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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE SERGIO C. GARCIA ON ADMISSION

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Amici Curiae National Center for Lesbian Rights and Lambda Legal Defense and Education Fund, Inc. respectfully request this Court's permission to file the accompanying amicus curiae brief in support of admission of Sergio C. Garcia to the State Bar of California.

This application is timely made within thirty days (30) days after the filing of the 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. Cal. Rules of Court, Rule 8.520(f)(2).

I. IDENTITY OF AMICI CURIAE

The National Center for Lesbian Rights ("NCLR") is a national, non-profit legal organization dedicated to securing and protecting equal rights for the lesbian, gay, bisexual, and transgender ("LGBT") communities, including LGBT persons in immigrant communities who seek basic human dignities, including equal opportunities to earn professional licenses.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of LGBT people and those living with HIV in

the United States. Through its *Proyecto Iguladad*, Lambda Legal serves Latino and Spanish-speaking LGBT and HIV-positive individuals across the United States, many of whom are immigrants.

II. INTERESTS OF AND ASSISTANCE OFFERED BY AMICI CURIAE

NCLR serves constituencies directly affected by the outcome of the decision in this case. NCLR has an interest in ensuring that undocumented immigrants who are LGBT are able to earn professional licenses, including a license to practice law, if they meet the necessary requirements. NCLR also has an interest in ensuring that California's lawyers reflect the full diversity of California's residents, including persons who are undocumented. As a non-profit legal organization, NCLR has substantial experience working with LGBT workers who require professional licenses to engage in particular occupations. The outcome of this case will directly affect how NCLR serves its undocumented clients seeking professional licenses.

Lambda Legal has successfully litigated and participated as an amicus curiae in numerous cases affecting the rights of LGBT people and, in particular, LGBT immigrants before this Court, the U.S. Supreme Court, and other state and federal courts, including recently serving as an amicus curiae in *Arizona v. United States*, a landmark Supreme Court case challenging

Arizona's anti-immigrant law, SB 1070. Through its work, Lambda Legal has become an expert on legal and policy issues affecting the LGBT community and, specifically relevant here, LGBT immigrants.

Amici Curiae NCLR and Lambda Legal believe that their backgrounds, expertise, interests and views in connection with the issues presented in this case will be helpful in resolving the issues currently before this Court. Based on this background, Amici Curiae will focus on issues not yet briefed in this case regarding whether there exist any "public policy limitations . . . on an undocumented immigrant's ability to practice law" or "other public policy concerns" that would arise from the granting of an undocumented immigrant's application for admission to the Bar. This brief will examine how undocumented immigrants in this country and in California have faced unjust exclusionary laws, including unwarranted denial of professional licenses. Based on their experience, Amici Curiae will highlight for the Court how there has also been a long history of LGBT persons being denied professional licenses by state governments and being denied opportunities for government employment based on sexual orientation or gender identity. Amici Curiae will further describe how discriminatory exclusion of LGBT persons from licensed professions and

government employment has now been repudiated repeatedly by courts and legislatures, and past exclusionary measures are now widely understood to have been based on biased, unfounded assumptions about the character of LGBT persons and their ability to contribute to public life. Drawing on that history, Amici Curiae's brief will address how the exclusion of undocumented immigrants from licensed professions often is based on similarly unfounded assumptions that likewise warrant repudiation.

III. CONCLUSION

For the foregoing reasons, the Amici Curiae National Center for Lesbian Rights and Lambda Legal respectfully request that this Court accept the accompanying brief for filing in support of admission of Sergio C. Garcia to the State Bar of California.

Dated: July 18, 2012

Respectfully submitted,

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BACKGROUND

Sergio C. Garcia was born in Mexico in 1977. When he was only seventeen months old, his parents brought him to California. He remained undocumented in the United States until approximately 1986, when he returned with his parents to Mexico. In 1994, when he was seventeen years old, Garcia's parents brought him back to California and filed an immigration visa petition for him. Even though the petition was approved in 1995, Garcia has been waiting for a visa to become available for almost eighteen years.

Garcia has lived in the United States for over twenty years. He has no criminal record. He has obtained his high school, college and law school degrees in the United States. He has passed the California bar examination and has met all the requirements for admission. The Committee of Bar Examiners of the State Bar of California has since informed this Court of Garcia's immigration status and recommended his admission to the California State Bar ("State Bar"). On May 16, 2012, the Court issued an Order to Show Cause to the Committee of Bar Examiners as to why its pending motion for admission of Garcia to the State Bar should be granted. The Court ordered any submission by the Committee of Bar Examiners be

filed on or before June 18, 2012. It invited amici curiae to submit applications for permission to file briefs in this proceeding.

