SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-009093 05/05/2015

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nelson
Deputy

STATE OF ARIZONA, et al.

KEVIN D RAY

v.

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT BOARD

LYNNE C ADAMS

NATHAN J FIDEL

RULING

The Court has had under advisement (i) the State's Motion for Judgment on the Pleadings (filed Feb. 26, 2014), (ii) the Student Intervenors' Motion for Summary Judgment (filed May 16, 2014), (iii) MCCCD's Motion for Summary Judgment (filed July 8, 2014); and (iv) the State's Motion for Summary Judgment on the Student Intervenors' Claims (filed Aug. 21, 2014).[1]

I.

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Ariz. v. U.S.*, 132 S. Ct. 2492, 2498 (2012); *see* U.S. Const., Art. I, § 8, cl. 4. "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Ariz. v. U.S., id.*

[1] The "State" references Plaintiff State of Arizona *ex rel.* Attorney General Thomas C. Horne; the "Student Intervenors" references Defendants Abel Badillo and Bibiana Vazquez; and "MCCCD" references Defendant Maricopa County Community College District.

The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, ("INA") charges the Secretary of the Department of Homeland Security ("DHS") with the administration and enforcement of all laws relating to immigration. *Ariz. Dream Act Coalition v. Brewer,* 2015 WL 300376, at *2 (D. Ariz. Jan. 22, 2015) ("*ADAC II*").

On June 15, 2012, the DHS Secretary announced a program that authorizes certain immigrants who came to the U.S. as children, without permission, to remain in the U.S. without fear of removal. This program is called Deferred Action for Childhood Arrivals ("DACA"). *See generally Ariz. Dream Act Coalition v. Brewer,* 757 F.3d 1053, 1057-58 (9th Cir. 2014) ("*ADAC*").[2] "Deferred action constitutes a discretionary decision by law enforcement authorities to defer legal action that would remove an individual from the country." *ADAC II,* 2015 WL 300376, at *1.

To qualify under DACA, an individual must show that he/she (1) came to the U.S. under the age of 16; (2) has continuously resided in the U.S. for at least five years preceding June 15, 2012; (3) currently attends school, has graduated from high school, has obtained a GED certification, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; (4) 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 (5) is not above the age of 30. *See* Napolitano Mem. at 1. A would-be DACA recipient is required to apply for an Employment Authorization Document ("EAD") from the U.S. Citizenship and Immigration Services ("USCIS"); an EAD allows a DACA recipient to work in the U.S. during the period of deferred action. *See generally ADAC,* 757 F.3d at 1059.

MCCCD has determined that a DACA recipient who presents an EAD *and* who meets Arizona state law residency requirements (*see* A.R.S. §§ 15-1801, -1802, 1802.01, -1803) is eligible for resident tuition (hereinafter, "DACA Resident Student").[3] The State disagrees with this determination and has filed this action for declaratory and injunctive relief, seeking to enjoin MCCCD from continuing to give resident tuition to DACA Resident Students.

[2] *Citing* Mem. from Janet Napolitano, Sec'y, DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children* (June 15, 2012) (MCCCD SOF at Ex. 10); *see also* Mem. from Jeh Charles Johnson, Sec'y, DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* ("Napolitano Mem.") (MCCCD Notice of Supplemental Auth. (filed Dec. 19, 2014) at (Ex.) 1).

[3] The Student Intervenors are DACA Resident Students.

A.

In 2006, Arizona voters indicated their refusal "to subsidize illegal aliens" by passing Proposition 300.[4] Among the provisions included in Proposition 300 was A.R.S. § 15-1803(B). This provision explicitly seeks harmony with existing federal law.

> *In accordance with the illegal immigration reform and immigrant responsibility act of 1996* ["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 classification as an in-state student pursuant to § 15-1802….

(Emphasis added.)

A court's "primary objective" in construing statutes adopted by initiative "is to give effect to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, 57 (2006), *citing Calik v. Kongable*, 195 Ariz. 496, 498 (1999). If the language of an initiative is "clear and unambiguous and, thus subject to only one reasonable meaning, we do so by applying the language without using other means of statutory construction." *Id.* (internal quotation omitted). If the language is ambiguous, "we consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose." *Gomez, id., quoting Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994); *see also Fogliano v. Brain ex rel. Cnty. of Maricopa*, 229 Ariz. 12, 18 (App. 2011) (primary objective in construing statute adopted by initiative is to give effect to intent of the electorate).

Notably, the terms "citizen," "legal resident," and "lawful immigration status" are not defined in A.R.S. § 15-1801 *et seq*. However, the voters clearly intended that these terms be construed "in accordance with" the standard under IIRAIRA. To be eligible for state education benefits, IIRAIRA provides:

> *Notwithstanding any other provision of law*, an alien *who is not lawfully present in the United States* shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

[4] Feb. 9, 2007 Letter, Russell Pearce to Bob Bulla, at 1 (MCCCD SOF at Ex. 4); *see generally* http://apps.azsos.gov/election/2006/info/PubPamphlet/english/Prop300.htm (MCCCD SOF at Ex. 5).

