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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE SERGIO C. GARCIA ON ADMISSION

OPENING BRIEF OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA RE: MOTION FOR ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA

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I. INTRODUCTION

A. Background

Sergio C. Garcia was born in Villa Jimenez, Mexico in 1977. When he was 17 months old, he was brought into the United States by his parents without inspection by immigration officials. His parents reportedly took him back to Mexico around the age of eight or nine, but they returned to the United States again without inspection in 1994, when Mr. Garcia was 17 years of age. His father, who was a lawful permanent resident at the time, and who has since gained full citizenship status, filed a petition for an immigrant visa ("Form I-130") for his son on November 18, 1994. That petition was approved in January of 1995, and Mr. Garcia has been waiting, in an undocumented status, for the past 17 years for the visa to become available.[1] During this time, he went to college, attended law school, and passed the California Bar Examination.

Under Business and Professions Code section 6046, the Committee of Bar Examiners (the "Committee") has the limited charge of: (1) examining all applicants for admission to practice law; (2) administering the requirements for admission to practice law; and (3) certifying to the California Supreme Court for admission those applicants who fulfill the

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[1] When a visa becomes available, Mr. Garcia will be eligible to adjust his status to a permanent legal resident, and can do so without having to leave the country. (See 8 U.S.C. § 1255(i).)

requirements for admission. In the case of Mr. Garcia, the Committee found that he met all the necessary requirements for admission.[2] Based on that conclusion, the Committee believed it had a duty to certify Mr. Garcia for admission to the California Supreme Court. On November 9, 2011, the Committee submitted his name, on motion, as an applicant certified for attorney licensure. The Committee informed the Court of Mr. Garcia's immigration status, given that the admission of an undocumented immigrant was a matter of first impression.

B. The Court's May 16, 2012 Order

On May 16, 2012, the California Supreme Court issued an Order to Show Cause to the Committee of Bar Examiners of the State Bar of California as to why its pending motion for the admission of Sergio C. Garcia to the State Bar of California (the "State Bar") should be granted. The Court ordered that any such submission should be filed on or before June 18, 2012. It also invited and welcomed amicus curiae participation.

The Court further ordered that the following issues, and possibly others, should be briefed in any such submission:

1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court's admission of an undocumented immigrant to the State

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[2] See Bus. & Prof. Code, § 6060 (Qualifications; Examination and Fee).

Bar of California? Does any other statute, regulation, or authority preclude the admission?

2. Is there any state legislation that provides – as specifically authorized by 8 U.S.C. section 1621, subdivision (d) – that undocumented immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance, if any, should be given to the absence of such legislation?

3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?

4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant's ability to practice law?

5. What, if any, other public policy concerns arise with a grant of this application?

In response to the Court's Order, the Committee hereby respectfully submits the following response.[3]

II. ROLE OF THE COMMITTEE

The State Bar is not an ordinary administrative body, but rather it is sui generis. (*Brotsky v. State Bar of Cal.* (1962) 57 Cal.2d 287, 300 [19

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[3] There are numerous terms used in this brief quoted from sources referring to aliens that are present in the United States with no lawful basis. The Committee has adopted the term "undocumented immigrant," because Questions 1, 2, and 4 in the Court's Order to Show Cause ask for briefing pertaining to "undocumented immigrants."

Cal.Rptr. 153, 368 P.2d 697].) It is a constitutional entity, established under article VI, section 9, of the California Constitution as a public corporation, and expressly acknowledged as an integral part of the judicial function. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6001; *In re Rose* (2000) 22 Cal.4th 430, 438 [93 Cal.Rptr.2d 298, 993 P.2d 956]; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48 [96 Cal.Rptr.2d 205, 999 P.2d 95].) The State Bar was created as an administrative arm and adjunct of the California Supreme Court for the purpose of assisting in matters of attorney admission and discipline.

The State Bar makes recommendations regarding admission matters to this Court, but its assistance is advisory. It is this Court that makes the ultimate decisions under its plenary power over the practice of law in California. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 598-99 [79 Cal. Rptr.2d 836, 967 P.2d 49] (hereinafter *Attorney Discipline*); *Rosenthal v. Justices of the Supreme Court of the State of California* (9th Cir. 1990) 910 F.2d 561, 566; see also *Hoover v. Ronwin* (1984) 466 U.S. 558 [104 S.Ct. 1989, 80 L.Ed.2d 590] [the State Supreme Court itself makes the final decision to grant or deny admission to practice, not the State Bar].)

The State Bar performs its admissions functions through the creation and operation of the Committee, which is charged with carrying out the duties set forth in the State Bar Act. (See Bus. & Prof. Code, § 6046.) The Committee essentially ensures that all applicants have met certain

educational, moral character, and examination elements. (See Bus. & Prof. Code, § 6060.) Upon certification by the Committee that an applicant has fulfilled these requirements, the Committee recommends to this Court that the applicant be licensed. (See Bus. & Prof. Code, § 6064.) However, it is this Court alone that has the power to accept, or reject, the recommendation. If the Court elects to admit the applicant as an attorney at law, it will direct an order to be entered upon its records to that effect and issue a certificate of admission. (See Bus. & Prof. Code, § 6064.)

Accordingly, the role of the Committee is limited; it is one of ensuring that certain criteria are met by each applicant before submitting the applicant for consideration for admission to the California Supreme Court. The Committee itself lacks the power to grant admission, and policy decisions in this area are, in general, vested with the Court, not the Committee.

III. RESPONSES TO THE COURT'S INQUIRIES

A. Does 8 U.S.C. Section 1621, Subdivision (c) Apply And Preclude This Court's Admission Of An Undocumented Immigrant To The State Bar Of California? Does Any Other Statute, Regulation, Or Authority Preclude The Admission?

No. 8 U.S.C. section 1621 does not preclude this Court's admission of Mr. Garcia to the practice of law in California.[4]

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[4] Nor is the Committee aware of the existence of any other statute, regulation, or authority that would preclude his admission.

1. Preemption and Section 1621

Enacted in 1996, section 1621 provides that "[n]otwithstanding any other provision of law," certain categories of "unqualified aliens" listed by statute are "not eligible for any State or local public benefit." (8 U.S.C. § 1621(a).) The statute goes on to define "State or local public benefit" in relevant part as "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." (8 U.S.C. § 1621(c)(1)(A).) A state may, however, "provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) ... only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." (8 U.S.C. § 1621(d).)

