ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA ex rel. Attorney General Mark Brnovich, Plaintiff-Appellant, vs. MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD, Defendant-Appellee, ABEL BADILLO, and BIBIANA CANALES, Intervenors/Defendants-Appellees.	No. 1 CA-CV 15-0498 Maricopa County Superior Court No. CV2013-009093

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INTRODUCTION

The superior court correctly held that Defendant-Intervenors Bibiana Vasquez and Abel Badillo ("Student-Intervenors") are eligible for in-state tuition in Arizona. Student-Intervenors are deferred action recipients under the federal Deferred Action for Childhood Arrivals ("DACA") program and as such are lawfully present in the United States for the remainder of their authorized stay. As DACA recipients, each has received an Employment Authorization Document ("EAD") and Social Security Number ("SSN"). Before according Ms. Vasquez and Mr. Badillo resident tuition, the Maricopa County Community College District ("MCCCD") verified their lawful presence by checking their EADs. In so doing, MCCCD acted in accordance with Arizona A.R.S. § 1-502, by which an EAD suffices to establish lawful presence for state benefits. Further, by accepting lawful presence as a qualifying basis for the higher education benefit of resident tuition, the MCCCD satisfied the lawful presence requirement explicitly established in IIRAIRA (8 U.S.C. § 1623), and also satisfied A.R.S. § 15-1803(B), which was expressly enacted "in accordance with [IIRAIRA]."

The argument just summarized is one that Student-Intervenors share with MCCCD. Accordingly, in compliance with ARCAP 13(h), Student-Intervenors adopt by reference the Statement of the Issues, Standard of Review, Statement of

Case and Facts, and Argument contained in MCCCD's Answering Brief. The facts, issues, and argument that follow are advanced to supplement rather than duplicate those presented by MCCCD.

STATEMENT OF FACTS

I. Student-Intervenors are DACA Recipients Who are Pursuing Higher Education at MCCCD

When the Secretary of Homeland Security announced the DACA program, she stated that our nation's immigration laws are not "designed to remove productive young people to countries where they may not have lived." See R-66 at 2 (Memo. from Janet Napolitano, DHS Secretary, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).) Student-Intervenors are such people, presently pursuing a commendably productive educational path.

Bibiana Vazquez and Abel Badillo, the Student-Intervenors, seek to protect their right to pay in-state tuition rates at Maricopa Community Colleges. See R-40 at 1-2 (Order Granting Intervention.) If the state prevails against Ms. Vazquez and Mr. Baldillo, their cost for a typical 15-unit semester would increase from $1,214 to $4,744, an annual increase of $7,080. See https://www.maricopa.edu/about-us/quick-facts/tuition-and-financial-aid. To deny them resident tuition would not only roughly quadruple the cost of their education, it would also force them each to

work more hours, sacrifice study time, seek and achieve fewer credits per semester, and substantially delay their transfer to ASU.

II. The State's Injunctive Effort in This Case Singles Out DACA Recipients For Disparate Treatment

From 2006 until the inception of the DACA program, the State of Arizona questioned neither the lawful presence of deferred action recipients nor their entitlement to in-state tuition, nor did it challenge MCCCD's acceptance of EADs from deferred action recipients as a basis for such tuition.[1] From the inception of the DACA program, however, Arizona has sought to deny in-state tuition to DACA recipients alone. See R-1 at 5-6, ¶¶ 20, 23, 25, Prayer for Relief (Complaint); R-102 at AZ00004, AZ00034, AZ000040, AZ000050 (Adams Decl.)

On the same day the DACA program was announced, Governor Janice Brewer called a press conference to denounce it as an "outrageous grant … of backdoor amnesty." See R-63, ¶ 7(CNN "Brewer: Obama immigration 'outrageous,'" June 15, 2012, video.)[2] And on August 15, 2012, the same day that U.S. Citizenship and Immigration Services (USCIS) began accepting applications for DACA, Governor Brewer issued Arizona Executive Order 2012-06 ("Executive

[1] The documents supporting these assertions are set forth in Part I of the Argument below.

[2] The video link found at R-63, ¶ 7 is no longer active, but can now be found at http://www.cnn.com/videos/bestoftv/2012/06/15/bts-immigration-jan-brewer-reax.cnn.

