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ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA ex rel. Attorney General Mark Brnovich, Plaintiff/Counter-Defendant/Appellant, v. MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD, Defendant/Appellee, ABEL BADILLO and BIBIANA VAZQUEZ, Intervenor-Defendants/ Counter-Plaintiffs/Appellees.	Court of Appeals Division One No. 1 CA-CV 15-0498 Maricopa County Superior Court No. CV2013-009093 **ANSWERING BRIEF OF DEFENDANT/APPELLEE**

ANSWERING BRIEF OF DEFENDANT/APPELLEE

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INTRODUCTION*

The federal government, acting under its broad authority to regulate and enforce immigration standards, created the Deferred Action for Childhood Arrivals ("**DACA**") program. Unsatisfied with the Maricopa County Community College District Board ("**MCCCD**")'s decision to offer resident tuition to DACA recipients, the Attorney General sued MCCCD.

The Attorney General's case suffers from two fundamental problems, either of which independently is sufficient to affirm the judgment in favor of MCCCD. First, and most fundamentally, the Attorney General had no power to sue MCCCD in the first place. Second, even if he did have authority, the superior court correctly held that DACA recipients with employment authorization documents qualify for resident tuition because they are lawfully present in the United States.

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* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP001), which also match the PDF page numbers and function as clickable links. Other record items are cited with "R-" followed by the record number, and are to the lower cause number unless otherwise noted.

STATEMENT OF FACTS AND CASE

I. Background on relevant state and federal laws.

The U.S. Congress passed two statutes in 1996 that play a role in this dispute. The first is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("**PRWORA**"), passed in August 1996. One section of PRWORA addresses a noncitizen's eligibility for certain public benefits. *See* 8 U.S.C. § 1621. The second is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("**IIRAIRA**"), passed in September 1996. IIRAIRA specifically addresses and governs a noncitizen's eligibility for resident tuition. It ties resident tuition eligibility to whether a student is "lawfully present in the United States." 8 U.S.C. § 1623.

Two Arizona voter propositions also play a role in this case. The first is Proposition 200, passed in 2004. That proposition required certain state and local agencies to perform immigration checks on applicants for public benefits and to report violations to federal authorities. *See* A.R.S. § 46-140.01. Confusion about the scope of public benefits that triggered those requirements resulted in an Arizona Attorney General Opinion. That

opinion determined that the proposition applied only to programs within A.R.S. Title 46 ("Welfare"). *See* Ariz. Att'y Gen. Op. I04-010.

Not everyone agreed with the Attorney General's determination of the scope of the proposition. The Legislature responded by passing a bill that would have broadened the scope of applicable benefits (thereby narrowing the availability of more public benefits), but the Governor vetoed that bill. *See* H.B. 2030 (47th Leg., 1st Reg. Sess. 2005); *see also* Fact Sheet for H.B. 2030 (explaining that the purpose was to require that "recipients of certain state-funded services are present legally in the United States").

After the Governor's veto, the Legislature sent the question to the voters in the form of Proposition 300, passed in 2006. Among other things, Proposition 300 amended A.R.S. § 15-1803(B) to read, "In accordance with [IIRAIRA], a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to" resident tuition. That provision is identical in both the vetoed bill and the voter-approved Proposition 300.

One final Arizona statute is relevant. In response to uncertainty over how state and local agencies should determine who is lawfully present, the

Legislature amended A.R.S. § 1-502. That statute specifies that an agency may rely on "[a] United States citizenship and immigration services employment authorization document" as sufficient documentation for "demonstrating lawful presence in the United States." A.R.S. § 1-502(A)(7).

II. The federal government implements DACA.

On June 15, 2012,[1] the federal government announced the DACA program. The U.S. Department of Homeland Security, which has the power to enforce the federal immigration laws, issued a memorandum (the "**2012 DACA Memo**") about how to address "young people who were brought to this country as children and know only this country as home."[2]

DACA permits a narrow set of individuals to apply for prosecutorial discretion. In particular, DACA applies only to an individual who:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years . . . ;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is

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[1] This date also marks the 30th anniversary of *Plyler v. Doe*, 457 U.S. 202 (1982), which held that public K-12 schools could not charge tuition to unauthorized immigrant children because education was a fundamental right.

[2] A copy of the 2012 DACA Memo appears at APP_____-__.

an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

2012 DACA Memo at 1. According to the federal government, applicants who satisfy those criteria are likely to have "lacked the intent to violate the law." *Id.* And many of them are "productive young people" who "have already contributed to our country in significant ways." *Id.*

Consequently, a successful applicant is permitted to remain in the United States lawfully for a renewable two-year period. Although DACA does not itself confer a particular immigration status or create a path to citizenship, the federal government has consistently stated that a DACA recipient "is not considered to be unlawfully present," "is authorized . . . to be present in the United States," and therefore is "lawfully present."[3]

In addition to this case, Arizona is involved in litigation in federal court regarding the effect of DACA on other state issues. An opinion from

[3] [R-82 at 2] Q1; *see also id.* at Q5 ("[Y]ou are considered to be lawfully present in the United States").

the Ninth Circuit in that case provides additional useful background on DACA. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058-59 (9th Cir. 2014).[4]

III. After analyzing the issue, MCCCD offered resident tuition to DACA recipients with employment authorization documents.

