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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 *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE DREAM BAR ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, ASIAN PACIFIC AMERICAN LEGAL CENTER, ASIAN LAW ALLIANCE, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND, AND NATIONAL COUNCIL OF LA RAZA IN SUPPORT OF SERGIO C. GARCIA

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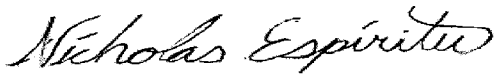
CERTIFICATE OF INTERESTED ENTITIES

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that he represents the following entities, each of which is an organization joining in the attached application and amici curiae brief:

- Dream Bar Association
- Mexican American Legal Defense and Educational Fund
- Asian Pacific American Legal Center
- Asian Law Alliance
- National Association of Latino Elected and Appointed Officials Educational Fund
- National Council of La Raza

Dated: July 18, 2012



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IDENTITY AND INTEREST OF AMICUS CURIAE

Amici cuiae Dream Bar Association (DBA), Mexican American Legal Defense and Educational Fund (MALDEF), Asian Pacific American Legal Center of Southern California (APALC), Asian Law Alliance (ALA), National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, and National Council of La Raza respectfully request leave under Rule 8.520(f) of the California Rules of Court to file their brief in support of Applicant Sergio C. Garcia.[1]

Dream Bar Association

The Dream Bar Association (DBA) is an unincorporated organization that welcomes undocumented and allied legal professionals, law students, and aspiring law students. Most DBA members refer to themselves as "DREAMers,"[2] as most would likely be beneficiaries of the Development, Relief, and Education Minors Act (DREAM Act) should it become federal law.[3] Many of the members are also eligible

---

[1] Pursuant to Rule 8.200(c)(3), *amici* state that no party in this case, and no person or entity other than *amici*, their members, or their counsel, authored the proposed *amici* brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

[2] These DBA members are individuals who immigrated with their families to the United States as minors. Ultimately, the families who brought them to the United States found no opportunity to apply for a formal immigration status. Despite spending their childhood completing a K-12 education as permitted by *Plyler v. Doe* (1982) 457 U.S. 202, coming of age, and completing undergraduate college and/or law school in the United States, these young people remain currently undocumented.

[3] The Development, Relief and Education for Alien Minors (DREAM) Act would create for individuals like Respondent an opportunity to adjust their status and become legal permanent residents. H.R. 1842, 112th Cong. (2011-12), S. 952, 112th Cong. (2011-12). Even though this legislation enjoys sustained bipartisan support, no version of the bill has advanced successfully through *both* chambers of the United States Congress.

for the deferred action and work authorization announced by President Obama on June 15, 2012. The DBA collects neither dues nor other monies. Its members include individuals that are similarly situated to Respondent who will seek or have applied for California Bar admission and/or bar admission in other states. Despite their undocumented status, these individuals, like Mr. Garcia, will be able to meet the current requirements for admission under the Rules of the Supreme Court Relating to Admissions to the Bar. The DBA's purpose is to provide a forum for DREAMers to identify opportunities to develop skills relevant to the legal profession through volunteer and pro bono activities. This support network seeks to provide its members with information related to financial aid, the Law School Admission Test, the law school application process, the bar exam, admission into the legal profession, and passage of the DREAM Act and other immigrant-friendly policies.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is the nation's leading Latino legal civil rights organization. Since MALDEF's founding in 1968, MALDEF has been dedicated to ensuring that Latino and immigrant students have equitable access to educational opportunities. Over the years, MALDEF has been heavily involved in litigation to protect the educational rights of Latino and minority students, including as counsel in *Plyler v. Doe* (1982) 457 U.S. 202, and represented undocumented students as proposed intervnors and amici in *Martinez v. The Regents of the University of California* (2011) 50 Cal.4th 1277. MALDEF has continued to advocate for the rights of undocumented students in advocating for the passage of the DREAM Act for the past decade, and remains a strong supporter of the current version of the DREAM Act. MALDEF has also advocated for California policies

that increase immigrant access to higher education. MALDEF believes that the admission of undocumented students to the State Bar of California will benefit not only the students, but also California and the Nation's well-being by improving access to legal services and increasing diversity in the legal profession. MALDEF believes that it immigration status is not a rational basis for denying immigrants, especially individuals such as the members of the Dream Bar Association, membership in the Bar.

