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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*, ABEL BADILLO, BIBIANA VAZQUEZ, and BIBIANA CANALES *Intervenor-Defendants*. ABEL BADILLO, BIBIANA VAZQUEZ, and BIBIANA CANALES, *Counter-Plaintiff*, vs. STATE OF ARIZONA ex rel. Attorney	No. CV2013-009093 **DEFENDANT-INTERVENORS' AMENDED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO STATE'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)** (Assigned to the Hon. Arthur Anderson)

General Thomas C. Horne,)
)
Counter- Defendant.)

I. INTRODUCTION

Student-Intervenors have permission from the federal government to work and live in the United States because they have applied for immigration relief under the Deferred Action for Childhood Arrivals ("DACA") program, and the federal government has vetted them and granted them the relief requested. As a result, they have federal work authorization documents ("EADs") and are eligible for social security numbers. Intervenors, like all DACA recipients, have lawful presence under federal law.

Because DACA recipients have lawful presence, they satisfy federal law's immigration qualifications for in-state tuition under IIRAIRA's 8 U.S.C. § 1623. The Court need look no further to decide this case.

In addition to the federal law's straight-forward immigration requirements, multiple canons of statutory construction dictate that IIRAIRA's 8 U.S.C. § 1623 governs over PRWORA's 8 U.S.C. § 1621. First, Arizona's Proposition 300 ("Prop. 300") explicitly incorporates IIRAIRA, and not PRWORA. Second, IIRAIRA is the more specific of the two statutes, and must trump the more general PRWORA. Third, Congress enacted IIRAIRA later in time, so it must displace PRWORA. Fourth, Arizona concedes that "status" and "presence" are both used interchangeably, which further bolsters that IIRAIRA's lawful presence standard is reiterated in Prop. 300 rather than displaced by a stricter requirement.

Because IIRAIRA's § 1623 sets federal immigration standards for in-state tuition eligibility, Arizona cannot raise the bar. To the extent that Arizona argues that Prop. 300 creates an immigration standard beyond what federal law requires, they are preempted from doing so.

Finally, the Ninth Circuit recently rebuked Arizona for discriminating against DACA recipients with regard to drivers' licenses, and Arizona's discriminatory pattern fares no better here. In short, DACA recipients are similarly situated to other deferred action recipients and other EAD recipients. Moreover, the State's acts establish animus against DACA recipients, and the State cannot depart from federal law's immigration classification defined in IIRAIRA's § 1623. Although the Ninth Circuit instructed that discrimination against DACA recipients is subject to strict scrutiny, Arizona's policy fails even rational review.

II. LEGAL ARGUMENT

A. The Tenets of Statutory Construction Require That § 1623 Govern to the Exclusion of §1621.

Under the tenets of statutory construction, 8 U.S.C. § 1623 of IIRAIRA must govern the question of residency based tuition for noncitizens to the exclusion of 8 U.S.C. § 1621 of PRWORA, because: (1) under a plain reading, A.R.S. § 15-1803(B) of Prop. 300 incorporates by reference § 1623, but not § 1621; (2) § 1623 is the specific statute that addresses residency tuition for noncitizens, while § 1621 does not; (3) § 1623 was enacted later in time than § 1621; and (4) other provisions in Prop. 300 confirm the "lawful presence" standard in A.R.S. § 15-1803(B). Last, Arizona's § 15-1803(B) must be read consistent with § 1623 to avoid federal preemption and equal protection problems.

As Student-Intervenors established in their moving papers, they meet federal requirements under § 1623 because they can establish lawful presence under federal law. *See* Intervenors' Motion for Summary Judgment ("MSJ") and Response to Arizona's Motion for Judgment on the Pleadings ("MJP") at 7:8-8:21; 11:8-12:18. Thus, they qualify for in-state tuition both under Federal Law and Prop. 300 as discussed below.

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1. Section 1623 Governs Because Prop. 300 Expressly Incorporates It, But Not § 1621.