Congress has the explicit authority to regulate immigration under article I, section 8 of the U.S. Constitution, and that authority has long been presumed to be exclusive or near-exclusive. (See U.S. Const. art. I, § 8.) In addition, when Congress acts in an area in which it has express authority, its laws preempt all state or local statutes, orders, or decisions to the contrary. (See U.S. Const., art. VI, ch. 2.) Courts have identified three different ways in which Congress may preempt contrary state law: (1) Congress may explicitly provide that a federal statute preempts state law ("express"

preemption) (see *English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79 [110 S.Ct. 2270, 110 L.Ed.2d 65]); (2) Congress may decide to occupy the entire field in a substantive area in which the Constitution provides the federal government with exclusive or explicit power ("field" preemption) (see *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372-73 [120 S.Ct. 2288, 147 L.Ed.2d 352]); or (3) a federal statute may conflict with state law, it may be impossible for a party to comply with both state and federal requirements, or state law may "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ("obstacle" or "conflict" preemption). (*Ibid*; see also *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 98 [112 S.Ct. 2374, 120 L.Ed.2d 73].) Although section 1621 contains an express preemption provision for "professional licenses ... provided by an agency of a State ... or by appropriated funds of a State," the issue remains whether section 1621 is applicable here and precludes this Court's admission of Mr. Garcia.

As a starting point, it should be noted that the United States Supreme Court has held that when Congress has legislated in a field that the states have traditionally occupied, the general assumption is that "the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*." (*Wyeth v. Levine* (2009) 555 U.S. 555, 565 [129 S.Ct. 1187, 173 L.Ed.2d 73]

[Emphasis added].) Traditionally, the courts, alone, have controlled admission, discipline, and disbarment of persons entitled to practice before them. (*Attorney Discipline, supra,* 19 Cal.4th at p. 600.) This is true in both the state and federal judicial systems. (*Theard v. U.S.* (1957) 354 U.S. 278, 281 [77 S.Ct. 1274, 1 L.Ed.2d 1342].)

California laws regulating bar admission do not attempt to regulate who may enter or remain in the United States. Only when states attempt to "'regulat[e] immigration,' i.e., '... determin[e]...who should or should not be admitted into the country, and the conditions under which a legal entrant may remain' ... is preemption structural and automatic. Otherwise, the usual rules of statutory preemption analysis apply; state law will be displaced only when affirmative congressional action compels the conclusion it must be." (*Martinez v. The Regents of the University of California* (2010) 50 Cal.4th 1277, 1287 [117 Cal.Rptr.3d 359, 241 P.3d 855].)

As will be discussed below, there is no clear and manifest purpose by Congress to regulate attorney admissions under section 1621[5] (an area traditionally left to the jurisdiction of the courts and not state agencies) and

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[5] "The absence of an express exclusion of state court jurisdiction 'is strong, and arguably sufficient, evidence that Congress had no such intent.'" (*In re Jose C.* (2009) 45 Cal.4th 534, 548 [87 Cal.Rptr.3d 674, 198 P.3d 1087].)

since a law license is not "provided by an agency of a State or local government or by appropriated funds of a State or local government," section 1621 does not preclude this Court's admission of Mr. Garcia.

2. A California Law License Is Not Provided by an Agency of a State or Local Government

For section 1621 to be applicable, the professional license must be "provided by an agency of a State or local government." (8 U.S.C. § 1621(c)(1)(A).) It is therefore necessary in the first instance to determine who provides the law license and whether that entity is an "agency" of the state.

Here, the relevant licensing entity is the California Supreme Court. The "inherent and primary regulatory power" over the legal profession in California, including the authority to admit persons to practice law, is vested in the California Supreme Court. (See *Keller v. State Bar of California* (1990) 496 U.S. 1, 11 [110 S.Ct. 2228, 110 L.Ed.2d 1] ["The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court"]; cf. *Attorney Discipline*, *supra*, 19 Cal.4th at p. 592.)

The California Supreme Court, however, is not an "agency" – rather, it is the third and co-equal branch of state government. Section 1621 does not provide otherwise as neither the text nor the legislative history of section

1621 defines "agency" or enumerates particular state agencies. Similarly, 8 U.S.C. section 1611, the comparable statute prohibiting an "agency of the United States" from providing "federal public benefits" to undocumented immigrants, also lacks a definition of "agency."

However, "agency" is defined elsewhere in federal law to expressly *exclude* the courts. (5 U.S.C. § 551(1) [Under the Administrative Procedure Act, agency is expressly defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but *does not include . . . the courts of the United States."* [Emphasis added]; see also *Hubbard v. United States* (1995) 514 U.S. 695, 699-700 [115 S.Ct. 1754, 131 L.Ed.2d 779], quoting 18 U.S.C. § 6, which defines "agency" as "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense" ["In ordinary parlance, federal courts are not described as 'departments' or 'agencies' of the Government.... [I]t would be strange indeed to refer to a court as an 'agency'..." and; "[t]his commonsense reading" is bolstered by the definition of "agency" in the federal false statements statute itself, which makes it "incontrovertible that 'agency' does not refer to a court."].)

Absent any context that might suggest otherwise, the term "agency" in section 1621 must be interpreted consistently with how it is used in other statutes—and here, the most closely analogous federal laws support the conclusion that the term "agency" does not include the courts.[6]

3. The Issuance of a California Law License Does Not Grant to an Applicant Any Public Resources Provided by Appropriated Funds of a State or Local Government

In addition to precluding a "public benefit" (e.g., a professional license) "provided by an agency of the State," section 1621 also prohibits a "public benefit" when it is "provided by appropriated funds of a State or local government." But this is not the case here.

The term "appropriated" means "to set apart for or assign to a particular purpose or use." (Merriam Webster Online Dict. <http://www.merriam-webster.com/dictionary/appropriated> [as of June 1, 2012]; see also Black's Law Dict. (9th ed. 2009) pp. 117-18 [defining "appropriation" as "[a] legislative body's act of setting aside a sum of money for a public purpose"].) This ordinary meaning of the term has been adopted by both federal and California state courts. (See *Wilcox v. Jackson*

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[6] Similarly, there is no express provision under California law that includes the judiciary in the definition of "state agency." (See Gov. Code, § 11000(a) ["every state office, officer, department, division, bureau, board and commission"].) To the contrary, the Supreme Court, courts of appeal, and superior court are the courts of record in the judicial branch of government that exercise the judicial powers of the state. (Cal. Const., art. VI, § 1.)

ex dem. McConnel (1839) 38 U.S. 498 [10 L.Ed. 264] ["appropriation . . . is nothing more or less than setting it apart for some particular use"]; *White v. Davis* (2003) 30 Cal.4th 528, 533 [133 Cal.Rptr.2d 648, 68 P.3d 74]; *Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 452 [111 Cal.Rptr.3d 822] [defining "appropriation" as a "legislative act setting aside a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose"]; *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1282 [36 Cal.Rptr.2d 404]; *Ryan v. Riley* (1924) 65 Cal.App. 181, 187 [223 P. 1027].)[7]

The question here is whether the California Legislature has "set apart" funds for the California Supreme Court for a "particular use" prohibited by section 1621. The answer is no. The functions of administering the California Bar Examination and certifying applicants for licensure are performed by the State Bar, through the Committee. These functions are *not* funded by any appropriated funds of the state. In *Attorney Discipline*, the California Supreme Court described the precise source of

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[7] The California Department of Finance likewise defines appropriation as "[a]n authorization from a specific fund for a specific purpose . . . . Legislation or the California Constitution can provide continuous appropriations . . . ." (Cal. Dept. of Finance Glossary of Budget Terms, at <www.dof.ca.gov/fisa/bag/dofglossfrm.htm> [as of June 4, 2011].)

funding for attorney discipline in California and made it clear that such funding was outside of the state coffers:

> License fees imposed by this court to fund an attorney disciplinary system would be imposed solely upon licensed attorneys, would not be imposed for general revenue purposes, would not become part of the state's General Fund, and would not be appropriated by the Legislature . . . . Therefore, the imposition of such fees would not invade the Legislature's exclusive power over taxation and appropriation.