Asian Pacific American Legal Center

The Asian Pacific American Legal Center of Southern California (APALC) is a nonprofit organization dedicated to advocating for civil rights, providing legal services and education, and building coalitions to positively influence and impact Asian Americans, Native Hawaiians and Pacific Islanders (AA/NHPIs) and to create a more equitable and harmonious society. Since its founding in 1983, APALC has worked on numerous cases and policy initiatives to promote immigrants' rights and to safeguard AA/NHPI students' access to higher education. In 2009, APALC and the Asian Law Caucus, along with a coalition of nearly 80 AA/NHPI civil rights, legal, social service, and community organizations, filed an amicus brief with the California Supreme Court in the case *Martinez v. The Regents of the University of California*, supporting undocumented college students' ability to pay in-state tuition under A.B. 540. APALC is a member of the Asian American Center for Advancing Justice along with the Asian American Justice Center in Washington D.C., the Asian American Institute in Chicago, and the Asian Law Caucus in San Francisco.

Asian Law Alliance

The Asian Law Alliance (ALA), founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian/Pacific Islander and low-income

communities in Santa Clara County. ALA has provided legal advice and community education to undocumented youth for over 25 years.

National Association of Latino Elected and Appointed Officials Educational Fund

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is the leading organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency includes the more than 6,000 Latino elected and appointed officials nationwide, more than 2,000 of whom are school board members or oversee public education at the state or local level. The NALEO Educational Fund's constituents actively promote the expansion of educational and professional opportunities for Latino youth, in the interest of enhancing our nation's future leadership and well-being. Our constituents also work to increase educational opportunities for undocumented youth living in their jurisdictions so that they can continue to contribute their talents to the building and strengthening of their communities.

National Council of La Raza

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, DC, serving all Hispanic subgroups in all regions of the country. It has regional offices in Chicago, Los Angeles, New York, Phoenix, and San Antonio and state operations throughout the nation.

For the foregoing reasons, *amici* respectfully request that the Court accept the accompanying brief for filing in the case.

Dated: July 18, 2012

Respectfully submitted,

Nicholas Espíritu

Nicholás Espíritu

MALDEF

INTRODUCTION

On May 16, 2012, this 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 "Bar") should be granted. The Court's Order to Show Cause 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. § 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?

2. Is there any state legislation that provides – as specifically authorized by 8 U.S.C. § 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?

Here, Amici will address questions 1, 2, and 5.

While Congress has expressly preempted some of the states' traditional power to administer public benefits, this limitation does not extend to the California Supreme Court's historic power to regulate the practice of law through admissions to the Bar. The plain language of 8 U.S.C. § 1621 limits the prohibition on professional licenses to those provided by state agencies or by appropriated funds of a State or local government. Since neither the Bar nor the California Supreme Court is a state agency, and since Bar admission is not given through appropriated funds, Bar membership is not a professional license limited by 8 U.S.C. § 1621. Additionally, if there is any doubt as to the meaning of the statutory language, the legislative history further demonstrates that Congress did not intend to alter California's ability to determine the eligibility to practice law.

Not only is this reading the correct one, but it also avoids the serious constitutional questions that would arise should this Court hold that 8 U.S.C. § 1621 prohibits undocumented immigrants from becoming members of the Bar. First, should this Court hold that 8 U.S.C. § 1621 has placed a prohibition on the California Supreme Court's ability to regulate the Bar, it effectively transfers this governmental decision-making function from the judicial branch to the California legislature in violation of the Tenth Amendment. Second, the change in eligibility for the Bar would violate the Contracts Clause by substantially altering the contracts entered into between undocumented law students and California public law schools, because one of the implied conditions of law school enrollment is the understanding that successful completion of a Juris Doctorate degree at these institutions makes students eligible to sit for the California Bar Examination and become members of the Bar.

Moreover, even if membership in the Bar were a professional license for purposes of 8 U.S.C. § 1621, California has affirmatively provided that undocumented immigrants can become members of the Bar as required by 8 U.S.C. § 1621(d)'s savings clause.

