Committee on Higher Education in Exhibit Y, Tabs A.4 and A.11 and the Department of Finance
5 bill analysis in Exhibit Y, Tab A.11 is **GRANTED**. (*So. Calif. Gas and Elec. Co. v. Public*
6 *Utilities Commission* (1979) 24 Cal.3d 653, 659.)

7 The request for judicial notice of the other materials in Exhibit Y, Tabs A.4 and A.11 and
8 all of the materials under Exhibit Y, Tabs A.6 and A.8 is **DENIED**. (*Kaufman & Broad, supra,*
9 133 Cal.App.4th at 38.)

10 The request for judicial notice of the materials in Exhibit Y, Tab A.13 is **DENIED**.
11 (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 487, fn. 4.)

12 For the reasons stated above, the request for judicial notice as to Exhibit Y, Tab B is
13 **DENIED** as to the materials under Tabs B.4, B.7, B.9, B.14, and B.15. Except as provided
14 above, the request as to Exhibit Y, Tab B is **GRANTED**.

15 The evidentiary objections to Exhibits B and C to the Complaint are **OVERRULED**. It
16 is proper for the court to take notice of the legislative history of a statute, including the
17 legislative antecedents of a statute. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17
18 Cal.4th 553, 571, fn. 9.) It is also proper for the court to consider statements in legislative
19 committee reports. (*So. Calif. Gas and Elec. Co., supra*, 24 Cal.3d at 659.)

20 The evidentiary objection to Exhibit D to the Complaint is **SUSTAINED**. In *City of*
21 *Richmond v. Comm. On State Mandates* (1998) 64 Cal.App.4th 1190, 1199, the court noted that
22 a predecessor bill was vetoed by the governor, but the opinion did not state that the Court of
23 Appeal took notice of the governor's veto message nor discuss the content of the governor's veto
24 message. The plaintiffs did not direct the court's attention to any evidence in the voluminous
25 papers they have filed which show that the Legislature considered the Governor's veto message.

26 **2. Regents of the University of California and Robert C. Dynes' Demurrer**

27 The demurrer to the first, second and sixth causes of action is **SUSTAINED WITHOUT**
28 **LEAVE TO AMEND**. Education Code section 68130.5 is not preempted by federal

1 immigration laws because (1) it does not regulate immigration; (2) there is no evidence that
2 Congress intended to occupy the field of resident tuition rates that may be charged by state
3 universities and colleges; and (3) section 68130.5 does not conflict with 8 U.S.C. §§ 1621 and/or
4 1623.

5 Section 68130.5 does not regulate immigration because it does not determine who should
6 or should not be admitted into the United States or the conditions under which an alien may
7 remain in this country. Standing alone, the fact that aliens are the subject of a state statute does
8 not render it a regulation of immigration. (*De Canas v. Bica* (1976) 424 U.S. 351, 355.) There
9 has been no showing that the term “person without lawful immigration status” in subdivision
10 (a)(4) of Section 68130.5 conflicts with or adds to federal immigration standards.

11 There has been no showing that Congress intended the Immigration and Naturalization
12 Act or any other federal statute cited by the plaintiffs to occupy the field of determining resident
13 tuition rates at state universities and community colleges. 8 U.S.C. §§ 1623 and 1621,
14 subdivision (d) contemplate state regulation in this area.

15 Although section 68130.5 confers a “benefit” within the meaning of 8 U.S.C. § 1621 (8
16 U.S.C. § 1621, subd. (c)(1)(B); Exhibit A to Plaintiffs’ Request for Judicial Notice, page 2;
17 Exhibit Y to Plaintiffs’ Request for Judicial Notice, Tab A.3, p. 2), the benefit conferred is
18 permitted under subdivision (d) of 8 U.S.C. § 1621. Subdivision (d) of 8 U.S.C. § 1621 does not
19 require a state statute to use the words “illegal alien” or to reference the federal statute.

20 Section 68130.5 does not conflict with 8 U.S.C. § 1623 because section 68130.5 does not
21 confer a benefit based on residency within California. The requirement of high school
22 attendance in California set forth in section 68130.5 does not require residency in California
23 because non-California residents may attend high school in this State. (Educ. Code, §§ 48050-
24 48051.) The plaintiffs fail to cite authority supporting their contention that mere physical
25 presence, as opposed to living, in California is sufficient to establish residency.

26 The demurrer to the third cause of action is **OVERRULED** because the third cause of
27 action is based on the alleged violation of 8 U.S.C. §§ 1621 and 1623, not federal preemption.
28

1 The demurrer to the fourth and seventh causes of action is **SUSTAINED WITHOUT**
2 **LEAVE TO AMEND.** Initially, the court notes that none of the authorities cited in the papers
3 show that a state may never, consistent with the equal protection and/or privileges and
4 immunities clauses of the state and federal constitutions, charge non-resident tuition. (*Cf. Kirk v.*
5 *The Bd. Of Regents of the Univ. of Calif.* (1969) 273 Cal.App.2d 430, 444-445.)

