

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**ROBERT MARTINEZ, ET AL.,**

Appellants,

v.

**REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, ET AL.,**

Respondents.

Court of Appeal, Third Appellate District, Case No. C054124  
Honorable Rick Sims, Acting Presiding Justice  
Honorable Vance Raye, Justice  
Honorable Harry E. Hull, Jr., Justice  
Yolo County Superior Court No. CV 052064  
Honorable Thomas E. Warriner

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## TABLE OF CONTENTS

	Page
INTRODUCTION	2
I.    NO ISSUE CONCERNING DAMAGES MERITS REVIEW BECAUSE THE LAW IS CLEAR THAT MONEY DAMAGES ARE PROHIBITED	3
II.   REVIEW IS UNWARRANTED BECAUSE NO COURT HAS EVER HELD THAT GEOGRAPHIC ORIGIN OR CITIZENSHIP ARE PROTECTED CLASSES	4
III.  PLAINTIFFS' DISAGREEMENT WITH DICTA DOES NOT MERIT REVIEW	6
CONCLUSION	6

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>Espinoza v. Farah Mfg. Co.</i> (1973) 414 U.S. 84	5
<i>Harris v. Capital Growth Investors XIV</i> (1991) 52 Cal.3d 1142	4, 5
<i>In re Cox</i> (1970) 3 Cal.3d 205	5
<i>Koebke v. Bernardo Heights Country Club</i> (2005) 36 Cal.4th 824	4
<i>Regents of University of California v. Superior Court (Bradford)</i> (1990) 225 Cal.App.3d 972	5, 6
 <b>Constitutional Provisions</b>	
California Constitution Article I, § 31	2, 4
 <b>Statutes</b>	
Civil Code § 51	2
Education Code § 68062	5, 6
§ 68130.5	3
§ 68130.7	2, 3

## TABLE OF AUTHORITIES (continued)

	<b>Page</b>
<b>Court Rules</b>	
California Rules of Court Rule 8.500(c)(1)	3
<b>Other Authorities</b>	
58 Ops. Cal. Atty. Gen. 608	5
Title VII of the Civil Rights Act of 1964	5
Unruh Civil Rights Act	2, 4

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**INTRODUCTION**

Plaintiffs' petition for review should be denied because they only present issues of well-settled law, without support of legal authority.

Plaintiffs seek damages in this case, but the law is clear that no damages can be awarded when challenging California's in-state tuition for nonresident high school graduates. (Ed. Code, § 68130.7.) Nor can plaintiffs state a cause of action for violation of either the Unruh Civil Rights Act (Civ. Code, § 51, et seq. (Unruh Act)) or Article I, section 31 of the California Constitution (Proposition 209); no court has held that "national origin" includes citizenship under these laws. Plaintiffs cannot state a cause of action for due process violations because, as they admit, having neither attended nor graduated from a California high school, they do not qualify for the exemption. And, finally, plaintiffs' disagreement with dicta of the appellate court does not warrant review by this Court.

I.

**NO ISSUE CONCERNING DAMAGES MERITS REVIEW  
BECAUSE THE LAW IS CLEAR THAT MONEY  
DAMAGES ARE PROHIBITED**

The courts below correctly rejected plaintiffs' claims for damages. Plaintiffs' Unruh Act claim (see Petn. for Review (Plaintiffs' Petn.), pp. 12-22; see p. 17, fn. 3.) is barred by the statutory immunity afforded to defendants in any challenge to the exemption.<sup>1/</sup> (Ed. Code, § 68130.7, & Opn. at p. 80.) Moreover, the appellate court correctly concluded that plaintiffs could not state a viable takings claim. (Opn. at p. 76.) Indeed, plaintiffs' admit they do not even qualify for the nonresident tuition exemption, having never attended or graduated from California high schools, and thus cannot point to any process they are due. (Opn. at p. 7.)

Plaintiffs raise a new legal theory that the immunity statute (Ed. Code, § 68130.7) is somehow unconstitutional. (Plaintiffs' Petn., pp. 20-22.) This issue is improperly raised as an issue for review before this Court because plaintiffs never advanced this argument before the Court of Appeal (Cal. Rules of Ct., rule 8.500(c)(1)) and fail to cite even one case in support of this proposition.

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1. The immunity statute provides that "[i]f a state court finds that Section 68130.5 . . . is unlawful . . . no money damages, tuition refund or waiver, or other retroactive relief, may be awarded. In any action in which the court finds that Section 68130.5 . . . is unlawful, the California Community Colleges, the California State University, and the University of California are immune from the imposition of any award of money damages, tuition refund or waiver, or other retroactive relief." (Ed. Code, § 68130.7.)

## II.

### **REVIEW IS UNWARRANTED BECAUSE NO COURT HAS EVER HELD THAT GEOGRAPHIC ORIGIN OR CITIZENSHIP ARE PROTECTED CLASSES.**

Plaintiffs offer a novel theory that, as U.S. citizens, they are being discriminated against in favor of undocumented immigrants. Plaintiffs fail to identify any conflict among the courts or need for uniformity of decision with respect to either the Unruh Act claim or their Proposition 209 argument. Indeed, plaintiffs never pleaded their Proposition 209 claim in their complaint.

