STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 12, 2011	No. I11-007 (R11-011) Re: Community Colleges: Student Not Lawfully Present in U.S.

To: The Honorable Linda Gray
The Honorable Russell Pearce
Arizona State Senate

Questions Presented

1. May a community college district classify a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes?

2. If this classification is improper, what penalties does a community college district face for providing such classifications?

3. May a community college district create separate tuition levels to circumvent the provisions of Proposition 300?

Summary Answers

1. No. Proposition 300 prohibits a community college district from classifying a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes.

2. By violating Proposition 300, a community college board and its members risk exposure to several adverse consequences, including litigation and potential liability for foregone monies.

3. No. A community college district may neither (1) create separate tuition levels for persons who are not lawfully present in the United States that are lower than the out-of-state tuition rate, nor (2) use individual financial assistance to achieve the same result.

Background

Historically, persons not lawfully present in the United States could establish domicile in Arizona and pay in-state tuition rates while attending State universities or community colleges. *See* Ariz. Att'y Gen. Op. I87-139. In 2004, the voters passed Proposition 200 to require State agencies to verify that applicants for "state and local public benefits" are lawfully present in the United States. *See* Ariz. Rev. Stat. ("A.R.S.") § 46-140.01. Proposition 200 did not define the phrase "state and local public benefits," and this office concluded that this section applied only to Title 46. *See* Ariz. Att'y Gen. Op. I04-010. Because some proponents of Proposition 200 disagreed with this interpretation, the State Legislature referred Proposition 300 to the voters in

order to prevent persons not lawfully present in the United States from receiving in-state tuition rates. *See Minutes of House Comm. On Appropriations*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Sen. Dean Martin, Proposition 300 Sponsor). In 2006, Arizona voters passed Proposition 300 with 71.4% approval. *See* Janice K. Brewer, *State of Arizona Official Canvass, 2006 General Election* 16 (2006). Proposition 300 added two sections relevant to this opinion. First, A.R.S. § 15-1803(B) was added, providing as follows:

> In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), 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 or entitled to classification as a county resident pursuant to § 15-1802.01.

Second, A.R.S. § 15-1825(A) was added, providing as follows:

> A person who is not a citizen of the United States, who is without lawful immigration status and who is enrolled as a student at any university under the jurisdiction of the Arizona board of regents or at any community college under the jurisdiction of a community college district in this state is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.

Proposition 300 also contained provisions: (1) preventing persons not lawfully present in the United States from participating in adult education classes provided by the Arizona Department of Education; (2) preventing persons not lawfully present in the United States from receiving childcare funding assistance; (3) requiring enforcement of Proposition 300's provisions without regard to race, religion, gender, ethnicity, or national origin; and (4) requiring State agencies administering these provisions to report various statistics on Proposition 300's enforcement. *See* Legislative Council, *Proposition 300: Analysis by Legislative Council, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 196–97 ("*Proposition 300: Analysis by Legislative Council*").

Analysis

I. Community College Districts May Not Classify a Person Who Is Not Lawfully Present in the United States as an In-State Student or a County Resident for Tuition Purposes.

Under A.R.S. § 15-1802.01(B), community college districts must adopt policies classifying students "for nonresident or resident tuition purposes." Before Proposition 300, community colleges could classify persons not lawfully present in the United States as in-state students for tuition purposes. *See* Ariz. Att'y Gen. Op. I87-139. Since the passage of Proposition 300, however, community college districts may not classify a person who is not lawfully present in the United States as an in-state student or a county resident for tuition purposes. Section 15-1803(B) specifically precludes any such classification. This conclusion is consistent with Proposition 300's intent. *See Proposition 300: Analysis by Legislative Council*; *see also* House of Representatives, *Summary: S.C.R. 1031* (June 22, 2006) ("[p]rohibits a person who is not a United States citizen, a legal resident or without lawful immigration status pursuant to federal law from classification as an in-state student or county resident pursuant to statute").