"In interpreting statutes, we look to the plain language as the most reliable indicator of meaning." *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249, 141 P.3d 422, 424 (Ct. App. 2006). "The plain language of [a statute] reveals that it must be read in connection with [another statute], which it specifically names." *See Nat'l Res. Def. Council v. U.S. E.P.A.*, 437 F. Supp. 2d 1137, 1158 (C.D. Cal. 2006). "The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length." *Engel v. Davenport*, 271 U.S. 33, 38 (1926) (internal citation omitted). The incorporation of another statute "serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924) (internal citation omitted).

Here, A.R.S. § 15-1803 provides that a noncitizen's eligibility for in-state tuition is "[i]n accordance with [IIRAIRA]," *see* A.R.S. § 15-1803(B), and IIRAIRA's § 1623 uses the "lawful presence" standard to determine whether an otherwise qualified noncitizen qualifies for the residency based tuition rate. *See* 8 U.S.C. § 1623. Therefore, A.R.S. § 15-1803(B) expressly adopts the federal "lawful presence" standards "as though it had been incorporated at full length." *See Engel*, 271 U.S. at 38. Defendants deny that the incorporated "lawful presence" standard applies to A.R.S. § 15-1803, but cite to zero cases to support their view. *See* Arizona's Response to Intervenors' Motion for Summary Judgment ("Arizona's Response to MSJ") at 4:11-14.

Defendants also erroneously contend that § 1623 of IIRAIRA must be read in conjunction with § 1621 of PRWORA. *See* Arizona's Response to MSJ at 3:17-18. This argument must fail under a plain reading of the statute because on its face § 1623 applies "Notwithstanding any other provision of law." *See* 8 U.S.C. § 1623. "The Courts of Appeal generally have interpreted similar 'notwithstanding' language ... to supersede all

other laws, stating that '[a] clearer statement is difficult to imagine.'" *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007). This is particularly true here because § 1621 was enacted prior to § 1623, and "the notwithstanding clause has a clear function—to convey that prior legislation should not be deemed a legal barrier." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1084 (9th Cir. 2013). Arizona concedes that "8 U.S.C. § 1621 was enacted first." *See* Arizona's Reply In Support of its Motion for Judgment on the Pleadings ("MJP") and Response to MCCCD's MSJ at 9:18. Thus, to the extent that the § 1621 establishes a different standard for eligibility than the newer § 1623, § 1621 must give way to § 1623 because "the notwithstanding clause" makes clear that "prior legislation should not be deemed a legal barrier." *Drakes Bay Oyster Co.*, 747 F.3d at 1084.

Likewise, § 1623 of IIRAIRA must govern to the exclusion of § 1621 of PRWORA under the "expressio unius" doctrine of statutory construction, which states that "the expression … of one or more things … , implies the exclusion of all things not expressed." *Cent. Hous. Inv. Corp. v. Fed. Nat. Mortgage Ass'n*, 74 Ariz. 308, 310-11, 248 P.2d 866, 867-68 (1952); *see also State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996). Here, the Arizona legislature demonstrated it knew how to expressly incorporate IIRAIRA into A.R.S. § 15-1803(B), making the drafter's exclusion of PRWORA from A.R.S. § 15-1803(B) intentional. *Id.* Thus, § 1623 must govern to the exclusion of § 1621.

Arizona also cites to inapposite authorities—a case and a secondary source—to prop up their contention that PRWORA should govern in conjunction with IIRAIRA. First, Arizona cites to an irrelevant case regarding a California statute that gave all persons, including "persons *unlawfully* present," postsecondary benefits *unrelated* to residency. *Martinez v. The Regents of the Univ. of California*, 50 Cal. 4th 1277, 1283; 1289-96 (2010) (emphasis added). In *Martinez*, the court had no reason to decide whether § 1623, a statute that specifically addressed *residency* based tuition for *lawfully* present individuals, governed to the exclusion of § 1623, as is the issue here. Thus Arizona's reference to the