6 Section 68130.5 does not classify persons on the basis of alienage or residency. Nothing
7 in the language of section 68130.5 supports the plaintiffs' contention that section 68130.5
8 discriminates against United States citizens based on their residency. If anything, subdivision (4)
9 imposes a greater burden on non-citizens by requiring certain aliens to submit additional
10 evidence to qualify for an exemption from non-resident tuition. The plaintiffs do not allege that
11 section 68130.5 discriminates against illegal aliens. (Opposition brief, p. 8, lines 7-8.)
12 Additionally, none of the authorities cited in the papers show that United States citizens are a
13 suspect class or that paying resident tuition rates is a fundamental right. For the reasons stated,
14 the minimum rational relationship test applies to this case.

15 The goal of helping high school students who will likely remain in California, and
16 presumably contribute to the State's economy, is a legitimate governmental purpose. (*Kirk v.*
17 *The Bd. Of Regents of the Univ. of Calif., supra*, 273 Cal.App.2d at 444.) Section 68130.5 is
18 rationally related to the State's valid interests. (Exhibit Y of Plaintiffs' Request for Judicial
19 Notice, Tab A.1, p. 29.) *Nyquist v. Mauclet* (1977) 432 U.S. 1 is distinguishable because there is
20 no evidence that the Legislature sought to promote immigration or naturalization when it enacted
21 section 68130.5. There has also been no showing that section 68130.5 interferes with federal
22 laws.

23 The demurrer to the fifth cause of action is **SUSTAINED WITHOUT LEAVE TO**
24 **AMEND.** (*Kirk v. The Bd. Of Regents of the Univ. of Calif., supra*, 273 Cal.App.2d at 444-445.)

25 The demurrer to the eighth cause of action is **SUSTAINED WITHOUT LEAVE TO**
26 **AMEND.** Section 68130.5 does not constitute arbitrary discrimination under the Unruh Act.
27 (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503-1504.) The Legislature has specifically
28 permitted public universities and colleges to charge non-resident tuition (Educ. Code, §§ 68050-

1 68052) and to exempt certain persons from the requirement of paying non-resident tuition (Educ.
2 Code, § 68130.5). To the extent Section 68130.5 conflicts with the Unruh Act, section 68130.5
3 was more recently enacted and is a more specific statute than the Unruh Act. Further, Civil Code
4 section 51, subdivision (c) provides that in the event of a conflict, the Unruh Act defers to the
5 provisions of the statute with which it conflicts.

6 Because the court sustains the demurrers to the first through eighth causes of action in the
7 two demurrers before it and the ninth and tenth causes of action are based entirely on the first
8 through eighth causes of action, it is unnecessary for the court to rule on the demurrer to the
9 ninth and tenth causes of action.¹

10 **3. Trustees of the California State University System, Board of Governors of the**
11 **California Community Colleges, Charles B. Reed and Marshall Drummond's**
12 **Demurrer**

13 The demurrer on the grounds of standing is **OVERRULED**. The defendants fail to cite
14 authority for the proposition that Article III standing requirements apply to state courts. (*Cf.*
15 *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) The plaintiffs' allegation that
16 Education Code section 68130.5 infringes on their constitutional and statutory rights is sufficient
17 to establish standing to challenge section 68130.5. (*Holmes v. Calif. National Guard* (2001) 90
18 Cal.App.4th 297, 314-315.)

19 The first and second causes of action allege that section 68130.5 violates 8 U.S.C. §§
20 1621 and 1623 (Complaint ¶¶ 94-95 and 111) and that Section 68130.5 is preempted by 8 U.S.C.
21 §§ 1621 and 1623 (Complaint ¶¶ 97 and 109). The defendants concede that a private right of
22 action need not exist to state a cause of action for preemption. This demurrer is limited to the
23 issue of whether the plaintiffs have a private right of action to bring claims alleging violations of
24 8 U.S.C. §§ 1621 and 1623.

25 The demurrer to the first cause of action and the third cause of action to the extent it is
26 based on a violation of 8 U.S.C. § 1623 is **SUSTAINED WITHOUT LEAVE TO AMEND**.
27 The focus of 8 U.S.C. § 1623 is on the aggregate, rather than the individual. (8 U.S.C. § 1643,

28 ¹ Below, the court sustains without leave to amend the CSU, Community Colleges Board,
Charles B. Reed and Marshall Drummond's demurrer to the third cause of action.

