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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

STATE OF ARIZONA ex rel. Attorney General Thomas C. Horne, Plaintiff, v. MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD, Defendant.	Case No. CV-2013-009093 **ARIZONA'S RESPONSE TO MOTION TO INTERVENE** (Assigned to the Honorable Arthur Anderson)

Introduction

Plaintiff, the State of Arizona, *ex rel.* Attorney General Thomas C. Horne (Arizona) opposes the Motion to Intervene made by Intervenor-Defendants Abel Badillo and Bibiana Vazquez (Proposed Intervenors). Proposed Intevenors have no direct or legally protected interest related to the subject matter of this lawsuit.

In this action, Arizona seeks to enforce two state laws, A.R.S. §§ 1803(B) and 1825(A), that prevent defendant Maricopa County Community College District (MCCCD) from granting in-state tuition to aliens without lawful status. More specifically, Arizona alleges that MCCCD is allowing students who have received

Employment Authorization Documents pursuant to the United States Department of Homeland Security's (USDHS) program for deferring prosecution of certain young aliens, commonly known as DACA, for Deferred Action for Childhood Arrivals, to qualify for in-state tuition in violation of state law. (Complaint, ¶¶ 18, 20.) As MCCCD has acknowledged that it does indeed allow such aliens to pay in-state tuition (Answer, ¶¶ 13-14), the only issues for this Court to determine are legal issues relating to the construction of the various statutes.

Relevant Facts and Law

Understanding the issues presented by this lawsuit requires examination of both federal law, which limits a state's ability to grant state and local public benefits to many aliens who are not here legally, as well as state law, which prevents such benefits from being granted to aliens without lawful status. It also requires consideration of the DACA memorandum.

A federal law, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), establishes the framework regarding provision of state or local public benefits to aliens. In general, it limits access to such benefits to "qualified aliens;"[1] those eligible for deferred prosecution under DACA are not "qualified aliens." Aliens who do not meet the qualifications of PRWORA are "not eligible for any state or local public benefit." 8 U.S.C. § 1621(a). PRWORA defines "state or local public benefits" to include "any . . . postsecondary education . . . benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a state or local government or by appropriated funds of a state or local government" such as in-state tuition rates. 8 U.S.C. § 1621(c)(1)(B). However, PRWORA also allows states to

[1] PRWORA provides that only the following categories of aliens are entitled to state and local public benefits: qualified aliens (as defined in 8 U.S.C. § 1641, which describes the categories of qualified aliens); non-immigrants under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*.; and aliens paroled into the United States under 8 U.S.C. § 1182(d)(5) for less than one year. 8 U.S.C. § 1621(a).

grant state and local public benefits, such as in-state tuition, to aliens but only if the state passes a law after August 22, 1996. The Illegal Immigration and Reform Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), further limits the provision of postsecondary education benefits to aliens not lawfully present, preventing a state from making such aliens eligible for tuition on the basis of residence, unless any other citizen or national of the United States is eligible for the same benefit on the same terms. 8 U.S.C. § 1623.

Arizona has not passed any law allowing those without lawful status to have access to postsecondary education benefits. Instead, Arizona voters approved Proposition 300 in 2006. Proposition 300 was intended to prevent persons who are not eligible for state and local benefits under federal law from being eligible to pay in-state tuition rates. The relevant provisions of Proposition 300 are codified at A.R.S. §§ 15-1803 and - 1825. Section 1803(B) prohibits students who do not have "lawful immigration status" from being classified as an in-state student for tuition purposes. Section 1825(A) prevents such students from being offered other tuition assistance that is subsidized or paid in whole or in part with state monies.

In 2012, USDHS announced its DACA policy. (The announcement is attached to the Complaint as Exhibit B.) Under this policy, USDHS allows certain young aliens who were brought to this country as children, and who meet other specified criteria, to stay here for up to two years and to obtain an Employment Authorization Document. The DACA Memorandum represents the Secretary of Homeland Security's decision, using her prosecutorial discretion, to confirm that she will not remove certain aliens. The Memorandum itself recognizes its limitations, specifically stating that it "confers no substantive right, immigration status or pathway to citizenship" and that "[o]nly Congress, acting through its legislative authority, can confer these rights." *Id.* Likewise, the United States Citizen and Immigration Services (USCIS), which has established the process for formalizing the grant of deferred prosecution, states on the application form that "[d]eferred action does not provide lawful status." (Complaint, Ex. C-2 at 1) And, as the District Court for the District of Arizona recently recognized,

the DACA Memorandum "does not have the force of law and cannot preempt state law or policy." *Arizona Dream Act Coalition v. Brewer*, CV12-02546 PHX DGC, 2013 WL 2128315, at *7 (May 16, 2013).[2]