case is inapposite. Second, Arizona's secondary source cites to *Martinez* as a basis to "note that some have questioned whether 'benefit' has the same meaning for purposes of PRWORA and IIR[A]IRA," without providing an answer. *See* Kate M. Manuel, *Unlawfully Present Aliens, Higher Education, In-state Tuition, and Financial Aid: Legal Analysis*, at 7 (Congressional Research Service, July 21, 2014). To the contrary, other courts have already limited the scope of PRWORA to liquid monetary funds that are paid out, to the exclusion of residency based tuition rates. *See Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004) ("In the area of post-secondary education, PRWORA addresses only post-secondary monetary assistance paid to students or their households").

Further, as discussed below, Arizona's reading is prohibited because it would render § 1623 superfluous, as it would be subsumed by § 1621.

2. <u>Section 1623 Governs Because It Specifically Addresses Residency Based Tuition For Non-Citizens, While § 1621 Is a General Benefits Statute.</u>

"[T]he general/specific canon avoids rendering superfluous a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* ("*RadLAX*"), 132 S. Ct. 2065, 2068 (2012). Because the "cardinal rule" of statutory construction is "that, if possible, effect shall be given to every clause," … "[s]pecific terms prevail over the general [terms] in … another statute which otherwise might be controlling." *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) (internal citation omitted); *see also, Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).

Here, Arizona concedes that § 1623 of IIRAIRA is a "narrow[er]" statute than § 1621 of PRWORA. *See* Arizona's Response to MSJ at 4:3. On its face, § 1623 regulates which noncitizens may obtain in-state tuition based on residency, which is the precise issue here. In contrast, § 1621 is a general benefits statute that includes the payment of certain post-secondary education benefits, *without* mention of the requirements for residency based

higher education benefits. As such, § 1623, the specific provision, must govern to the exclusion of § 1621, the general benefits statute. *See Mancari*, 417 U.S. at 550-551. Arizona's argument that § 1621 should be read in conjunction with § 1623 is prohibited because it would render § 1623 superfluous, as it would be swallowed by § 1621, the general statute. *RadLAX*, 132 S. Ct. at 2068. By Arizona's reading, § 1623 would do nothing as § 1621 would imposes its standard on top of § 1623, rending § 1623 useless.

3. Section 1623 Governs Because It Was Enacted Later In Time.

In addition to being more specific, § 1623 was also enacted one month after § 1621. To the extent that there is any potential conflict between § 1623 and § 1621 conflict, "the more recent, specific statute governs over an older, more general statute.'" *State v. Jones*, CR-13-0292-PR, 2014 WL 4346113 (Ariz. Sept. 3, 2014) (quoting *UNUM Life Ins. Co. v. Craig,* 200 Ariz. 327, at 333 ¶ 29, 26 P.3d 510, 516 (2001). The strength of a specific statute is so evident that it "is not submerged by a later enacted statute covering a more generalized spectrum." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1069-70 (9th Cir. 2010); *see also Mancari*, 417 U.S. at 550-551 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority in enactment"). Thus, § 1623 governs exclusively.

4. Arizona Concedes That The State Standard For Residency Based Tuition Includes "Lawful Presence."

After incorporating IIRAIRA, Prop. 300's A.R.S. §15-1803(B) provides that a person must be a "citizen" or "legal resident"[1] or have "lawful immigration status" to qualify for resident tuition. Arizona's Prop. 300 uses "lawful immigration status," "lawful presence," "qualified student," and other terms to collectively refer to persons who are

[1] Student-Intervenors incorporate by reference Defendant MCCCD's arguments regarding "legal resident" as if fully set forth herein. *See* Defendant MCCCD's Reply In Support of MSJ at 4:8-5:2. (noting that the phrase "legal resident" encompasses all persons legally present and residing in Arizona).

