THOMAS C. HORNE
Firm Bar No. 014000
Attorney General

Kevin D. Ray, 007485
Leslie Kyman Cooper, 012782
Jinju Park, 026023
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 542-8328
Facsimile: (602) 364-0700
E-mail: EducationHealth@azag.gov

Attorneys for Plaintiff, the State of Arizona ex rel. Attorney General Thomas C. Horne

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne, Plaintiff, vs. MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD, Defendant, ABEL BADILLO, BIBIANA VAZQUEZ, and BIBIANA CANALES Intervenors-Defendants.	Case No. CV2013-009093 **ARIZONA'S RESPONSE TO INTERVENORS' MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Arthur Anderson) **(Oral Argument Requested)**
ABEL BADILLO, BIBIANA VAZQUEZ, and BIBIANA CANALES Counter-Plaintiffs, vs. STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne, Counter-Defendant.	

Plaintiff the State of Arizona ex rel. Thomas C. Horne ("Arizona") responds to the Motion for Summary Judgment by Student Intervenors Abel Badillo, Bibiana Vazquez and Bibiana Canales (collectively, the "Student Intervenors").[1] The Student Intervenors seek summary judgment against the State, asserting that its enforcement action against MCCCD is preempted by federal law and violates the equal protection clause. The Student Intervenors' preemption argument should be rejected; Arizona law is consistent with federal law, not in conflict with it. And, the Student Intervenors cannot show that Arizona has violated the equal protection clause by requiring MCCCD to comply with state law on this issue.

This Court should deny Student Intervenors' motion for summary judgment. There are no facts at issue in this matter at this time. In fact, Student Intervenors moved for summary judgment on their equal protection claim before making any disclosure supporting that claim. Because Student Intervenors chose to move for summary judgment on this claim before exchanging disclosure statements, this Court should infer that they possess no other facts in support of their equal protection claim.[2] Because they chose to make a dispositive motion without engaging in discovery, this Court should infer that they do not expect that Arizona possesses any relevant facts either. This Court should reject also reject Student Intervenors' request, in footnote 3, that they be allowed to conduct discovery in support of their claim. Student Intervenors did not make a proper request under Rule 56(f), because they failed to

---

[1] As a preliminary matter, Arizona states that it fails to understand how the Student Intervenors can respond to Arizona's Motion for Judgment on the Pleadings. That Motion is directed solely to MCCCD's action of allowing DACA recipients to pay in-state tuition in violation of A.R.S. § 15-1803. It is not directed at the Student Intervenors, who in fact, had not been allowed to intervene at the time that Motion was filed. (Arizona moved for judgment on the pleadings on February 26, 2014; the court permitted intervention on March 31, 2014.) Moreover, rather than responding to Arizona's Motion for Judgment on the Pleadings, the Student Intervenors devote themselves to their motion for summary judgment. To the extent the Student Intervenors response is permitted, Arizona incorporates the reply portion of its Reply in Support of Its Motion for Judgment on the Pleadings and Response to MCCCD's Motion for Summary Judgment.

[2] Student Intervenors' Disclosure Statement is attached to Arizona's Responsive Statement of Facts Regarding Intervenors' Claims ("RSOF–I") as Exhibit A. Pages 8-9 address their equal protection claim and contain no facts. Student Intervenors did not disclose any documents substantiating their claim, and listed no witnesses, other than themselves, Governor Janice Brewer and former state senator Russell Pearce.

provide an affidavit specifying the reasons that they could not present evidence in support of their motion, and did not certify that they engaged in "personal consultation and good faith efforts" to resolve the matter. Ariz. R. Civ. P. 56(f)(1) and (3).

I. The Student Intervenors Proceed Based on Flawed Premises.

The Student Intervenors proceed from several incorrect premises. They first assert that as DACA beneficiaries, they "qualify for in-state tuition under . . . [8 U.S.C. §] 1623" and A.R.S. § 15-1803(B). In so doing, they misconstrue both federal and state law. Second, they assert that Arizona has somehow "changed its position" regarding deferred action because it previously accepted "lawful presence" as the standard for eligibility for in-state tuition, but no longer does so, in the wake of the DACA Memorandum. They provide no evidence to support this allegation. Finally, they accuse Arizona of targeting DACA recipients, but fail to present any evidence in support of this contention.