II. By Disregarding Proposition 300, a Community College Board and Its Individual Members Risk Adverse Consequences such as a Special Action Suit to Compel Compliance or a Suit by the Attorney General or Taxpayers Requiring Reimbursement for Unlawful Payment of Public Monies.

Because Proposition 300 contains no specific penalties or enforcement mechanisms, it is enforceable only through generally available enforcement mechanisms. Enforcement of its provisions in some circumstances will turn on a court's conclusion that the provisions are mandatory, not discretionary or directory. *See, e.g., Department of Revenue v. Southern Union Gas Co.*, 119 Ariz. 512, 514, 582 P.2d 158, 160 (1978); *Bilke v. State*, 221 Ariz. 60, 63 ¶ 12, 209 P.3d 1056, 1059 (App. 2009). For example, special actions may be brought under certain circumstances against government entities, such as community college districts, to "compel the

performance of an act which the law specially imposes as a duty." A.R.S. § 12-2021; Ariz. R.P. Special Actions 1. Violating a court's order to do so is a class 3 misdemeanor and is subject to court-ordered penalties such as fines and payment of attorney fees. *See* A.R.S. §§ 12-2029 to -2030. Additionally, under A.R.S. § 35-212(A), the Attorney General may "bring an action in the name of the state to enjoin the illegal payment of public monies . . . or if the monies have been paid, to recover such monies plus twenty per cent of such amount together with interest and costs, including reasonable attorney fees." If the Attorney General declines to bring such a suit, a taxpayer may bring the suit and may recover attorney fees if successful. A.R.S. § 35-213. Likewise, under the common law, a taxpayer residing in a community college district may have standing to sue to enjoin the district's unlawful payment of public money. *See Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432-33, 600 P.2d 44, 45-46 (App. 1979).

Suits may be brought against a community college district board as an entity. A.R.S. § 15-1444(B)(3). Individual members of a community college district board may also be personally liable; however, they "are immune from personal liability with respect to all acts done and actions taken in good faith within the scope of their authority." A.R.S. § 15-1443(C). Thus, the Attorney General or private citizens may bring suit to enforce Proposition 300, and several different penalties for violations may be available.

III. Community College Districts May Not Circumvent Proposition 300 by Charging Less than Out-of-State Tuition for Persons Who Are Not Lawfully Present in the United States.

Proposition 300 does not allow community college districts to create tuition classifications lower than the out-of-state tuition level in order to circumvent the prohibition on charging in-state tuition levels to persons not lawfully present in the United States. Unambiguous statutes — those subject to only one reasonable meaning — are applied as written,

but if ambiguity is present, statutes are interpreted in light of their context, language, subject matter, historical background, effects, and intent. *Arizona Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 470 ¶ 10, 212 P.3d 805, 808 (2009); *see also State v. Gomez*, 212 Ariz. 55, 57 ¶ 11, 127 P.3d 873, 875 (2006). Here, Arizona law, as made clear by Proposition 300's intent and the statutory context,[1] does not afford persons who are not lawfully present in the United States eligibility for tuition rates lower than out-of-state tuition.[2]

A. Proposition 300 was intended to require that persons not lawfully present in the United States must pay out-of-state tuition rates.

The primary objective in construing propositions adopted by the people is to give effect to the intent of the electorate. *See Gomez*, 212 Ariz. at 57 ¶ 11, 127 P.3d at 875; *see also* A.R.S. § 1-211(B) ("Statutes shall be liberally construed to effect their objects and to promote justice."). To determine the intent for a proposition referred to the voters by the Legislature, both the intent of "'those who framed the provision and . . . the intent of the electorate that adopted it'" must be examined. *See Hernandez v. Lynch*, 216 Ariz. 469, 472 ¶ 8, 167 P.3d 1264, 1267 (App. 2007) (quoting *Calik v. Kongable,* 195 Ariz. 496, 498 ¶ 10, 990 P.2d 1055, 1057 (1999)). Thus, in addition to the usual indicators of legislative intent such as committee minutes and fact sheets,

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[1] Because the legislative intent and statutory context confirm a reasonable interpretation of the statutory language added by Proposition 300, it is not necessary to opine as to whether additional reasonable interpretations are possible. *See State ex rel. Ariz. Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (App. 1980) (reviewing legislative history "[w]ithout characterizing [the statute] as ambiguous").

