Mary O'Grady, 011034
Lynne Adams, 011367
Grace E. Rebling, 028661
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000

Attorneys for Maricopa County Community College District

IN THE SUPERIOR COURT OF THE STATE 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, ABEL BADILLO and BIBIANA VAZQUEZ, Intervenor-Defendants.	No. CV2013-009093 **(Oral Argument Requested)** (Assigned to the Hon. Arthur Anderson)
ABEL BADILLO and BIBIANA VAZQUEZ, Counter-Plaintiff, vs. STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne, Counter- Defendant.	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO ARIZONA'S MOTION FOR JUDGMENT ON THE PLEADINGS

Students who have qualified for the federal Deferred Action for Childhood Arrivals ("DACA") program are eligible for resident tuition pursuant to A.R.S. § 15-1803(B) because they are lawfully present in the United States while they are part of that program and they have the documentation necessary to comply with A.R.S. § 1-502.

Section 15-1803(B) was specifically enacted "in accordance" with 8 U.S.C. § 1623, which ties eligibility for resident tuition to lawful presence in the United States. The Attorney General not only ignores that statutory direction, he attempts to capitalize on the fact that the various immigration terms included in Section 15-1803(B) are not defined in either state or federal law and are used interchangeably. In light of that admittedly confusing abyss, the Attorney General has concocted his own definitions for the terms. The result contradicts the "lawful presence" standard in 8 U.S.C. § 1623 and is unsupported by the text, context and history of A.R.S. § 15-1803(B).

The Attorney General compounds this error by asserting that DACA students are "not here lawfully." (*See* Arizona's Motion for Judgment on the Pleadings ("AG's Mot.") at 2.) This assertion flatly contradicts the federal government's official pronouncements governing the DACA program and indicating in no uncertain terms that DACA students are indeed lawfully present in the United States. Pursuant to the federal law and A.R.S. § 15-1803(B), those students are therefore eligible for in-state tuition.

Factual Background

Because the resolution of this matter hinges on statutory construction, information about the relevant state and federal immigration laws, the DACA program, and MCCCD's in-state tuition policy is essential to placing the language used in A.R.S. § 15-1803(B) in context.

Federal and State Immigration Laws

Both federal and state law restrict eligibility for public benefits based on a person's immigration status in the United States. In August 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (known as "PRWORA"). *See* 8

U.S.C. § 1621. PRWORA generally governs a noncitizen's eligibility for state and local public benefits. One month later, in September 1996, Congress enacted a more specific law that explicitly governs a noncitizen's eligibility for resident tuition. The tuition provision was part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (known as "IIRAIRA"), and it ties in-state tuition eligibility to whether a person is lawfully present in the United States.[1] *See* 8 U.S.C. § 1623.

In 2004, Arizona voters approved Proposition 200, which required agencies administering state and local public benefits to verify the immigration status of applicants for benefits and report any violations to federal immigration authorities. *See* A.R.S. § 46-140.01. In enacting Proposition 200, the State declared that "the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage *illegal immigration*." Proposition 200, Findings and Declaration at § 2 (emphasis added.)

Because Proposition 200 did not define the term "state and local public benefits," confusion arose about its scope. In response to a request from the Director of the Arizona Health Care Cost Containment System Administration, then-Attorney General Terry Goddard issued an Opinion regarding the definition of "state and local public benefits." The Opinion concluded that Proposition 200 applied only to those programs within Title 46 of Arizona's Revised Statutes "that qualify as state and local public benefits" pursuant to PRWORA. Ariz. Att'y Gen. Op. I04-010 (entitled "State and Local Public Benefits Subject to Proposition 200").

Based on the belief that the Opinion too narrowly interpreted the scope of Proposition 200, in 2005, the Arizona Legislature passed a law that would have restricted benefits to other programs outside of Title 46. *See* H.B. 2030 (47th Leg., 1st Reg. Sess. 2005); Fact Sheet for H.B. 2030 (explaining that the purpose was to require that "recipients of certain state-funded services are present legally in the United States"); *see also Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 463 ¶ 3, 160 P.3d 1216, 1221 (App. 2007) (lawsuit alleging that Attorney General

[1] The key statutes and documents cited in this brief are attached to the Statement of Facts.