INTEREST OF AMICI CURIAE

The National Center for Lesbian Rights ("NCLR") is a national, non-profit legal organization dedicated to securing and protecting equal rights for the lesbian, gay, bisexual, and transgender ("LGBT") communities, including LGBT persons in immigrant communities who seek basic human dignities, including equal opportunities to earn professional licenses. NCLR has an interest in ensuring that undocumented immigrants who are lesbian, gay, bisexual or transgender are able to earn professional licenses, including a license to practice law, if they meet the necessary requirements for certification.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of LGBT people and those living with HIV in the United States. Through its *Proyecto Iguladad*, Lambda Legal serves Latino and Spanish-speaking LGBT and HIV-positive individuals across the United States, many of whom are immigrants. Lambda Legal has successfully litigated and participated as an amicus curiae in numerous cases

affecting the rights of LGBT people and, in particular, LGBT immigrants before this Court, the U.S. Supreme Court, and other state and federal courts, including recently serving as an amicus curiae in *Arizona v. United States*, a landmark Supreme Court case challenging Arizona's anti-immigrant law, SB 1070. Through its work, Lambda Legal has become an expert on legal and policy issues affecting the LGBT community and, specifically relevant here, LGBT immigrants.

This case presents questions regarding the opportunities that California will afford to undocumented immigrants to obtain licenses to practice law. Undocumented immigrants in this country and in California have long faced unfounded exclusionary laws, including unwarranted denials of professional licenses. Amici submit this brief to highlight for the Court that there is also a long history of LGBT persons being denied professional licenses by state governments and being denied opportunities for government employment based on sexual orientation or gender identity. Discriminatory exclusion of LGBT persons from licensed professions and government employment has now been repudiated repeatedly by courts and legislatures, and past exclusionary measures are now widely understood to have been based on biased, unfounded assumptions about the character of

LGBT persons and their ability to contribute to public life. Undocumented immigrants have often faced similar baseless assumptions, and such assumptions should likewise be rejected as grounds for excluding undocumented immigrants from professional licenses.

SUMMARY OF ARGUMENT

Undocumented immigrants and lesbian, gay, bisexual and transgender ("LGBT") persons have both experienced histories of exclusion, bias, and discrimination. Those histories, while distinct and unique, are similar in important ways. For both groups, discrimination has frequently been rooted in erroneous assumptions that members of these groups are unfit for particular professions or are habitual lawbreakers who lack the moral values or loyalties of ordinary Americans. The country's long and unfortunate history of excluding LGBT persons from various professions and denying or revoking their professional licenses offers instructive context for the present case because such discriminatory treatment of LGBT persons has now been widely repudiated, including in California. Unfortunately, undocumented immigrants in many cases continue to face exclusion from licensed professions without adequate justification.

In addition, the LGBT community encompasses many immigrants, including those who are undocumented. Many LGBT immigrants face unique barriers to participation and inclusion in public life based on their immigration status and sexual orientation or gender identity. These persons are a vital part of our State and should not unjustifiably be denied the same chance as others to contribute, work, and belong.

NCLR and Lambda Legal submit this amicus brief to address questions 4 and 5 in the Court's May 16, 2012 Order, regarding whether there exist any "public policy limitations . . . on an undocumented immigrant's ability to practice law" or "other public policy concerns" that would arise from granting an undocumented immigrant's application for admission to the Bar. This brief will examine, as applied here to undocumented immigrants, two arguments that this Court rejected in *Raffaelli v. Committee of Bar Examiners* as to the eligibility of a permanent legal resident to be admitted to the California Bar: (1) the argument that a non-citizen cannot appreciate the spirit of American institutions, and (2) the argument that a non-citizen cannot commit to support the Constitutions of the United States and California. (*Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, 296-98[101 Cal.Rptr. 896] (hereafter *Raffaelli*).)

Similar unfounded policy arguments were once used to deny LGBT persons professional licenses, but today those barriers have largely fallen. We urge the Court to heed the lessons learned from the historical denial of professional licenses to permanent residents and LGBT persons and reject such justifications as the basis for any legal or public policy impediment to granting an otherwise qualified, undocumented immigrant a professional license to practice law.