either lawfully or unlawfully present. *See* Defendant-Intervenors' MSJ and Response to Arizona's MJP at10:19-11:7 (noting interchangeable use in A.R.S. §§ 15-1825; 1781; and 1782); and Defendant MCCCD's MSJ and Response to Arizona's MJP at 7:15-9:9 (noting interchangeable use in A.R.S. §§ 15-1825; 15-1781; 15-232; and 46-801). Arizona does not dispute this usage, and actually embraces it, conceding "that the phrases 'an alien who is not lawfully present in the United States' and 'a person without lawful immigration status' have the same meaning." *See* Arizona's Reply In Support of its MJP and Response to MCCCD's MSJ at 8:8-13) (citing *Martinez*, 50 Cal. 4th at 1288). The United States agrees with this reading, noting that "Congress, through the REAL ID Act, has expressed its judgment that 'approved deferred action status' is 'lawful status[.]'"). *See* Brief for the United States as Amicus Curiae, p. 16, *Arizona Dream Act Coal.* ("*ADAC*") *v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), attached as Ex. C to Fidel Decl.

Here, it is beyond dispute that DACA recipients qualify for in-state tuition, both because they satisfy the "lawful immigration status" definition in state law and the federal "lawful presence" standard under IRIAIRA that is expressly incorporated into A.R.S. §15-1803(B). *See* infra Section III.B. at 7:18-9:21 (DACA recipients have authorized presence under federal law).

Arizona's intermingling of "lawful immigration status" with "lawful presence" is not only supported by the broader statutory scheme, but also necessary to ensure that A.R.S. § 15-1803(B) is not federally preempted, as discussed below.

B. <u>Arizona's Reading of State Law Is Federally Preempted.</u>

Arizona's reading of A.R.S. §15-1803(B) is conflict preempted because (1) it classifies DACA students as "unlawful," or "not fully lawful," in direct contravention to the federal government's classification of DACA recipients, and (2) Arizona's misclassification of DACA recipients denies them the in-state tuition rate that § 1623, a federal statute, provides lawfully present individuals like DACA recipients.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372 (2000) (internal citation omitted). The United States Supreme Court has confirmed that "state laws are preempted when they conflict with federal law, including when they stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States,* 132 S. Ct. 2492, 2493 (2012) (internal citation omitted). Moreover, "[t]he States enjoy no power with respect to the classification of aliens." *Plyler v. Doe,* 457 U.S. 202, 225 (1982).

The Ninth Circuit has defined DACA recipients as "noncitizens authorized to be present in the United States." *ADAC v. Brewer*, 757 F.3d 1053, 1065 n.4 (9th Cir. 2014) (finding no federal basis to deny that DACA recipients demonstrate the "federally authorize presence" that similar noncitizens with EADs have); *see also* Brief for the United States as Amicus Curiae, p. 12-14, *ADAC v. Brewer*, 757 F.3d 1053, attached as Ex. C to Fidel Decl. (DACA recipients have the same authorized presence that other EAD recipients have).

Likewise, the district court in *ADAC v. Brewer* held that "Defendants have identified nothing about the (c)(33) category code to suggest that DACA recipients are somehow less authorized to be present in the United States than are other deferred action recipients." 945 F. Supp. 2d 1049, 1061, overruled on other grounds by *ADAC*, 757 F.3d 1053. Similarly, "DHS considers DACA recipients [to be lawfully] present in the United States because their deferred action is a period of stay authorized by the Attorney General." *ADAC*, 757 F.3d at 1059 (citing 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. 214.14(d)(3); U.S. Immigration and Naturalization Servs., Adjudicator's Field Manual Ch. 40.9.2(b)(3)(J)). Likewise, the official federal guidance, federal courts, and the Board of Immigration Appeals confirm that DACA recipients are "lawfully present" during their grant of DACA status. *See* Defendant-Intervenors' MSJ and Response to Arizona's MJP at 11:9-17; and Defendant MCCCD's MSJ and Response to Arizona's MJP at 11:23-14:17.

