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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne,

Plaintiff,

vs.

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD,

Defendant.

Case No. CV2013-009093

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS INTERVENOR-DEFENDANTS

(Assigned to the Hon. Arthur Anderson)

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Arizona seeks to strip DACA recipients of in-state tuition and potentially violate their Due Process and Equal Protection rights without allowing them to participate in this lawsuit. Arizona's position is especially misguided here because Applicants have affirmatively established each element of the intervention standard, as established in their moving papers. In response, Arizona ignores the legal standards for intervention, and instead makes irrelevant arguments that they will prevail on the merits.

To the extent Arizona does offer any argument, Arizona does not cite to any cases to refute Applicants' positions. Instead, the State mostly mischaracterizes Applicants' authority to arrive at the erroneous conclusions that Applicants have no protectable interest in their own education, no protectable interest in continuing to receive in-state tuition, no protectable interest in receiving Due Process, and no protectable interest in receiving Equal Protection under the law. Arizona's position defies common sense.

Applicants are the direct beneficiaries of the existing in-state tuition rate for DACA recipients, and as such are the real parties in interest. DACA students have a unique interest that MCCCD may not adequately represent. Indeed, MCCCD did not raise the affirmative defenses that Applicants have made for themselves and MCCCD agrees that Applicants should intervene.

II. ARGUMENT

A. Applicants Are Entitled To Intervene As A Matter of Right Under Ariz. R. Civ. P. 24(a)(2).

The Parties agree that intervention as a matter of right under Rule of Civil Procedure ("Rule") 24(a) involves application of a four-part test. *See* Arizona's Response to Motion to Intervene ("Response"), at 4-5. First, the applicant's motion should be timely. Second, the applicant should assert an interest relating to the property or transaction, which is the subject of the action. Third, the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest. Fourth, the interests of the applicant

should not be adequately represented by the parties already involved in the action. *See* Ariz. R. Civ. P. 24(a)(2).

Arizona concedes that Applicants satisfy the timeliness factor and fails to undermine Applicants' showing that they satisfy remaining factors. Thus, Applicants respectfully request that this Court grant their Motion.

1. Arizona Concedes That Applicants' Motion To Intervene Is Timely.

Arizona does not even address whether Applicants' motion to intervene is timely, thus conceding that Applicants satisfy the timeliness prong for intervention as a matter of right under Rule 24(a)(2). Applicants made this motion 6 days after the scheduling hearing on November 13, 2013, before motion practice commenced, and before discovery commenced. Given Applicants' motion at the early stage of this lawsuit, the existing parties will not be delayed or prejudiced if the Court permits intervention.

2. Applicants Present a Multitude of Legally Protectable Interests and the State's Primary Response is an Irrelevant Prediction that They Will Win on the Merits.

Applicants have demonstrated that they have financial, educational, due process, and equal protection interests in this litigation. *See* Motion to Intervene as Intervenor-Defendants ("Motion"), at 4-8. Further, any *one* of these interests satisfies the second and third prong of the intervention test under Rule 24(a)(2), since this suit may impair their multitude of legally protectable interests. *See Natural Res. Def. Counsel, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (The "question of impairment is not separate from the question of existence of an interest."). In response, Arizona mostly offers irrelevant promises that they will win on the merits because Applicants have "no colorable claim to in-state tuition." *See e.g.* Response, at 6. In addition to being wrong under the law, as Applicants will prove at a later point, Arizona's arguments are beside the point at this stage. Applicants need only establish that they have a protectable interest to intervene, and they have done so here. *See* Ariz. R. Civ. P. 24(a)(2)(requiring that

"the applicant claims an interest relating to the property or transaction which is the subject of the action").

a. Applicants Have a Legally Protectable Monetary Interest That Entitles Them To Intervention.

Applicants, DACA recipients, currently pay in-state tuition rates at MCCCD, and their tuition will increase from $81 to $322 per-credit-hour if Arizona prevails in its suit. Arizona does not deny that they seek to raise the tuition of the Applicants by stripping them of their in-state tuition, stating that it seeks to "prevent defendant [MCCCD] from granting in-state tuition" to DACA recipients. Response, at 1. Thus, the facts are plain that Applicants have a financial interest in the suit determining whether DACA recipients will pay in-state tuition.

