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Dear Ms. Fuller,

We are writing in our personal capacity as immigration professors and law teachers, who have both studied and litigated immigration matters over the years. We understand that Rep. Leo Berman has requested an AGO from your office, based upon the recent *Martinez v. Regents* litigation that is in its early stages in California. [Whether, under the federal Constitution, the state of Texas may permit undocumented persons to receive the benefit of in-state tuition at Texas state colleges and universities: <http://www.oag.state.tx.us/opinions/opinions/50abbott/rq/2008/pdf/RQ0742GA.pdf>] We have organized our response along three lines, including matters of res judicata/ripeness/finality, differences in the TX and CA statutes, and the *Martinez v. Regents* appeals panel reasoning.

First: Res Judicata/ripeness/finality: The *Martinez v. Regents* matter is not resolved in California, so any response is premature. The CA Supreme Court has not yet accepted the appeal, and there is still the remand to the trial court. In any event, no response by TX AGO, occasioned by this one preliminary decision, is warranted, especially when the CA case cited by Rep. Berman is not resolved.

Second: In response to a North Carolina request, Homeland Security/ U.S. Immigration and Customs Enforcement (DHS/ICE) has issued a letter saying that federal law does not prohibit the admission of undocumented aliens to post-secondary institutions and that individual states or institutions are free to develop policies concerning such admissions so long as federal immigration status standards are used to classify alien applicants: <http://www.nacua.org/documents/AdmissionUndocAlien072008.pdf> (July 28, 2008). This letter alone shows that the CA court got it wrong.

Third: Even if an AGO were warranted, the decision in *Martinez v. Regents* is wrong on both statutory grounds and constitutional analysis: it misconstrues the term “benefit” under federal law, misapplies the two federal court cases that have construed the statutes in question (both in effect upheld the statutes, one allowing a state to extend residency status [*Day*, in Kansas] and one allowing a state to withhold residency status [*Merten*, in Virginia]), and fails to cite the many state AGO’s and scholarly articles on the

subject—while citing a page in the congressional hearings record and a student note in favor of its reasoning. Because that opinion is still on appeal, we respond to the various issues it raises, but have not addressed the opinion point by point.

States That Allow Undocumented Students to Gain Resident Tuition Status (by Statute):

Texas, H.B. 1403, 77th. Leg., Reg. Sess. (Tex. 2001), amended by S.B. 1528, (Tex. 2005)

California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001)

Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002)

New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002)

Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003)

Oklahoma, S.B. 596, 49th Leg., 1st Sess. (OK 2003) [rescinded, 2007] +

Illinois, H.B. 60, 93rd Leg., Reg. Sess. (Ill. 2003)

Kansas, K.S.A.76-731a (KS 2004)

Nebraska, LB 239 (enacted over veto, April 13, 2006)

New Mexico, N.M.S.A. 1978, Ch. 348, Sec. 21-1-1.2 [47th Leg. Sess. (2005)]

+ The Oklahoma Taxpayer and Citizen Protection Act of 2007 (HB 1804) repealed the 2003 provision for according residency tuition and grants to eligible undocumented students, although the actual language of the bill, signed into law in May, 2007, grandfathered in those students already eligible and enrolled.

First, as this is a matter of statutory interpretation, it is important to start with the specific statutes addressed in the litigation, and which undergird the legislation drafted in the various states.

IIRIRA, CHAPTER 14--RESTRICTING WELFARE AND PUBLIC BENEFITS FOR ALIENS

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not --

(1) a qualified alien (as defined in section 1641 of this title),

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

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

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

(b) Exceptions

Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b (v) (3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) 'State or local public benefit' defined

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

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

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

(2) Such term shall not apply --

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of

a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-758 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

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 for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

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

(a) In general

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

(b) Effective date

This section shall apply to benefits provided on or after July 1, 1998.

Our reading follows this reasoning: the word “unless” in Section 1623 can only mean that Congress enacted a condition precedent for states enacting rules in this area; the word “benefit” is defined in Section 1621 in a way that makes it clear that Congress intended it as a “monetary benefit,” whereas the determination of residency is a status benefit. Section 1621 says explicitly that states may provide this benefit only if they act to do so after August 22, 1996. Taken together, these provisions form an interlocking

logic that points toward only one reasonable conclusion: that federal law allows states to confer (or, not to confer) residency status upon the undocumented in their public postsecondary institutions. No other reading makes any sense.

First, in-state residency is entirely a state-determined status. There are no federal funds tied to this status, as opposed to, for example, federal highway programs, where acceptance of the dollars obligates a state to abide by federal speed limits. On the one occasion when this jurisdictional matter was considered by the U.S. Supreme Court, in the Maryland case of *Moreno v. Elkins*, where the issue was whether G-4 non-immigrants could establish postsecondary residency in the state for in-state tuition purposes, the Court certified this exact question to the Maryland State Court of Appeals. The Maryland State Court of Appeals held that G-4 aliens were not precluded from establishing domicile, and the U.S. Supreme Court then deferred to this finding, and adopted it into its final ruling on the issue, in *Toll v. Moreno*. Had state residency been a matter of federal law, the U.S. Supreme Court would have decided the issue itself; but instead, it left the interpretation and determination to a state court. While *Toll* concerned non-immigrants rather than the undocumented, we believe it is instructive on the issue of delegation as well.

The provisions of the 1996 federal statute do not preclude the ability of states to enact residency statutes for the undocumented. Section 505, 8 U.S.C. § 1623 reads:

[A]n 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.