Here, Arizona incorrectly persists in the belief that "DACA recipients are not lawfully present…for all purposes." (Arizona to MCCCD at 4:1-2; 7:26-8:6). In doing so, Arizona has placed DACA recipients in an inferior subcategory to deferred action recipients and EAD recipients. Because only the federal government is authorized to classify aliens, Arizona's actions are preempted. *See Plyler,* 457 U.S. at 225. Arizona cannot apply its own unsupported determination of who is lawfully present under federal law, or create levels of lawful presence under federal law, as it tries to do here. *Id.*; *see also Hispanic Interest Coal. Of Ala. V. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *23 (N.D. Ala. Sept. 28, 2011) (preempting state statute because it impermissibly created a state definition of "lawful presence" for purposes of admission to public higher education that excluded numerous categories of noncitizen who were lawfully present under federal law, including deferred action recipients).

In the same vein, Arizona's misclassification of DACA students as "unlawful" for in-state tuition purposes is federally preempted because it reads a state statute—A.R.S. 15-1803(B)—in contravention to the federal law under § 1623 of IRAIRA. *See Arizona v.,* 132 S. Ct. at 2493 ("state laws are preempted … when they stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"). Here, § 1623 of IRAIRA sets the standard for immigration-based eligibility for in-state tuition at lawful presence, and Arizona cannot raise that bar without violating the constitution. *Id*.

Moreover, Arizona's attempt to read A.R.S. 1-502 to require more than an EAD from DACA students to prove lawful presence is preempted. *Id.* Even the non-binding authority that Arizona cites to confirms that "For federal public benefits, agencies should comply with federal guidance to verify eligibility." *See* Arizona's Response to Intervenors' MSJ at 5:17-22 (citing Atty Gen. I10-008 (December 28, 2010) at 3, ¶8). Here, the federal government has granted DACA students lawful status during their period of authorized stay, and EADs are sufficient evidence of that.

C. Arizona Blatantly Violates the Equal Protection Clause.

Arizona has crafted a blatantly illegal policy targeting DACA recipients. This is not the first time that Arizona has illegally targeted DACA recipients, and is instead part of a larger campaign. First, on the day that DACA took effect, Governor Brewer issued an executive order declaring that the federal government "plans to issue employment authorization documents to certain unlawfully present aliens…," essentially denying the legality of the DACA program. *See* Ex. A. to Fidel Decl.; *see also ADAC*, 757 F.3d at 1059 (noting timing of Governors' executive order). Second, Governor Brewer declared that DACA recipients were "illegal people," "here illegally and unlawfully," and claimed "the Obama amnesty plan doesn't make them legally here[.]" *Id*. Third, Arizona denied DACA recipients drivers' licenses. *Id*. Fourth, Arizona expanded its campaign against DACA recipients to deny them in-state tuition. *See* State's Complaint at ¶¶ 23 & 25. Fifth, the Ninth Circuit declared that Governor Brewer's attempt to deny drivers' licenses to DACA recipients likely violated the constitution's equal protection guarantees and ordered the district court to enter a preliminary injunction. *ADAC*, 757 F.3d at 1069. Sixth, the Ninth Circuit declared that the Governor's and other state defendants' "[drivers' license] policy appears intended to express animus toward DACA recipients themselves, in part because of the federal government's policy toward them." *Id*.

Arizona has not been subtle in its campaign. Arizona essentially concedes that it did nothing to challenge MCCCD's policy of accepting EADs prior to DACA, and that its "inquiry" was limited to challenging DACA recipients and no one else. *See* Complaint at ¶ 20 ("In September 2012, the Attorney General discovered that MCCCD was granting in-state tuition rates to DACA-eligible students…"); *see also* Lynne Adams Declaration ("Adam's Decl.") at AZ000040 (Arizona correspondence acknowledging State's "initial inquiry" regarding in-state tuition occurred "nearly six months" prior to March 2013). Arizona sent correspondence to MCCCD demanding that it deny in-state tuition to *only*

DACA recipients, but not others receiving deferred action or others using federal EADs. *See id.* at AZ00004 (State's inquiry limited to individuals receiving "work permits through the federal Deferred Action for Childhood Arrivals program"); *id.* at AZ00034 ("MCCCD's policy on DACA eligible students violates the law"); *id.* at AZ00039 ("grant of in-state tuition for DACA eligible students is improper"); *id.* at AZ000050 ("allowing DACA students to pay in-state tuition…violates Arizona law"). Even the Attorney General's lawyers conceded to feeling some pressure to move forward with their position, stating, "I'm getting some pressure to move on this issue." *Id.* at AZ000036.