Finally, allowing undocumented immigrants to become members of the Bar is good public policy, both because it is in line with federal and state policy efforts already undertaken to invest in the advancement of these individuals, and because their inclusion to in the Bar supports the Bar's mission and ideals of improving access to legal services and increasing diversity in the legal profession.

ARGUMENT

I. Section 1621 Has Not Preempted the California Judicial Branch's Traditional Power to Regulate Bar Membership.

A. Section 1621 Has Expressly Preempted Some State Power to Extend Public Benefits to Undocumented Immigrants.

Congress, through 8 U.S.C. § 1621,[4] has placed limitations on the states' ability to award certain "public benefits" to undocumented immigrants. It defines these "State or local public benefits" as:

> (A) 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; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or

[4] Section 1621 was passed as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) Pub.L. No. 104-193 (Aug. 22, 1996) 110 Stat. 2105.

> local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621(c)(1). However, Congress included a savings clause that allows the states to provide these public benefits to undocumented immigrants so long as they "enact[] a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. Const., art. VI, cl. 2. Congress has the power to enact laws over the subject of immigration. See e.g., *Arizona v. United States* (2012) 567 U.S. ____, No. 11—182, slip op. at p. 2 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). While states are "per se pre-empted" from regulating immigration, not "every state enactment which in any way deals with [immigrants] is a regulation of immigration." *DeCanas v. Bica* (1976) 424 U.S. 351, 355. Indeed, because the regulation of bar membership is not a "determination of who should or should not be admitted into the country, [or] the conditions under which a legal entrant may remain" (*id.*) "the usual rules of statutory preemption analysis apply." *Martinez v. The Regents of the Univ. of Cal.* (2010) 50 Cal.4th 1277, 1287 (*Martinez*) (quoting *In re Jose C.* (2009) 45 Cal.4th 534, 550). Therefore, California's determination of who may be admitted to the Bar, regardless of alienage "will be displaced only when affirmative congressional action compels the conclusion it must be." *Id.*

Federal law can preempt state power in at least three instances. First, state power may be limited by express preemption of state action. See *Arizona v. United States*, *supra*, 567 U.S., slip op. at p. 8 ("Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."). Here, Section 1621, by

specifically limiting states' ability to provide public benefits and defining what those public benefits are, has expressly preempted the states' power to some extent. See *Martinez*, *supra*, 50 Cal. 4th at p. 1297 ("Congress [with Section 1621] did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so expressly").

Second, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, *supra*, 567 U.S., slip op. at p. 7. Third, state laws may be preempted even where there is no exclusive federal field, due to the "physical impossibility" of complying with both the federal and state regulation, or where state law presents an "obstacle" to the full objectives of Congress. *Id.* at p. 8. Here, because Congress has expressly specified the way in which it has chosen to limit the power of the states and included a savings clause that allows states to extend these benefits if they so choose, Congress cannot be said to have occupied the field of granting public benefits or professional licenses to undocumented immigrants. See *Martinez*, *supra*, 50 Cal. 4th at p. 1297 (holding 8 U.S.C. § 1621(d) demonstrates "Congress did not intend to occupy the field fully"); see also *Chamber of Commerce of the United States v. Whiting* (2011) 131 S.Ct. 1968, 1981 (declining to hold exclusive federal authority where "Congress specifically preserved . . . authority for the States"). Nor can the preservation of state discretion present a physical impossibility or present an obstacle to Congress' objectives. See *Martinez*, *supra*, 50 Cal. 4th at 1296-98.

B. Section 1621 Does Not Preempt the California Supreme Court's Authority to Decide Who Should Be Admitted to the Bar.

1. Section 1621 Should Be Read Narrowly Because There Is a Presumption Against Preemption of Historic State Judicial Powers.

"In preemption analysis, courts should assume that 'the historic powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.' " *Arizona v. United States*, *supra*, 567 U.S. slip op. at p. 8 (quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230); see also *Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Chamber of Commerce*, *supra*, 131 S.Ct. at p. 1980. In other words, when Congress legislates in a way that circumscribes traditional state power, there should be a presumption against preemption. "[I]n the absence of a showing of arbitrary or discriminatory application in a particular case," rules of bar admission are not "a matter of federal concern." *Konigsberg v. State Bar of Cal.* (1961) 366 U.S. 36, 45. Rather, the admission and discipline of attorneys is a "core of the State's power to protect the public." *Hoover v. Ronwin* (1984) 466 U.S. 558, 569. Thus, there should be a presumption against the preemption of the State's ability to regulate Bar licensure.