MCCCD determined that a DACA recipient with employment authorization may be eligible for resident tuition.[5] MCCCD explained its reasoning in a public document. In summary, an individual must be "lawfully present" in order to qualify for resident tuition under 8 U.S.C. § 1623(a), and as a matter of state law (A.R.S. § 1-502), MCCCD may rely on employment authorization documents to verify lawful presence.[6]

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[4] The Fifth Circuit has preliminarily enjoined the Deferred Action for Parents of Americans and Lawful Permanent Residents ("**DAPA**") program for failure to satisfy the notice-and-comment requirement of the Administrative Procedure Act, but DAPA is independent from DACA and the Fifth Circuit's ruling has no effect on DACA or the issues raised in this case. *See Texas v. United States*, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *revised* (Nov. 25, 2015). The Supreme Court has granted a writ of certiorari. *See* -- U.S. --, 2016 WL 207257 (Jan. 19, 2016).

[5] *See* [R-83 at PDF pages 35-37].

[6] *See* [R-83 at PDF pages 35-37].

IV. The Attorney General sued MCCCD without any authorization or power to do so.

The Attorney General disagreed with MCCCD's interpretation. He sued MCCCD, seeking declaratory and injunctive relief prohibiting MCCCD from permitting DACA recipients to pay resident tuition.[7]

In a motion for judgment on the pleadings, MCCCD argued that the Attorney General had no authorization or power to file the lawsuit in the first place.[8] Then, nearly 8 months after suing, the Attorney General obtained a letter from the Governor purporting to authorize the Attorney General to file the suit that he had already filed.[9] The superior court agreed with MCCCD that the Attorney General had no independent statutory or constitutional authority to sue MCCCD on this issue, but held that the Governor's letter supplied the otherwise missing authority.[10]

In addition, two MCCCD students who paid resident tuition based on DACA moved to intervene.[11] Although the Attorney General opposed

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[7] *See* [R-1 at 6].

[8] [R-27].

[9] [R-33 at PDF page 5].

[10] [R-52 at 2-3].

[11] R-15.

their intervention,[12] the superior court granted those students intervention as of right under Ariz. R. Civ. P. 24(a).[13]

V. The superior court held that DACA recipients are eligible for resident tuition.

The superior court granted summary judgment in favor of MCCCD and the intervenors.[14] Agreeing with MCCCD, the court reasoned that individuals "lawfully present" are eligible for resident tuition, and that a DACA recipient who submits employment authorization documents may be considered lawfully present.[15]

The superior court entered judgment in favor of MCCCD and the student intervenors and certified the judgment under Ariz. R. Civ. P. 54(b).[16] Only claims for attorneys' fees and costs remain pending in the superior court.

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[12] R-20.

[13] R-40.

[14] *See* [R-126].

[15] *See* [R-126 at 3-5].

[16] [R-136 at 2].

STATEMENT OF THE ISSUES

1. The Arizona Constitution limits the Attorney General's powers to those the legislature expressly creates by statute. No statute or legislative act authorized the Attorney General to file this lawsuit. Should judgment in favor of MCCCD be affirmed because the Attorney General filed this lawsuit without the power to do so?

2. As a matter of state and federal law, individuals who are lawfully present in the United States may be eligible for resident tuition. It is undisputed that DACA recipients are lawfully present. Did the superior court correctly hold that DACA recipients may lawfully receive resident tuition in light of their lawful presence in the United States?

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *See Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 518 ¶ 9 (App. 2009). It also reviews de novo the superior court's legal conclusions in its ruling on a motion for judgment on the pleadings. *Shaw v. CTVT Motors, Inc.*, 232 Ariz. 30, 31 ¶ 8 (App. 2013).

ARGUMENT SUMMARY

The Attorney General has only the powers given to him by the Arizona Constitution or the Legislature. No constitutional provision or statute authorized him to file this lawsuit. Although the Governor purported to authorize the suit, as a matter of Arizona constitutional law the Governor has no power to give the Attorney General extra powers. (Argument § I.)

On the merits, the superior court correctly held that a DACA recipient may pay resident tuition to MCCCD. MCCCD has the authority to set tuition rates, including determining those students who qualify for resident tuition. No part of Arizona or federal law prohibits a student lawfully present in the United States from paying resident tuition. (Argument § II.A.) As a matter of federal law, a DACA recipient is lawfully present, and as a matter of Arizona law, MCCCD may rely on an employment authorization document to verify lawful presence. (Argument § II.B.)