Moreover, Arizona cites to *no* cases where individuals with a direct financial interest were denied intervention as of right. Instead, Arizona attempts to distinguish Applicants' cases and fails. First, with regard to *Day v. Sebelius*, they argue that "[b]ecause they [the student intervenors] were benefitting from the statute, they had a legally protectable interest that justified intervention." Response, at 6 (citing *Day v. Sebelius*, 227 F.R.D. 668, 672 (D. Kan. 2005)). However, that is precisely the point that Applicants make; they are financially "benefitting" from a reduced tuition rate and consequently have a "legally protectable" interest in preserving it. Arizona's attempts to distinguish *Hill v. Alfalfa Seed & Lumber Co.* are equally flawed. 38 Ariz. 70 (1931). Arizona essentially argues that a surety financial interest is a "vital interest" while a financial interest in one's tuition rate is so insubstantial that it should be ignored. Response, at 6 (citing *Hill,* 38 Ariz. at 73(1931)). But that defies common sense. As *Hill* makes clear, one becomes "vitally interested" in a suit because the loss is ultimately theirs. *Hill*, 38 Ariz. at 73. Here, Applicants are "vitally interested" in this suit because the loss of in-state tuition benefits is a loss that ultimately affects Applicants' ability to pay reduced tuition, to register for classes, attend college and participate in all of

the educational opportunities that MCCCD has to offer.

Finally, the state promises victory on the merits. *See* Response, at 6. But that is irrelevant to any intervention analysis. Applicants must only show "an interest relating to the property or transaction which is the subject of the action," and do not need to prove the merits of their positions at this early stage. Ariz. R. Civ. P. 24(a)(2). Thus, the State's flawed analysis of state and federal law is an irrelevant distraction, as the merits of the claims will be decided with the benefit of discovery and full briefing.[1]

b. Applicants Have An Interest In Maintaining Educational Opportunities Which Entitles Them To Intervention.

As noted in Applicants' Motion to Intervene, Applicants ability to register for classes, attend college and partake in other related educational opportunities will be greatly affected if their tuition goes up substantially. *See* Motion, at 4-8. Arizona does not appear to dispute these facts. Further, Arizona provides *no* caselaw where individuals with a direct interest in maintaining educational opportunities were denied intervention. Instead, Arizona mischaracterizes *Grutter v. Bollinger*. 188 F.3d 394 (6th Cir. 1999). First, the Ninth Circuit and Arizona both apply a "liberal" construction and broadly evaluate intervention, so Defendants are incorrect that these jurisdictions take a strict view of intervention. *See Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001)(citing *Forest Conservation Council* ("*FCC* ") *v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995)(establishing that the Ninth Circuit, in general, construes "Rule 24(a) liberally in favor of potential intervenors.")); *see also Bechtel v. Rose*, 150 Ariz. 68, 72 (1986)(stating that "[i]t is well settled in Arizona that Rule 24 'is remedial and should be liberally construed with the view of assisting parties in obtaining justice and protecting their rights.'")(citing

[1] Defendants repeatedly make this irrelevant point throughout their brief with regard to every legally protectable interest that Applicants articulate. In order to preserve judicial resources, Applicants present this more detailed argument regarding the irrelevance of merits arguments only once.

Mitchell v. City of Nogales, 83 Ariz. 328, 333, 320 P.2d 955, 958 (1958)). Moreover, Arizona cites to no authority for its dubious proposition that the Sixth Circuit is an outlier with regard to its liberal view of intervention. Second, Applicants present straight-forward, measurable and legally protectable interests including financial, educational, due process, and equal protection interests in this litigation. *See* Motion, at 4-8. Similarly, the Court in *Grutter* held that, "[t]here is little room for doubt that access to the University for African-American and Latino/a students will be impaired to some extent ... if the University is precluded from considering race as a factor in admissions." *Grutter*, 188 F.3d at 400. Here, rather than acting to preserve an amorphous "plus" factor for admission, Applicants seek to preserve a straight-forward and measurable interest in University access, including financial, educational and constitutional interests. Similarly, while the intervenors in *Grutter* would have their interests impaired "to some extent" with admissions decisions, here, the Applicants will be severely impaired if their tuition rate quadruples. *See id.* Thus, the educational interests here are particularly straight-forward and critical, and even more suitable for establishing a basis for intervention than those in *Grutter*.

c. Applicants Have An Interest In a Sound Educational System That Does Not Violate the Equal Protection Clause.