ARGUMENT

I. BIASES TOWARD LGBT PERSONS AND UNDOCUMENTED IMMIGRANTS HAVE RESULTED IN LAWS THAT TARGET MEMBERS OF THESE COMMUNITIES AND EXCLUDE THEM FROM PUBLIC LIFE

Both immigrants and LGBT persons have long been targets for exclusionary laws and persecution under discriminatory criminal statutes. For example, California passed laws in the early 1950's that specifically targeted members of the LGBT community, including laws prohibiting "sodomy," "oral copulation" or "lewd vagrancy." (Eskridge, Dishonorable Passions: Sodomy Laws in America, 1861-2003 (2008), p. 103.) In addition to facing criminal penalties, persons arrested or convicted under these statutes were often publicly described as "perverts," banned from churches, educational institutions, and other public places, and terminated from their

jobs. (See, e.g., *Gaylord v. Tacoma Sch. Dist. No. 10* (Wash App. Ct. 1977) 559 P.2d 1340, 1341-42 [teacher discharged only a few weeks after his school learned he was gay].) Even after California repealed its laws criminalizing same-sex intimate relationships, LGBT persons continued to face prosecution under other state sodomy laws until the United States Supreme Court invalidated those laws in *Lawrence v. Texas* (2003) 539 U.S. 558, 578 [123 S.Ct. 2472, 156 L.Ed.2d 508].

Immigrants likewise have long been the targets of both facially discriminatory laws and purportedly neutral laws that were in fact intended to single them out for harassment and exclusion. For example, many local governments developed loitering laws in response to anti-immigrant fervor about immigrants on street corners and in other public spaces seeking work as day laborers. (See Cummings & Boutcher, *Mobilizing Local Government Law for Low-Wage Workers* (2009) 1 U.Chi.Legal F. 187, 213.) In the mid-1850's, the California Legislature passed laws targeting Spanish-speaking residents, including a ban on pastimes associated with Californios (Spanish-speaking California natives) and an anti-vagrancy act called the "Greaser Act." (Mooney, *The Search for A Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872* (2000)

21 Berkeley J. Emp. & Lab. L. 633, 650.) Immigration officials also used convictions for "disorderly conduct" or "loitering" in public parks or bathrooms to exclude immigrants from the United States, arguing that these vaguely defined offenses constituted crimes of "moral turpitude." (See Canaday, "*Who Is A Homosexual?": The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law* (2003) 28 Law & Soc. Inquiry 351, 360-61.) Later, police used these same anti-vagrancy and loitering laws to harass LGBT persons and justify police raids on LGBT gathering places. (See Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots* (1995) 5 Colum. J. Gender & L. 33, 64.)

Laws targeting immigrants have continued to be enacted in recent times. For example, in 1975 Texas revised its Education Code to permit local school districts to deny enrollment to undocumented children and to withhold state funds for the education of undocumented children. (*Plyler v. Doe* (1982) 457 U.S. 202, 205 [102 S.Ct. 2382, 72 L.Ed.2d 786].) In invalidating this Texas statute, the United States Supreme Court held that "[b]y 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 . . . to the progress of our Nation." (*Id.* at p. 223.) In 1994, California voters passed Proposition 187, which banned the delivery of health, education, and social services to undocumented immigrants. (Kragh, *Forging A Common Culture: Integrating California's Illegal Immigrant Population* (2004) 24 B.C. Third World L.J. 373, 393.) Even after a federal district court held that most of the provisions of Proposition 187 were unconstitutional, *League of United Latin Am. Citizens v. Wilson* (C.D. Cal. 1997) 997 F.Supp. 1244, 1261, ballot initiatives continued to target undocumented immigrants for adverse treatment. (Ryan, *The Unz Initiatives and the Abolition of Bilingual Education* (2002) 43 B.C. L. Rev. 487, 501.) Proposition 227, for example, imposed new burdens on immigrants by mandating that all public instruction be conducted in English, with few exceptions. (*Ibid.*)

While laws targeting the private relationships and public gatherings of LGBT persons have waned, particularly after *Lawrence v. Texas*, the use of criminal laws to target undocumented persons continues. In 2010, Arizona enacted SB 1070, a law that criminalized undocumented immigrants who seek work or fail to carry proof of legal immigration status. (*Arizona v. United States* (2012) __U.S.__, No. 11–182, 2012 WL 2368661, at pp. *9-

10. [132 S.Ct. 2492, ___].) The law also allowed police to make warrantless arrests of any person the officer had probable cause to believe had "committed any public offense that makes the person removable from the United States." (*Id.* at p. *13.) While the United States Supreme Court recently invalidated these sections of the Arizona law, it declined in the case before it to strike down another section of the law requiring a police officer to make a "reasonable attempt" to determine the immigration status of a person arrested, stopped or detained if the officer has a "reasonable suspicion" that the person is undocumented. (*Id.* at pp. *15, 17.) Local governments have also renewed efforts to pass anti-loitering laws targeting day laborers. (See, e.g., *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (9th Cir. 2011) 657 F.3d 936, 950 [striking down anti-day laborer law on free speech ground]; see also Cummings & Boutcher, *supra*, 1 U.Chi.Legal F. at p. 213 [discussing how local governments have passed anti-solicitation ordinances under their local police power to remove day laborers from seeking work on the streets].)