Nonetheless, in the fall of 2012, MCCCD began offering in-state tuition to DACA-eligible students (who otherwise met the residency requirements). When asked by the State to justify its actions in light of the clear prohibitions in A.R.S. §§ 1803 and 1825, MCCCD responded that it relies on A.R.S. § 1-502, a statute that describes how political subdivisions, such as MCCCD, and state agencies determine eligibility for state and local public benefits[3] such as in-state tuition. The statute provides that "[n]otwithstanding any other state law and to the extent permitted by federal law, . . . a political subdivision of this state that administers any state or local public benefit shall require each natural person who applies for a state or local benefit to submit at least one of the following documents," including a "United States citizenship and immigration services employment authorization document." Arizona Revised Statutes § 1-502 does not, by its terms, create any rights to any specific benefit. It merely describes how eligibility for such benefits is established, listing the types of proof that persons "who appl[y] for state or local public benefits" must submit to "demonstrat[e] lawful presence in the United States" as a necessary prerequisite to applying for such benefits. A.R.S. § 1-502(A). It thus cannot serve as a legitimate basis for granting in-state tuition to DACA-recipients.

Argument

I. Proposed Intervenors are not entitled to intervene as of right.

Proposed Intervenors seek intervention as of right under Ariz. R. Civ. P. 24(a)(2). To qualify for intervention as of right, "(1) the applicant must timely move to intervene;

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[2] Notably, Proposed Intervenors do not assert that DACA changes their immigration status.

[3] A.R.S. § 1-502 states the definition of "state and local public benefits" found in 8 U.S.C. § 1621 shall govern for purposes of this section, with certain exceptions not relevant here. A.R.S. § 1-502(I).

(2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (2003), (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). An applicant must satisfy each of these four requirements. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997). "The requirement of a significantly protectable interest is generally satisfied when 'the interest is protectable under some law, and there is a relationship between the legally protected interest and the claims at issue.'" *Arakaki*, 324 F.3d at 1084, quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir.1993).[4] As Arizona courts state, "the interest which an intervenor must have is a direct and immediate interest in the case, so that the judgment to be rendered would have a direct and legal effect upon his rights, and not merely a possible and contingent equitable effect. *Weaver v. Synthes, Ltd. (U.S.A.)*, 162 Ariz. 442, 447, 784 P.2d 268, 273 (Ct. App. 1989) (quoting *Miller v. City of Phoenix*, 51 Ariz. 254, 263, 75 P.2d 1033, 1037 (1938). Notably, "[a]n interest in the result of an action is not the same has having an interest in the right of the action." *Weaver*, 162 Ariz. at 448, 784 P.2d at 274.

A. No direct or legally protectable interest.

Here, Proposed Intervenors cannot establish a direct or legally protectable interest. Proposed intervenors claim that they have financial, educational and constitutional interests that justify intervention. However, Proposed Intervenors cannot identify any tangible or concrete legal right, under either federal or state law, that protects these claimed interests here. In fact, as described above, both federal and state law deny Proposed Intervenors any right or interest. Because Proposed Intervenors do not possess a sufficient interest, this Court should deny intervention.

[4] As Proposed Intervenors note, Arizona courts look to federal law in construing Rule 24. *In re One Cessna Aircraft*, 118 Ariz. 399, 401 (1978).