Applicants, DACA recipients and MCCCD college students, can plainly show an interest in ensuring that the State does not illegally discriminate against them. Applicants' would assert an Equal Protection defense under the Fourteenth Amendment. In response, Arizona argues that Applicants "have not provided any facts to support this allegation" and "[c]onsequently, it cannot serve as the basis for intervention." Response, at 8. However, Applicants have alleged all the facts necessary to show that Arizona discriminatorily singles out DACA-recipients by attempting to deny them in-state tuition. Through discovery, Applicants will evaluate similarly situated groups that Arizona treats differently. Moreover, Arizona has just begun to implement its new interpretation of Proposition 300, a seven-year

old law, and Applicants cannot be expected to understand the intricacies of the new reading prior to engaging in discovery. Additionally, Applicants must only show an interest, and do not need to prove the merits of their positions at this early stage. *See* Section II.A.2(a), above. Finally, Arizona's claim that Applicants' "equal protection claim will likely fail," is irrelevant and Applicants need not address the likelihood of success of their Equal Protection Claim. Response, at 9; *see also* Section II.A.2(a), above.

d. Applicants Have a Due Process Claim That Entitles Them To Intervention.

Applicants also have an interest that would be impaired absent intervention because, if Arizona is successful, Applicants would lose their in-state tuition rates without Due Process. "It is well-established … that education benefits created by statute are property interests that cannot be taken away without adherence to the minimum procedural requirements of Due Process." *Sebelius*, 227 F.R.D. at 674. As noted above, Arizona does not deny that they seek to raise the tuition of the Applicants and deny them in-state tuition. Response, at 1. Thus, the facts are plain that Applicants have a vested property interest in this suit determining whether DACA recipients will pay in-state tuition and they could potentially lose their in-state tuition without Due Process.

Arizona attempts to distinguish Applicants in this case and proposed intervenors in *Day* by arguing that proposed intervenors in *Day* "proceeded under a Kansas law that granted them in-state tuition." Response, at 10. However, just like the proposed intervenors in *Day*, Applicants proceed under an Arizona state law, specifically, § 1-502, which grants them in-state tuition.[2]

[2] Contrary to what Arizona argues, § 1-502 is consistent with Proposition 300 and both demonstrate eligibility of DACA-recipients presenting an EAD for in-state tuition. Further, regardless of Arizona's points on their merits, Applicants have expressed a multitude of legally protectable interests and therefore, should be able to intervene in this suit.

e. Applicants Have An Interest In Avoiding The Added Burden That Would Result From An Adverse Judgment In Their Absence.

Applicants also have an interest in influencing the outcome in this lawsuit now, rather than risk an adverse judgment that would weaken their legal posture later. Sections II.A.2(a)-(d) reaffirm Applicants' legally protectable monetary, educational, and constitutional interests. In *Saunders*, the Arizona Supreme Court found that the proposed intervenors, employees, had an interest at stake because if the statute were declared unconstitutional, employees would be disadvantaged in future proceedings relating to the constitutionality of the statute. *Saunders v. Superior Court*, 109 Ariz. 424, 425 (1973)(involving a taxpayer's challenge to the constitutionality of city employees' retirement fund). Without citing to any caselaw, Arizona argues that an employee's interest in their retirement fund is different from a student's financial interest in their tuition rate. But that is beside the point for this analysis since *Saunders* identifies the practical disadvantage that emerges from an adverse judgment. As in *Saunders*, if this Court were to find that the in-state tuition rate for DACA recipients is unlawful, "[t]he principle of stare decisis would effectively" be a "practical disadvantage to the protection of [Applicants'] interest" such that it warrants their intervention as of right. *Id.* Thus, Applicants have an interest in avoiding the added burden that would result from an adverse judgment in their absence.

3. Applicants Have A Significantly Protectable Interest And Their Interest Will Be Impaired If Denied Intervention.

The existence of Applicants' legally protectable interests, discussed in Applicant's Motion to Intervene and reaffirmed above, leads to the potential impairment of these interests if Applicants are denied intervention in this suit. *See* Motion, at 4-8. Arizona only responds to this point by arguing that "Proposed Intervenors do not have a legally protectable interest" because Arizona intends to prevail. Response, at 10. These merits arguments are irrelevant. As noted above, however, Applicants have a multitude of interests that would be impaired if Applicants are denied intervention. *See* Sections II.A.2(a)-(e).

