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 California Supreme Court

PETITIONERS' REPLY BRIEF

KRIS W. KOBACH
Counsel of Record
GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
kkobach@gmail.com

MICHAEL BRADY
SUSAN H. HANDELMAN
ROPERS, MAJESKI, KOHN, & BENTLEY
1001 Marshall St., Suite 300
Redwood City, CA 94063

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

ARGUMENT

I. Petitioners Possess Article III Standing.

Petitioners are U.S. citizen students who attend or have attended public colleges or universities in California and have been required by Respondents to pay higher, out-of-state tuition rates while illegal aliens have been afforded in-state tuition rates, in violation of 8 U.S.C. §1623. Petitioners' requested relief includes: (1) an injunction prohibiting Respondents from continuing to unlawfully charge Petitioners a higher tuition rate than that charged to certain illegal aliens, (2) reimbursement of the unlawful excess tuition they have been required to pay by Respondents, and (3) a declaration that Cal. Ed. Code §68130.5 is preempted by federal law.

Respondents argue that while Petitioners possess standing under California standing doctrine, they lack Article III standing. Respondents claim that Petitioners are not injured by the fact that illegal aliens pay lower tuition rates, and that any injury is not redressable because "[i]f the state law is invalidated . . . petitioners' tuition will remain unchanged." California Community Colleges (CCC) Br. 11; Regents Br. 18. Respondents fail to correctly describe the injuries at issue and fail to assess all of the forms of relief sought.

A. Petitioners Suffer Injury to a Legal Interest.

The primary injury-in-fact suffered by Petitioners is *an injury to a legal interest* – the legal interest created by 8 U.S.C. §1623. Specifically, it is the legal interest in receiving "any postsecondary education benefit" provided by the state's public universities and community colleges to "an alien who is not lawfully present in the United States" in "no less an amount, duration and scope." *Id*.

It is settled law that injury to a legal interest created by a federal statute is sufficient to confer Article III standing on a plaintiff: " . . . Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citations omitted). This Court has repeatedly recognized the power of Congress to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (*citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972), and *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)).

The injury to the legal interest created by §1623 occurs irrespective of financial injury. Whenever an

illegal alien is offered a postsecondary education benefit and that benefit is denied to a U.S. citizen student at the state's universities, based on "whether the citizen . . . is such a resident," 8 U.S.C. §1623, the legal interest created by the federal statute has been invaded.

This injury is redressable by invalidation of the offending state statute. It matters not whether the U.S. citizen students pay in-state or out-of-state tuition rates after the invalidation of the state statute. The invasion of their legal interest under §1623 ends when the unequal treatment ends. Where disparate treatment is the cause of the injury, "the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted); *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2333 (2010); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817-18 (1989).

B. Petitioners Seek Reimbursement.

Petitioners also assert a financial injury in the form of the excess tuition charged to them, over and above the tuition charged to illegal aliens at the same institutions. Because the proceedings below never passed the demurrer stage, no court considered what forms of relief should be granted. If Petitioners prevail on their §1623 express preemption claim or their

conflict preemption claims, they will seek injunctive relief ordering Respondents to reimburse Petitioners for the excess tuition they paid.

Regents Respondents present the novel theory that Cal. Ed. Code §68130.7 – a law enacted shortly after §68130.5 to immunize California from paying damages for its violation of 8 U.S.C. §1623 – actually permits the State to violate federal law with impunity. Regents. Br. 19. Therefore, Respondents reason, since the State has declared through legislative fiat that it shall not be liable, reimbursement can never occur; thus redressability (and standing) is denied. *Id.* On its face, this argument is meritless. *See Haywood v. Drown*, 129 S.Ct. 2108, 2114 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").[1]

C. Petitioners Do Not Present a Generalized Grievance.

Respondents also make the unsupported assertion that Petitioners present a generalized grievance "that California is not in compliance with federal law." CCC Resp. 7; Regents Resp. 16. This assertion is

[1] Even if §68130.7 were a valid exercise of State authority, it would not negate the redressability of the denial of equal treatment guaranteed by §1623. Ending the benefit for illegal aliens would still redress the injury.

incorrect. Petitioners are U.S. citizen students who have personally been denied the in-state tuition benefits given to illegal aliens at the same state universities – a legal interest conferred on them specifically by Congress under §1623. The general public suffers no such injury. This is far from a "generalized grievance" that is "plainly undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (*quoting Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

II. Petitioners Bring a Preemption Claim, and Therefore Do Not Need a Separate Private Right of Action.

Respondents argue that because Petitioners waived their argument that §1623 creates a private right of action, Petitioners may not proceed in this Court. Regents Br. 18; CCC Br. 13. However, Petitioners are asserting that §1623 *preempts* §68130.5, not that they have a private right of action to *enforce* the substantive provisions of the law.

This Court routinely reviews preemption claims without first determining whether the party has a private right of action to bring the case. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 625 (1973).