Order") warning that under DACA, the federal government "plans to issue employment authorization documents to certain unlawfully present aliens," and directing state agencies to "initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility . . . for any taxpayer-funded public benefits." See R-68 at 1 (Executive Order.)

Meanwhile, on June 25, 2013, Arizona's Attorney General Horne filed this lawsuit to prevent MCCCD from allowing DACA students to obtain in-state tuition and from accepting DACA recipients' EADs as proof of qualification for in-state tuition.[3] The lawsuit targeted only DACA recipients, not other deferred action recipients. *See* R-1 at 5-6, ¶¶ 20, 23, 25 (Complaint.)

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ISSUES PRESENTED FOR REVIEW

Can Arizona deny DACA recipients in-state tuition while according it to other deferred action recipients without violating the Fourteenth Amendment Equal Protection Clause?

[3] Eight months later Governor Brewer attempted to ratify the lawsuit with a letter of retroactive authorization. *See* R-31 at 2 (State of Arizona's Response to MCCCD's Motion for Judgment on the Pleadings.) Whether the Attorney General has standing to pursue this action is addressed in MCCCD's Answering Brief, and Student-Intervenors have adopted those arguments by reference.

Is Arizona preempted by federal statutory law and the Supremacy Clause from treating DACA recipients as a disfavored subclass of deferred action recipients?

ARGUMENT

Although the superior court said the Student-Intervenors' equal protection claim "appears to have merit," and suggested that their preemption claim was "plausible," the court did not base its judgment on either ground. R-126 at 5 (5/5/15 Order.) The judgment may be affirmed, however, on any basis supported by the record. *See, e.g., Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300 ¶ 12 (App. 2011). Accordingly, Student-Intervenors address these issues for two purposes.

First, the equal protection and preemption arguments support the statutory interpretation advanced by MCCCD in Part II of its Answering Brief. A venerable canon of construction is that statutes should be interpreted in a way that avoids placing their constitutionality in doubt. R-126 at 5 (5/5/15 Order) (citing *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 270 (App. 2011)); see also *Aitken v. Indus. Comm'n of Ariz.*, 183 Ariz. 387, 389 (1995).

Second, Student-Intervenors' constitutional arguments present independent grounds for affirming the trial court's grant of summary judgment.

Third, in the event this Court concludes that material questions of fact or inference preclude resolving the equal protection and preemption issues in the Student-Intervenors' favor at this stage, the court, for the same reason, should deny the State's request to enter summary judgment in its favor.

I. Arizona's Refusal to Accommodate Student Intervenors' Lawful Presence Underlies Their Equal Protection and Preemption Claims

The Secretary of Homeland Security has the lawful prerogative to authorize certain otherwise unauthorized aliens to remain in the United States for discrete periods of time. This power is recognized in 8 U.S.C § 1182(a)(9)(B), which establishes consequences for *unlawful* presence, and defines unlawful presence in pertinent part as "presen[ce] in the United States after the expiration of the period of stay authorized by the Attorney General." *See* 8 U.S.C § 1182(a)(9)(B)(ii). The Secretary, in the exercise of this power (which, as the statute reflects, was formerly invested in the Attorney General of the United States), can authorize recipients to lawfully apply for a social security number and an EAD in order to put their authorized stay to productive use. Indeed, as the 9th Circuit has noted, the DACA application requires simultaneous application for an EAD. *See Ariz. Dream Act Coal. v. Brewer* ("*ADAC*"), 757 F.3d 1053, 1059 (9th Cir. 2014); *see also* 8 C.F.R. § 274a.12(c)(14). And those, including DACA recipients, who are granted such periods of stay are by statutory definition not *unlawfully* present. *See* 8 U.S.C §

1182(a)(9)(B)(ii). They are rather, by necessary implication, lawfully present, i.e., present by a dispensation that lies within the Secretary's lawful authority.