Congress does not have the authority to regulate purely state classifications, and the Maryland case established this in the area of postsecondary residency/domicile issues. But even if this were not true and if Congress did have such authority, section 1623 would not preclude any state from enacting undocumented student legislation, due to the word “unless.” A flat bar would not include such a modifier. The only way to read this language is: State A cannot give any more consideration to an undocumented student than it can give to a nonresident student from state B. For example, Kansas could not enact a plan to extend resident status to undocumented students after they had resided in the state for twelve months, and then accord that same status to U.S. citizens or permanent residents from Missouri or Nebraska after eighteen months of such residence. No state plan does this; indeed, several of the plans require three years of residency for the undocumented, as well as state high school attendance--neither of which is required for citizen non-residents. New Mexico's 2005 statute is the only statute that accords full participation after a mere twelve months. As such, it does not favor the undocumented over other nonresident applicants. This is the only plausible reading of section 1623. The CA Appeals Court panel thus misconstrues both the immigration dimensions and the actual operations of residency determinations.

In section 1623, the term “benefit” refers to dollars (“amount, duration, and scope”). However, the “benefit” actually being conferred by residency statutes is the right to be considered for in-state resident status. This is a non-monetary classification, and this definition lends support to our reading of the statute. Congress has enacted a separate program for federal financial aid, which limits eligibility to certain classes of aliens, and which does not extend to the undocumented.

Moreover, 1621(c) must be read to enable states to determine residency reclassification. That provision reads, in pertinent part: ‘[An undocumented] alien . . . is not eligible for any State or local public benefit (as defined in subsection (c) of this section.’ But a more careful reading of subsection (c) confirms our interpretation, by referencing *payments*. It prohibits ‘any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.’ Thus, the “benefit” of being reclassified as a resident student in a state does not trigger any of the prohibitions. Subsection (1)(B)'s reference to “postsecondary education” is modified by “or any other similar benefit for which payments or assistance are provided . . . by an agency of a State or local government or by appropriated funds of a State or local government.” This clearly indicates that what is proscribed is money or appropriated funds (arguably financial aid or grants), but not the status benefits confirmed by the right to declare state residency. In classic residency determinations, such as these, no money or proscribed appropriated funds are in play.

Further, subsection (d) provides that states may provide otherwise-prohibited public benefits ‘only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.’ This must allow states to do as I believe they may do. Beginning with Texas, ironically the state where *Plyler v. Doe* originated twenty-five years earlier, a number of states have enacted statutes to allow these few students-- who have personally broken no law--to enroll in college.

The Kansas provision allowed undocumented public college applicants in the state to establish that they had attended the state’s public school for three years and graduated. In an unusual development, the Kansas Attorney General declined to have his office argue the defense and instead hired local private counsel to undertake defense of the statute. (One of the signatories served as the Kansas expert witness in this litigation.) In July 2004, the federal district judge found for the state by determining that the plaintiff students had no standing to bring the case, since they had not been denied any benefit or received any harm by the state's practice.

District Judge Richard D. Rogers denied standing to the plaintiffs, and after oral arguments in Fall, 2006, this decision was upheld by the Tenth Circuit, and the *cert* petition was denied by the U.S. Supreme Court. The judge got this formulation exactly right, although he might have added that both the United States Congress and the Kansas legislature had done exactly this, by means of federal law and K.S.A. section 76-

731a. In the complex calculus concerning the state status of in-state residency to the undocumented, if *Merten* can be law in Virginia, then *Day* must prevail in Kansas. The pneumatics of this policy are that states are allowed to deny the status and enact a policy not to enroll the undocumented or accord them the lower tuition; symmetrically, they may also do so. We believe that the CA Supreme Court could still hold that this matter is moot, as the appeals court finessed the issue of standing. As was the case in Kansas, one student gaining in-state status harms no other student.

In May, 2005, the Texas Legislature acted to revise its statute, broadening it slightly to address some of the technical problems that had arisen under the first statute. In the meantime, thousands of undocumented Texas students have enrolled under the provision, as they have in other states that have enacted policies under IIRIRA.

Various state attorneys general have issued AGO's on this very issue, and may be useful. For example, the AG in Nevada, New Mexico, and several other states have concluded that the undocumented may establish domicile in their state, and may attend public colleges—as DHS has opined. As a recent example, the Arkansas AG has responded that the undocumented could enroll in that state's public colleges: <http://ag.arkansas.gov/opinions/docs/2008-109.pdf> (September 10, 2008).

On this issue, the Texas case *Plyler v. Doe* should again be useful, as in its footnote 22:

“Appellant School District sought at oral argument to characterize the alienage classification contained in § 21.031 as simply a test of residence. We are unable to uphold § 21.031 on that basis. Appellants conceded that if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. Tr. of Oral Arg. 31-32. It is thus clear that Tyler's residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. **And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.** [Emphasis added] C. Bouvé, *Exclusion and Expulsion of Aliens in the United States* 340 (1912). Appellants have not shown that the families of undocumented children do not comply with the established standards by which the State historically tests residence. Apart from the alienage limitation, § 21.031(b) requires a school district to provide education only to resident children. The school districts of the State are as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission.”

In summary, there are good reasons not to issue an AGO while the referenced case is still in its early stages. By if you decide to issue one, we believe that the clear answer is that the Texas statute is constitutional under state law and federal law analyses. Moreover, the DHS has clearly indicated that states may do as Texas and California have done. Finally, there is simply no other reasonable way to read this statute other than the one we urge. If we may be of further assistance, please feel free to call upon us, through Professor Michael A. Olivas. (Of course, this is undertaken as our personal opinions, and should not be construed as representing our home institutions.)

Sincerely,

/s/ Michael A. Olivas

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