1. The claimed financial interest.

Proposed intervenors claim a financial interest in this litigation because they will have to pay higher out-of-state tuition rates if Arizona prevails. (Motion, at 4-5.) They rely on *Day v. Sebelius*, 227 F.R.D. 668 (D. Kan. 2005) and *Hill v. Alfalfa Seed & Lumber Co*., 38 Ariz. 70, 297 P. 868 (1931). Neither establishes a sufficient financial interest to justify intervention. *Day* differs from the instant case because it concerned a Kansas statute that granted in-state tuition to certain aliens who were not lawfully present, pursuant to 8 U.S.C. § 1623. *Day*, 227 F.R.D. at 670. The *Day* intervenors were aliens eligible for, and paying, in-state tuition under that statute and related public interest groups. *Id*. at 672. Because they were benefitting from the statute, they had a legally protectable interest that justified intervention. *Id*. *Hill*, a 1931 case interpreting the 1928 Arizona code, allowed a principal on a bond to intervene in a suit against the surety. The proposed intervenor in *Hill* identified a "vital interest" in the surety because the intervenor was primarily and ultimately responsible to indemnify any losses against the bond. *Hill*, 38 Ariz. At 73, 297 P. at 869.

Here, on the other hand, an Arizona law, passed in connection with a federal law governing the topic, prohibits community colleges and universities from offering in-state tuition to persons, such as Proposed Intervenors, who are without lawful status. A.R.S. §§ 15-1803, 1825. Thus, Proposed Intervenors have no colorable claim to in-state tuition and no interest sufficient to support the grant of intervention.

Tellingly, Proposed Intervenors do not even allude to these statutes, much less address their effect on their claim. Instead, they cite A.R.S. § 1-502(A)(7), a statute that only describes how political subdivisions, such as MCCCD, and state agencies determine eligibility for state and local public benefits[5] such as in-state tuition. Because A.R.S. § 1-502 does not create rights to any benefits, it cannot provide a legally protectable interest to justify Proposed Intervenors' claim of intervention. Nor can the

[5] A.R.S. § 1-502 states the definition of "state and local public benefits" found in 8 U.S.C. § 1621 shall govern for purposes of this section, with certain exceptions not relevant here. A.R.S. § 1-502(I).

fact that MCCCD has mistakenly relied on this statute in granting DACA recipients in-state tuition provide a sufficient interest to justify intervention as of right.

2. The claimed educational interest.

Proposed Intervenors also claim an interest in protecting educational opportunities for themselves and other DACA recipients. (Motion, at 5-6.) They rely on *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), a case involving race-conscious admissions policies to support their claim that their educational interests justify intervention. First the Sixth Circuit's standard for an "interest" to intervene by right in not the standard used by the Ninth Circuit. The Sixth Circuit subscribes to a "rather expansive motion of the interest sufficient to invoke intervention of right." *Id*. at 398. The Ninth Circuit and Arizona do not. Even if this standard applies here, the Proposed Intervenors have not articulated the same concrete interest as the *Grutter* intervenors because the proposed intervenors there were individuals of various races who benefitted from (or would in the future benefit from) the existing race-conscious admissions policy. *Id*. at 397. Here, however, efforts to claim a direct and protectable educational interest ignore clear Arizona law that denies in-state tuition to those without lawful immigration status, just as efforts to claim a legally protectable financial interest ignored such law. *Grutte*r is thus unlike this case, where there can be no claim of right to in-state tuition.

3. The claimed interest in avoiding an adverse judgment.

Next, Proposed Intervenors claim an interest in participating in this action now, to avoid an adverse judgment that would impair ability to protect their interest later. (Motion, at 6.) This argument proceeds, like the others, from the fallacy that Proposed Intervenors have a legally protectable interest in paying in-state tuition. Because they do not, as established above, their claimed interest in avoiding an adverse judgment is immaterial. Proposed Intervenors are thus unlike the proposed intervenors in *Saunders v. Superior Court*, 109 Ariz. 424, 426, 510 P.2d 740, 742 (1973), who had a "vested economic interest" in the retirement fund at issue there.

4. The claimed interest in an educational system that does not violate the Equal Protection Clause.

Proposed Intervenors also assert that as students, they have an interest in a sound educational system that does not violate the law and that intervention is the proper means for them to assure that their district operates in accord with the law. (Motion, at 6-7.) They also assert that a judgment in Arizona's favor would result in a violation of the Equal Protection clause, because it would result in Proposed Intervenors being treated differently than other "similarly-situated students." (Id. at 7) In support of this argument, they rely on *Arizona Dream Act Coalition v. Brewer*, CV12-02546 PHX DGC, 2013 WL 2128315 (May 16, 2013) and several desegregation cases where students were allowed to intervene. (*Id*.)