This presumption is strengthened in light of the fundamental link between Bar licensure and the functioning of the Judicial Branch. The California Constitution expressly vests this power with the Supreme Court and places the administration of the California State Bar within the judiciary. Cal. Const. art. VI, § 9; see also Cal. Bus. & Prof. Code, § 6064 (California Supreme Court holds "inherent jurisdiction" over the practice of law and the rules and regulations that govern it); Cal. Rules of the State Bar, rule 4.1 (only the California Supreme Court may admit applicants as attorneys in the state). California courts have long recognized that power over Bar admission "can possibly have no other origin" than the judiciary. *In re Cate* (1928) 273 P. 617, 620; see also *In re Attorney Discipline Sys.* (1998) 19 Cal.4th 582, 607 (admission and discipline of attorneys in California lies expressly within the courts own reserved, primary, and inherent authority); *Obrien v. Jones* (2000) 23 Cal.4th 40, 48 (court retains authority over attorney admission and discipline "at every step"); *Hoffman*

v. State Bar of California (2003) 113 Cal.App.4th 630, 635 (courts are the "primary regulatory power over the admission . . . of attorneys").

While "[a]n attorney does not hold an office or public trust, in the constitutional sense of that term, [he or she] is an officer of the court, exercising a privilege or franchise." *In re Cate*, *supra*, 273 P. at p. 618. Thus, admission to the Bar is an assessment of whether the applicant "possess[es] the requisite qualifications" for this state-wide service within the Judicial Branch, and "[t]heir admission is not the exercise of a mere ministerial power. It is the exercise of judicial power." *Id.* (quoting *Ex parte Garland* (1866) 71 U.S. 333, 378-79). Thus, Bar licensure is not only a fundamental state power, but is one deeply tied to California's sovereignty as exercised through the Judicial Branch.

2. Section 1621's Limitations on Public Benefits Do Not Apply to Bar Membership.

In determining whether Congress has preempted historical state powers, "the purpose of Congress is the ultimate touchstone." *Wyeth, supra*, 555 U.S. at p. 565 (quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485) (citation omitted). "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, supra,* 518 U.S. at p. 486. In determining the legislative intent, courts are to "first examine the statutory language, giving it a plain and commonsense meaning." *Martinez, supra,* 50 Cal.4th at p. 1290. Here, the statutory language of 8 U.S.C. § 1621 excludes professional licenses from prohibitions of 8 U.S.C. § 1621, when they are not provided (1) "by an *agency* of a State or local government" nor (2) "by *appropriated funds* of a State or local government." 8 U.S.C. § 1621(c)(1)(A) (italics added). First, the California Supreme Court, which provides for Bar admission, is not a governmental agency. Second, Bar admission is not provided with funds appropriated by

the State. Accordingly, 8 U.S.C. §1621's restriction on state-provided or state-funded benefits is inapplicable to Bar licensure.

3. California Courts Are Not Agencies of a State Within the Meaning of 8 U.S.C. § 1621(c).

The prohibition in 8 U.S.C. § 1621 does not apply to this Court because the Court is not an "agency . . . of a State." 8 U.S.C. § 1621(c)(1)(A). While PRWORA does not define the term "state agency," other authorities make plain that this Court is not an "agency . . . of a State."