Opinion I04-010 too narrowly interpreted the scope of Proposition 200). Governor Napolitano vetoed that bill, and therefore in 2006, the Legislature submitted Proposition 300 to the voters (via S.C.R. 1031). The language of Proposition 300, which added the statutory provisions relevant to this case, mirrored the language found in vetoed H.B. 2030. *Compare* H.B. 2030 (47th Leg., 1st Reg. Sess. 2005) *with* A.R.S. § 15-1803(B) (as amended by Proposition 300). Voters passed Proposition 300 in 2006, and included in the Proposition's provisions was A.R.S. § 15-1803(B), which established that "[i]n accordance with [IIRAIRA]," only citizens, legal residents and persons with lawful immigration status are eligible for resident tuition.

Neither Proposition 200 nor Proposition 300 provided guidance on the documentation necessary to prove eligibility for public benefits. In response to a request for guidance on that issue, the Attorney General concluded that there were various methods for verifying immigration status, including written declarations. Ariz. Att'y Gen. Op. I07-005 (entitled "Implementation of Proposition 300 With Regard to Adult Education Services"). The Attorney General also opined that in implementing the applicable portions of Proposition 300, the Arizona Department of Education had to develop procedures to ensure that only "citizens, legal residents, and others lawfully present in the United States receive services." *Id.*

That Attorney General Opinion led to further action by the Arizona Legislature. The Legislature enacted a statute that required individuals to provide documentation – rather than just written declarations – to verify lawful presence in the United States. *See* H.B. 2467 (2007) (codified at A.R.S. § 1-501, et seq). The Legislature subsequently amended A.R.S. § 1-502 to specify the documents that applicants for state or local public benefits must present to establish their lawful presence in the United States. The list of documents acceptable under state law includes Employment Authorization Documents ("EADs"). (Defendant's Statement of Facts In Support of Motion for Summary Judgment ("MCCCD's SOF") ¶ 6; A.R.S. § 1-502(A)(7).)

The Deferred Action for Childhood Arrivals Program

On June 15, 2012, the Secretary of the U.S. Department of Homeland Security ("DHS")

issued a memorandum announcing that, effective immediately, certain young people who met several key requirements would be considered for a deferred action program, known as Deferred Action for Childhood Arrivals.[2] Memorandum from Janet Napolitano, DHS Secretary, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) ("2012 DACA Memo"). According to the federal government, DACA recipients are "considered to be lawfully present in the United States" during the period of time their stay in the United States is authorized by DHS. (MCCCD's SOF ¶ 4.) Although the DACA program does not provide a pathway to obtaining permanent lawful status or citizenship, DACA recipients are entitled to work during their period of deferred action and may obtain EADs from the U.S. Citizenship and Immigration Services ("USCIS"). (MCCCD's SOF ¶ 5.)

DACA Students' Eligibility for Resident Tuition

After DHS announced the DACA program, MCCCD analyzed whether DACA recipients were eligible for resident tuition. Because DACA students had EADs, which are accepted documentation of lawful presence under A.R.S. § 1-502, MCCCD determined that a DACA participant who presents an EAD to establish lawful presence is eligible for resident tuition. (MCCCD's SOF ¶ 7.)

Argument

I. Persons Lawfully Present in the United States Are Eligible for Resident Tuition.

The fundamental issue in this case is the statutory interpretation of A.R.S. § 15-1803(B). That statute states:

---

[2] To qualify for the DACA program, an individual must show that she (1) came to the United States under the age of sixteen; (2) has continuously resided in the United States for at least five years preceding June 15, 2012; (3) currently attends school, has graduated from high school, has obtained a GED certification, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and (5) is not above the age of thirty. 2012 DACA Memo.

> In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to section 15-1802 or entitled to classification as a county resident pursuant to section 15-1802.01.

In determining the voters' intent in enacting Section 15-1803(B) – included in Proposition 300 – this Court need look no further than the language of the statute itself, which specifies that it is to be construed in accordance with IIRAIRA, which in turn links in-state tuition to an individual's *lawful presence* in the United States. But that is not the only indication of the appropriate interpretation of Section 15-1803(B). The context, purpose, and background of Proposition 300 all support the conclusion that Section 15-1803(B) allows people who are lawfully present in the United States, as are DACA students, to qualify for resident tuition.