The Attorney General's arguments for reversal are incorrect. Even though DACA does not confer a particular immigration status, a DACA recipient may still qualify for resident tuition because a DACA recipient is

lawfully present. (Argument § II.D.1.) Contrary to his contention, 8 U.S.C. § 1621 (PRWORA) does not prohibit a DACA recipient from paying resident tuition because 8 U.S.C. § 1623 (IIRAIRA) governs that issue. (Argument § II.D.2.) Finally, the legislative history of Proposition 300 supports the superior court's holding that a student lawfully present in the United States may qualify for resident tuition. (Argument § II.D.3.) The judgment should be affirmed.

ARGUMENT

I. The Attorney General had no authority to bring this lawsuit.

A. The judgment should be affirmed based on the lack of authority to file suit.

The superior court did not base its judgment in favor of MCCCD on the authority of the Attorney General to file suit. But the judgment should be affirmed on this basis. The judgment may be affirmed on any basis supported by the record. *See, e.g.*, *Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300 ¶ 12 (App. 2011) (Court of Appeals may "affirm a trial court on any basis supported by the record" (citation omitted)).

Because affirming on this basis would not expand the judgment, no cross-appeal is necessary. *See CNL Hotels & Resorts, Inc. v. Maricopa County*, 230 Ariz. 21, 25 ¶ 20 (2012) ("Merely seeking to support a lower court's

judgment for reasons not relied upon by it is not attempting to enlarge [an appellee's] own rights or lessen those of [an] adversary, and a cross appeal is unnecessary." (alterations in original; internal quotation marks and citation omitted)).

B. The Attorney General had no statutory basis to file this suit.

As a matter of constitutional law, the Attorney General has limited powers in Arizona. He cannot sue without an express constitutional or statutory grant of power. *See, e.g.*, *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997) ("In Arizona, the Attorney General has no common law powers; whatever powers he possesses must be found in the Arizona Constitution or the Arizona statutes." (quotation marks and citation omitted)). No provision of the Arizona Constitution authorizes the Attorney General to sue, and the Attorney General has never identified any constitutional authority for this case.

Nor does he have any statutory basis. For his purported statutory authority, the Attorney General relies solely on A.R.S. § 41-193(A)(2).[17] The superior court properly rejected that argument.[18] That statute permits the

[17] [2014-4-14 Supplemental brief at 2].

[18] [2014-4-25 order at 2-3].

Attorney General to "prosecute and defend any proceeding . . . in which the state or an officer thereof is a party or has an interest." A.R.S. § 41-193(A)(2). But under settled law in Arizona, § 41-193(A)(2) does not itself authorize the Attorney General to initiate proceedings.

In *Arizona State Land Dept. v. McFate*, 87 Ariz. 139 (1960), the Arizona Supreme Court thoroughly analyzed that statute and the powers of the Attorney General. It held that § 41-193(A)(2) "*presupposes* a properly instituted proceeding in which the State or an officer thereof 'is a party or has an interest. . . .'" *McFate*, 87 Ariz. at 145 (emphasis added). The Court specifically held that the statute "does not permit the Attorney General, in the absence of specific statutory power, to initiate an original proceeding." *Id.* "To hold otherwise," the Court explained, "would, in effect, vest him [the Attorney General] with common law powers contrary to the clear purport of our Constitution and statutes." *Id.* (citations omitted). In addition, the Court explained that although § 41-193(A)(2) authorizes the Attorney General to "prosecute" actions, in this context that word does not mean "the power to commence a proceeding." *McFate*, 87 Ariz. at 146.

In many instances the Attorney General *may* initiate proceedings. But "these instances are dependent upon specific statutory grants of

power." *McFate*, 87 Ariz. at 144. "[W]here the legislature intended to authorize the Attorney General to initiate proceedings, it has so provided in clear terms." *McFate*, 87 Ariz. at 146.

For these reasons, A.R.S. § 41-193(A)(2) does not provide an independent basis for suing. The Attorney General must look elsewhere for statutory authority to bring this case, but he relies on no other statutory basis. Recognizing this settled law, the superior agreed with MCCCD on this point, holding, "Initially, the Court agrees with MCCCD that the Attorney General did not have statutory authority to initiate this action," and quoting *McFate* to explain why § 41-193(A)(2) does not give the Attorney General authority.[19]

C. The Governor's letter did not give the Attorney General power to sue.

1. Under the Arizona Constitution, the Governor and the Attorney General are independent.

With no statutory basis for his actions, the Attorney General turned to the Governor. The Governor signed a letter purporting to authorize the Attorney General to sue, even though he had already filed suit eight

[19] [2014-4-25 order at 2].

months earlier.[20] This letter, however, provides no legitimate basis for the Attorney General's lawsuit because the Governor lacks the authority to give that power to the Attorney General.