As a preliminary matter, State law makes clear that this Court, and not the Bar, "provide[s]" law licenses within the meaning of 8 U.S.C. § 1621(c). It is the Supreme Court, and not the State Bar, which admit[s] [an] applicant as an attorney at law" in California. Cal. Bus. & Prof. Code § 6064; see also Cal. Rules of the State Bar, rule 4.1 (acknowledges the Supreme Court has "inherent jurisdiction over the practice of law in California" and is ultimately the final arbiter of an applicant's fitness to hold a law license); see also *In re Attorney Discipline Sys.*, *supra*, 19 Cal.4th 582 at p. 592. The role of the State Bar, acting through its examining committee, is to "certify to the Supreme Court for admission" the application of any individual who meets the requirements to practice law in California. *Greene v. Zank* (1980) Cal. App. 3d 497, 505; see also Cal. Bus. & Prof. Code § 6064 ("[T]he Supreme Court may admit such applicant as an attorney at law" after certification by the examining committee."). The State Bar has no independent authority to deny an applicant admission to the Bar. *Hustedt v. Workers Compensation Appeals Bd.* (1981) 30 Cal.3d 329, 339; see also Cal. Rules of the State Bar, rule 4.9. Thus, although the Bar is clearly involved in the processing of

applications to practice law, it in no way "provide[s]" the license within the meaning of 8 U.S.C. § 1621(c).[5]

Courts are virtually never considered to be agencies. "[A]n administrative agency is 'a governmental authority, *other than a court* and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.'" *Mogensen v. Bd. of Supervisors* (2004) 268 Neb. 26, 30 (quoting *State ex. rel. Stenberg v. Murphy* (1995) 247 Neb. 358, 366) (emphasis added). State courts have generally recognized that the judiciary is a coordinate branch of government to which the label "agency" cannot apply. See, e.g., *Schreiber v. Bastemeye*r (Iowa 2002) 644 N.W.2d 296, 299 (holding a component of the judicial branch is not an agency); *Watkins v. Mississippi Bd. of Bar Admissions* (Miss. 1995) 659 So. 2d 561, 572 (holding Mississippi courts are not agencies governed by state Administrative Procedures Act); *Sacharow v. Sacharow* (2003) 177 N.J. 62, 75 (same in New Jersey); *City of Federal Way v. Koenig* (2009) 167 Wash. 2d 341, 346 (reaffirming that state courts are not state agencies).

Moreover, this Court has *inherent* authority to regulate the members of the Bar. *In re Attorney Discipline Sys. supra*, 19 Cal.4th at 592-93. This contrasts with California's agencies, which are permitted by the legislature and Governor to exercise limited *delegated* authority. *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 297-300.

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[5] Even if the Bar were considered to be the entity that "provide[s]" the license under § 1621(a)(1)(C), the Bar likely would not be considered a state agency for purposes of that statute. In many contexts there is a presumption against according agency status to the Bar. See *Keller v. State Bar of California* (1990) 496 U.S. 1, 11 (holding State Bar is not a government agency for certain First Amendment analyses); see also *In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 599 ("The Legislature also made clear that the State Bar is not in the same class as those state agencies that have been placed within the executive branch").

The California Government Code reinforces the conclusion that this Court is not a state agency. The general definition of "state agency" at California Government Code § 11000 includes "every state office, officer, department, division, bureau, board, and commission." See also Cal. Govt. Code § 11405.30 (similar definition). When the Legislature means to apply a statute's requirements to both agencies and the courts, it lists agencies and courts separately in the statute. See Cal. Govt. Code § 7596(b) (applying smoking ban to public buildings); Cal. Govt. Code § 8547.2 (specially listing the courts as a state agency for purposes of the Whistleblower Protection Act); Cal. Govt. Code §13323 (making budget rule applicable to any "State agency *or* court") (italics added); Cal. Govt. Code § 19994.30 (defining scope of state's tobacco control program); cf. Cal. Govt. Code § 11340.9(a) (exempting the judicial and legislative branches from California's standard rulemaking procedures); *Service Employees Internat. Union v. Superior Court* (1982) 137 Cal.App.3d 320, 323-326 (noting that superior courts are not public agencies within the meaning of the Meyers-Milias Brown Act). This language makes clear that courts, no less than the Legislature, another coordinate branch of government, are excluded from the normal meaning of "state agencies" under California law.