(*Attorney Discipline, supra,* 19 Cal. 4th at p. 597.)

The rationale is equally applicable here. Applicant license fees are the sole source of funding for attorney licensing in California.[8] While the final act of issuing the order of admission is done by this Court, such involvement does not change the fact that the license is not "provided by appropriated funds." (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 788 [67 Cal.Rptr.2d 350] [finding that state and local governments' active assistance in collecting child support payments does not change the fact that the source of the payments are private]; *City Plan Development Inc. v. Office of Labor Com'r* (Nev. 2005) 117 P.3d 182, 190 [finding that the payment of prevailing wage rates by a contractor to workers under a public

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[8] "Applicants for admission to practice shall pay such reasonable fees, fixed by the [Board of Trustees of the State Bar of California], as may be necessary to defray the expense of administering the provisions of [the State Bar Act], relating to admission to practice. These fees shall be collected by the examining committee and paid into the treasury of the State Bar." (Bus. & Prof. Code, § 6063.)

contract is not a "local public benefit" for purposes of section 1621]; *Rajeh v. Steel City Corp.* (Ohio Ct. App. 2004) 813 N.E.2d 697 [reasoning that workers' compensation is distinguishable from many of the benefits listed in section 1621 because it was intended to serve as a tort remedy and because it is funded by employers rather than the government].)

Moreover, a law license is distinguishable from the other "public benefits" listed in section 1621, which include: "any grant, contract, loan" and "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit" that may involve "payments or assistance" that are "provided ... by appropriated funds of a State or local government." (8 U.S.C. § 1621(c)(1)(A)&(B).) A law license does not provide any payment or assistance to a bar applicant. It is a grant of permission to engage in the practice of law. (See *Chamber of Commerce v. Whiting* (2011) ___ U.S. ___ [131 S.Ct. 1968, 1978, 179 L.Ed.2d 1031], quoting Webster's Third New International Dictionary (2002) p. 1304 ["A license is 'a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful'"].) Provision of a law license is distinguishable from the licensing activity, which is a regulatory program of the state. (See *Cleveland v. U.S.* (2000) 531 U.S. 12, 21 [121 S.Ct. 365, 148 L.Ed.2d 221] [noting that licensing is a "regulatory program"

established through the exercise of state police powers].) A state may fund the licensing activity and pay for the regulatory program; however, a licensed applicant receives no payment of appropriated funds in obtaining a license. (*Id.* at p. 15 [in overturning a mail fraud case, court held that in issuing a license, a state does not part with any money or property].)

The legislative purpose of section 1621 was to reduce the incentives for illegal immigration by denying "aliens" not residing legally in the United States benefits financed by "appropriated funds." (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 301 [67 Cal.Rptr.2d 187] [stating that in enacting section 1621, Congress wanted to ensure that "the availability of public benefits [would] not constitute an incentive for immigration to the United States . . ."].) Congress has also stated that undocumented immigrants within the United States should "not depend on public resources to meet their needs, but rather rely on their own capabilities" to achieve "self-sufficiency." (8 U.S.C. § 1601.)

Mr. Garcia is not dependent on, nor does he seek, any "public resources." There are no "appropriated" funds required to grant Mr. Garcia a law license. Instead, as discussed above, the relevant funds come from applicant fees. Additionally, many of the benefits listed in section 1621, such as welfare and retirement payments, are either direct income support payments or services intended to meet the daily needs of disadvantaged individuals. But Mr. Garcia and other similarly situated individuals—who

have graduated from law school and passed one of the most difficult bar examinations in the United States—are not seeking "public resources." Indeed, there may be no better example of individuals who are relying on their "own capabilities" as opposed to "public resources." Thus, the legislative history further supports the proposition that a California law license is not provided by "appropriated funds of a State or local government."

4. Conclusion

California law licenses are not "provided by an agency of a State or local government or by appropriated funds of a State or local government," and section 1621 therefore does not preclude this Court from admitting Mr. Garcia to the practice of law.

B. Is There Any State Legislation That Provides – As Specifically Authorized By 8 U.S.C. Section 1621, Subdivision (d) – That Undocumented Immigrants Are Eligible For Professional Licenses In Fields Such As Law, Medicine, Or Other Professions, And, If Not, What Significance, If Any, Should Be Given To The Absence Of Such Legislation?

Under section 1621(d), a state may "provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible ... only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." The California Legislature, however, has not

affirmatively enacted legislation giving undocumented immigrants the ability to obtain professional licensure in the legal field or any other fields.[9]

This is a case of first impression in California as it relates to law licensure.[10] As this Court is well aware, other professional licenses are provided by state executive branch agencies. Admission to practice law is different, and falls exclusively within the purview of the California Supreme Court in its sovereign judicial capacity. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801, 636 P.2d 1136] ["In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts."]; *Attorney Discipline, supra,* 19 Cal.4th at p. 600.)

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[9] It is worth noting that the California Legislature recently passed legislation giving undocumented immigrants other public benefits, such as: (i) in-state college tuition (see Ed. Code, § 68130.5, upheld by the California Supreme Court in *Martinez, supra*, 50 Cal.4th 1277); (ii) the ability to serve in any capacity in student government and "receive any grant, scholarship, fee waiver, or reimbursement for expenses that is connected with that service ..." (see Ed. Code, § 66016.3); and (iii) private-funded scholarships and state-funded financial aid for public colleges and universities, including institutional grants, community college fee waivers, Cal Grants, and Chafee Grants. (See Ed. Code, § 66021.7 [known as the California Dream Act of 2011].)

[10] A similar matter is now pending before the Florida Supreme Court, and that Court has been asked to issue an advisory opinion on the subject. (See Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar (Case No. SC 11-2568).)