A. Federal Law Does Not "Grant Eligibility" for In-State Tuition.

The Student Intervenors first err by arguing that 8 U.S.C. § 1623 grants DACA beneficiaries eligibility for in-state tuition. Defendant-Intervenors' Motion for Summary Judgment and Response to Arizona's Motion for Judgment on the Pleadings (hereinafter, "Intervenors' Response and MSJ"), at 4. It does not. Section 1623 must be read in conjunction with section 1621, which generally governs access to state and local public benefits. Section 1621 prevents those who are not qualified aliens from access to state and local public benefits, including "any . . . postsecondary education . . . or any other similar benefit for which payments or assistance are provided to an individual . . . by an agency of a State or local government or by appropriated funds of a State or local government." In-state tuition is a state or local public benefit. *Martinez v. Regents of the Univ. of Cal.*, 166 Cal. Rptr. 3d 518, 531 (2008), *rev'd on other grounds*, 241 P.3d 855 (2010). *See* also Kate M. Manuel, *Unlawfully Present Aliens, Higher Education, In-state Tuition, and Financial Aid: Legal Analysis*, at 7 (Congressional Research Service, July 21, 2014) (hereinafter, *CRS Unlawfully Present Aliens Report*) ("In-state tuition has generally been considered a public benefit, and PRWORA and IIRIRA restrict the circumstances in which states may provide public benefits to unlawfully

present aliens." (For the Court's convenience, a copy of this report is attached Arizona's RSOF–I as Ex. B.)

Section 1623 constitutes a narrowing of a state's ability to provide in-state tuition benefits to those not here lawfully. It "prohibits a state from making unlawful aliens eligible 'on the basis of residence within a State' for a postsecondary education benefit." *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 863 (2010), quoting 8 U.S.C. § 1623(a).[3] Contrary to the Student Intervenors' argument, this provision does not grant eligibility for in-state tuition, but rather regulates the manner in which a state may offer such eligibility.

Student Intervenors compound the error of relying on 8 U.S.C. § 1623 as granting eligibility for in-state tuition when they misinterpret the reference in A.R.S. § 15-1803(B) to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). They argue that A.R.S. § 15-1803's incorporation of that Act somehow incorporates a specific definition of immigration status that is different than the immigration status stated in Arizona law. But section 1623 does not do this. To the extent that section 1623 can be said to refer to a specific immigration status, it should be read in connection with 8 U.S.C. § 1621, which draws a distinction between qualified aliens (described at 8 U.S.C. § 1621(a)) and unqualified aliens. Because DACA recipients are not qualified aliens, they are among those prohibited by 8 U.S.C. § 1621 from having access to state and local public benefits.

Student Intervenors also argue that the Attorney General's interpretation of A.R.S. § 15-1803 and 1825 in Arizona Attorney General Opinion I11-87 concludes that "lawful presence" suffices to establish eligibility for in-state tuition. Intervenors' Response and MSJ, at 5. Even

[3] *Martinez* rejected a challenge to a California state statute that grants in-state tuition to those persons who meet three requirements: 1) they possess a California high school degree; 2) that if they are unlawful aliens, they affirm that they will try to legalize their status; and 3) they have attended high school in California for three or more years. Several other states have enacted similar statutes that allow in-state tuition on a basis other than residence. *See e.g.* Colo. Rev. Stat. § 23-7-110; N.J. Stat. Ann. 18A:62-4.4; N.M. Stat. Ann. § 21-1-4.6. At one point before referral to the voters, Proposition 300 included provisions that would have allowed those who attended public school in Arizona for six years, graduated from public high school here and whose parent paid income tax here for six preceding taxable years to pay in-state tuition to be classified as an in-state student for tuition purposes. S. Con. Res. 1031, 47th Leg., 2d Reg. Sess. (Ariz. 2006), attached to Arizona's RSOF–I as Ex. C.

a casual perusal of the Opinion, however, demonstrates that this conclusion is not supported. Rather, this Opinion should be seen in context of previous law, which allowed those who were domiciled in Arizona to pay in-state tuition, regardless of immigration status. Ariz. Op. Att'y Gen. I87-139.

B. Employment Authorization Documents Are Not Evidence of Eligibility for In-State Tuition.

Student Intervenors also argue that MCCCD has accepted Employment Authorization Documents ("EADs") as evidence of lawful presence and eligibility for in-state tuition since Proposition 300 was passed in 2006, including EADs issued to DACA recipients. Intervenors' Response and MSJ, at 4, citing Exhibit A to the Declaration of Nathan J. Fidel. This information is supported only by a statement by MCCCD regarding its practice. This is not competent evidence and, in any event, is irrelevant. This Court should reject Student Intervenors' *ipse dixit* argument; EADs are not valid evidence of eligibility for in-state tuition simply because MCCCD says they are. Moreover, the reference to 8 C.F.R. § 274a12(c)(14) adds nothing to the argument, as that regulation addresses "classes of aliens authorized to accept employment." It has nothing to do with immigration status under state or federal law.