The lawful presence of deferred action recipients, including DACA recipients, is also supported by 8 U.S.C. § 1611, which, while denying eligibility for federal public benefits to aliens otherwise not qualified, creates an exception for certain social security benefits payable "to an alien who is *lawfully present* in the United States as determined by the Attorney General and … who was authorized to be employed…." *See* 8 U.S.C. § 1611(b)(3). In explication of Section 1611, 8 C.F.R § 1.3, entitled "Lawfully present aliens for purposes of applying for Social Security Benefits," provides in pertinent part, "For the purposes of 8 U.S.C. § 1611(b)(2) only, 'an alien who is lawfully present in the United States' means" an alien who belongs to one of 7 enumerated classes, the sixth of which is "Aliens currently in deferred action status." 8 C.F.R § § 1.3(a)(4)(vi).

"Lawful presence" and its counterpart "unlawful presence" are, in short, codified standards with distinctive meaning within an extensive federal immigration scheme. It should accordingly be inferred that Congress invoked that meaning deliberately, not loosely, when addressing eligibility for state higher education benefits in IIRAIRA (8 U.S.C. § 1623).

Until the announcement of DACA in 2012, six years after the passage of Proposition 300, Arizona authorities recognized unlawful presence as the

touchstone of disqualification and lawful presence as a qualification for higher education benefits in this state. This may be determined, as MCCCD explains in its Answering Brief, from A.R.S. § 15-1803(B)'s explicit expression of accordance with 8 U.S.C. § 1623. It is further established as follows.

First, the Arizona Legislature accepted the federal guidepost of lawful presence when it amended A.R.S. § 1-502 in 2009, three years after the enactment of Prop 300 and three years before DACA's advent, by adding subsection A(7) to the statute. Since that amendment, the statute has provided, in pertinent part:

> A. Notwithstanding any other state law *and to the extent permitted by federal law*, any agency of this state or a political subdivision of this state that administers any state or local public benefit shall require each natural person who applies for the state or local public benefit to submit at least one of the following documents to the entity that administers the state or local public benefit demonstrating *lawful presence* in the United States:
>
> 7. A United States citizenship and immigration services employment authorization document or refugee travel document.

A.R.S. § 1-502(A)(7), amended 2009, H.B. 2008, 3rd Special Session of the 49th Legislature (emphasis added).

Second, five years after the enactment of Prop 300 and one year before DACA's implementation, Arizona's Attorney General recognized unlawful presence as the touchstone of ineligibility for higher education benefits in an Opinion entitled "Re: Community Colleges: Student Not Lawfully Present in U.S. *See* Ariz. Att'y Gen. Op. 111-007. See R-65. Not only did the Attorney General

focus on unlawful presence in the Opinion's title; he also used the term "not lawfully present" at least 29 more times within the body of the opinion to identify those who were ineligible for Arizona in-state tuition. *Id*. (*passim*).

Third, MCCCD has stated "that from and after the adoption of Proposition 300, it accepted employment authorization documents of eligibility to be considered for in-state tuition rates," and that, "consistent with that practice," it continued to do so after the advent of DACA. *See* R-9, at 4, ¶13 (MCCCD Answer); see also R-64 (MCCCD Website).

Fourth, only after the creation of the DACA program did Arizona's Attorney General undertake to challenge MCCCD's practice. In September 2012, the Attorney General initiated lengthy correspondence with MCCCD and its counsel by inquiring whether and on what basis MCCCD intended to grant resident tuition to DACA recipients who present EADs. *See* R-102 at AZ000004-05 (Adams Decl.) Ultimately, MCCCD explained through counsel that MCCCD would do so because DACA recipients' lawful presence qualified them for such benefits and because it "cannot offer a rational basis" to distinguish DACA recipients from other holders of federal work authorizations. *See id.* at AZ000053-55 (Adams Decl.) At the conclusion of that correspondence, Arizona's Attorney General initiated this lawsuit, seeking to enjoin MCCCD from granting resident tuition to DACA recipients alone. *See* R-1 at 6, ¶¶ 23, 25, and Prayer for Relief (Complaint.)

By singling out DACA recipients in this manner, and by seeking essentially to consign them to an inferior subcategory in comparison with other deferred action recipients legally present in the United States, Arizona contravenes and obstructs federal immigration law and violates both the Equal Protection and Supremacy Clauses.