Indeed, every state in the union recognizes that the power to admit and to discipline attorneys rests solely with the state's highest court. (*Hustedt, supra,* 30 Cal.3d at pp. 336-37; see also *Hoover, supra*, 466 U.S. at pp. 568-69; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 361 [97 S.Ct. 2691, 53 L.Ed.2d 810]; *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792 [94 S.Ct. 2004, 44 L.Ed.2d 572]; *In re Griffiths* (1973) 413 U.S. 717, 722-23 [93 S.Ct. 2851, 37 L.Ed.2d 910].)

Because the admission and discipline of attorneys is uniquely a judicial function, a state supreme court acts in a "legislative capacity" and "occupies the same position as that of a state legislature" when regulating in this area. (See *Hoover, supra,* 466 U.S. at p. 568; *Supreme Court of Virginia. v. Consumers Union of U.S., Inc.* (1980) 446 U.S. 719, 734 [100 S.Ct. 1967, 64 L.Ed.2d 641] [state supreme court and its members are, for all intents and purposes, the state's legislators when enacting the bar code].)[11]

Accordingly, "it is this [C]ourt and not the Legislature which is [the] final policy maker" in matters concerning the practice of law in California (see *Attorney Discipline, supra,* 19 Cal.4th at p. 602), and legislative action

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[11] Assuming arguendo that 8 U.S.C section 1621 is found to be applicable to this case, this Court could elect to invoke the savings clause under section 1621(d) and, in its quasi-legislative authority, in effect enact a law (i.e., a rule of court) expressly providing that undocumented immigrants are eligible for law licensure.

is not a pre-requisite to this Court's ability to determine whom to admit to the practice of law in California.

C. Does The Issuance Of A License To Practice Law Impliedly Represent That The Licensee May Be Legally Employed As An Attorney?

The issuance of a license to practice law does not impliedly represent that the licensee may be legally employed as an attorney because licensure and employment are independent and distinct concepts.

California courts have recognized an "implied representation of competency made by the licensing of [an] attorney." (*In re Martin* (1962) 58 Cal.2d 133, 139 [23 Cal.Rptr. 167]; *Wilson v. Smith* (1943) 60 Cal.App.2d 211, 212 [140 P.2d 144]; *Strong v. Mack* (1943) 58 Cal.App.2d 805, 809 [137 P.2d 748].) The United States Supreme Court has recognized an "implied representation" that a licensee who is allowed to hold himself out to practice law is in "good standing" to do so. (*Theard, supra*, 354 U.S. at p. 281.) These implied representations, however, do not equate to an attorney's ability to be legally employed, since the issue of licensure is separate from the issue of employment.

The licensing function is ultimately within the exclusive purview of the California Supreme Court; whereas, the question of whether, and to what extent, the licensee may be employed is governed by other authorities, and in the case of undocumented immigrants, by the federal immigration laws.

While a license to practice law is necessary to obtain employment as an attorney, having a law license does not mean that the holder may be employed. (See *Hason v. Medical Bd. of California* (9th Cir. 2002) 279 F.3d 1167, 1172, cert. dism. (2003) 538 U.S. 958 ["Although medical licensing does occur within the employment context, medical licensing is not equivalent to employment. The Medical Board does not make employment decisions, and the Board's grant of a license is not tantamount to a promise or guarantee of employment as a physician."].)

Congress itself recognizes the independent nature of these concepts. The general issue of professional licensure for undocumented immigrants is governed by 8 U.S.C. section 1621 (although as previously discussed, section 1621 does not apply to law licensure). Under 1621(d), states are allowed to affirmatively grant undocumented immigrants professional licenses if they so choose. The issue of employment for undocumented immigrants, however, is contained in a completely different statutory scheme under section 8 U.S.C. section 1324a, which expressly preempts states in the area of employment. Therefore, Congress must have intended states to be able to license undocumented immigrants, irrespective of employability.

This Court has similarly embraced the distinction between employment and licensure, as it currently admits non-immigrant aliens to the practice of law in California without regard to their ability to be legally

employed as attorneys. Specifically, these individuals come to the United States on student or visitor visas (which contain explicit work restrictions), attend law school in California, pass the California Bar Examination, and gain admission to practice law in this state. After receiving their law licenses, they may return home to their countries of origin, they may remain here and attempt to adjust their status, or they may seek lawful permanent residence. However, the grant of a law license provides no guarantee of a pathway to lawful employment in the United States for these individuals.

In addition, the California Legislature has subscribed to this position. In 2005, it enacted legislation specifically allowing individuals who are not eligible for a social security number to provide alternative forms of identification when applying for a law license. Business & Professions Code section 6060.6 states:

> Notwithstanding Section 30 of this code and Section 17520 of the Family Code, the Committee of Bar Examiners may accept for registration, and the State Bar may process for an original or renewed license to practice law, an application from an individual containing a federal tax identification number, or other appropriate identification number as determined by the State Bar, in lieu of a social security number, if the individual is not eligible for a social security account number at the time of application and is not in noncompliance with a judgment or order for support pursuant to Section 17520 of the Family Code.

(Bus. & Prof. Code, § 6060.6 (Stats. 2005, ch. 610, § 1 [Assem. Bill No. 664 (2005-2006 Reg. Sess.].)

The Senate Floor Analysis for Assembly Bill 664 explains that the purpose of the statute is to allow foreign law students to take the California

Bar Examination. (Sen. Rules Comm., Off. of Sen. Floor Analyses, Third Reading Analysis of Assem. Bill No. 664 (2005-2006 Reg. Sess.) pp. 2-3.) The Analysis explains that Family Code section 17520 requires a social security number as a condition of state licensing to track child support evaders. (*Ibid.*) This requirement made it impossible for foreign law students to take the Bar Exam, so the statute was enacted to correct the problem. (*Ibid.*)[12]

Section 6060.6 is an express acknowledgment by the California Legislature that non-immigrant aliens who: (i) are here as students; (ii) are not eligible for a social security number; and (iii) are generally not permitted to work in the United States, may nonetheless sit for the California Bar Examination and be admitted to practice law in California.

Finally, importing an implied representation of legal employability from licensure would impose upon the Committee, and this Court, a qualification standard that does not currently exist and would require a case-by-case assessment of federal immigration law and what the licensee intends to do with the license after it is granted – a line of inquiry that would be difficult, if not impossible, to effectuate. Whether, and to what extent, the

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[12] According to State Bar records, since 2005, 1,373 applicants have applied for the social security number exemption.

licensee wants to use the license in future employment endeavors is for the individual to determine in compliance with all laws.