Arizona's Complaint is equally stark, as it seeks an order to "prohibit MCCCD from allowing DACA-eligible aliens to pay in-state tuition." *See* Complaint at ¶¶ 23 & 25. In its prayer for relief Arizona asks this Court to "permanently enjoin MCCCD from continuing its policy of giving in-state rates to DACA-eligible individuals." *Id.* at 6:20-27.

While true that Plaintiffs have not conducted discovery in this case, Arizona's course of action regarding MCCCD, the State's allegations in this suit targeting DACA recipients, the Governor's executive order, and the Governor's statements regarding DACA are a more than sufficient basis to find for the Student-Intervenors.

Moreover, the only fact necessary for liability here is Arizona's illegal policy, singling out DACA recipients for disparate treatment. The State's complaint establishes that point, repeatedly. *See* Complaint at ¶¶ 23, & 25. The remainder of Intervenors' equal protection theory can be proven up as a matter of law. Arizona's illegal policy violates the equal protection clause four different ways.

First, Arizona seeks to allow all deferred action recipients in-state tuition, but not DACA recipients, when DACA is merely a form of deferred action.[2] *See ADAC*, 757 F.3d

[2] Student-Intervenors previously named other deferred action recipients as a similarly situated group. *See* Defendant Intervenors' MSJ and Response to MJP at 15:2-4. ("the state has no rational reasons for attempting to deny DACA recipients the in-state tuition that other deferred action recipients receive").

at 1058 (DACA is "a form of deferred action"). As Student-Intervenors noted in their moving papers, the federal government has already defined that the relief pursuant to DACA "is identical for immigration purposes" to any person receiving deferred action. *See* Fidel Decl. ex. B (USCIS, FAQ, About DACA, Q7). In addition to federal guidance, the state already has been notified by a federal judge that it cannot make any legal distinction between DACA recipients and deferred action recipients with regard to their immigration classification. *ADAC v. Brewer*, 945 F. Supp. 2d 1049, 1061 ("Defendants have identified nothing about the (c)(33) category code to suggest that DACA recipients are somehow less authorized to be present in the United States than are other deferred action recipients.") *overruled on other grounds by ADAC v. Brewer*, 757 F.3d 1053. Arizona offers no justification to support discriminating between these similarly situated groups.

Second, Arizona seeks to allow all EAD recipients to establish lawful presence for in-state tuition, except DACA recipients, even though all of these individuals would rely on the same federal identification to establish eligibility for in-state tuition. [3] Here again, the federal courts have already ordered Arizona to enjoin this illegal policy, albeit in the context of driver's license, "agree[ing] with the district court that DACA recipients are similarly situated to other categories of noncitizens who may use Employment Authorization Documents to obtain driver's licenses." *ADAC*, 757 F.3d at 1065. Similarly, Arizona has offered no justification for discriminating between these similarly situated groups.

Third, Arizona creates its own immigration category that violates federal law. *See* supra Section III.B. at 7:18-9:21. Under §1623, individuals with authorized presence under federal law cannot be denied in-state higher education benefits based on their immigration

[3] Here, as above, Student-Intervenors presented this argument in their previous filing. *See* Defendant-Intervenors' MSJ and Response to State' MJP at Section III.E.2. (14:16-20) ("[Arizona's policy] targets DACA students, but not other individuals with authorized presence.").

classification. Here, Arizona tries to mischaracterize DACA students as something less than fully "lawfully present" and tries to raise the bar under federal law to exclude individuals with authorized presence. Arizona can do neither, and has no basis for doing so.[4] *See Kurti v. Maricopa County*, 201 Ariz. 165, 171 ¶21, 33 P.3d 499, 505 (2001) (strict scrutiny applies when "Arizona's statutes do not follow the federal law regarding treatment of a particular subclass of aliens").