A. Section 15-1803(B) Must Be Construed Consistent With Federal Law.

The goal in interpreting a voter-enacted law is to fulfill the voters' intent. "If the statute is subject to only one reasonable interpretation, [the courts] apply it as written without further analysis. But if the statute is ambiguous, [the courts] consider secondary principles of statutory interpretation, such as the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Ariz. Citizens Clean Elections Comm'n v Brain*, 683 Ariz. Adv. Rep. 43, 322 P.3d 139, 142 ¶ 11(2014) (internal quotation marks and citation omitted).

Here, the voters' intent is specified in the statute itself. Section 15-1803(B) expressly establishes that it was enacted "[i]n accordance with the illegal immigration reform and immigrant responsibility act of 1996" (IIRAIRA). (MCCCD's SOF ¶ 1.) IIRAIRA addresses the question of eligibility for resident tuition in 8 U.S.C. § 1623. Under this federal 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 U.S. is eligible for such a benefit . . . ." 8 U.S.C. § 1623

(emphasis added). By indicating that Section 15-1803(B) was enacted "[i]n accordance with" IIRAIRA, Arizona's statutory language leaves no doubt that it is incorporating the federal "lawfully present" standard for resident tuition established in 8 U.S.C. § 1623.

Despite the specific statutory reference to IIRAIRA, the Attorney General completely ignores 8 U.S.C. § 1623 and argues that the relevant federal law is instead PRWORA, 8 U.S.C. § 1621. Not only is Section 1621 of PRWORA not mentioned in Section 15-1803(B), on its face, it is not the federal law that addresses in-state tuition. Instead, Section 1621 of PRWORA sets forth a qualified alien's eligibility for state and local public benefits *generally*. Although the benefits addressed by PRWORA include the payment of certain post-secondary education benefits, such as publicly-funded scholarships or grants, to non-citizens, they do not include requirements for qualifying for in-state tuition. *See Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) (noting that 8 U.S.C. § 1621 addresses only *post-secondary monetary assistance* paid to students); Expert Report of Roxana Bacon ("Bacon Expert Report") at ¶ 76 (indicating that 8 U.S.C. § 1621 is not relevant to in-state tuition determination). The Attorney General has provided no justification for ignoring the specific language in IIRAIRA governing tuition – the language Section 15-1803(B) itself indicates governs – in favor of another federal statute, and there is none.

Moreover, not only does Section 1623 of IIRAIRA specifically address eligibility for in-state tuition, it applies "[n]otwithstanding any other provision of law." 8 U.S.C. § 1623. It is well-established law that a specific statute will not be controlled by a general one, like 8 U.S.C. § 1621. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (noting that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment").

The voters provided this Court with a very clear roadmap regarding the interpretation of Section 15-1803(B): In the event of any ambiguity about the statute, IIRAIRA was to provide guidance. IIRAIRA is clear that in-state tuition eligibility is based on lawful presence in the

United States, and Section 15-1803(B) must be construed in accordance with that guidance.

B. The Statute's Context and History Makes Clear That State Law Requires Lawful Presence for Resident Tuition.

After incorporating the appropriate federal standard in its opening phrase, Section 15-1803(B) states that a person must be a "citizen" or "legal resident" or have "lawful immigration status" to qualify for resident tuition. The terms "legal resident" and "lawful immigration status" are not defined in state statute, and the Attorney General has offered this Court no definition of these terms. (MCCCD's SOF ¶ 2.) Nonetheless, the clear statement that Section 15-1803(B) was enacted *"[i]n accordance with [IIRAIRA]"* indicates that the statute must include people who are lawfully present in the United States. This interpretation of the statutory language is further supported by the statutory text, context, purpose and history.

1. Interchangeable use of same terms in other statutes.

Other state statutes make clear that the state uses "lawful immigration status," "lawful presence" and other immigration terms interchangeably and without any meaningful difference to collectively achieve the goal of prohibiting those not lawfully present in the United States from qualifying for resident tuition.