Under the Arizona Constitution, both the Governor and the Attorney General are constitutionally created positions. Arizona voters elect each official independently. *See* Ariz. Const. art. V, § 1(B). And the Constitution specifies each of their powers in different ways.

As to the Governor, the Constitution itself specifically lists the powers of that office. *See* Ariz. Const. art. V, § 4. The Constitution also addresses the powers and duties of the Attorney General. But rather than establish specific constitutional duties and powers, the Constitution delegates that authority to the Legislature. It says, "The powers and duties of . . . [the] attorney-general . . . shall be as prescribed by law." Ariz. Const. art. V, § 9. The Legislature, in turn, has fleshed out the powers and duties of the Attorney General. The general powers and duties appear in A.R.S. §§ 41-192, 41-193. Other individual statutes give the Attorney General powers in other specific circumstances. E.g., A.R.S. § 38-431.07 (Open

[20] [R-33 at PDF page 5].

Meeting Law; authorizing the Attorney General to "commence a suit" for the purposes of requiring compliance with the Open Meeting Law or determining whether violations of the Law occurred); [ADD OTHER EXAMPLES].

Thus, under the Arizona Constitution, the Attorney General has only specific powers, and those powers are limited to those "prescribed by law," i.e., by the Legislature. That term, as used in the Arizona Constitution when doling out powers to government officials, unambiguously means "as provided by *legislative enactment*." *Litchfield Elementary Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 221 (App. 1980) (emphasis added; collecting cases); *accord McFate*, 87 Ariz. at 142 ("[T]he 'law' referred to in Article V, Section 9, is the statutory law of the State and not the common law.").

At bottom, the Governor and the Attorney General are independent constitutionally created positions, and that constitutional independence must be respected. To permit one office to add powers or retroactively bless the ultra vires action of another office would impinge on the offices' independence, encroach on the voters' separate elections for each office,

and interfere with the power of the Legislature to define the powers of the Attorney General.[21]

2. The Governor's and the Attorney General's claimed rationales for blessing the lawsuit violate the Arizona Constitution.

Because the Constitution limits the Attorney General's power, the Attorney General must bear the burden of demonstrating why and how its novel theory comports with Arizona's constitutional structure when no legislative act authorizes this suit. The Governor and the Attorney General rely on the Governor's constitutional duty to "take care that the laws be faithfully executed." Ariz. Const. art. V, § 4. But that provision "is not a source from which the power to make legislative decisions can be created." *Litchfield*, 125 Ariz. at 220. In other words, the take-care clause does not enable the Governor to make law. Consequently, because the Constitution limits the Attorney General's powers to those the Legislature chooses, the

[21] In these ways, Arizona's system diverges from the federal system. The U.S. Constitution did not create the Attorney General of the United States. Rather, the U.S. Congress created that office *after* the Constitution was ratified. Due to that congressional enactment, the President appoints the Attorney General of the United States. *See* 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States."). Under the federal system, therefore, the President may direct and authorize the Attorney General to act in ways that Arizona's governor cannot.

Governor cannot use the take-care clause to provide the Attorney General with power the Legislature has not otherwise granted to him.

Before the superior court, the Attorney General relied solely on *McFate*, 87 Ariz. 139.[22] That case does not support the Attorney General's theory. To start, it held that the Attorney General did *not* have the power to sue without express statutory authority. *See id.* at 148 ("We hold that the Attorney General was without authority to initiate the proceeding before the Superior Court. . . ."). That case involved a suit the Attorney General filed against the State Land Department and State Land Commissioner. The case cites the take-care clause as support for the notion that the Governor could achieve the *result* desired by the Attorney General because the Governor "is responsible for the supervision of the executive department" (including the defendants State Land Department and State Land Commissioner), and must take care that the laws are faithfully executed as part of those supervisory powers. *Id.* But it forbade the *means* used in that case, i.e., a suit brought by the Attorney General. Nothing in the case supports the notion that the take-care clause enables the Governor

[22] [R-31 at 2].

to authorize the Attorney General to sue. The Attorney General's use of the Governor's letter and the take-care clause is unprecedented and should be rejected.

The superior court incorrectly found that the take-care clause and the Governor's letter justified the Attorney General's action. In addition to *McFate*, it relied on two cases, neither of which supports such an interpretation of the Constitution.[23] In *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458 (App. 2007), the court held that the Governor could properly be named as a *defendant* in a declaratory judgment action concerning the proper implementation of a voter initiative because the Governor has the power to direct how the executive branch implements a law. *See* 215 Ariz. at 470 ¶ 37. That power to direct the implementation of the law stems from the take-care clause. *See id.* ¶ 35. The case does not permit the Governor to give the Attorney General the power to sue.