Likewise, A.R.S. § 1-502 does not necessarily allow a noncitizen to use an EAD to demonstrate eligibility for in-state tuition. Attorney General Opinion I10-008 explains that federal law governs eligibility for state and local public benefits, limiting eligibility to "a citizen, a qualified alien, a nonimmigrant, or an alien who is paroled into the United States under § 212(d)(5) of the Immigration and Naturalization Act." Ariz. Op. Att'y Gen. I10-008 (December 28, 2010), quoting 8 U.S.C. § 1182(d)(5). It further explains that the list of documents in §1-502 "do not all satisfy the citizenship or immigration status requirements that the federal government has established for public benefits other than Medicaid."[4] *Id.* It thus recommends that "For state and local public benefits, agencies should comply with A.R.S. § 1-

[4] The Opinion provides examples, noting that an I-94, which is one of the documents listed in 1-502, is not always evidence of lawful presence. Ariz. Op. Att'y Gen. I10-008 (December 28, 2010). Conversely, the Attorney General noted that a "permanent resident card," which is not listed, qualifies for purposes of establishing eligibility for state and local public benefits. *Id.*

502 and take additional steps as necessary to ensure that recipients of the benefits satisfy the eligibility requirements in 8 U.S.C § 1621." *Id*. Put more simply, MCCCD cannot simply rely on the list of documents in A.R.S. § 1-502; it must consult other guidance to determine eligibility for specific benefits.

In any event, A.R.S. § 1-502 must be interpreted in harmony with A.R.S. §§ 15-1803 and 1825, both of which are protected by the Voter Protection Act, which "limits the legislature's authority to amend measures approved by voters." *Arizona Early Childhood Dev. and Health Bd. v. Brewer*, 221 Ariz. 467, 469, ¶ 6, 212 P.3d 805, 807 (2009) (describing Voter Protection Act, Ariz. Const. art. 4, pt. 1, § 1(C)-(D).)

C. No Evidence Supports Student Intervenors' Contention that the Attorney General Targeted DACA Recipients.

The Student Intervenors allege that Arizona has unfairly targeted DACA recipients and changed its position regarding the eligibility of deferred action recipients for in-state tuition after the DACA program was announced. Intervenors' Response and MSJ, at 6. The Student Intevenors cite no evidence to support these allegations. They merely note the Governor's opposition to the DACA Memorandum. They also assert that the Attorney General Opinion I11-007 somehow represents a conclusion that DACA recipients are eligible for in-state tuition and that the present lawsuit reverses that position. Because this contention is unsupported by any evidence, it should be rejected.

II. The Student Intervenors Fail to Establish that A.R.S. §§ 15-1803 and 1825 are Preempted.

Student Intervenors assert that the Immigration and Nationality Act preempts A.R.S. §§ 1825 and 1803. They rely on conflict preemption. Conflict preemption occurs when "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States,* 132 S. Ct. 2492, 2501 (2012).

Student Intervenors fail to identify the federal law that preempts state law, asserting only that that Arizona's reading of Proposition 300 "conflicts with federal immigration law determining eligibility for resident tuition." Intervenors' Response and MSJ, at 13.

Presumably, they rely on 8 U.S.C. § 1623. As established above, however, neither 8 U.S.C. § 1621 nor § 1623 establishes eligibility for in-state tuition. Rather, section 1621 "generally bars states from providing such benefits to unlawfully present aliens unless they enact legislation that 'affirmatively provides' for unlawfully present aliens' eligibility." *CRS Unlawfully Present Aliens Report,* at 7. And, section 1623 "has been described as 'narrowing states' authority under PRWORA." *Id.* Federal statutes, like 8 U.S.C. §§ 1621 and 1623, that prohibit states from offering certain benefits except under specified conditions cannot preempt state statutes that confirm such prohibitions.

Student Intervenors also argue that Arizona has created a different classification scheme for noncitizens than the federal government does. However, they have presented no evidence that Arizona has created any classification scheme. This action represents a single instance of enforcement against one party that announced it would implement a policy that the state believed was contrary to law. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *22 (N.D. Ala. Sept. 28, 2011) is inapposite; the statute at issue there required that aliens attending public postsecondary education in Alabama possess either "lawful permanent residence or an appropriate nonimmigrant visa." In other words, this section of Alabama's statute created its own definition of "lawfully present" for purposes of attendance at postsecondary institutions. *Id*. at *23. Arizona's statute creates no such classification. This Court should dismiss Student Intervenors' preemption claim, because they fail to establish that federal law conflicts with, and preempts, state law.