For example, state law applicable to universities and community colleges uses the term "lawful immigration status" interchangeably with the terms "lawfully present" and "legal resident," even in the same statute. (MCCCD's SOF ¶ 3.) Consider, for example, the use of those terms in A.R.S. § 15-1825, another statute adopted in Proposition 300.

- **Subsection (A)** of A.R.S. § 15-1825 prohibits a person who is

  "not a citizen" or

  without "lawful immigration status"

  from receiving certain financial assistance and tuition waivers.

- **Subsection (B)** requires community colleges to report to the Legislature the total number of students not entitled to such assistance "under this section" because the student is

"not a citizen" or

not a "legal resident of the United States" or

"not lawfully present in the United States."

Thus, the Legislature has indicated that "without lawful immigration status" (Subsection A) must mean someone who is either "not a legal resident" or is "not lawfully present" (Subsection B). There can be no difference in the meaning of the terms included in Subsections A and B; community colleges are to report those students who are not entitled to assistance because they are not citizens or are without lawful immigration status, either because they are not legal residents or not lawfully present.[3]

A.R.S. § 15-1781 also supports the conclusion that a person "lawfully present" is eligible for in-state tuition. This statute establishes a program for certain loans to students. Section 15-1781(2) defines a "qualified applicant" for the loans as an "Arizona resident who is a citizen or legal resident of the United States or who is otherwise lawfully present in the United States" and "who qualifies for in-state tuition" pursuant to A.R.S. § 15-1802. Section 15-1802 provides domicile rules for determining whether an individual qualifies for in-state tuition. The statute therefore indicates that any person lawfully present in the United States is eligible for in-state tuition, if he or she is an Arizona resident.

Similarly, both A.R.S. §§ 15-232 and 46-801, which were amended by Proposition 300, provide certain public benefits to individuals who are "otherwise lawfully present" in the

[3] The term "legal resident" logically encompasses all persons lawfully present and residing in Arizona, regardless of the legal basis for their ability to reside in Arizona. *Cf. Parra v. Cont'l Tire N. Am., Inc.*, 222 Ariz. 212, 214 ¶ 2 n.1, 213 P.3d 361, 363 (App. 2009) (plaintiff in personal injury case was a Mexican *citizen* and *resident* of Yuma County, Arizona); Bacon Expert Report ¶¶ 85-86 (construing "legal resident" to include those who are lawfully present is consistent with federal immigration law and practice).

United States, without any reference to their "status."

Even federal cases and statutes use the term "status" loosely to describe either lawful presence or similar immigration classifications. *E.g.*, Real-ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified at 49 U.S.C. § 30301 note) (referring to "deferred action status"); *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012) (generically referring to "work status" and "employment authorization status"); Bacon Expert Report ¶¶ 35, 63 (noting that "'status' has no singular meaning in federal law" and that "lawful immigration status" is not defined by or used in federal immigration law); *id.* ¶ 88 (the rights and privileges afforded to DACA grantees are "a type of 'status'"). Indeed, even the Attorney General's *current motion* loosely uses the term "DACA-status." (AG's Mot. at 4.) There is simply no definition or consistent use of the term "status" either in state or federal law, and contextually, it is clear that it can and does encompass "lawful presence."

2. Interchangeable use of the terms by the Attorney General.

Aside from state laws, in construing the scope of Section 15-1803(B), Attorney General Horne has himself used the term "lawfully present" to encompass all three terms actually used in the statute: "citizen," "legal resident," and "lawful immigration status." Arizona Attorney General Opinion I11-007, prepared before the DACA program was announced, uses *only* the term "lawfully present" without any regard to the specific language of statute.[4] Ariz. Att'y Gen. Op. I11-007 (entitled "Community Colleges: Student Not Lawfully Present in the U.S.").

3. Use of other immigration terms by supporters of Proposition 300.

The Publicity Pamphlet of Proposition 300 makes clear that its proponents targeted "illegals" and not persons lawfully present in this country. *See* Proposition 300, Publicity

[4] Although not an official interpretation of the statute, soon after the voters approved Proposition 300, Russell Pearce, a primary supporter of Proposition 300 and sponsor of the predecessor legislation that Governor Napolitano had vetoed, used the phrase "lawfully present" to describe the standard for eligibility for in-state tuition. He too made no distinction between "lawful presence" and the phrase "lawful immigration status." *See* 2/9/07 letter from Russell Pearce to Bob Bulla.