II. Arizona's Disparate Treatment of DACA Recipients Violates the Equal Protection Clause of the Fourteenth Amendment

The State of Arizona violates the equal protection clause in three independent ways. First, among all deferred action recipients, the State challenges only DACA recipients' qualification for in-state tuition, though DACA is merely a form of deferred action. *See ADAC*, 757 F.3d at 1058 (DACA is "a form of deferred action").[4] Second, although Arizona allows other EAD recipients to establish lawful presence for in-state tuition in accordance with A.R.S. § 1-502, it makes an exception of DACA recipients, although all these individuals rely on the same federal identification. Third, Arizona's treatment of DACA recipients under 15-1803(B) conflicts with 8 U.S.C § 1623, the federal standard it purports to

[4] The federal courts have already explained to Arizona that its discriminatory acts on this basis violate equal protection guarantees. An Arizona Federal Court explained, "Defendants' distinction between DACA recipients and other deferred action recipients is likely to fail rational basis review" in the context of drivers' licenses. *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1072 (D. Ariz. 2013). The trial court did not enjoin Arizona's acts initially due to its findings that there was no irreparable harm, and thereafter, the 9th Circuit reversed and ordered that Arizona's illegal acts be preliminarily enjoined. *ADAC*, 757 F.3d at 1069 (9th Cir. 2014).

comply with. *Kurti v. Biedess*, 201 Ariz. 165, 171 ¶21 (App. 2001) (when "Arizona's statutes do not follow the federal law regarding the treatment of a particular subclass of aliens," they are subject to an equal protection challenge applying strict scrutiny).

The State of Arizona did not limit its disparate treatment of DACA recipients to challenging their qualification in-state tuition. It also singled them out for denial of driver's licenses, an attack the 9th Circuit held to warrant preliminary injunctive relief in *ADAC*, 757 F.3d at 1058—an injunction then made permanent by the district court in *Ariz. Dream Act Coal. v. Brewer* ("*Dream Act*"), 81 F. Supp. 3d 795, 800 (2015). The equal protection issues arising from the State's conduct are highlighted in those decisions.

In explanation of its holding, the 9th Circuit observed that DACA recipients were "authorized to be present in the United States in the same sense" as other immigrants issued EADs, and it found no rational basis for the State to distinguish one group from the other as qualified to receive driver's licenses. *See ADAC*, 757 F.3d at 1064, 1066.

The record, according to the court, did suggest one illegitimate basis for the State's policy:

> Defendants' policy appears intended to express animus toward DACA recipients themselves, in part because of the federal government's policy toward them. Such animus, however, is not a legitimate state interest. "If the constitutional concept of 'equal protection of the law'

> means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 1067 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996) (emphasis in text).

Given its finding that the State's policy was "likely to fail even rational basis review," the court found no need to decide what standard of scrutiny would apply. *See id.* at 1065. In a footnote, however, the court 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." *See id.* at 1065 n. 4

Before the district court on remand, the State argued "that DACA recipients are still in the country illegally because the Secretary of DHS lacked the authority to grant them deferred status." *See Dream Act*, 81 F. Supp. 3d. at 805. The district court rejected this contention and found DACA recipients "similar in all relevant respects to noncitizens who are permitted by the State to obtain driver's licenses on the basis of EADs." *See id.*[5] The court went on to permanently enjoin the State

[5] Addressing the question of lawful presence, the court stated, "Other authorities have recognized that noncitizens on deferred action status are lawfully permitted to remain in the United States. *See, e.g., Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258-59 (11th Cir.2012) (a non-citizen "currently classified under 'deferred action' status . . . remains permissibly in the United States"); *In re Pena-Diaz*, 20 I.& N. Dec. 841, 846 (B.I.A.1994) (deferred action status "affirmatively permit[s] the alien to remain"); 8 C.F.R. § 1.3(a)(4)(vi) (persons "currently in deferred action status" are "permitted to remain in" and are "lawfully present in the United States"). The Ninth Circuit also noted that

from refusing to accept EADs as proof of authorization to be present in the United States for the purpose of obtaining a driver's license. *See id.* at 811

The *ADAC* cases pave the way for the equal protection argument in this case. Here as there, DACA recipients have been singled out for disparate treatment. Here as there, the underlying animus is reflected in the record. *See, esp.* R-68, ¶¶ 7, 8 (Brewer Statements and Executive Order.) And here as there, the State can proffer no rational basis for singling out DACA recipients for discriminatory treatment when compared to others presenting valid EADs and others in deferred action.