Fourth, Arizona's animus against DACA recipients as evidenced by this lawsuit, is by law illegitimate. As the Ninth Circuit explained with regard to Arizona's acts against DACA recipients, "Such animus … is not a legitimate state interest." *ADAC*, 757 F.3d at 1067; *see also Romer v. Evans*, 517 U.S. 620, 634-35 (1996) ("bare … desire to harm a politically unpopular group" is not legitimate). [5]

In addition, the Ninth Circuit has all but declared that strict scrutiny applies to discrimination against DACA recipients, "we noted that the Supreme Court has consistently required the application of strict scrutiny to state action that discriminates against noncitizens authorized to be present in the United States." *ADAC*, 757 F.3d at 1065 n. 4. The Ninth Circuit did not rule on this point merely because Arizona's policy illegally discriminating against DACA recipients could not pass a rational basis test. *Id*. The same is true here.

Finally, Arizona's argument that they can violate equal protection rights under the guise of "selective enforcement" to target DACA recipients is meritless. First, the Ninth

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[4] The State is again wrong that an equal protection analysis requires a similarly-situated group. By making DACA recipients something less than "lawfully present," Arizona created a state classification that deviates from the federal classification, thus triggering strict scrutiny under the equal protection clause. *See Kurti*, 201 Ariz. at 171 ¶21, 33 P.3d at 505. The same is true when a state's acts are motivated by improper animus, as the analysis does not rest on a similarly-situated group. *ADAC*, 757 F.3d at 1067 N.4 (animus cannot be a legitimate interest under the constitution).

[5] In the event that the Court concludes that Student-Intervenors' equal protection claim requires additional discovery, Students request leave to conduct additional discovery.

Circuit has already held that Arizona cannot discriminate against DACA recipients because singling out DACA recipients to deny them drivers' licenses violates the equal protection clause, and the same is true of in-state tuition. *ADAC*, 757 F.3d at 1068-69. Second, Student-Intervenors have already identified classes of similarly situated individuals who Arizona treats more favorably than DACA recipients, including (i) other deferred action recipients, and (ii) other noncitizens using EADs, who can both establish eligibility for in-state tuition. Thus, Arizona's claim that Intervenors have not identified any similarly situated groups is false. Third, unlike the *Dowling v. Arpaio* case, this is not "selective prosecution" case where a single individual is attempting to prove disparate treatment. Rather, here, Arizona has a well-developed pattern of treating a class of individuals, DACA recipients, in a discriminatory manner which violates equal protection guarantees. In summary, Arizona cannot opt out of the constitution by arguing they can "selectively" deny in-state tuition to DACA recipients. *ADAC*, 757 F.3d at 1068-69; *Dandmundi v. Tisch*, 686 F.3d 66, 69 (2nd Cir. 2012) (applying strict scrutiny to discrimination against "a group of nonimmigrant aliens" with temporary work authorization).

Here, Arizona offers *no* basis to support their illegal discrimination, and cannot satisfy rational basis, much less strict scrutiny.

III. CONCLUSION[6]

For the forgoing reasons, Student-Intervenors respectfully request that the Court deny the Attorney General's Motion for Judgment on the Pleadings and Motion for Summary Judgment, and grant MCCCD's and Student-Intervenors' Motions for Summary Judgment.

DATED this 25th day of September, 2014.

[6] Student-Intervenors concede that their intervention as Defendants in this case provides them their due process rights, and they do not pursue an independent affirmative claim.

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By: /s/ Martha L. Gomez

THE FOREGOING has been e-filed and a COPY
e-delivered this 17h day of October, 2014, to

The Honorable Arthur Anderson
Maricopa County Superior Court
East Court Building
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COPY served via Turbo Court
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