In sum, both immigrants and LGBT people have been targeted by discriminatory laws that seek to exclude them from participation in public life, and that history strongly suggests that attempts to exclude

undocumented persons from professional licensing are "more likely . . . to reflect deep-seated prejudice . . . than . . . rationality." (*Plyler v. Doe*, *supra*, 457 U.S. at p. 218 fn.14.)

II. NOW-REPUDIATED ARGUMENTS FOR DENYING PROFESSIONAL LICENSES TO LGBT PERSONS ARE INSTRUCTIVE FOR WHY THIS COURT SHOULD REJECT SIMILAR PUBLIC POLICY ARGUMENTS AS JUSTIFICATIONS FOR DENYING LICENSES TO PRACTICE LAW TO UNDOCUMENTED IMMIGRANTS

Among the most significant ways that LGBT persons historically suffered discrimination was the denial and revocation of professional licenses. Courts and legislators denied professional licenses to LGBT persons based on claims that they were morally unfit to perform a particular job or incapable of abiding by the law. Undocumented immigrants have faced similar false and stigmatizing perceptions of criminality or moral unfitness based solely on their immigration status.

In *Raffaelli v. Committee of Bar Examiners*, the Committee of Bar Examiners ("Committee") argued that several state interests justified denying admission to the California bar to a permanent legal resident who was not a United States citizen. Among other things, the Committee argued that: (1) a lawyer who is a non-citizen cannot "appreciate the spirit of American institutions," and (2) a lawyer who is a non-citizen cannot take an

oath to support the Constitutions of the United States and California. (*Raffaelli, supra*, 7 Cal.3d at pp. 296-98.) This Court found such arguments unconvincing and rejected them. (*Ibid.*) While courts had previously accepted similar arguments for denying professional licenses to LGBT persons, those arguments likewise have been rejected over the past 40 years, and today there are few jurisdictions in America, if any, where simply being lesbian, gay, bisexual, or transgender is regarded as a basis for exclusion from professional licensing. Just as these policy arguments no longer prevent permanent residents or LGBT persons from becoming licensed attorneys, this Court should now reject such policy arguments as applied to undocumented immigrants.

A. Undocumented Immigrants Are Capable of Appreciating the Spirit of American Institutions.

In *Raffaelli*, the Committee of Bar Examiners argued that non-United States citizens should be excluded from the State Bar of California because they would be unable to "appreciate the spirit of American institutions," as they supposedly failed to understand the values of the American governmental and social system. (*Raffaelli, supra*, 7 Cal.3d at p. 296.) Implicit in this argument was the assumption that immigrants are "outsiders" who lack the same moral and social values as American citizens. LGBT

persons have battled similar assumptions in fighting to obtain professional licenses. While these stereotypes still persist in society, this Court has rejected this "outsider" argument as applied to permanent residents and LGBT persons, and the Court should similarly reject it as a basis to deny undocumented immigrants a professional license to practice law.

1. California historically denied licenses to LGBT professionals based on claims that they were morally unfit.

Many professional licenses include a moral fitness test that excludes individuals based on gross immorality, immoral conduct, unprofessional conduct, or conduct involving moral turpitude. In the 1950s and 1960s, California was one of many states that disciplined doctors, dentists, pharmacists, embalmers and guardians for "gross immorality."[1] Convictions of crimes involving "moral turpitude" also prompted disciplinary action against attorneys, chiropractors, dentists, doctors, physical therapists, optometrists, pharmacists and engineers.[2] Licensing boards applied these terms to private consensual sexual acts between people of the same sex and

[1] (Bus. & Prof. Code §§ 2361(d) [doctors], 1680(8) [dentists], 3105 [optometrists], 4350.5 [pharmacists], 7698 [funeral directors and embalmers] (West 1954); Cal. Probate Code § 1580(4) [guardians] (West 1954).)

[2] (Bus. & Prof. Code §§ 6101 [attorneys], 1000-10b [chiropractors], 1679 [dentists], 2383 [doctors], 2685(d) [physical therapists], 3105 [optometrists], 4214 [pharmacists], 6775 [engineers] (West 1954).)

thus denied and revoked professional licenses to LGBT persons based on their purported lack of moral fitness. (Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States* (1999) 50 Hastings L.J. 1015, 1078.) LGBT persons convicted under state sodomy laws were often barred from obtaining licenses in professions ranging from medicine to interior design. (See *Lawrence v. Texas*, *supra*, 539 U.S. at p. 581 (conc. opn. of O'Connor, J.) [noting that if petitioners' sodomy convictions were upheld they would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training and interior design].)