Pamphlet at 4. There is also no indication in any of the legislative history related to Proposition 300 that a distinction was intended between lawful presence and lawful status. Instead, proponents used various terms interchangeably to discuss the provisions of both the Proposition and the predecessor legislation, with the clear goal of limiting benefits to people who are not lawfully present in this country. *E.g.*, Hearings of House of Representatives' Appropriations and Education Committees regarding S.C.R. 1031 (supporters of the bill made clear that the provisions of Proposition 300 were intended to prohibit people in the country "illegally" from receiving in-state status); Bacon Expert Report ¶¶ 81-82 (noting that Proposition 300 used the terms "not a citizen," "without lawful immigration status," "not a legal resident," "not lawfully present," and "otherwise not lawfully present" without defining the terms and without any consistency). These sources confirm that the various terms included in Section 15-1803(B) were used collectively to limit resident tuition to individuals who are lawfully present in the United States – either as citizens, legal residents or otherwise – all "[i]n accordance" with IIRAIRA.

C. Interpreting Section 15-1803(B) In Accordance With IIRAIRA Avoids Constitutional Problems.

It is no accident that Section 15-1803(B) references and was enacted in accordance with the relevant federal law. "Because Arizona's statutes do not follow the federal law regarding the treatment of a particular subclass of aliens," Arizona's statutes are subject to constitutional challenges. *Kurti v. Biedess*, 201 Ariz. 165, 171 ¶21, 33 P.3d 499, 505 (App. 2001); *see also Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (holding that state restrictions that primarily affect lawfully resident aliens' economic interests are subject to heightened judicial scrutiny). State laws that deviate from federal immigration law raise two constitutional problems.

The first is federal preemption. The Immigration and Nationality Act (INA) establishes a comprehensive federal statutory regime that regulates the subject of immigration and the status of noncitizens. *See Arizona*, 132 S. Ct. at 2498 (confirming the federal government's

broad power over immigration). State law that conflicts with federal law regarding the treatment of noncitizens is impliedly preempted. *Cf. Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (finding no preemption of state law because "Arizona went the extra mile in ensuring that its law closely tracks [federal law's] provisions in all material respects"); *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (holding that university policy barring certain noncitizens from acquiring in-state student status violated the Supremacy Clause). By adopting Section 15-1803(B) "[i]n accordance with IIRAIRA," Arizona avoided potential preemption problems.

Second, the statute's consistency with IIRAIRA also avoids equal protection problems. *Kurti*, 201 Ariz. at 171 ¶ 21, 33 P.3d at 505. In contrast, the Attorney General proposes to disqualify DACA recipients from resident tuition even though all others who are lawfully present in the United States are eligible and even though the federal standard is "lawful presence." Bacon Expert Report ¶ 90 (opining that "Arizona's immigration laws are only in harmony with federal immigration law if those with lawful presence but not any formal 'status' [including DACA grantees] . . . are eligible for in-state tuition"). The Attorney General's interpretation treats DACA recipients differently than all others who possess EADs or who may be granted another type of federal deferred action.[5]

For all of these reasons, Section 15-1803(B) should be interpreted to adopt the federal lawful presence standard.

II. DACA Recipients Are Lawfully Present in the United States.

Throughout his briefing, the Attorney General states that DACA recipients are "not here lawfully." (*See* AG's Motion at 2, 4.) To the contrary, as a matter of federal law, DACA

[5] In an action brought by the Arizona Dream Act Coalition against Governor Brewer challenging the constitutionality of the State's denial of driver's licenses to DACA recipients and seeking a preliminary injunction, the District Court of Arizona held that plaintiffs showed a likelihood of success on the merits of their equal protection claim. *AZ Dream Act Coalition v. Brewer*, 945 F. Supp. 2d 1049, 1071 (D. Ariz. 2013).

recipients are lawfully present in the United States during the period of deferred action. And because they are lawfully present, they are eligible for in-state tuition pursuant to A.R.S. § 15-1803(B).