Moreover, Congress chose to apply the prohibition in 8 U.S.C. § 1621(a) to "agenc[ies] of a state" and not to the States themselves. While a general federal prohibition against state activity may foreclose state courts from operating in a certain way, 8 U.S.C. §1621 runs a prohibition only against state agencies. This Court has cautioned in its recent decision construing 8 U.S.C. § 1621, "against reading into a statute language it does not contain or elements that do not appear on its face," especially when Congress has "shown it knows how to add the element in express terms when it wishes to do so." *Martinez, supra,* 50 Cal.4th at p. 1295-96 (citing, *inter alia, Kimbrough v. United States* (2007) 552 U.S. 85, 103). Congress

knows how to run a prohibition directly against a State as opposed to a State agency. See, e.g., 15 U.S.C. § 5001(g) ("no State shall prohibit the sale or manufacture" of certain imitation firearms); 15 U.S.C. § 6763(b) (prohibiting states from interfering with certain federal insurance regulations).[6] The latter of these two statutes would impliedly operate on state courts. 15 U.S.C. § 6763(b)(4) (No State shall "implement the procedures of such State's system of licensing or renewing the licenses of insurance producers in a manner different from" the federal regulatory scheme). This Court must give effect to this drafting choice by recognizing that courts, not traditionally considered to be agencies, are outside the limited scope of § 1621(c). See *Hubbard v. United States* (1995) 514 U.S. 695, 699-700 (noting that federal courts are generally not considered agencies for purpose of applicability of federal law).

4. Bar Membership Is Not Granted Using Appropriated Funds.

Nor is Bar membership provided by "appropriated funds" from the California legislature for purposes of 8 U.S.C. § 1621(c)(1)(A). The admission process for the State Bar is funded entirely by levying various fees upon applicants and current members.[7] See Bus. & Prof. Code, § 6063 (mandating that "Applicants for admission to practice shall pay such

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[6] Congress has also shown its ability to use the term "state court" in legislation. See, e.g., 28 U.S.C. §§ 1446, 1738, 2254, and 2283. These statutes illustrate Congress's competence in applying the force of its legislation to state courts.

[7] For example, the total cost of admissions for 2011 was $18,516,019, with $277,752 deriving from membership fees and donations; $17,527,293 from examination application fees; $260,010 from continuing legal education fees, and $599,236 from "other income" undefined in the Bar report. The Bar experienced revenues of $148,272 in admissions for that year. State Bar of Cal, *Fin. Statement & Indep. Auditor's Rep.* 39 (2011) *available at* http://www.calbar.ca.gov/AboutUS/Publications/Reports.aspx.

reasonable fees . . . as may be necessary to defray the expense of administering . . . admission to practice"). These fees collected from applicants and members never become part of the state's General Fund and are thus not appropriated by the Legislature. See Cal. Bus. & Prof. Code § 6144 ("All fees shall be paid into the treasury of the State Bar, and, when so paid, shall become part of its funds."); c.f. *In re Attorney Discipline Sys.*, *supra*, 19 Cal.4th at p. 597 (interim "[l]icense 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").

5. The Purpose and Legislative Record of 8 U.S.C. § 1621 Does Not Indicate Congress Intended to Limit California's Regulation of Bar Membership.

If this Court concludes that there is ambiguity in whether Bar admission is covered under 8 U.S.C. § 1621(c), the Court should "look[] to legislative history and other extrinsic material." *Oklahoma v. New Mexico* (1991) 501 U.S. 221, 236 n.5; see also *People v. Garcia* (2002) 28 Cal. 4th 1166, 1172 ("if the statutory language may reasonably be given more than one interpretation, courts may consider extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the scheme encompassing the statute").

In 8 U.S.C. § 1621, which was passed as part of PRWORA, Congress explicitly focused on "end[ing] the *dependence* . . . on government benefits." PRWORA, 42 U.S.C. § 601(a)(2) (2012) (emphasis added). Referring specifically to immigrants, Congress declared:

> Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not *burden the public benefits system.* It is a compelling government interest to enact new rules for eligibility and

> sponsorship agreements in order to assure that aliens be *self-reliant* in accordance with national immigration policy.

8 U.S.C § 1611 (emphasis added). The repeated association between such "benefits" and individuals' dependence on "public resources to meet their needs" undergirds Congress' express intent to motivate individuals to rely upon "their own capabilities and the resources of their families, their sponsors, and private organizations." 8 U.S.C. § 1601(2)(A).