Concerns of a similar nature were raised, but ultimately dismissed, by the Vermont Supreme Court in *Dingemans v. Board of Bar Examiners* (Vt. 1989) 568 A.2d 354. There, applying a preemption analysis, the Court invalidated a bar admission rule that limited admission to citizens and permanent resident aliens. The applicant was a non-immigrant alien who had entered the United States on a student visa and then adjusted status to an H-1 visa (a work visa issued to aliens of "distinguished merit and ability"). (*Id.* at p. 355.) The H-1 visa allowed the applicant to engage in "legal consultant" services for a law firm.[13] (*Ibid.*) In declining to recommend admission, the Vermont Bar noted its concern that issuing the license to practice law would somehow give the applicant authority that exceeded the scope of the work limitations in her H-1 visa (allowing her the right to represent a client in her own name, appear in court on behalf of a client, sign documents as an attorney, and engage in the full scope of services normally performed by an attorney). (*Ibid.*)

The Vermont Supreme Court disagreed and struck down the bar rule, stating that to do otherwise would contravene the federal H-1 visa scheme.

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[13] As a legal consultant, the applicant was limited to performing legal research and writing and providing legal advice and resources to other attorneys within the law firm. (*Id.* at p. 355.)

In so ruling, the Court dispelled the notion that licensure was a "hollow right" simply because the applicant could not fully engage in the practice of law due to the express work restrictions in her visa. (*Dingemans, supra,* 568 A.2d at 356-57.) The Court held that:

> [Applicant's] mere admission to the bar of Vermont would not be a violation of her visa; [applicant] would be in violation only if she exceeded the restriction set forth in her visa, that of being a legal consultant. Upon admission to the bar, the scope of her visa would be a matter to be resolved strictly between herself and the federal government.

(*Id.* at p. 356.)

By comparison, Mr. Garcia is in line to receive a visa, which will allow him to adjust his status. Mr. Garcia's current "employability" should not be tied to his licensure. What Mr. Garcia, or any other foreign applicant, does with his license after licensure must comport with federal regulations and that is a matter strictly between him and the federal government.

D. If Licensed, What Are The Legal And Public Policy Limitations, If Any, On An Undocumented Immigrant's Ability To Practice Law?

Every person admitted to practice law in California is obligated to "faithfully … discharge the duties of an attorney at law to the best of [their]

knowledge and ability." (Bus. & Prof. Code, § 6067; see Bus. & Prof. Code, § 6068 for the list of duties.)[14]

Undeniably there are certain limitations on an undocumented immigrant's ability to practice law (see discussion below); however they should not serve as a bar to licensure. Mr. Garcia, like every other attorney, would be bound by his legal and ethical obligations which, from a regulatory perspective, are sufficient to ensure the protection of the public.

1. Federal Immigration Laws Impose Employment Restrictions on Undocumented Immigrants; However, this Does Not Preclude All Uses of a Law License

Undocumented immigrants cannot be hired for employment by a law firm, corporation, agency, or any other employer. (8 U.S.C. § 1324a.) Section 1324a was enacted in 1986 as part of the Immigration Reform and Control Act ("IRCA") "to reduce the incentives for employers to hire illegal

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[14] For example it is the duty of all attorneys under Business and Professions Code section 6068 to, among other things: maintain respect due to the courts; maintain only legal or just actions; maintain inviolate the confidence of his or her client; and never reject the cause of the defenseless or the oppressed. In addition, Business and Professions Code section 6211 requires an attorney receiving or disbursing client trust funds to establish and maintain an IOLTA account. (See also, Rule of Prof. Conduct 4-100(A) ["All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account,' or words of similar import...."].) An attorney can open this type of account by using a social security number (if eligible for one), an individual taxpayer identification number ("ITIN"), or a federal Employer Identification Number ("EIN"). Undocumented immigrants, as discussed infra, can apply for an ITIN.

aliens." (*N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.* (2nd Cir. 1997) 134 F.3d 50, 55, abrogated on other grounds in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* (2002) 535 U.S. 137 [122 S.Ct. 1275, 152 L.Ed.2d 271].) The House Judiciary Committee Report accompanying IRCA discussed "how the willingness of many illegal immigrants to accept low wages and substandard conditions makes them attractive to some employers who are ready to 'exploit [them as a] source of labor' often to the detriment of United States workers whose wages are depressed or whose jobs are lost." (*N.L.R.B. v. A.P.R.A., supra,* 134 F.3d at pp. 55-56 [citations omitted].)

Employer sanctions are the central enforcement feature of IRCA. It is "unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien." (8 U.S.C. § 1324a(a)(1), (a)(1)(A).)

Under IRCA, the term "hire" means "the actual commencement of employment of an employee for wages or other remuneration." (8 C.F.R. § 274a.1(c).) "Employment" is defined as "any service or labor performed by an employee for an employer." (8 C.F.R. § 274a.1(h).) An unauthorized alien may not be "employed" by an "employer." (See 8 U.S.C. § 1324a.) An employer that violates this provision is subject to civil penalties (see 8 U.S.C. § 1324a(e)(4)), or criminal penalties if they engage in a pattern of hiring unauthorized aliens. (8 U.S.C. § 1324a(f).)

IRCA also establishes an "extensive 'employment verification system,' designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States." (*Hoffman, supra,* 535 U.S. at p. 137 [citations omitted].) Known as the I-9 system, employers are required to verify the identity of their employees and ensure they are eligible to work in the United States by examining certain specified documents. (8 C.F.R. § 274a.2(b).) IRCA establishes a list of permissible verification documents, enabling employees to prove eligibility by supplying any document on the list.[15] (8 U.S.C. § 1324a(b)(1)(A)-(b)(1)(D); see also *Chamber of Commerce of U.S. v. Edmondson* (10th Cir. 2010) 594 F.3d 742, 751.)

No reasonable employer would assume that the issuance of a law license to an individual relieves them of their obligation to verify employment eligibility consistent with the I-9 System. Thus, for all practical purposes, undocumented immigrants would not be able to work for an employer. However, IRCA does not preclude all avenues of use for a law license. An undocumented immigrant can engage in an independent contractor relationship or perform pro bono services.

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[15] Notably, a law license is not listed as a permissible verification document. (See 8 C.F.R. § 274(a).2(b)(v).)

IRCA only applies to employment and only penalizes employers for hiring undocumented immigrant employees. Excluded from the definition of employee under IRCA is "independent contractor" and excluded from the definition of employer is a "person or entity using contract labor." (8 C.F.R. § 274a.1(f) ["employee... does not mean independent contractor"]; 8 C.F.R. § 274a.1(g) ["employer shall ... not [mean] the person or entity using the contract labor"].)