All of the circuits that have considered the issue agree that a party does not need a private right of action to bring a preemption claim. "A party may

bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2006). "In other words, a 'claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.'" *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003) (*quoting Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1007 (2d Cir. 1997); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 579-81 (9th Cir. 2007).

Additionally, Respondents conceded at the trial court that Petitioners do not need a private right of action to bring a preemption claim, App. 120, and did not re-raise the issue in the California Supreme Court. Having conceded the issue and waived it below, Respondents cannot now argue that Petitioners need a private right of action to bring a preemption claim. *See The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 593 (2008).

Regents Respondents also misrepresent the holding of *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 2987 (2008), a standing case concerning Kansas's law granting in-state tuition rates to illegal aliens. Respondents claim that

"'none of these [*Day*] Plaintiffs would be eligible to pay resident tuition' even if the law were struck down," and the same standing conclusion applies in this case. Regents Br. 18 (*quoting Day*, 500 F.3d at 1135). However, that holding in *Day* applied to the plaintiffs' Equal Protection Clause claim, not to their preemption claims. *See id.* at 1132-35.[2]

More importantly, reliance on the *Day* decision is problematic at best because the Tenth Circuit erred by intermixing standing and private right of action doctrines. The Tenth Circuit incorrectly made the former dependent upon the latter. "The standing question *is* whether §1623 creates a private right of action." *Day*, 500 F.3d at 1138 (emphasis added). The *Day* court then proceeded to evaluate whether §1623 conferred a private right of action on the plaintiffs, rather than whether they had standing to bring their preemption challenge under normal standing doctrine. *Id.* at 1138-39. This Court has specifically cautioned lower courts against making this error. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the

[2] The Tenth Circuit's holding that a plaintiff lacks standing under the Equal Protection Clause when he would not otherwise qualify for the benefit conflicts with this Court's precedents holding that the remedy could simply be an end to the unequal treatment. *Heckler*, 465 U.S. at 739-40; *Levin*, 130 S.Ct. at 2333.

question of whether she had asserted a proper cause of action.").

III. Confusion Persists Among the States.

Prior to the Petition in this case, eleven states had granted in-state tuition rates to illegal aliens, in violation of §1623. Pet. 7 n.5.[3] Respondents brush aside the continuing confusion in the states as "speculation regarding future legislation." Regents Br. 25. However, it is far from speculative. In the weeks since the Petition was filed, the legislature of a twelfth state, Maryland, has passed an act affording illegal aliens in-state tuition in violation of §1623.[4]

At the same time that twelve states have defied §1623, numerous other states have rejected proposals to grant in-state tuition benefits to illegal aliens because they correctly surmised that doing so would violate federal law. *See* Ariz. Rev. Stat. 15-1803(B) ("In accordance with [§1623], a person . . . who is without lawful immigration status is not entitled to classification as an in-state student . . . "); *see also* WLF Amicus Br. 12-13. State attorneys general also have found that providing in-state tuition to illegal

---

[3] Petitioners omitted the Wisconsin statute, Wis. Stat. §36.27(cr), in their Petition.

[4] Maryland SB 167. *See* Sabrina Tavernise, *Maryland: Bill Giving Tuition Breaks to Immigrants is Sent to Governor*, NY TIMES, April 13, p. A19. At this time, the governor has not yet signed it.

aliens would violate §1623. *See, e.g.*, Va. Atty. Gen'l Op. No. 06-018 (2006); *see also* WLF Amicus Br. 13.

The writ should be granted to give guidance to the state legislatures and officials that have disputed the meaning of §1623 for more than a decade, to prevent additional states from violating federal law, and to avoid needless litigation that will otherwise continue.

IV. The Lack of a Federal Regulation Reinforces Petitioners' Argument.

Regents Respondents also argue that because the Department of Homeland Security ("DHS") has not promulgated regulations interpreting §1623, certiorari is not warranted. Regents Br. 27-28. Respondents' novel theory seems to be that if there were any confusion about the meaning of the statute, then the DHS would have promulgated regulations to clarify it. *See id*.

What Respondents fail to recognize is that *the relevant agencies do not even agree* on which one of them has the authority to interpret §1623. It is a one-sentence statute that does not mention which agency is responsible for enforcing it. There are three possibilities – DHS, the Department of Justice, or the Department of Education. Respondents declare that it obviously must be DHS's job, since DHS is charged with enforcing immigration laws. Regents Br. 27. However, that is not the Justice Department's view. Recently, both the Justice Department and DHS were

asked by litigants in Nebraska to take action to enforce §1623 in their state.[5] The Department of Justice responded on April 14, 2011, *not by referring the matter to DHS*, *but by referring it to the Department of Education*.[6] DHS did not even respond. Similarly, as Respondents concede, DHS has not taken any action since being asked to do so by Amicus WLF in 2005. Regents Br. 27 n.13. This uncertainty among the executive branch departments regarding whose responsibility it is explains why no department has stepped forward to address the confusion among the states. For that reason, review by this Court is especially necessary.