In *Ahearn v. Bailey*, 104 Ariz. 250, 253 (1969), the Court held that the Legislature lacked the power to remove members of the Industrial Commission because that power fell within the Governor's charge to take

[23] [R-52 at 3].

care that the laws are faithfully executed. It says nothing about the power to sue or the Governor's authority to give power to the Attorney General. To the contrary, it confirms that "the powers and duties of the office of Attorney General are wholly within the control of the Legislative Department." *Id.* at 254.

For these reasons, the Attorney General lacked the power to bring this suit in the first place. The Attorney General has no constitutional or statutory basis for this case, and the superior court erred in finding that the Governor's letter could give the Attorney General extra powers. The judgment in favor of MCCCD should be affirmed on this basis.

II. The superior court correctly held that nothing prohibits MCCCD from accepting resident tuition from DACA-qualified students because they are lawfully present in the United States and have the necessary documentation.

A community college district such as MCCCD has statutory authority to make policies for determining eligibility for resident tuition, subject to some certain requirements. *See* A.R.S. §§ 15-1802.01, 15-1805(B); *see also* A.R.S. § 15-1802 (requirements for in-state tuition). MCCCD used this authority to determine that a DACA recipient with employment

authorization documents may pay resident tuition.[24] That determination is a valid exercise of MCCCD's authority unless the Attorney General can demonstrate that some other statutory basis prohibits it.

This dispute principally turns on whether any federal or state statute prohibits a determination by MCCCD that students lawfully present in the United States meet the residency requirements for in-state/resident tuition. Because no statute prohibits that, MCCCD's determination is valid and proper and the judgment should be affirmed.

A. An individual "lawfully present" in the United States may qualify for resident tuition.

1. Under federal law, an individual "lawfully present" in the United States may qualify for resident tuition.

An individual must be lawfully present in the United States in order to qualify for resident tuition. The U.S. Congress established that requirement in IIRAIRA, which specifies that "an alien who is not *lawfully present* in the United States shall not be eligible on the basis of residence . . . for any postsecondary education benefit." 8 U.S.C. § 1623 (emphasis added). Those who are not lawfully present may not receive resident

[24] *See* [R-83 at PDF pages 35-37].

tuition, but the statute does not prohibit those who *are* lawfully present from paying resident tuition.

2. Under Arizona law, an individual "lawfully present" in the United States may qualify for resident tuition.

Arizona state law mirrors that federal requirement. Arizona voters passed Proposition 300 in 2006, which expressly amended Arizona law to be consistent with IIRAIRA on this point. As amended, A.R.S. § 15-1803(B) states, "In accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [citation omitted], a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student."

The phrase "lawful immigration status" in A.R.S. § 15-1803(B) is not defined under either federal or state law. For several reasons, when read in context it must mean the same thing as "lawfully present" in 8 U.S.C. § 1623.

First, the Arizona statute expressly references the federal statute, indicating the intention to interpret one the same way as the other. *See* A.R.S. § 15-1803(B) ("In accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . ."). For that express statutory

cross-reference to make any sense, the phrase "lawful immigration status" in A.R.S. § 15-1803(B) must mean the same thing as "lawfully present" in 8 U.S.C. § 1623.

Second, the same Arizona voter proposition that added the phrase "lawful immigration status" in A.R.S. § 15-1803(B) used that phrase interchangeably with "lawfully present" in a different section. In A.R.S. § 15-1825(A), an individual "without lawful immigration status . . . is not entitled to tuition waivers" and some other forms of financial assistance. The next subsection of that statute requires community colleges and universities to report the number of students "not entitled to tuition waivers" and the other forms of financial assistance because they are "not lawfully present in the United States." A.R.S. § 15-1825(B). The reporting obligation in subsection B must cover the same scope as the prohibition in subsection A for the statute to make any sense, particularly because both subsections list the same types of financial assistance. Consequently, the phrase "lawful immigration status" must mean the same thing as "lawfully present" in the statutes created or amended by Proposition 300, including A.R.S. § 15-1803(B).

Third, other Arizona statutes also confirm that an individual "lawfully present" in the United States may qualify for resident tuition. For example, only a "[q]ualified applicant" is eligible for a particular loan program for certain teachers. A.R.S. § 15-1781. The term "[q]ualified applicant" means "an Arizona resident who is a citizen or legal resident of the United States or who is otherwise *lawfully present* in the United States," and, if the applicant attends an Arizona university, "qualifies for in-state tuition." A.R.S. § 15-1781(2) (emphasis added).