Historically, courts reserved some of their harshest judgment for LGBT persons who openly expressed their sexual orientation, viewing these employees as flouting the values of the American public and flagrantly disregarding moral standards. For example, in 1972, John Singer, a typist at the Equal Employment Opportunity Commission was dismissed after he responded to charges that he "flaunted" his sexuality by allegedly kissing a man at a previous workplace, identifying himself as gay in a newspaper interview, and applying for a marriage license with another man. (*Singer v. U.S. Civil Serv. Comm'n* (9th Cir. 1976) 530 F.2d 247, 249, vacated (1977)

429 U.S. 1034.) The Ninth Circuit affirmed the EEOC's decision that by "flaunting his homosexual way of life," he "lessened public confidence" in the government's ability to conduct its business. (*Id.* at p. 255.)

LGBT teachers faced particular scrutiny under moral fitness tests. Many states expressly prohibited LGBT persons from teaching. For example, the West Virginia Attorney General stated in 1983 that gay teachers in West Virginia would be considered "immoral" under West Virginia law and thus dismissed from their jobs. (60 Ops.W.Va.Atty.Gen 46 (1983).) He noted that even if "homosexual and lesbian behavior" is legal, it is "strongly contrary to the moral code," and "violate[s] community standards of acceptable sexual behavior." (*Ibid.*) Until 1990, an Oklahoma statute similarly prohibited lesbians, gays, and bisexuals from teaching. (Okla. Stat. tit. 70, § 6-103.5 [repealed in 1989].) The Oklahoma statute provided that "a teacher, student teacher or teacher's aid may be refused employment or reemployment, dismissed, or suspended after a finding that the teacher or teacher's aid has engaged in public homosexual conduct or activity." (*Ibid.*) Transgender teachers were also viewed as violating moral fitness tests, particularly if they underwent surgery. (See, e.g., *Ashlie v. Chester-Upland Sch. Dist.* (E.D. Pa. May 9, 1979) No. 78-4037, 1979 U.S.

Dist. LEXIS 12516, at p. *2 [noting school's dismissal of transgender teacher after she underwent surgery because of purported "improper conduct" and "immorality"].)

In 1967, the California Court of Appeal affirmed the revocation of a teacher's credential after he was convicted of "lewd or dissolute conduct" under the California Penal Code for soliciting sex from a male undercover police officer. (*Sarac v. State Bd. of Educ.* (1967) 249 Cal.App.2d 58, 60-61 [57 Cal.Rptr. 69].) The court noted the following:

> Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of Education Code, section 13202. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children. It certainly constitutes evidence of unfitness for service in the public school system within the meaning of that statute.

(*Id.* at p. 62.) Even after this Court required a nexus between alleged immoral conduct and a teacher's fitness to teach in *Morrison v. State Bd. of Educ.* (1969) 1 Cal.3d 214 [82 Cal.Rptr. 175], California courts continued to uphold the revocation of teaching credentials when teachers were convicted of crimes involving consensual sexual conduct with someone of the same sex. (See e.g. *Purifoy v. State Bd. of Educ.* (1973) 30 Cal.App.3d 187, 189,

194 [106 Cal.Rptr. 201] [upholding revocation of a male teacher's credentials without a fair hearing on his fitness to teach because he had been convicted under an anti-loitering statute after he engaged in sexual conduct with another man in a public restroom]; *Moser v. State Bd. of Educ.* (1972) 22 Cal.App.3d 988, 989-90 [101 Cal.Rptr. 86] [upholding revocation of a teaching license of a male teacher who engaged in consensual sexual activity with another male because his actions were "unprofessional," "immoral," and involved acts of "moral turpitude" thus establishing his "unfitness to teach"].)

One California appellate court even upheld a school board's revocation of a teacher's credentials after he was acquitted of violating a statute prohibiting oral copulation. (See *Bd. of Educ. v. Calderon* (1973) 35 Cal.App.3d 490, 497 [110 Cal. Rptr. 916].) In *Calderon*, Marcus Morales Calderon, a teacher at Los Angeles City College, was arrested and charged with violating a statute prohibiting oral copulation after engaging in sexual activity with another man. (*Id.* at p. 492.) Calderon was eventually acquitted of the charges, but the school refused to reinstate him without court review. (*Ibid.*) The Court of Appeal upheld his dismissal. (*Ibid.*)

Ongoing refusals by lower courts to reverse teaching credential revocations and dismissals led this Court to clarify that, under its decision in *Morrison*, even teachers who were convicted of criminal sex offenses had a right to a fitness hearing and that "proof of the commission of a criminal act does not alone demonstrate the unfitness of a teacher but is simply one of the factors to be considered." (*Bd. of Educ. v. Jack M.* (1977) 19 Cal.3d 691, 702, fn.6 [566 P.2d 602].) This Court found unpersuasive the Board of Education's argument in *Jack M.* that a gay teacher's conviction under a morality law automatically demonstrated his unfitness as a teacher because of his purported disrespect for the law. (*Ibid.*)