V. The California Supreme Court Improperly Concluded that an Express Preemption Savings Clause Also Resolves any Conflict Preemption Claims.

This Court made clear in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), that where a case presents both express preemption and implied conflict preemption challenges, and the express preemption challenge fails, that conclusion does not mean that implied conflict preemption has not occurred. A complete conflict preemption analysis must still be

[5] Letter to Department of Justice, February 7, 2011; Letter to Department of Homeland Security, February 7, 2011 *available at* http://www.irli.org/node/35.

[6] Letter from Department of Justice, April 14, 2011 *available at* http://www.irli.org/node/35.

conducted. *See also Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). This Court recently reiterated this *Geier* principle. *AT&T Mobility LLC v. Concepcion*, Slip Op. 9 (April 27, 2011).

Rather than follow this Court's *Geier* line of precedents, the California Supreme Court ignored it entirely and adopted a pre-*Geier* view that if a statute falls within an express preemption savings clause, then implied preemption cannot occur. Pet. 29-33. The court devoted four paragraphs to explaining why this must be so.[7] App. 30-32. The court concluded: "In short, Congress did not impliedly prohibit what it expressly permitted. Section 68130.5 is not impliedly preempted." App. 32.

Respondents attempt in vain to conceal the court's mistake in this regard. Regents Respondents simply declare without elaboration that "the court properly rejected Petitioners' implied preemption claims." Regents Br. 28. However, they misunderstand the problem. The problem is not that the court failed to reject the implied preemption claims. The problem is that the court rejected them *for an impermissible reason*: an implied preemption claim cannot be rejected simply because the statute in question is saved

[7] While the court's reasoning may apply to implied field preemption, *see* App. 31-32, it does not apply to implied conflict preemption – a distinction Respondents miss.

by an express preemption savings clause. *Geier*, 529 U.S. at 869.

CCC Respondents understand the problem. However, they respond by ripping fragments from the court's decision and stitching them back together in the form of an implied preemption analysis that the court never conducted. CCC Resp. 21-24. They admit that they are doing exactly that: "Although the California Supreme Court did not explicitly label this discussion as the impossibility prong of implied preemption, it effectively disposes of that analysis." *Id*., 23 n.8 (citing App. 18-19). Respondents grossly mischaracterize the court's decision. Nothing on pages 18-19 comes close to addressing Petitioners' conflict preemption arguments.

One of Petitioners' principal conflict preemption claims before the California Supreme Court was that §68130.5 suffers from impossibility preemption. This is because an illegal alien student must remain unlawfully present at a California university in order to take advantage of the law's valuable financial subsidy. It is therefore impossible to comply with federal law while receiving the benefit of §68130.5. Respondents' attempt to fabricate a response to this impossibility preemption argument from the court's out-of-context statements does not make sense. Respondents say that "the court also addressed how it was possible *for the State law to comply with the federal law*. . . ." CCC Resp. 22 (emphasis added). That is correct. But that has nothing to do with *whether an illegal alien can comply with federal law*

while receiving the benefit of in-state tuition rates. The court was addressing an express preemption claim under §1623, not an impossibility-of-compliance conflict preemption claim.

Petitioners' second conflict preemption claim concerned the federal crime of "encourage[ing]" or "induc[ing]" an illegal alien to "reside in the United States." 8 U.S.C. §1324(a)(1)(A)(iv). When Respondents encourage illegal aliens to seek admission by offering them in-state tuition rates, they severely undermine the enforcement of this federal law. The California Supreme Court said nothing in response to this conflict preemption claim. So too with Petitioners' claims that §68130.5 conflicts with the classifications of federal immigration law by inventing its own classifications. Instead, the court dismissed all of the implied preemption claims with the sweeping observation that "Congress did not impliedly prohibit what it expressly permitted." App. 32.

Finally, Regents Respondents oddly assert that "[t]he California Supreme Court's ruling does not conflict with any of the authorities cited in the Petition" because "none of those cases involved statutory language that affirmatively authorized states to enact legislation, subject to specified conditions. . . ." Rather, each statute contained a savings clause "provid[ing] that certain state legislation or regulation would fall outside the scope of the preemption clause." Regents Br. 23. There is no functional difference between the two. In §§1621(d) and 1623, as well as in the preemption savings clauses analyzed by this

Court, *see* Pet. 29-33, certain state activity is expressly preempted while other state activity is saved from preemption. The analysis is the same. *See Geier*, 529 U.S. at 869. Granting the writ will prevent lower courts from making this error and reviving the pre-*Geier* confusion.

CONCLUSION

For the foregoing reasons, certiorari is warranted.

Respectfully submitted,

KRIS W. KOBACH
Counsel of Record
GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
kkobach@gmail.com

MICHAEL BRADY
SUSAN H. HANDELMAN
ROPERS, MAJESKI, KOHN, & BENTLEY
1001 Marshall St., Suite 300
Redwood City, CA 94063

May 2, 2011