The typical relationship between an attorney in private practice with a client is that of an independent contractor rather than an employee. (See *Associated Indemnity Corp. v. Industrial Accident Commission* (1943) 56 Cal.App.2d 804 [133 P.2d 698]; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 880-81 [110 Cal. Rptr. 511]; *Channel Lumber Co., Inc. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1230 [93 Cal.Rptr.2d 482].) If an undocumented immigrant was engaged by a client as an independent contractor, that relationship would not subject the client to penalties under 8 U.S.C. section 1324a.[16]

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[16] As an independent contractor, Mr. Garcia would be required and fully able to report and pay income taxes. For IRS purposes, individuals who do not have and are not eligible to obtain a social security number may apply for an ITIN. (See 26 C.F.R. § 301.6109-1(d)(3).) ITINs are also accepted by the State of California Franchise Tax Board in reporting income and paying taxes (payable via electronic funds transfers from bank accounts, money orders, or cash). (See, e.g., Form

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An undocumented immigrant can also provide pro bono services for a client, or any other person or entity for that matter, as section 1324a only applies to the employment of an employee for wages or other remuneration. (8 C.F.R. § 274a.1(c).) Again, whatever an individual chooses to do after licensure, if anything, must be done in accordance with the profession's high legal and ethical obligations and within the confines of all applicable laws.

2. The Five State Interests Raised and Rejected in *Raffaelli* Dealing with Non-Immigrant Aliens Are Equally Applicable to Undocumented Immigrants

In *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288 [101 Cal.Rptr. 896], this Court invalidated a statutory provision requiring all applicants for bar admission to be citizens of the United States, expressly holding that citizenship bears no rational relationship to one's professional or vocational competency or qualification. (*Id.* at pp. 303-04.)

Raffaelli had initially entered the United States as a non-immigrant alien on an exchange visitor visa, and later obtained a student visa that authorized him to remain in the United States until his education was completed. (*Raffaelli, supra,* 7 Cal.3d at p. 291.) He attended college and law school in California, and then took and passed the California Bar Examination in 1969. (*Ibid.*) Between 1969 and 1971 it appears he had no

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540ES<https://www.ftb.ca.gov/forms/2012/12_540es.pdf> [as of June 6, 2012].)

lawful status in the United States; however, he subsequently married an American citizen and was granted the status of a permanent resident alien in 1971. (*Ibid.*)

The Committee rejected his application for law licensure based solely on the fact that he was not a citizen as mandated by statute. The California Supreme Court declared the citizenship requirement void. In reaching its decision, the Court dismissed the following five state interests as not rationally connected to the citizens-only ban. This Court's analysis in *Raffaelli* is equally applicable here, where the issue involves undocumented immigrants.

a. "A lawyer must appreciate the spirit of American institutions"

A state cannot constitutionally authorize exclusion from the practice of law on the ground that the applicant holds particular beliefs concerning American institutions. (*Raffaelli, supra,* 7 Cal.3d at p. 296.) "[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. [Citation omitted]." (*Ibid.*) What a state can do is ensure that an applicant has a general understanding of the theory and practice of the American governmental social system in which he must function. (*Ibid.*) To suggest, however, that such a person lacks "'appreciation of the spirit of American institutions' merely because

he is not himself a citizen" is an irrational basis for excluding aliens on this ground. (*Ibid.*) As this Court eloquently stated:

> Knowledge of this kind is acquired in many ways, both formal and informal. It comes not so much from the accident of birth as from the experience of the daily life of the community and the role of government in that life. These manifestations unfold to everyone who has lived in America or taken an active interest in the American scene.

(*Raffaelli, supra,* 7 Cal.3d at p. 296.)

There is no indication that undocumented immigrants lack appreciation for the spirit of American institutions, particularly those who – like Mr. Garcia – have been in the United States since they were minors, attended and graduated from American schools, and proclaimed a desire to legalize their immigration status and become citizens.

Further, there is no justifiable basis for believing that undocumented immigrants will be disloyal to America. Nevertheless, the issue of the possibly treasonous behavior of anyone seeking a law license is dealt with in the State Bar Act. Under Business and Professions Code section 6064.1, "[n]o person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means" will be admitted to practice law in California.

b. "A lawyer must take an oath to support the Constitutions of the United States and California"

Business and Professions Code section 6067 requires "[e]very person on his admission ... [to] ... take an oath to support the Constitution of the United States and the Constitution of the State of California." In *Raffaelli*, this Court held that it was inconceivable that "aliens as a class are incapable of honestly subscribing to this oath." (*Raffaelli, supra,* 7 Cal.3d at p. 297.)

The attorney's oath is a forward-looking obligation imposed on the individual at the time of his admission. There is no indication that Mr. Garcia's prior undocumented entries into the United States, both of which occurred when he was a minor, will taint his promise to prospectively uphold and support the laws. The oath is not given to "aliens as a class" but to attorneys as individuals, and Mr. Garcia as an individual will have to subscribe to it if he is admitted. There is no basis in the extant record to believe that Mr. Garcia as an individual will be unable to do so. Mr. Garcia has resided continuously in the United States since the age of 17; he is the son of a United States citizen; and he is the beneficiary of an approved visa application, which places him on track to achieve lawful permanent residency and ultimately gives him a clear pathway to naturalization – all of which underscore his affinity to this country and strong incentive to be law abiding.

Moreover, not every breach of the law or indication of a continuing offense prevents a person from taking the oath and faithfully discharging the duties of an attorney. In *Hallinan v. Committee of Bar Examiners of State Bar* (1966) 65 Cal.2d 447 [55 Cal.Rptr. 228, 421 P.2d 76], the Court considered and approved the certification of an applicant with a lengthy history of civil disobedience violations. It did so even though the applicant suggested that lawyers are not always required to obey the laws and admitted that as an attorney he might well take part in future civil disobedience. (*Id.* at pp. 457-58.)

In issuing the order of admission, this Court held that "every intentional violation of the law is not, ipso facto, grounds for excluding an individual from membership in the legal profession." (*Hallinan, supra,* 65 Cal.2d at p. 469.) "The question is not whether the [applicant's] conduct can be condoned. It cannot. The question is whether such conduct demonstrates that he does not presently possess the character to be entitled to practice law. We think that it does not." (*Id.* at p. 471.)