Even after this Court decided these cases, LGBT teachers (and their allies) continued to face persecution when California Senator John Briggs introduced an initiative to prohibit gays and lesbians (and their heterosexual allies) from working in California's public schools. (Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion* (2005) 57 Fla.L.Rev. 1011, 1018.) Senator Briggs portrayed LGBT persons as "disgusting people and predatory child molesters." (*Ibid.*) His campaign distributed a pamphlet with a young boy lying in a pool of blood and warned voters to "protect your family from vicious killers and defend your children

from homosexual teachers." (*Id.* at p. 1018 [citing Clendinen and Nagourney, Out for Good: The Struggle to Build a Gay Rights Movement in America (1999), p. 381].) While the Briggs Initiative ultimately failed, it was illustrative of continued attempts to exclude LGBT persons from professional life based on assumptions that LGBT persons lacked the same moral values as other Americans. (Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity* (2003) 12 Law & Sexuality 271, 288.)

LGBT attorneys were also targeted by moral fitness requirements. For decades, many states denied and revoked attorney licenses of lesbians and gay men because of their sexual orientation. In one case, after an attorney was arrested under Florida's sodomy law in 1956, Florida revoked his license to practice law. (*Florida Bar v. Kimball* (Fla. 1957) 96 So.2d 825, 825.) Seventeen years later, New York denied the same attorney a license to practice in that state based on his sodomy charge in Florida, even though Florida had declared the statute unconstitutional two years before he applied for admission in New York. (*Application of Kimball* (N.Y. Ct. App. 1973) 33 N.Y.2d 586, 587-88 [301 N.E.2d 436] [noting that the New York Legislature prohibited consensual sodomy as "deviate sexual intercourse"

and no court had yet ruled New York's statute unconstitutional]; see also *Bar v. Kay* (Fla. 1970) 232 So.2d 378, 379 [disbarring a man convicted of indecent exposure for engaging in consensual sexual activity with another man in a public place].) Both New York and Florida appellate courts eventually reversed their state bars' decisions to preclude admission of attorneys based on their sexual orientation alone. (See e.g. *Fla. Bd. of Bar Exam'rs v. Eimers* (Fla. 1978) 358 So.2d 7, 9-10 [holding that Florida cannot deny bar admission based on a candidate's "mere preference for homosexuality" and instead must show a "substantial nexus between his antisocial act" and his "permanent inability . . . to live up to the professional responsibility and conduct required of an attorney"].)

California similarly precluded LGBT persons from practicing law by revoking professional licenses after individuals were charged with or convicted of sodomy or vagrancy. For example, in a 1957 case, an attorney was convicted of violating California's statute prohibiting vagrancy after he engaged in sexual conduct with another man in public. (*In re Boyd* (1957) 48 Cal.2d 69, 69 [307 P.2d 625].) The Court ordered that Boyd be suspended from practicing law for three years. (*Ibid.*) Even though Boyd's conviction under the vagrancy statute was a misdemeanor offense, the Court

determined that his actions involved "moral turpitude," which it defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*Id.* at p. 70 [citing 2 Bouvier's, Law Dict., Rawle's Third Revision (8th ed. 1914), p. 2247].)

Transgender people also have long faced discrimination that unfairly barred them from many professions. In 1984, for example, the Seventh Circuit Court of Appeals upheld Eastern Airline's decision that Karen Frances Ulane could no longer be a pilot because she had undergone a gender transition. (*Ulane v. E. Airlines, Inc.* (7th Cir. 1984) 742 F.2d 1081, 1087.) Even today, transgender people face barriers to working in many professions solely because of their transgender status. (See, e.g., *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312, 1321 [transgender woman prevailed on equal protection claim after being terminated from her position as an editor in the Georgia General Assembly's Office of Legislative Counsel]; *Schroer v. Billington* (D.D.C. 2008) 577 F.Supp.2d 293, 300-02 [transgender applicant prevailed on sex discrimination claim after being denied employment at Congressional Research Service on the pretext that her

transition raised questions about her trustworthiness and ability to retain a security clearance, among other things]; *Barnes v. City of Cincinnati* (6th Cir. 2005) 401 F.3d 729, 737 [transgender police officer prevailed on sex discrimination and equal protection claims after her demotion]; *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566, 573 [transgender firefighter prevailed on sex discrimination and retaliation claims when a fire department suspended her after she informed a supervisor about her gender identity and transition].)

All of these cases underscore the historical stigma against LGBT persons that for decades fueled false assumptions that they were incapable of modeling the moral values required of a licensed professional. While many professions still initiate disciplinary proceedings against workers who engage in "gross immorality" or crimes of "moral turpitude," the once common application of these prohibitions to lesbians and gays has largely ended, and professionals no longer face the same persecution in their professions simply for being gay. (See Finer, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion, Circa 2000* (2000) 10 Colum. J. Gender & L. 231, 260 [noting that gay and lesbian applicants "*presently* have little to fear from Bar examiners and character

committees" that their sexual orientation will deny them professional licenses] [internal citations omitted].)