Review by this Court is unwarranted for several reasons. First, plaintiffs admit they cannot qualify for the exemption. (Opn. at p. 7.) Thus, even if their legal theory had merit in an abstract sense, plaintiffs cannot avail themselves of it, making this case a uniquely poor vehicle for this Court to address the issue.

Second, there is no split among the lower courts. Plaintiffs cite two California Supreme Court cases that use the term “geographical origin.” (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 842-843 [Unruh Act protects against discrimination on the basis of marital status]; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162 fn. 10 [Unruh Act does not protect against economic discrimination]; see Plaintiffs’ Petn., p. 14.) But neither case expands the Unruh Act to protect alleged discrimination on the basis of geographic origin or citizenship. Rather, in both *Koebke* and *Harris*, this Court affirmed that the Unruh Act only protects those enumerated categories or those categories extended by judicial construction. (*Harris, supra*, 52 Cal.3d at p. 1161; *Koebke, supra*, 36 Cal.4th at pp. 842-843.) As the lower court correctly found, plaintiff’s cited authorities do not support plaintiffs’ position. (Opn. at pp. 78-79 [“*Koebke* did not, as plaintiffs claim, extend the Unruh Act to geographic origin;” “Plaintiffs fail to persuade us that ‘national origin’ includes alienage/citizenship”].)

Plaintiffs repeatedly cite a state case that does not discuss either the Unruh Act or Proposition 209. (See *Regents of University of California v. Superior Court (Bradford)* (1990) 225 Cal.App.3d 972 [analyzing constitutionality of a residency statute on equal protection grounds, Ed. Code, § 68062]; Opn. at p. 79 [“However *Bradford* was not an Unruh Act case”].)

Nor is there a conflict between state courts and the federal courts. Plaintiffs cite three lower federal court cases, all of which concern Title VII of the Civil Rights Act of 1964, not state law. The trial court correctly observed that these cases do not bar discrimination based on citizenship or alienage. (Opn. at p. 82, quoting *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 95.) In any case, the United States Supreme Court has held that “national origin” does not include citizenship status. (*Espinoza, supra*, 414 U.S. at pp. 84, 88 [citizens are not a protected class under Title VII]; see Opn. at pp. 82-83.)

Finally, plaintiffs cite *In re Cox* (1970) 3 Cal.3d 205 and an Attorney General opinion (58 Ops. Cal. Atty. Gen. 608) for the sweeping proposition that the Unruh Act applies to “all persons” within the jurisdiction of California subject to arbitrary discrimination and that the list of protected classes is “illustrative rather than restrictive.” (Plaintiffs’ Petn., pp. 9, 12.) Plaintiffs read too much into these authorities, in so far as this Court has held that “judicial expansion of the classifications to whatever courts may label ‘arbitrary discrimination’ cannot be justified.” (*Harris, supra*, 52 Cal.3d at p. 1154.)

Because plaintiffs are not entitled to the exemption that they claim is discriminatory and their theory is unsupported and undeveloped by the lower courts, there is no reason for this Court to grant review.



### III.

#### **PLAINTIFFS' DISAGREEMENT WITH DICTA DOES NOT MERIT REVIEW**

Plaintiffs allege a conflict between the nonresident tuition exemption and Education Code section 68062, as interpreted by *Bradford, supra*, 225 Cal.App.3d 972. Section 68062 prohibits an undocumented immigrant from being deemed a resident for tuition purposes if prohibited under federal immigration laws. The court below explained that plaintiffs “read too much into *Bradford*” as meaning that a violation of section 68062 would constitute discrimination against citizens of sister states. (Opn. at pp. 32-33.) The court correctly held that there is no conflict because the nonresident tuition exemption as the later-enacted statute prevails. (Opn. at pp. 31-32.)

After concluding there was no conflict between the statutes, the appellate court proceeded to discuss the possibility of implied repeal. Plaintiffs take issue with the appellate court’s discussion of implied repeal, which does not form the primary basis of the court’s holding that plaintiffs cannot state a viable claim of discrimination in violation of section 68062. (Plaintiffs’ Petn., pp. 22-26; Opn. at pp. 31-33.) Plaintiffs’ mere disagreement with the court’s alternate discussion of implied repeal does warrant review. (See Opn. at p. 32-33.)

#### **CONCLUSION**

For the foregoing reasons, the Court should deny the petition for review. The Court should, however, grant the petition for review filed by the Board of Governors of the California Community Colleges and Chancellor Michael Drummond.

Dated: November 17, 2008

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Julie Weng-Gutierrez", written in a cursive style.

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petition for Review uses a 13 point Times New Roman font and contains 1217 words.

Dated: November 17, 2008

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Julie Weng-Gutierrez", with a stylized flourish at the end.

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**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **Robert Martinez, et al. v. Regents of the University of California, et al.**

No.: **S167791**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On November 17, 2008, I served the attached **Answer to Petition for Review** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight and FedEx**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 17, 2008, at Sacramento, California.

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