Similarly, Mr. Garcia's status in the United States, should not, ipso facto, be grounds for excluding him from law licensure. He has met all of the prescribed qualifications and there is no reason to believe he cannot take the oath and faithfully uphold his duties as an attorney.

c. "A lawyer must remain accessible to his clients and subject to the control of the bar"

The Court noted in *Raffaelli* that the risk of deportation is easily outweighed by the possibility that a citizen lawyer could just as easily become unavailable. (*Raffaelli, supra*, 7 Cal.3d at p. 299.) "[T]he possibility that an alien lawyer might voluntarily return to his native land is not significantly different, in today's highly mobile society, from the possibility that a citizen lawyer might voluntarily move to a different jurisdiction." (*Ibid.*) The Court also pointed out that all lawyers may be involuntarily removed from practice "by death, by serious illness or accident, by disciplinary suspension or disbarment, or by conscription" and that "[i]n any of [these] circumstances the client will undergo the same inconvenience of having to obtain substitute counsel." (*Ibid.*)

Indeed, both statistics and immigration policy demonstrate the unlikelihood of someone in Mr. Garcia's position being deported. In 2011, for example, there were 319,077 removals by Immigration Customs and Enforcement ("ICE"). (ICE Removal Statistics (FY 2011 data through Sep. 30, 2011) <http://www.ice.gov/removal-statistics/> [as of June 6, 2012].) Of those, 54.6% were criminal offenders, 19.6% were repeat immigration violators, 11.6% were border removals, 4.7% were immigration fugitives, and 9.5% were "Other Removable Aliens" comprised of mis-

categorized criminals or aliens removed on national security grounds or for general immigration violations. (*Ibid.*)

Moreover, if the federal government did take the extraordinary step of instituting removal proceedings, Mr. Garcia, as a long-term resident of the United States, may be eligible for relief from removal. (See generally Johnson et al., Understanding Immigration Law (LexisNexis 2009) pp. 320-31 [summarizing various forms of relief from removal available to noncitizens under the U.S. immigration laws].)[17] He would also be entitled to a due process hearing in connection with any removal proceedings. (See 8 U.S.C. §§ 1229, 1230; *Woodby v. I.N.S.* (1966) 385 U.S. 276 [87 S.Ct. 483, 17 L.Ed.2d 362].) Arguably, this would give him sufficient time to make arrangements for the transfer of his client files.

As a safeguard, there are already mechanisms in place to deal with attorneys who become suddenly unavailable and "incapable of devoting the time and attention to ... protect the interest of a client matter." (Bus. & Prof. Code, §§ 6180, 6190.) Under sections 6180 and 6190, a superior court

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[17] Such relief may include an adjustment of his immigration status under 8 U.S.C. § 155(i). Once his visa becomes available, he does not need to depart the United States and would avoid the 10-year bar that would have otherwise been triggered if he had to leave the country. (8 U.S.C. § 1182(a)(9)(B)(i).) He may also be eligible for cancellation of removal. (See 8 U.S.C. § 1229b(b)(1) [providing for relief from removal for undocumented immigrant who has resided in the United States continuously for 10 years].)

can issue an order of assumption of jurisdiction over an attorney's law practice and appoint another licensed attorney or the State Bar to handle the disposition of client files. This process provides additional assurances of client protection, and would be equally applicable in the rare instance of an attorney's deportation.

d. "The practice of law is a privilege, not a right"

The "right-privilege" dichotomy is an "out-moded adage" that is not relevant to whether an applicant should be licensed. (*Raffaelli, supra*, 7 Cal.3d at pp. 299-300.) The fact is, "the practice of law is not a matter of grace, but the right of one who is qualified by his learning and his moral character." (*Id.* at p. 300.) "Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." (*Ibid.*, citing *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232, 239 fn. 5 [77 S.Ct. 752, 1 L.Ed.2d 796].) Here, Mr. Garcia has met the requisite criteria for admission to practice law in California.

e. "A lawyer is an 'officer of the court' and therefore 'should be a citizen'"

There is no nexus between being an officer of the court and a citizen; this reasoning "cannot rationally be invoked to justify the wholesale exclusion of aliens from the bar." (*Raffaelli, supra,* 7 Cal.3d at p. 301;

accord *In re Griffiths*, *supra*, 413 U.S. 717.) Although attorneys are often referred to as "officers of the court," they are not "officers" within the ordinary meaning of that term. (*In re Griffiths, supra,* 413 U.S. at p. 728.) As noted by the United States Supreme Court, lawyers are engaged in a private profession; while they "do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts ... they are not officials of the government." (*Id.* at p. 729.) "[H]olding a license to practice law ... [does not] place one so close to the core of the political process as to make him a formulator of government policy" and require him to be a citizen to carry out the functions of being a lawyer. (*Ibid.*)[18]

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[18] In *LeClerc v. Webb* (5th Cir. 2005) 419 F.3d 405, the Fifth Circuit upheld a Louisiana bar rule prohibiting non-immigrant aliens (those here legally on a student, work, or visitor's visa) from sitting for the bar examination. Applying an equal protection analysis, the Court limited the holdings of *Raffaelli* and *Griffiths* to citizens and permanent resident aliens, and reasoned that non-immigrant aliens constituted a separate class of aliens that could be precluded from attorney licensure pursuant to a rational basis test. That case is distinguishable, however, as here, there is no California bar rule prohibiting certain classes of aliens from taking the exam or becoming licensed, and in 2005 the California Legislature enacted Business and Professions Code section 6060.6 specifically permitting non-immigrant aliens the ability to take the California Bar Examination. (Cf. *Dingemans, supra,* 568 A.2d 354 [Vermont allows non-immigrant aliens to take the Vermont Bar Examination].)

E. What, If Any, Other Public Policy Concerns Arise With A Grant Of This Application?

Today, federal, state, and local governments and the courts continue to grapple with the modern day reality of undocumented immigration. In 1982, the Supreme Court in *Plyler v. Doe* (1982) 457 U.S. 202, 218-19 [102 S.Ct. 2382, 72 L.Ed.2d 786], in words that ring true today, observed that:

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

An estimated 11 million undocumented immigrants live in the United States.[19] Because of the availability of jobs in the United States, greatly increased border enforcement has had limited impacts on decreasing the undocumented population. (See Kevin R. Johnson & Bernard J. Trujillo, Immigration Law and the US Mexico Border (2011) pp. 220-21.)

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[19] See Jeffrey Passel & D'Vera Cohn, U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade (Sept. 2010), Pew Hispanic Center, <http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade/>.

Consequently, both Presidents Bush and Obama have supported reform of the U.S. immigration laws.[20]

As Congress has not passed comprehensive immigration reform, many state and local governments have stepped in to enact immigration enforcement legislation. (See National Conference of State Legislatures, 2010 Immigration Related Bills and Resolutions in the States (January-March 2010) p.1 ["With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate."]; see, e.g., *United States v. Arizona* (9th Cir. 2011) 641 F.3d 339, cert. granted (2011) 132 S.Ct. 845.) The question facing the courts and state legislatures is how to reasonably, fairly, and legally respond to the existence of the substantial undocumented population in the United States. The answers are not always easy. Despite what some activists from both sides of

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[20] See President George W. Bush, President Bush Proposes a New Temporary Worker Program (Jan. 7, 2004), <http://www.georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html> [proposing temporary worker program and observing that undocumented immigrants who seek only to earn a living end up in the shadows of American life – fearful, often abused and exploited]; see also Lee, *President Obama on Fixing Our Broken Immigration System: "E Pluribus, Unum,"* (May 10, 2011) White House Blog, <http://www.whitehouse.gov/blog/2011/05/10/president-obama-fixing-our-broken-immigration-system-e-pluribus-unum> [calling for reform of "broken" immigration system and advocating for passage of the DREAM Act because "we should stop punishing innocent young people for the actions of their parents"].

the political spectrum often contend, the complex legal and policy questions are not subject to simple policy solutions.