2. Undocumented immigrants face similar arguments based on unfounded perceptions of immorality and criminality.

In *Raffaelli*, *supra*, 7 Cal.3d at page 296, this Court rejected the Committee of Bar Examiner's argument that non-citizen permanent residents were unable to "appreciate the spirit of American institutions" because they allegedly lacked understanding of the theory and practice of the American governmental and social system. The Committee's argument suggested that immigrants were "outsiders" who had such a different value system that they would be unable to appreciate American social and governmental values. (*Ibid.*) This Court rejected the Committee's argument in *Raffaelli* and should equally reject similar policy arguments that may be offered with respect to other immigrants, including undocumented persons.

The Committee's argument in *Raffaelli* that non-citizens are unable to "appreciate the spirit of American institutions" reflected an unstated assumption that non-citizens have different social and moral values than American citizens. Similar in some ways to the history described above regarding the LGBT community, undocumented immigrants have faced

persistent discriminatory and stigmatizing social attitudes that paint them as morally corrupt or unfit. (See Annand, *Still Waiting for the Dream: The Injustice of Punishing Undocumented Immigrant Students* (2008) 59 Hastings L.J. 683, 689 [hereafter Annand].) Just as vague morality standards were used to exclude LGBT persons from professional life, immigrants have faced arbitrary treatment based on amorphous standards that permit deportation based on conviction for crimes involving "moral turpitude." (See Moore, *"Crimes Involving Moral Turpitude": Why the Void-for-Vagueness Argument Is Still Available and Meritorious* (2008) 41 Cornell Int'l L.J. 813, 816 (2008) [noting that since 1891, courts and immigration officers have deported and excluded tens of thousands of immigrants through accusations of moral turpitude, while there is little consistency in the definition of such crimes].) Indeed, the same vaguely worded standards that led to the exclusion of LGBT persons from various forms of employment also targeted immigrants. (See, e.g., Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law* (2005) 105 Colum.L.Rev. 641, 643 [describing how the Page Law, repealed in 1974, which banned women from immigrating to engage in prostitution or

for other lewd or immoral purposes, led to the exclusion of almost all immigrant Chinese women].)

Undocumented immigrants also face societal prejudice that they are immoral, or even criminals, based on their immigration status alone, even though entering the United States without immigration authorization is a civil infraction, not a criminal violation. (See Annand, *supra*, at pp. 689-90 [finding that undocumented immigrants are often labeled "immoral" or "criminals" for entering the United States without authorization].) Just as misdemeanor convictions for vagrancy or sodomy were once used to associate LGBT persons with "immoral conduct" and justify the denial of professional licenses, undocumented immigrants continue today to suffer from similar unfounded associations with immorality or criminality based solely on their immigration status. Such assumptions permeated the policy arguments in *Raffaelli* as to why immigrants should be precluded from practicing law in California. This Court rightfully rejected such arguments in *Raffaelli* as applied to permanent residents, and it should similarly reject any such policy concerns as they apply to undocumented immigrants.

B. Undocumented Immigrants Are Fully Capable of Upholding the Constitutions of the United States and California.

In *Raffaelli, supra*, 7 Cal.3d at page 298, the Committee of Bar Examiners argued that non-citizens should be denied licenses to practice law because they would be incapable of honestly taking an oath to support the Constitutions of the United States and California. The Committee argued that because an immigrant remains a national of his native land, "he cannot be loyal to the United States." (*Ibid.*) The Committee's argument also presumed that immigrants would be unable to comply faithfully with federal and state law merely because of their immigration status. This Court rejected the Committee's arguments and the erroneous assumptions upon which they were premised and ruled that non-citizens are eligible for California bar admission. (*Id.* at p. 299.) This Court should equally reject such arguments and assumptions here.

1. This Court should reject any public policy argument premised on the false assumption that undocumented immigrants lack loyalty to the United States.

This Court held in *Raffaelli, supra*, 7 Cal.3d at page 298, that there were no rational grounds for believing that non-citizen bar applicants lacked loyalty to the United States. This Court cited the numerous contributions of

immigrants to this country and noted that an immigrant does not lack a "stake in the economic and social fortune of the state merely because the federal law denies him the right to naturalization." (*Ibid.*) The same reasoning applies to undocumented applicants for bar admission. There is no reason to assume that they lack a stake in California's economic and social fortune. (See *Arizona v. United States*, *supra*, WL 2368661, at pp. *9-10 ["The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here."].) This is particularly true for Mr. Garcia, who has spent much of his childhood and adult life in the United States, including almost eighteen years waiting to obtain a visa.