Proposed Intervenors appear to be arguing that a judgment in favor of Arizona would result in an Equal Protection violation, because some deferred action recipients would lose their in-state tuition and others would not. However, Proposed Intervenors have not provided any facts to support this allegation. Consequently, it cannot serve as the basis for intervention.

That students have been allowed to intervene in desegregation cases is immaterial. In such cases, properly substantiated complaints allege sufficient facts regarding unconstitutional segregation. *See e.g*., *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974)(allowing parents of Chinese ancestry to intervene where de jure segregation established); *United States v. Board of School Comm'rs of City of Indianapolis*, 466 F.2d 573 (7th Cir. 1972)(suit by United States alleging unconstitutional segregation of schools); *United States v. School Dist. of Omaha*, 367 F.Supp. 198 (D. Neb. 1973)(same). Here, on the other hand, Proposed Intervenors cite no facts whatsoever in support of their constitutional claims. In fact, their proposed cross-complaint[6] in intervention includes barely one page of conclusory

[6] Proposed Intervenors seek to intervene as defendants. (Motion, at 1.) Therefore, their proposed cross-complaint in intervention is incorrect; Proposed Intervenors should have attached a proposed counterclaim.

allegations. (Motion, Ex. D.) Moreover, one of the Proposed Intervenors' conclusory allegations defeats any claim for violation of the equal protection clause. They allege that "Arizona's policy denies in-state tuition to deferred action-recipients." (Motion, Ex. D, at ¶ 14.) Because Proposed Intervenors allege that Arizona denies in-state tuition to all deferred action recipients, they cannot be claiming that Arizona treats some deferred action recipients differently than it treats others.

In any event, a 2001 Arizona case regarding eligibility for state and local public benefits that was decided after Congress enacted PRWORA demonstrates that Proposed Intervenors' equal protection claim will likely fail. *Kurti v. Maricopa County*, 201 Ariz. 165, 33 P.3d 499 (2001) addressed aliens' eligibility for certain health benefits. There, plaintiffs alleged a violation of the equal protection clause because Arizona law allowed "qualified aliens" who entered the United States before August 22, 1996 to have access to non-emergency indigent health care while denying such care to qualified aliens who entered after August 22, 1996. *Id*., 201 Ariz. at 167, ¶1, 33 P.3d at 501. Defendants asserted that Arizona's statutes were consistent with PRWORA, and that this consistency thus defeated plaintiffs' claims. The court rejected this argument because the relevant state law was inconsistent with federal law—PRWORA prevents qualified aliens who entered the United States after Aug. 22, 1996 from access to such benefits for a period of five years, while Arizona's law forever denied such benefits to such aliens. *Id*., 201 Ariz. at 169-70, ¶¶ 14-18, 33 P.3d at 503-04. Because state law differed from federal law with respect to a qualification based on alienage, the court applied strict scrutiny to plaintiffs' claims. *Id*. Here, on the other hand, Arizona law is completely consistent with federal law. Thus, even if Proposed Intervenors could somehow articulate an equal protection challenge, it would be subject to rational basis scrutiny.

5. The claimed Due Process violation.

Lastly, Proposed Intervenors claim a due process property interest in in-state tuition, such that they are entitled to minimal due process before losing their in-state

tuition rates. This claim is defeated, like their other claims, by the fact that they have no entitlement of any kind to in-state tuition, given clear Arizona law to the contrary. As noted above, this fact sets them apart from the proposed intervenors in *Day v. Sebelius*, who proceeded under a Kansas law that granted them in-state tuition.

B. No impairment of any interest.

Because Proposed Intervenors do not have a legally protectable interest, it is not necessary to analyze whether their interests will be impaired. In any event, Proposed Intervenors assert a right to bring an independent action to vindicate their rights. (Motion, at 12.) Thus, any impairment of their rights would be minimal.

C. Adequate representation exists.

Proposed Intervenors' assert that MCCCD may not adequately protect their interests because MCCCD has a civil trusteeship obligation that may cause it to heed negative opinion about granting in-state tuition to those here unlawfully. They also assert that MCCCD may have financial interests that conflict with Proposed Intervenors' own interests, because MCCCD might receive higher out-of-state tuition from those DACA-recipients who continue with their education in the event Arizona prevails. MCCCD has demonstrated that it can and will adequately protect any interests that Proposed Intervenors possess.