Fourth, an Arizona Attorney General Opinion confirms that A.R.S. § 15-1803(B) turns on whether the individual is "lawfully present." In 2011 (before DACA), the Arizona Attorney General issued an Opinion concerning the effects of Proposition 300 and A.R.S. § 15-1803(B) on resident tuition. *See* Ariz. Att'y Gen. Op. I11-007.[25] The Opinion quotes the phrase "lawful immigration status" from the statute, but never uses it outside of quotation marks. By contrast, the Opinion uses the phrase "lawfully present" 32 times, typically suggesting that phrase as the test for resident tuition eligibility. *See, e.g., id.* at 6 ("Proposition 300 was intended

[25] A copy is available at {CITE TO RECORD OR ADDENDUM}.

to require that persons not *lawfully present* in the United States must pay out-of-state tuition rates." (Emphasis added)).

For these reasons, the only interpretation of A.R.S. § 15-1803(B) that makes sense, comports with the expressly referenced federal law, fits within other statutory sections from the same voter proposition and other statutes, and is consistent with the Attorney General Opinion, is that an individual lawfully present may pay resident tuition.

B. A DACA recipient with employment authorization is "lawfully present."

The superior court correctly held that DACA recipients are lawfully present.[26] The Attorney General does not contest that holding, and in fact recognizes that "the USCIS does consider such persons to be lawfully present during the period deferred action is in effect." (Opening Brief at 20 (quotation marks omitted).)[27] Nor could he contest that. The Ninth Circuit has held that "DHS considers DACA recipients not to be unlawfully

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[26] [R-126 at 4-5].

[27] Later in its brief, the Attorney General asserts, "As explained in above [sic], the USCIS's decision in that regard does not mean that DACA recipients are lawfully present. . . ." (Opening Brief at 24.) The Attorney General does not explain that assertion or how to reconcile it with the stated position of the federal government.

present in the United States because their deferred action is a period of stay authorized by the Attorney General." *Brewer*, 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)); *see also* 8 C.F.R. § 1.3(a)(4)(vi) (for Social Security benefits, persons "currently in deferred action status" are "lawfully present in the United States").

MCCCD verifies DACA students' lawful presence by checking their employment authorization documentation. *See Brewer*, 757 F.3d at 1059 ("DACA recipients are also eligible to receive Employment Authorization Documents, allowing them to work in the United States. Indeed, would-be DACA recipients are *required* to apply for employment authorization when they apply for DACA."). As the superior court correctly held, "In Arizona, an EAD [employment authorization document] is appropriate documentation of 'lawful presence' in the U.S."[28] The court relied on A.R.S. § 1-502(A), which specifies what documents state and local authorities must use to determine whether an individual is lawfully present. That statute allows an agency to rely on "[a] United States

[28] [R-126 at 5].

citizenship and immigration services employment authorization document" as sufficient documentation for "demonstrating lawful presence in the United States." A.R.S. § 1-502(A)(7).

Consequently, as a matter of Arizona law, an individual who produces an employment authorization document (obtained through the DACA program) qualifies as lawfully present and may qualify for resident tuition.

C. The Attorney General mischaracterizes the superior court's opinion.

The Attorney General repeatedly mischaracterizes the superior court opinion by identifying supposed errors that the superior court did not actually make. For example, he suggests that the superior court erred by holding that DACA confers a particular status. He says (at 20), "[c]ontrary to the trial court's conclusions, none of these benefits changes a DACA recipient's immigration status." The superior court made no such error because it never concluded that DACA confers status. Rather, the superior court correctly concluded that a DACA recipient is lawfully present in the

United States, which means that he or she may be entitled to resident tuition.[29]

He also claims (at 31) that "The trial court erred in concluding that 8 U.S.C. § 1623 granted eligibility for in-state tuition." But the court did not hold that the statute granted eligibility. To the contrary, it held, "individuals who are 'lawfully present' in the U.S. are not *excluded* from state 'resident education benefits' by federal law."[30] MCCCD has the statutory authority to determine who qualifies for resident tuition, so long as the students who pay resident tuition meet the statutory requirements and no other statute *prohibits* it. *See* A.R.S. §§ 15-1802.01, 15-1805(B); *see also* A.R.S. § 15-1802.

The Attorney General also complains (at 36) that the superior court "construed the statute to . . . allow those *not here lawfully* to establish eligibility for in-state tuition." (Emphasis added.) To the contrary, the superior court did the exact opposite. It construed the statute to *require* an

[29] [R-126 at 4].

[30] [R-126 at 4] (emphasis added).

individual to be here lawfully (i.e., to be "lawfully present") in order to qualify for resident tuition.[31]

D. The Attorney General's arguments to the contrary conflict with the controlling statutes.

The Attorney General offers several arguments related to the interpretation of A.R.S. § 15-1803(B), none of which has any merit or justifies reversal.

1. Contrary to the Attorney General's contention, a DACA recipient may qualify for resident tuition even though DACA does not confer a particular status.