[2] This interpretation is consistent with federal law. *See* 8 U.S.C. 1623(A) ("[persons] not lawfully present in the United States shall not be eligible on the basis of residence . . . for any postsecondary education benefit unless [U.S. citizens are] eligible for [the same] benefit . . . without regard to [residency]"); *see also Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 868-69 (Cal. 2010) (finding no preemption of state's ability to set postsecondary tuition rates for persons not lawfully present in the United States); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603 (E.D. Va. 2004) ("there is no Supremacy Clause bar to a state admissions policy that denies admission to illegal aliens, provided that in doing so, the institutions implementing the policy adopt federal immigration standards").

materials provided to the electorate may also be considered. *See id.* at 474 ¶¶ 15-16, 167 P.3d at 1269. Some important indicators of intent are found in the publicity pamphlet, including the Legislative Council's analysis and arguments for or against the proposition submitted by the public. *See Ruiz v. Hull*, 191 Ariz. 441, 450-51 ¶ 36, 957 P.2d 984, 993-94 (1998); *see also Calik*, 195 Ariz. at 500-01 ¶¶ 17-18, 990 P.2d at 1059-60 (relying on the legislative council's analysis).

Legislative statements about Proposition 300 and the materials provided to the voters form a unified narrative that clearly demonstrates an intention to require persons not lawfully present in the United States to pay out-of-state tuition rates. According to its legislative sponsor, Proposition 300 "does not mean illegal immigrants cannot obtain an education. It simply means taxpayers will not subsidize their education *just as taxpayers do not subsidize California residents* who attend Arizona State University, for example." *See Minutes of House Comm. on Appropriations*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Sen. Dean Martin, Proposition 300 sponsor) (emphasis added). Likewise, in another hearing, a committee member stated that he did "not believe the students are being penalized by not being able to get a taxpayer subsidy. The students can go to college, but *have to pay out-of-state tuition*." *See Minutes of House Comm. On K-12 Educ.*, 47th Legis., 2nd Reg. Sess. (March 29, 2006) (statement of Rep. Eddie Farnsworth, Member, H. Comm. on K-12 Educ.) (emphasis added). Nothing in the legislative record contradicts this sentiment.

The legislative intent is echoed in the publicity pamphlet by the Legislative Council's analysis and the arguments of Proposition 300's proponents. Legislative Council summarized Proposition 300's effect as providing "that a state university or community college student who is not a United States citizen and who does not otherwise possess lawful immigration status in

this country is not entitled to waivers, grants or any other financial assistance paid in whole or part with state funds." *See Proposition 300: Analysis by Legislative Council.* Likewise, the bill's sponsor, Sen. Martin, argued for passage of Proposition 300 because

> US citizens from other states attending Arizona schools have to pay the full cost of tuition. However, citizens of foreign countries, who break the law to enter Arizona illegally, are given taxpayer subsidized tuition.
>
> It's not fair; it's not right. Vote YES on Prop 300 to save taxpayers millions in subsidies for illegals.

Senator Dean Martin, *Argument "for" Proposition 300, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 197. Another proponent of Proposition 300 argued, "It is indefensible that we should be charging students who come to Arizona for education from other states a large amount of money more than we charge students who have defied our laws by their illegal presence in our state." Don Goldwater, *Argument "for" Proposition 300, in Publicity Pamphlet: Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006* 197. Thus, Proposition 300 must be construed to prohibit community college districts from setting tuition rates for persons not lawfully present in the United States lower than tuition rates for out-of-state students.

B. Section 15-1803(B) prohibits tuition rates for persons not lawfully present in the United States that are lower than out-of-state tuition rates.