In the INA, Congress gave the Secretary of DHS the authority to exercise discretion in determining whether to pursue the deportation of an individual. 8 U.S.C. § 1103(a)(1) (authorizing the Secretary of DHS to administer and enforce the INA and all other laws relating to the immigration and naturalization of aliens). DHS and the immigration agencies under its purview, including USCIS, regularly exercise prosecutorial discretion in determining whether to remove a noncitizen from the United States. *See, e.g., Arizona*, 132 S. Ct. at 2492; *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (discussing deferred action).

Deferred action is one form of discretionary relief exercised by DHS. It is a period of stay in the United States that is authorized by the federal government.[6] Under the INA, a noncitizen is deemed to be "unlawfully present" if the person is present in the United States after the expiration of the "period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). Conversely, a noncitizen is "lawfully present" during a period of stay authorized by the federal government. In other words, in the exercise of the executive's discretionary power, DHS has the authority to make an otherwise undocumented person's presence in the United States lawful for a period of time. *E.g.*, *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258-59 (11th Cir. 2012) (a noncitizen "currently classified under 'deferred action' status . . . remains permissibly in the United States"); *see also* 8 U.S.C. § 1182(a)(9)(B); 8 C.F.R. § 1.3(a)(4)(vi) (providing that persons in deferred action

[6] DACA recipients are by no means the only individuals who can receive deferred action. For example, victims of crime can receive deferred action while their applications for a nonimmigrant visa are being adjudicated, and domestic violence victims can also receive deferred action and EADs. For humanitarian reasons, other groups of individuals have been identified in the past as candidates for deferred action. *See, e.g.*, 28 C.F.R. § 1100.35(b) (discussing relief for human trafficking victims).

status are lawfully present in the United States for purposes of applying for Social Security benefits); Bacon Expert Report ¶¶ 41-44 (noting that DACA grantees are "lawfully present").

The DACA program is an exercise of DHS's discretionary power to grant deferred action. DACA recipients may remain in the United States for a renewable period of two years. *See* 2012 DACA Memo. Their presence, which is known and authorized by DHS, is deemed lawful under federal law. This point is underscored in the USCIS documents implementing DACA, which consistently identify DACA recipients as "lawfully present" in the United States. (*See* MCCCD's SOF ¶ 4.)

Their lawful presence in this country is further confirmed by two other privileges that DHS confers on DACA recipients that are not otherwise available to individuals unlawfully present in this country:

- The right to apply for an EAD. 8 U.S.C. § 1324a(h); *see also* MCCCD's SOF ¶ 5 (citing USCIS DACA FAQs). An EAD grants the person the right to obtain a social security number, to be employed, and to pay employment and income taxes as any U.S. citizen.
- The right to receive permission to travel outside the United States and lawfully re-enter. DACA recipients are granted re-entry by DHS because their presence in the United States is lawful; they are returning to a lawful residence. *See* USCIS Memorandum: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 2009); *accord* 8 U.S.C. § 1182(a)(9)(B).

See also Bacon Expert Report ¶¶ 48-62 (discussing these two privileges "that are not available to anyone who is not 'lawfully present'"). In short, a DACA recipient is lawfully present in the United States during the period of deferred action. The Attorney General has cited no authority to the contrary.

While ignoring DHS's statements that indicate with certainty that DACA students are "lawfully present" in the United States, the Attorney General makes much of the fact that the 2012 DACA Memo notes that participation in the DACA program does not confer "immigration status or a pathway to citizenship." (AG's Mot. at 4.) In federal immigration law parlance, there is a difference between "lawful presence" in the United States, which can be

granted by DHS, and "immigrant status," which can only be granted by Congress. Bacon Expert Report ¶¶ 63-71. Although it is not defined in federal immigration law, "immigrant status" is generally understood by federal immigration practitioners as referring to qualifying for the privileges of residing in the United States pursuant to 8 U.S.C. § 1101(a)(15). *Id.* ¶¶ 67-68.