4. The Existing Defendants Will Not Adequately Represent Applicants' Interest.

The Applicants' burden under the fourth and final prong of the intervention as of right test is "minimal." Motion, at 8-9 (citing *Trbovich v. United Mine Workers of American*, 404 U.S. 528, 538 n.10 (1972)(holding that the adequacy analysis requires the intervenor to show only that representation of its interest "may be" inadequate, and the applicant's burden on showing this element should be viewed as "minimal."). First, Applicants and MCCCD have different interests and MCCCD fails to raise Applicants' affirmative defenses. Motion, at 9 (citing *Grutter*, 188 F.3d at 401 (where "proposed intervenors . . . articulated specific relevant defense that the University may not present," they "established the possibility of inadequate representation."). Second, MCCCD may not give Applicants' arguments the same primacy as Applicants would themselves because the Parties have potentially conflicting interests. Motion, at 9 (citing *Saunders*, 109 Ariz. At 426 (Where "the interest of [the proposed intervenor and an existing party] are in conflict, … each should be entitled to their own legal representation.").

In response, Arizona argues that MCCCD can adequately represent the Applicants' interests without citing to any specifics facts in the record. *See* Response, at 10. Arizona simply relies on MCCCD's "actions to date." Response, at 10. But even MCCCD has agreed that Applicants should be allowed to represent their own interests as students.

B. Applicants Are Entitled To Permissive Intervention Under Ariz. R. Civ. P. Rule 25(b)(2)

Applicants alternatively seek permissive intervention under Rule 24(b)(2). Motion, at 12-14. Permissive intervention under Rule 24(a) involves a three-part test. First, the applicant's motion should be timely. Second, the applicant's defense and the main action should have a question of law or fact in common. Third, the intervention should not unduly delay or prejudice the adjudication of the rights of the original parties. *Dowling v. Stapley*,

221 Ariz. 251, 272 (App. 2009)(internal citation omitted). Here, the state appears to concede on the first two prongs of the permissive intervention test as Arizona says nothing about (1) timeliness and (2) expressly concedes that common question of law or fact. On common question of law and fact, Arizona agrees that "[i]t is true....Proposed Intervenors' concerns both relate to the construction of Arizona law" at issue. Response, at 11.

Arizona only offers argument on the third prong, but their arguments fail. With regard to "undue delay" and "prejudice", the Applicants have already stated that they will complete discovery under the same schedule that this Court has ordered for existing parties, so by definition there will be no delay, much less undue delay. Similarly, because the Applicants would be litigating common issues of in-state tuition in the same timeframe, there is no prejudice to either the State or MCCCD. *See* Motion, at 13. Consequently, Arizona's conclusory and unsupported arguments regarding delay and prejudice should be rejected. Arizona also argues that Applicants attempt to "politicize this matter", but offers no factual basis for this statement. In contrast, the record plainly reflects that Applicants seek to defend their access to in-state tuition by intervention, a procedural mechanism in Court, rather than by any political maneuver. Thus, the Court should reject Arizona's argument and allow intervention.

Arizona also fails to address the additional factors that the Court may consider with regard to permissive intervention. They only argue that they will prevail on the merits, and they remain silent on these factors. In its moving papers, Applicants established that they had an interest in this suit, that they had standing to raise relevant issues as the real parties in interest, that they seek to raise relevant defenses related to the merits of the case, and that their interests are not adequately represented by the state actors in this suit. *See* Motion, at 13-14. Arizona rebuts none of these points, and only makes irrelevant claims going to the merits. *See e.g.* Response, at 6.

Finally, Arizona argues that Applicants should file briefs as amicus, but that

undermines the entire point of intervention. When, as here, Applicants can meet the requirements for intervention they should be allowed to defend those rights in court as a party, particularly under Arizona and Ninth Circuit rules which construe intervention "liberally." *Bechtel v. Rose*, 150 Ariz. 68, 72 (1986)(intervention "is remedial and should be liberally construed")(internal citations omitted); *FCC v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir.1995)(the Ninth Circuit construes "Rule 24(a) liberally in favor of potential intervenors")).

III. COUNTERCLAIM

Arizona offers no argument regarding Applicants counter-claim. Thus, because Applicants plead appropriate claims, the Court should also allow Applicants to assert their theories. *See* Motion, at 14.

IV. CONCLUSION

For all the foregoing reasons, Applicants respectfully request that this Court grant their Motion to Intervene.

DATED this 24th day of December 2013.

/s/ Nathan J. Fidel

By:_____

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THE FOREGOING has been electronically Filed this 24th day of December, 2013

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