III. The Student Intervenors Fail to Establish an Equal Protection Violation.

Student Intervenors also assert that Arizona's actions violate the Equal Protection clause of the federal constitution. Intervenors' Response and MSJ, at 14. However, neither their complaint in intervention nor their motion for summary judgment clearly set out the basis for an equal protection claim. They state that Arizona is "ignoring federal eligibility requirements regarding a [sic] noncDitizens' eligibility for resident tuition." *Id*. However, as noted already, federal law restricts eligibility for resident tuition, rather than granting it.

In any event, any equal protection claim by Student Intervenors is more properly judged as a claim of selective enforcement in violation of the equal protection clause, because this matter represents the state's effort to enforce MCCCD's compliance with state law. As the federal district court of Arizona recently explained,

> To state an equal protection claim based on the allegedly selective enforcement of a law, plaintiff must show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people. To do so, plaintiff must identify a 'similarly situated' class against which plaintiff's class can be compared. Then, if the alleged selective enforcement does not implicate a fundamental right or a suspect classification, the plaintiff can establish a "class of one" equal protection claim by demonstrating that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

Dowling v. Arpaio, 858 F. Supp. 2d 1063, 1081 (D. Ariz. 2012) (internal quotations omitted). Furthermore, "[t]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 398 (1978).

In *Dowling*, the district court dismissed a selective enforcement claim because the plaintiff failed to provide "enough information about similarly situated individuals for the Court to determine that Dowling was treated differently than others similarly situated." *Id.*, at 1081-82. Here, as in *Dowling*, Student Intervenors have failed to identify "a similarly situated class" against which their class can be compared. Their Statement of Facts includes nothing that supports a claim of selective enforcement. Their Complaint and Disclosure Statement are similarly lacking. *See* Ex. A to Arizona's RSOF–I. Thus, here, as in *Dowling*, the Court must reject the claim of selective prosecution in violation of the equal protection clause.

Even if the Court were to reach Student Intervenors' equal protection claim, it would have to judge such a claim using the rational basis test. *Ariz. Dream Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1067-68 (D. Ariz. 2013) (applying rational basis review to equal protection claims of DACA recipients) *rev'd on other grounds*, No. 13–16248, 2014 WL 3029759 (9th Cir. July 7, 2014). Student Intervenors lack lawful status. Because they lack lawful status, their claims are subject to rational basis scrutiny. As a recent Congressional Research Service report explained, Supreme Court decisions apply a standard of scrutiny higher than rational basis only when the matter involves lawful permanent residents. *CRS UnlawfullyPresent*

Aliens Report, at 4. The only exception is *Plyler v. Doe*, 457 U.S. 202, 220-21 (1982), which created a special "intermediate scrutiny" for elementary and secondary school children, and even Plyler noted that "undocumented status is not irrelevant." Student Intervenors' reliance *Kurti v. Maricopa County* is misplaced: the Kurtis were lawful permanent residents. 201 Ariz. 165, 167, n. 1, ¶1, 33 P.2d 499, 501 (App. 2010).

Conclusion

For the reasons state above, Arizona respectfully requests that this Court deny Student Intervenors' Motion for Summary Judgment.

DATED this 19th day of August, 2014.

THOMAS C. HORNE
Attorney General

By /s/ Leslie Kyman Cooper
Kevin D. Ray
Leslie Kyman Cooper
Jinju Park
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for State of Arizona, ex rel. Attorney General Thomas C. Horne

ORIGINAL filed via AZTurboCourt
with the Clerk of the Superior Court,
Maricopa County, this 19th day of August, 2014

COPY emailed this 19th day of August, 2014 to:

Mary O'Grady
Lynne Adams
Grace E. Rebling
Osborn Maledon, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
mogrady@omlaw.com
ladams@omlaw.com
grebling@omlaw.com
dburton@omlaw.com

Attorneys for Defendants

Victor Viramontes
Martha L. Gómez
Mexican American Legal Defense
and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, California 90014
VViramontes@MALDEF.org
MGomez@MALDEF.org

Daniel R. Ortega Jr.
Ortega Law Firm, P.C.
361 East Coronado Road
Phoenix, Arizona 85004-1525
Danny@ortegalaw.com

José de Jesús Rivera
Nathan J. Fidel
Haralson, Miller, Pitt,
Feldman & Mcanally, P.L.C.
2800 North Central Avenue, Suite 840
Phoenix, Arizona 85004
jrivera@hmpmlaw.com
nfidel@hmpmlaw.com
jlarsen@hmpmlaw.com

Attorneys for Proposed Intervenor-Defendants

By: /s/ Koren Lyons
#4110653