The 2012 DACA Memo therefore correctly notes that the DACA program "confers no substantive right, immigration status or pathway to citizenship" and that "[o]nly the Congress, acting through its legislative authority, can confer these rights." Because only Congress has the authority to change the categories of individuals who have "immigrant status," and can therefore become citizens through naturalization, or who have "non-immigrant status," and have permission both to enter and stay in the United States, the 2012 DACA Memo is simply acknowledging that something more than DACA status is required to obtain those rights. Bacon Expert Report ¶¶ 69, 71 (2012 DACA Memo "simply communicates that no 'green cards' are being issued as a result of" the DACA program and that the program "could not confer a specific statutory classification on anyone who does not meet all the statutory requirements of that classification"). Those statements do not undermine the fact that although deferred action does not provide "immigration status" pursuant to 8 U.S.C. § 1101(a)(15), DACA recipients are lawfully present in this country during their authorized stays.

III. Because DACA Students Are Lawfully Present, They Are Eligible for Resident Tuition If They Present the Documentation Specified in A.R.S. § 1-502 .

The final step in the necessary analysis of in-state tuition eligibility is the interplay between A.R.S. § 15-1803(B) and A.R.S. § 1-502. While Section 15-1803(B) provides the applicable standard – lawful presence in the United States – Section 1-502 provides a list of the documents that must be used to demonstrate that lawful presence. A.R.S. § 1-502; *cf.* A.R.S. § 41-1080(A)(8) (providing a list of documents that applicants for a license may provide to establish citizenship or "alien status"). Among those documents are USCIS-issued EADs,

which DACA recipients may be granted.[7] A.R.S. § 1-501(A)(7); *see also* Bacon Expert Report ¶¶ 48-55 (stating that "[o]nly persons who are lawfully present in the United States are eligible for EADs"). Because DACA students have EADs, they may establish their lawful presence in the United States with documentation specified by state law and thus they establish their eligibility for resident tuition under Section 15-1803(B).

Conclusion

DACA students are lawfully present in the United States and eligible for resident tuition under A.R.S. § 15-1803(B) if they present the documentation required by A.R.S. § 1-502. The Attorney General's Motion for Judgment on the Pleadings should be denied, and MCCCD's Motion for Summary Judgment should be granted.

DATED this 16th day of May, 2014.

OSBORN MALEDON, P.A.

By */s/* Grace Rebling
Mary O'Grady
Lynne Adams
Grace E. Rebling
2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012-2793

Attorneys for Maricopa County Community College District

[7] There is no such statutory guidance regarding documents that could be used to establish "lawful immigration status" or that an individual is a "legal resident." Indeed, if A.R.S. § 1-502 does not apply to in-state tuition decisions, universities and community colleges would have no state guidance regarding the documentation that could be used to demonstrate that someone has the appropriate "status" or is a "legal resident."

COPY of the foregoing e-filed and a COPY delivered this 16th day of May, 2014, to:

The Honorable Arthur Anderson
Maricopa County Superior Court
East Court Building
101 W. Jefferson
Phoenix, AZ. 85003-2243

Copy of the foregoing served via Turbo Court this 16th day of May, 2014, to:

Kevin D. Ray
Leslie Kyman Cooper
Jinju Park
Assistant Attorneys General
1275 West Washington Street
Phoenix, AZ 85007
EducationHealth@azag.gov
Leslie.cooper@azag.gov
Attorneys for the State of Arizona ex rel.
Attorney General Thomas C. Horne

Victor Viramontes
Martha L. Gomez
Mexican American Legal Defense and Educational Fund
634 S. Spring St., 11th Floor
Los Angeles, CA 90014
VViramontes@MALDEF.org
MGomez@MALDEF.org
Attorneys for Intervenor-Defendants

Jose de Jesus Rivera
Nathan J. Fidel
Haralson, Miller, Pitt, Feldman & McAnally, PLC
2800 N. Central Ave., Suite 840
Phoenix, AZ 85004
jrivera@hmpmlaw.com
nfidel@hmpmlaw.com
Attorneys for Intervenor-Defendants

Daniel R. Ortega
Ortega Law Firm
361 E. Coronado Rd.
Phoenix, AZ 85004
Danny@ortegalaw.com
Attorneys for Intervenor-Defendants

/s/ J. Rial

5441741_6