The Attorney General principally contends (e.g., at 16) that a DACA recipient is not eligible for resident tuition merely because "DACA does not change an illegal alien's formal immigration status." Fundamentally, the Attorney General's repeated insistence that DACA does not confer a particular immigration status misses the point. When read together and in context with other Arizona statutes, 8 U.S.C. § 1623 and A.R.S. § 15-1803(B) make resident tuition available to individuals "lawfully present." (*See* Argument § II.A.)

[31] [R-126 at 4.]

For this reason, the Attorney General's reliance (at 18-19) on the opinion of the Office of Legal Counsel similarly misses the point. He inaccurately summarizes the opinion (at 18) as concluding that DACA recipients "obtain nothing more than relief from deportation." Although the opinion states that DACA does not confer a specific status, it also explains, "unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence. . . ." 38 Op. O.L.C. 1, 20. And it explains in detail the specific statutory and regulatory bases for those benefits. *See id.* at 21-22.

2. 8 U.S.C. § 1621 does not prohibit a DACA recipient from being eligible for resident tuition.

The Attorney General suggests (at 25-31) that PRWORA, 8 U.S.C. § 1621, prohibits a DACA recipient from receiving resident tuition. It does not. That flawed argument rests on several flawed premises. First, Arizona law specifically references IIRAIRA, not PRWORA. Second, as a matter of federal law, 8 U.S.C. § 1623, not 8 U.S.C. § 1621, governs the availability of resident tuition. And third, Arizona did not need to pass the

type of law called for by subsection (d) of § 1621 because DACA recipients are lawfully present.

(a) Arizona law incorporates the legal standard from IIRAIRA not PRWORA.

In determining who is eligible for or prohibited from receiving resident tuition, Arizona law explicitly incorporates IIRAIRA, 8. U.S.C. § 1623. The Arizona statute reads, "In accordance with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208; 110 Stat. 3009). . . ." A.R.S. § 15-1803(B) (capitalization altered). The statute expressly includes the federal public law number and citation to the Statutes at Large. This citation unambiguously refers to IIRAIRA, not to PRWORA.

Although the Attorney General attempts to conflate the two by citing both §§ 1621 and 1623 in the same sentence with the names of both PRWORA and IIRAIRA (at 25), the statutes came from separate enactments. IIRAIRA bears Public Law Number 104-208 and is found at 110 Stat. 3009. Section 505 of that Act was codified at 8 U.S.C. § 1623, and includes the "lawfully present" standard. By contrast, 8 U.S.C. § 1621 comes from an entirely different act of Congress: PRWORA, which bears

Public Law Number 104-193 and is found at 110 Stat. 2105. Consequently, the reference to federal law in the Arizona statute (A.R.S. § 15-1803(B)) must refer to 8 U.S.C. § 1623.

(b) Resident tuition is governed by 8 U.S.C. § 1623, not 8 U.S.C. § 1621.

The Attorney General contends (e.g., at 28) that PRWORA, 8 U.S.C. § 1621, governs eligibility for resident tuition. But that section does not even mention resident tuition. Rather, it addresses state benefits generally, including housing assistance, welfare benefits, unemployment compensation, and food stamps. It covers some grants concerning postsecondary education, such as scholarships or similar grants, but does not specifically address resident tuition. By contrast, IIRAIRA, 8 U.S.C. § 1623, expressly covers residence-based based postsecondary education benefits, i.e., resident tuition.

Because 8 U.S.C. § 1621 covers state benefits generally and 8 U.S.C. § 1623 addresses resident tuition specifically, § 1623 controls. "A basic principle of statutory interpretation instructs that specific statutes control over general statutes." *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 100 (App. 1994). Moreover, even if §

1621 could be interpreted to apply to resident tuition in a vacuum (i.e., if § 1623 did not exist), the existence of the more specific statute (§ 1623) means that § 1623 still controls. *See Mercy*, 181 Ariz. at 100 ("Further, when a general and a specific statute conflict, we treat the specific statute as an exception to the general, and the specific statute controls.").

The Attorney General's cited authorities do not support his contention. For example, he cites (at 26) *Texas v. United States*, 2015 WL 6873190, but the very quotation he includes says nothing about the issue. He quotes the case for the unremarkable proposition, "Unlawfully present aliens are generally not eligible to receive . . . state and local public benefits unless the state otherwise provides." *Id.* at *2. That point concerning individuals who are *unlawfully* present is not in dispute. Indeed, the same opinion further explains that deferred action and the resulting change to being "lawfully present in the United States" is "a change in designation that confers eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens." *Id.* at *17.

He also cites *Martinez v. Regents of Univ. of California*, 166 Cal. App. 4th 1121 (2008), even though that opinion was superseded, 198 P.3d 1 (Cal. 2008) and ultimately reversed, 50 Cal. 4th 1277 (2010). And in the

controlling opinion, the court determined that the specific California policy at issue did not even trigger 8 U.S.C. § 1623 because the policy did not require residency at all—"many *nonresidents* may qualify for it." 50 Cal 4th at 1290.