8 U.S.C. § 1623(a) (emphasis added).

In other words, individuals who are "lawfully present" in the U.S. are not excluded from state "resident education benefits" by federal law.[5] Attorney General Horne obliquely concluded as much (pre-DACA program), construing the scope of § 15-1803(B) vis-à-vis persons "lawfully present," without regard to the three terms actually used.[6] This construction is consistent with other statutes added or amended by Proposition 300, which use the four terms interchangeably and without meaningful difference.[7] *See, e.g., Magness v. Ariz. Registrar of Contractors,* 234 Ariz. 428, 432 (App. 2014) (statutes that relate to the same subject are *in pari materia* and should be construed together).

B.

Federal law, not state law, determines who is lawfully present in the U.S. *See generally Ariz. v. U.S.*, 132 S. Ct. *at* 2498. The circumstance under which a person enters the U.S. does not determine that person's lawful presence here. "DHS considers DACA recipients not to be unlawfully 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] The State cannot establish subcategories of "lawful presence," picking and

[5] The Court agrees with MCCCD that § 1623(a), not § 1621, applies here. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), 8 U.S.C. § 1621 (setting forth alien's eligibility for state and local public benefits).

[6] Ariz. Att'y Gen. Op. I11-007, *Community Colleges: Student Not Lawfully Present in U.S*. (MCCCD SOF at Ex. 3).

[7] *See* A.R.S § 15-1825(B) (requiring community colleges to report total number of students not entitled to financial assistance because he/she was not a citizen or legal resident of the U.S. or "not lawfully present" in the U.S.) *and compare with* subsection (A) (prohibiting person who is not a citizen or "who is without lawful immigration status" from receiving financial assistance); A.R.S. § 15-232(B) (Department of Education shall provide classes to adults who are citizens or legal residents of the U.S. "or are otherwise lawfully present" in the U.S.); A.R.S. § 46-801(8) ("eligible family" for purpose of child care services means citizens or legal residents of U.S. or individuals "who are otherwise lawfully present" in the U.S.); *see also* Ariz. Att'y Gen. Op. I07-005, *Implementation of Proposition 300 With Regard to Adult Education Services.*

[8] 8 U.S.C. § 1182(a)(9)(B)(ii) provides:

> For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

See also http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions at Qs 1, 5 (MCCCD SOF at Ex. 9; MCCCD Notice of Supplemental Auth. (filed Dec. 19, 2014) at (Ex.) 3).

choosing when it will consider DACA recipients lawfully present and when it will not. *See ADAC, id.* at 1065, *citing Plyler v. Doe,* 457 U.S. 202, 225 (1982) ("States enjoy no power with respect to the classification of aliens."); *cf. Toll v. Moreno,* 458 U.S. 1, 17 (1982) (university policy barring certain aliens from acquiring in-state status violated Supremacy Clause). In Arizona, an EAD is appropriate documentation of "lawful presence" in the U.S. *See* A.R.S. § 1-502(A)(7).[9]

The Court agrees with MCCCD that a DACA recipient who submits an EAD may proceed to establish eligibility for resident tuition pursuant to A.R.S. § 15-1803(B).

C.

The Student Intervenors raise constitutional challenges to the State's interpretation of A.R.S. § 15-1803(B). Their equal protection claim appears to have merit.[10] *Cf. ADAC,* 757 F.3d at 1063-67 (plaintiffs demonstrated likelihood of success on equal protection claim with respect to policy that prevents DACA recipients from obtaining Arizona driver's licenses); *ADAC II,* 2015 WL 300376, at *4-9.[11] However, "[t]he fundamental rule of judicial restraint is to avoid constitutional questions unless absolutely necessary to decide the case." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists,* 227 Ariz. 262, 270 (App. 2011) (internal quotation and citation omitted). Based on the discussion *supra,* it is not absolutely necessary for the Court to decide those questions in this case.

[9] A.R.S. § 1-502(A) provides:

> 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….

(Emphasis added.)

[10] The Student Intervenors argue that the State's interpretation treats DACA recipients differently than others who have EADs or who may be granted another type of deferred action.

[11] With regard to plaintiffs' preemption claim, the Ninth Circuit noted that the theory was "plausible." 757 F.3d at 1061-63. Subsequently, the District Court granted defendants' motion to dismiss the claim. 2015 WL 300376, at *1 n.2.

II.

Based on the foregoing,

IT IS ORDERED ***granting*** MCCCD's Motion for Summary Judgment (filed July 8, 2014).

IT IS FURTHER ORDERED (i) ***granting*** the Student Intervenors' Motion for Summary Judgment (filed May 16, 2014) ***in part*** and (ii) ***denying same in part*** (re. constitutional claims) as moot.

IT IS FURTHER ORDERED (i) ***denying*** the State's Motion for Judgment on the Pleadings (filed Feb. 26, 2014) and (ii) ***denying*** the State's Motion for Summary Judgment on the Student Intervenors' Claims (filed Aug. 21, 2014) as moot.