1. Current Policy Supports Inclusion, Rather Than Exclusion

For at least a generation, the United States Supreme Court has addressed the questions surrounding the constitutional treatment of undocumented immigrants brought into this country by their parents. The current state of the law and underlying policy in California supports inclusion, rather than exclusion, of this population.

In *Plyler*, the Supreme Court struck down as unconstitutional a Texas law that effectively barred undocumented students from receiving an elementary and secondary school public education. In so holding, the Court recognized that:

> The children who are plaintiffs in these cases are special members of [an alien] underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. . . . *Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.*

(*Plyler, supra,* 457 U.S. pp. at 219-20 [Emphasis added].)[21]

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[21] See generally, Michael A. Olivas, No Undocumented Child Left Behind (2012) [analyzing legal developments concerning access to public education by undocumented students]; María Pabón López & Gerardo R.

(Cont'd on next page)

Based on that reasoning, the Court held that the Texas law could not deny undocumented children a public education and impose a:

> [l]ifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas law], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

(*Plyler, supra,* 457 U.S. at pp. 223-24.)

The Supreme Court's decision in *Plyler* did not involve access to post-secondary education. The federal government has left it to the states to determine whether undocumented students are eligible to enroll in public colleges and universities.[22] The California Legislature and this Court have addressed some of the challenges facing undocumented students who

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> López, Persistent Inequality: Contemporary Realities and the Education of Undocumented Latina/o Students (2010) [to the same effect].

[22] The United States Department of Homeland Security ("DHS") does not require any school to determine a student's immigration status and has stated that DHS does not require any school to request immigration status or to report to the government if they know of a student is out of status, except in the case of those who came on student visas or for exchange purposes and are registered with the Student Exchange and Visitor Program. (United States Department of Homeland Security, Immigration and Customs Enforcement, Letter sent to Jim Hackenberg, (May 9, 2008) <https://www.salsa.democracyinaction.org/o/371/images/ICE%20Statement%20on%20Enrollment%20of%20Undocumented.pdf>.)

matriculate from California high schools. (See Ed. Code, § 68120.5, upheld in *Martinez, supra,* 50 Cal. 4th 1277, cert. den. (2011)131 S. Ct. 2961 [rejecting claim that allowing undocumented students eligibility for in-state fees at California colleges and universities violated federal law].) Last year, the California Legislature passed the California DREAM Act that allows certain children who were brought into the United States under the age of 16 without proper immigration documentation to apply for student financial aid. (See Ed. Code, § 66021.7; see also A.B. 130, Cal. Legis. 2011 and A.B. 131, Cal. Legis. 2011.)

Congress, for the last decade, has been debating various versions of the DREAM (Development, Relief, and Education for Alien Minors) Act, which, generally speaking, would allow for the regularization of the immigration status of undocumented college students and facilitate their access to public university educations. (See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform* (2009) 55 Wayne L. Rev. 1757.) Undocumented students through the DREAM Act seek to be placed on the same footing as other similarly-situated residents of the state with respect to access to public colleges and universities. They specifically strive to pay the same entrance fees charged other residents of the state, and to be eligible for financial assistance programs for which other state residents are eligible.

Developing federal executive policy echoes and extends this sentiment. On June 15, 2012, the Secretary of the Department of Homeland Security released a memorandum on "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (see <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>), which will ensure that the United States government will not institute removal proceedings against eligible undocumented students and will allow them to apply for work permits. TIME Magazine's June 25, 2012 cover story, highlights the challenges of undocumented students, who in most respects are fully assimilated into American society. (See Vargas, *Not Legal Not Leaving* (June 25, 2012; TIME Magazine U.S. <http://www.time.com/time/magazine/article/0,9171,2117243,00.html?pcd=pw-hp>.)

The Committee's recommendation to license Mr. Garcia builds logically on these evolving efforts to allow access to educational opportunities for undocumented students. The State of California, which has expressed a desire to invest in the education of undocumented students, should be able to benefit from the contributions of these individuals as professionals, both economically and otherwise.

2. No Policy Implications Outweigh the Committee's Finding that Mr. Garcia, if Licensed, Can Competently Represent Clients Because He Has Met the Minimum Qualifications to Practice Law

Mr. Garcia has demonstrated to the satisfaction of the Committee that he has met the legal and regulatory requirements for licensing. As discussed above, there are no apparent limitations because of his immigration status on his ability to zealously represent his clients to the best of his abilities. From a consumer protection standpoint, Mr. Garcia will be subject to the same legal and ethical obligations that are expected and demanded of all licensed attorneys. Issuing a license to Mr. Garcia is consistent with all applicable laws and regulations and does not encourage a violation of the law. Indeed, if he did violate the law in some way, he would be subject to possible discipline by the State Bar and face the possible loss of his license to practice law.

As outlined above, nothing in licensing suggests impliedly or expressly that Mr. Garcia can be employed as an attorney. If licensed to practice law by the California Supreme Court, Mr. Garcia will need to comply with all employment provisions of the immigration laws with respect to his representation of clients. As we have noted earlier, however, he can engage in the practice of law as an independent contractor or provide pro bono services without violating IRCA.

The issues involved in this case and the issues surrounding the legal status of persons brought into this country by their parents without proper authorization raise questions that are the subject of considerable contemporary public attention and discourse. Consequently, this Court has selected an appropriate time for briefing and consideration of the important question of the licensing of Mr. Garcia.

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IV. CONCLUSION

For all the foregoing reasons, the Committee respectfully requests that its pending motion for the admission of Sergio C. Garcia to the practice of law in California be granted.

DATED: June 18, 2012

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
THE STATE BAR OF CALIFORNIA

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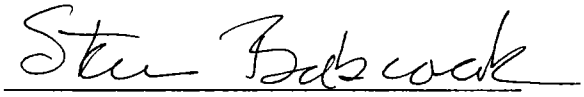
By: 
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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this OPENING BRIEF OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA RE: MOTION FOR ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA contains 10,797 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: June 18, 2012

Starr Babcock, Esq.

CERTIFICATE OF SERVICE

I, Joan Sundt, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 180 Howard Street, San Francisco, California 94105-1639, in said County and State. On June 18, 2012, I served the following document(s):

OPENING BRIEF OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA RE: MOTION FOR ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA

on the parties listed below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

Jerome Fishkin
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☒ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I am employed in the Office of General Counsel for the State Bar of California, and the foregoing document(s) was(were) printed on recycled paper.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 18, 2012.

Joan Sundt