Similarly, the report from the Congressional Research Service (cited in Opening Brief at 26) ambiguously refers to both PRWORA (§ 1621) and IIRAIRA (§ 1623) in the same sentence, which provides little help. And in any event, the report is not binding on federal courts, let alone an Arizona court.

The Attorney General's reliance (at 29-30) on legislative purpose and statutory titles suffers from the same problem. The title for 8 U.S.C. § 1623 ("Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits") reflects the reality that those who are *not* "lawfully present" enjoy fewer benefits than those who *are* "lawfully present," which is entirely consistent with the legislative purposes identified by the Attorney General.

(c) A DACA recipient may qualify for resident tuition even without a state enactment under 8 U.S.C. § 1621(d).

The Attorney General (at 27) incorrectly claims that 8 U.S.C. § 1621(d) requires Arizona to pass a specific form of law in order to make DACA recipients eligible for resident tuition. But that subsection requires a state to pass a new law only to provide a benefit to "an alien who is *not lawfully present in the United States*." 8 U.S.C. § 1621(d) (emphasis added). Even assuming that PRWORA applies to resident tuition benefits, because it is undisputed that a DACA recipient *is* lawfully present, Arizona did not have to make a new law in order to extend resident tuition to DACA recipients.

The Attorney General cites (at 28) three out-of-state statutes that "make resident tuition available to aliens who are *not* lawfully present." (Emphasis added.) But those statutes concerning those not lawfully present shed no light on DACA recipients, who *are* lawfully present.

3. The Attorney General contends that the Arizona voters intended to limit resident tuition "to those here legally," but DACA recipients are "here legally" because they are "lawfully present."

The Attorney General invites this Court to consider the legislative history of Proposition 300. (*E.g.*, Opening Brief at 35-36.) But even the

Attorney General's own interpretation of the legislative history supports the superior court's holding that students who are lawfully present may be eligible for resident tuition.

The Attorney General claims Proposition 300 "was intended to limit access for taxpayer-funded education benefits to those *here legally*." (Opening Brief at 35 (emphasis added).) He further claims, "Both supporters and opponents described the measure as applying to those *not here legally*. . . ." (*Id.* (emphasis added).) Exactly. A student who is "lawfully present" *is* "here legally." The Attorney General does not explain how or why "here legally" requires a particular formal status, above and beyond the natural meaning of "lawfully present."

He further claims (at 35-36) that "[b]oth supporters and opponents described the measure as applying to those not here legally and neither drew a distinction between the provisions that applied to those 'without lawful status' and those without 'lawful presence.'" He is correct, and that further demonstrates why those terms must be interpreted to mean the same thing, and further illustrate why the superior court properly interpreted A.R.S. § 15-1803(B) as requiring lawful presence.

To remove all doubt, he even quotes an Arizona Attorney General Opinion highlighting the "intention to require persons *not lawfully present* in the United States to pay out-of-state tuition rates." (*Id.* at 36 (emphasis added) (quoting Ariz. Att'y Gen. Op. I11-007 (2011)).) Thus, even using the Attorney General's evidence of voter intent, an individual who is "lawfully present" may be eligible for resident tuition.

4. The Attorney General's arguments concerning the role of an employment authorization document miss the point.

The Attorney General disputes the superior court's reliance on an employment authorization document. But in so doing, the Attorney General misinterprets the role of the employment authorization document.

The superior court held that "an EAD is appropriate documentation of 'lawful presence' in the U.S."[32] That is the correct interpretation of Arizona law, which expressly lists "[a] Untied States citizenship and immigration services employment authorization document" as sufficient documentation for "demonstrating lawful presence in the United States." A.R.S. § 1-502(A)(7).

[32] [IR-126 at 5.]

The Attorney General identifies two purported errors, but both miss the point. First, the Attorney General claims (at 37-38) that the list of documents in A.R.S. § 1-502(A) is both overinclusive and underinclusive. He identifies a particular document (an I-94 form) that does not always indicate lawful presence, and an Arizona Attorney General Opinion concluding that the list is not perfect. Those criticisms have nothing to do with this case or this dispute. Whatever problems the other documents may have, the Attorney General offers no reason why an *employment authorization document* in particular is inadequate to establish lawful presence.

Second, the Attorney General notes (at 38; *also* at 23) that "EADs may be issued to persons who lack lawful immigration status." But the superior court did not hold otherwise, nor did it need to. Eligibility for resident tuition requires lawful presence, and as a matter of Arizona law an agency may rely on an employment authorization document as evidence of lawful presence. *See* A.R.S. § 1-502(A)(7).

REQUEST FOR ATTORNEYS' FEES AND INTEREST

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

{INTEREST?}

CONCLUSION

The judgment of the superior court should be affirmed.

RESPECTFULLY SUBMITTED this ___ day of _____, 2016.

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