Proposed Intervenors' speculation that MCCCD's defense of its decision to grant in-state tuition to those without lawful status will be less than vigorous because of its civil trusteeship obligation is not reasonable, given MCCCD's actions to date. MCCCD's defense of its actions against the State's enforcement effort leaves no reason to believe that it will not continue to press its argument that its course of action is lawful.

Proposed Intervenors' argument about a potential financial conflict must be judged against reality. MCCCD has a total budget of approximately $1.6 billion,[7] with

[7] See Adopted Budget FY2013-14, May 21, 2013, available at http://www.maricopa.edu/business/budget/fy14bgt/fy14adoptedbgt.pdf, last accessed December 10, 2013.

approximately 250,000 students.[8] According to news articles, substantially fewer than some 150 -250 of those students are DACA recipients. Even if 200 DACA-recipients switched from paying in-state to out-of-state tuition, the difference would amount to only a tiny fraction of MCCCD's total budget. In any event, given MCCCD's staunch opposition to the State's position to date, it is not reasonable to assume that MCCCD will change its position on the hopes of making a few more dollars in out-of-state state tuition.

Finally, while Arizona does not question the expertise or dedication of Proposed Intervenors' counsel, that issue is immaterial to an analysis of whether intervention is appropriate.

II. Permissive intervention should be denied.

Proposed Intervenors also request that they be granted permissive intervention under Ariz. R. Civ. P. 24(b)(2). This request should also be denied, because Proposed Intervenors have no legally protectable interest. Additionally, intervention in this simple matter of statutory construction will unnecessarily delay, complicate and politicize this matter. The existing parties contemplate minimal, streamlined factual and expert discovery scheduled for completion in less than six months, followed by rapid resolution of the issues. (Order, dated Nov. 14, 2013.)

Proposed Intervenors assert that common questions of law and fact exist between Arizona's action and their interests as asserted in their cross-complaint. It is true that Arizona's claim that MCCCD is violating the law by allowing those without lawful status to pay in-state tuition and Proposed Intervenors' concerns both relate to the construction of Arizona law regarding the eligibility of those without lawful status for in-statute tuition. However, Proposed Intervenors' cross-complaint and justifications for intervention demonstrate that their participation will unnecessarily complicate this action. As noted above, Proposed Intervenors do not even mention, much less address,

[8] See MCCCD Comprehensive Annual Financial Report, http://www.maricopa.edu/business/reporting/CAFRs/CAFR%20FY1112.pdf., last accessed December 10, 2013.

the state law that denies those without lawful status access to in-state tuition and other similar benefits. They also raise constitutional objections to Arizona's action that MCCCD has not raised.

Proposed Intervenors next assert that examination of additional factors that courts may consider when evaluating requests for permissive intervention counsel in favor of granting intervention. These factors include "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case." *Bechtel v. Rose in and for Maricopa County*, 150 Ariz. 68, 73, 722 P.2d 236, 240 (1986), quoting *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977). Notably, a court should consider such factors only if any of the conditions for intervention listed in Rule 24(b)(2) have been satisfied. *Id*. Here, Proposed Intervenors cannot satisfy the requirements for permissive intervention, so it is not necessary to consider these other factors. Even if it were appropriate, however, the fact that Arizona law denies benefits such as in-state tuition to those without lawful status counsels against granting permissive intervention.

Finally, as noted above, Proposed Intervenors assert that they can bring an independent action to vindicate any rights. (Motion, at 12.) While they assert that their right to bring an independent action supports granting their petition for intervention, the authority upon which they rely is inapposite. In *Spangler*, 552 F.2d at 1328-29, and *Brown v. Board of Education*, 84 F.R.D. 383, 404 (D. Kan. 1979), courts held that parties seeking to challenge a desegregation order should proceed by means of intervention, a decision that depended on the nature of a desegregation order, the need for continuing jurisdiction to assure its implementation as well as the need to assure an orderly means of bringing matters regarding its implementation to the court's attention. *Brown*, 84 F.R.D. at 404 (citing *Hines v. Rapides Parish School Board*, 479 F.2d 762, 765 (5th Cir. 1973)). No such issues are present here. And, if Proposed Intervenors need to be heard in this action, they can participate as *amicus curiae.*

Conclusion

For the reasons stated above, this Court should deny the Motion to Intervene.

DATED this 10th day of December, 2013.

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