Similar fears of disloyalty led to the exclusion of LGBT persons from federal jobs in the State Department during the McCarthy era. (See Koppelman, *Why Gay Legal History Matters* (2000) 113 Harv.L.Rev. 2035, 2039, reviewing Eskridge, Gaylaw: Challenging the Apartheid of the Closet (1999) p. IX, 470 [noting that 119 employees were fired in the State Department for homosexuality as perceived threats to the country's loyalty and security].) While arguments that LGBT persons are inherently disloyal hold little influence today, such false conceptions continue to haunt

undocumented immigrants. (See Gunlicks, *Citizenship As A Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States* (1995) 63 Geo.Wash.L.Rev. 551, 572 [criticizing social biases against undocumented immigrants that assume that all members of this group lack allegiance and loyalty to the United States].) This Court should reject any such policy arguments here.

2. Undocumented persons' immigration status does not make them more likely to violate the law.

The Committee of Bar Examiners argued in *Raffaelli*, *supra*, 7 Cal.3d at page 297, that immigrants would be unable to honestly take an oath to uphold the state and federal Constitutions because they would be incapable of following the law. In rejecting the Committee's argument, this Court recognized that there is no rational basis for believing that non-citizens "lack a commitment to abide by the laws of the land." (*Id.* at p. 299.) It further noted that a person does not "show a tendency towards a crime, simply because he is not a citizen of this country." (*Id.* at p. 299 [citing *People v. Lovato* (1968) 258 Cal.App.2d 290, 293 [65 Cal.Rptr. 638], disapproved on other grounds by *People v. Satchell* (1971) 6 Cal.3d 28 [489 P.2d 1361].])

In the past – and even quite recently – LGBT persons encountered similar arguments that they were unfit to perform certain jobs because their very status necessarily meant that they would break the law. For example, LGBT persons were denied work as police officers and government attorneys based on internal policies (written and unwritten) assuming that they would be unable to enforce sodomy laws. (See, e.g., *Shahar v. Bowers* (11th Cir. 1997) 114 F.3d 1097, 1101 [upholding Georgia Attorney General's decision to rescind an offer of employment after a prospective employee disclosed she was a lesbian based on an assumption that her employment conflicted with the Department's ability to enforce Georgia's sodomy law]; see also *City of Dallas v. England* (Tex. App. 1993) 846 S.W.2d 957, 959 [finding unconstitutional a department policy preventing a lesbian from working as a police officer under the state's sodomy statute].)

Just as courts generally no longer find persuasive the argument that LGBT persons are unable to abide by the law due to their LGBT status, Amici urge this Court to disregard similar policy arguments that may be offered in this case concerning undocumented immigrants. The mere fact that an applicant is undocumented does not suggest that he or she is incapable of upholding the law and otherwise fulfilling all of the

professional and ethical obligations of an attorney. (See *Hallinan v. Committee of Bar Examiners of State Bar* (1966) 65 Cal.2d 447, 453-55, 473-74 [421 P.2d 76] [admitting an applicant into the California bar even though he opined that attorneys should not always follow the law and admitted that he might participate in future civil disobedience].) This Court noted in *Hallinan, supra*, 65 Cal.2d at page 459, that "every intentional violation of the law is not, ipso facto, grounds for excluding an individual from membership in the legal profession." Instead, the Court required that evidence regarding the circumstances of the act "reveal some independent act beyond the bare fact of a criminal conviction to show that the act demonstrates moral unfitness and justifies exclusion or other disciplinary action by the bar." (*Ibid.*) There is nothing in the record to suggest that Mr. Garcia is morally unfit or likely to commit a crime so as to justify exclusion from the California bar. He has met all the necessary qualifications, and no evidence has been presented that he has committed any act that would make him unfit for admission.

//

CONCLUSION

For the foregoing reasons, NCLR and Lambda Legal respectfully urge this Court to admit Mr. Garcia to the California State Bar.

Dated: July 18, 2012

Respectfully submitted,

Angela K. Perone

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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 BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA contains 6,103 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: July 18, 2012

Angela K. Perone

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CA SBN 245793

CERTIFICATE OF SERVICE

I, Chris Zaldua, 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 870 Market Street, Suite 370, San Francisco, California 94102, in said County and State. On June 18, 2012, I served the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA

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

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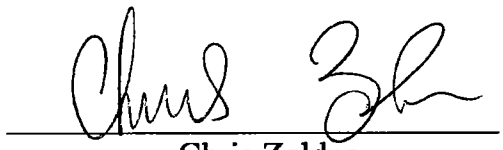
BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. 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 at the National Center for Lesbian Rights, 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.



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