III. Arizona's Disparate Treatment of DACA Recipients Is Federally Preempted and Violates the Supremacy Clause

Although the State argued unsuccessfully in the *Dream Act* case that "DACA recipients are still in the country illegally because the Secretary of DHS lacked the authority to grant them deferred status," *see Dream Act*, 81 F. Supp. 3d. at 805, it has now apparently agreed that DACA recipients have some sort of lawful presence, but asserts that "lawful presence "is not defined in immigration law." *See* Opening Brief at 20.

Congress' REAL ID Act is "consistent with the INA's definition of 'unlawful presence.'" *ADAC*, 757 F.3d at 1074. The Ninth Circuit further explained that, "Persons with 'approved deferred action status' are expressly identified as being present in the United States during a 'period of authorized stay,' for the purpose of issuing state identification cards." *Id*. at 1074, *citing* 49 U.S.C. § 30301 note, § 202(c)(2)(B)(viii),(C)(ii).

The Student-Intervenors, however, have shown this to be demonstratively untrue. As demonstrated in the authorities cited in Part I of this brief, "lawful presence" and "unlawful presence" are the subject of an extensive network of immigration statutes, regulations, and practices that provide a definitional foundation for Congress's use of unlawful presence in both 8 U.S.C. §§ 1623 and 1621. This network of laws and practices accommodates the Homeland Security Secretary's authority to confer lawful presence for discrete periods of time on various categories of noncitizens, including recipients of deferred action.

When the Secretary makes use of such authority, as in the case of DACA recipients, one effect is the exclusion of the period of authorized presence from the time that will be charged against an eventual application for readmission. *See* 8 U.S.C § 1182(a)(9)(B)(ii). The State acknowledges but dismisses this effect as one of minimal significance. *See* Opening Brief at 20-22. Contrary to the State's dismissive argument, however, this is a substantial *statutorily established* consequence of the deferred status DHS is lawfully empowered to confer.

The same is true of DACA recipients' permission to acquire social security numbers under 8 U.S.C. § 1611(b)(3) and EADs under 8 C.F.R. § 274a.12(c)(14).

In short, deferred action recipients are a class of aliens whose lawful presence, albeit temporary, is accorded defined treatment within the complex of

federal statutes and regulations Student-Intervenors have identified, including the most significant statute for present purposes, IIRAIRA's 8 U.S.C. §§ 1623.

As demonstrated, Arizona accommodated itself to federal effects of lawful presence initially, only changing course with the announcement of DACA. *See supra* at 12-14. But in changing course, the State has attempted to classify DACA recipients as a disfavored subclass, unentitled to what it would otherwise accord to the recipients of deferred action, including the uses of an EAD.

"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). "[S]tate laws are preempted when they conflict with federal law, including when they 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, 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). Because only the federal government is authorized to classify aliens, Arizona cannot create its own unsupported sub-classification of entitlement to the consequences and uses of deferred action. *See Id.*

Arizona's sub-classification of DACA students is likewise federally preempted because—notwithstanding that 15-1803(B) purports to be in accordance

with IIRAIRA's §1623—Arizona reads A.R.S. 15-1803(B) to set a different in-state tuition-eligibility standard than IIRAIRA's. *See Crosby*, 530 U.S. at 372 (State law is conflict-preempted when it is impossible to comply with both state law and federal law).

We end this section by returning to the reason that DACA recipients are federally authorized to hold EADs as well as social security numbers as elements of their authorized presence: to put their authorized presence to productive use. The State's obstruction of that purpose is both unmoored from and contrary to federal law and warrants a determination of both statutory and constitutional preemption.

REQUEST FOR ATTORNEYS' FEES

Pursuant to ARCAP 21, A.R.S. §§ 12-348.01 and 12-341, Appellee requests its fees and costs incurred on appeal.

CONCLUSION

For the foregoing reasons, the judgment of the superior court should be affirmed.

Respectfully submitted this 17th day of February, 2016.

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