Statutes must be construed so as to avoid absurd results. *State v. Barr*, 217 Ariz. 445, 450 ¶ 20, 175 P.3d 694, 699 (App. 2008); *Mail Boxes v. Indus. Comm'n of Ariz.*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995) ("we must define [statutory terms] in a way that avoids absurdity and fulfills the legislature's purpose"). Likewise, courts must "'avoid construction of statutes which would render them meaningless or of no effect.'" *Graf v. Whitaker*, 192 Ariz. 403, 407, 966 P.2d 1007, 1011 (App. 1998) (quoting *State v. Clifton Lodge No. 1174, Benevolent &*

Protective Order of Elks, 20 Ariz. App. 512, 513, 514 P.2d 265, 266 (1973)). Proposition 300 prohibits community college districts from charging "in-state student" or "county resident" tuition rates for persons not lawfully present in the United States. A.R.S. § 15-1803(B). This provision would be rendered meaningless and an absurd result would occur if community college districts could simply set up a new fee classification equal to or slightly higher than in-state or resident tuition levels but still substantially lower than out-of-state tuition rates. The clear intent of Proposition 300 was to raise the tuition level for persons not lawfully present in the United States to the same tuition level that out-of-state students pay and to avoid giving persons not lawfully present in the United States an advantage over lawfully present students from other states. As such, A.R.S. § 15-1803(B) prohibits community college districts from setting up tuition classifications outside Arizona's statutory tripartite in-state/resident/out-of-state tuition classification system[3] in order to circumvent Proposition 300's mandate.[4]

C. Section 15-1825(A) prevents community college districts from using individual financial assistance to circumvent the out-of-state tuition requirement for persons not lawfully present in the United States.

Under A.R.S. § 15-1825(A), community college districts may not give "tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies" to persons unlawfully present in the United States. When interpreting such provisions, "the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the

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[3] This opinion does not decide whether Arizona's statutory scheme prohibits alternative tuition classifications (e.g., classifications based on reciprocal residency agreements that differentiate between residents of various out-of-district Arizona counties) for persons lawfully present in the United States.

[4] In addition to fulfilling Proposition 300's purpose and avoiding an absurd result, this interpretation is also consistent with Proposition 300's other relevant provision — A.R.S. § 15-1825(A) — which prohibits individual deviations from normal tuition rates as discussed below.

neighboring words with which it is associated." *U.S. v. Williams*, 553 U.S. 285, 294 (2008); *accord Norgord v. State ex rel. Berning*, 201 Ariz. 228, 231 ¶ 12, 33 P.3d 1166, 1169 (App. 2001). Likewise, "[t]he *ejusdem generis* canon of construction 'provides that general words which follow the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class.'" *Nielson v. Hicks*, 225 Ariz. 451, 453 ¶ 10, 240 P.3d 276, 278 (App. 2010) (quoting *State v. Barnett,* 142 Ariz. 592, 596, 691 P.2d 683, 687 (1984)). To determine statutory meaning, courts will also examine "related statutes" that "may shed light on the proper interpretation of the statutes in question." *State v. Diaz*, 224 Ariz. 322, 324 ¶ 10, 230 P.3d 705, 707 (2010).

Here, A.R.S. § 15-1825(A) complements A.R.S. § 15-1803(B) by prohibiting community colleges from using various types of financial assistance to circumvent the out-of-state tuition requirement for persons not lawfully present in the United States. All of the listed terms in A.R.S. § 15-1825(A) refer to individualized assistance. By including the terms "tuition assistance" and "other financial assistance," Proposition 300 prohibits *any* individualized assistance that is subsidized or paid with state monies, including assistance not otherwise specified such as subsidized loans, tuition discounts, or work-study programs. Consequently, this interpretation is consistent with the evidence of Proposition 300's intent.

Conclusion

Community college districts may not charge rates lower than out-of-state tuition for students not lawfully present in the United States, and Proposition 300 precludes creating special tuition classifications or awarding individualized financial assistance to circumvent this requirement. Violating these provisions may subject community college districts and members of community college boards to litigation, financial liability, and other penalties.

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