Further, conference reports—even ones partially at odds with "[t]he statute's plain language and prior legislative history"—are nonetheless "due great weight." *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Service* (1983) 462 U.S. 810, 833 & n. 28; see also *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 318 (relying on the conference report of an act that was part of an omnibus appropriations bill together with PRWORA). In its only conference report on the statute, Congress explicitly defined "state benefits" as "*means-tested* public benefits of a State or political subdivision of a State under which the State or political subdivision specifies the standards for eligibility, and does not include any Federal public benefit." H.R. Rep. No. 104-725, at H8874 (Conf. Rep.) (emphasis added).[8] It further defined "means-tested" as "a program of public benefits of the Federal, State, or local government in which eligibility for or the amount of benefits or both are *determined on the basis of income, resources, or financial need.*" *Id.* at H8928 (emphasis added). Eligibility for Bar licensure is not means-tested, but is rather determined only by educational achievement, bar exam passage, and payment of requisite fees. See Cal. Rules of the State Bar, rule 4.1. Thus, nothing in Congress' interpretation

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[8] Indeed, the "means-tested" definition of state public benefits appears in the portion of the conference report *specifically referring* to Section 1621. H.R. Rep. No. 104-725, at H8927-28 (Conf. Rep.) (section headed "State Authority to Limit Eligibility of Qualified Aliens for State Public Benefits").

of "state benefits" while drafting PRWORA serves as a basis for expanding the notion of bar licenses to 8 U.S.C. § 1621.

II. Construing 8 U.S.C. § 1621 to Allow Undocumented Students to Be Admitted to the Bar Would Avoid Constitutional Conflicts.

If there is any ambiguity as to whether 8 U.S.C. § 1621(c) denial of public benefits applies to Bar memberships, this Court should interpret 8 U.S.C. § 1621 in such a way so as to avoid the serious constitutional questions that would arise with such a denial. See *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 846–847 ("An established rule of statutory construction requires [courts] to construe statutes to avoid constitutional infirmities") (citations and internal quotation marks omitted); see also *Clark v. Martinez* (2005) 543 U.S. 371, 380-81 ("when deciding which of the two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . ."). Should this Court hold that 8 U.S.C. § 1621(c) applies to Bar membership, and that California has not affirmatively provided for undocumented immigrants to be eligible for Bar membership, it raises two serious constitutional questions. First, if 8 U.S.C. § 1621 applies to Bar memberships, this effectively shifts power over Bar memberships from the judiciary to the legislature, which would violate the Tenth Amendment. Second, should undocumented immigrants be deemed not eligible to become members of the Bar, it would constitute a change in law that materially and substantially alters the contracts that undocumented immigrant law students have with law schools, particularly *public* law schools, in violation of the Contracts Clause.

A. Requiring California to Pass a New State Law Under 8 U.S.C. § 1621(d) Impairs California's Ability to Structure its Governmental Functions.

As discussed above, the California Supreme Court is the exclusive and final arbiter of admission to the Bar. If this Court were to hold that Bar membership was a public benefit for purposes of 8 U.S.C. § 1621(c), then only the state legislature could decide whether undocumented immigrants are eligible to become members of the Bar because they would be the entity responsible for passing the legislation required by 8 U.S.C. § 1621(d)'s savings clause. This would intrude on California's state sovereignty, and likely violate the Tenth Amendment. Federal legislation can violate the Tenth Amendment if: (1) it regulates the States as States; (2) it concerns attributes of state sovereignty; and (3) it is "of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional governmental functions." *United States v. Bongiorno* (1st Cir.1997) 106 F.3d 1027, 1033 (citations and internal quotation marks omitted) (quoting *Hodel v. Va. Surface Mining & Reclam. Ass'n, Inc.* (1981) 452 U.S. 264, 287-88). As to the first two prongs, 8 U.S.C. § 1621 undoubtedly regulates states as states, as it was intended to prohibit state agencies from providing certain public benefits to undocumented immigrants, and the allocation of governmental power between branches of government is a quintessential function of sovereignty. There is also no question that compliance with 8 U.S.C. § 1621 would impair California's ability to structure the operation of its governmental functions, because it would effectively remove power that currently lies exclusively with the judiciary, and place it in the hands of the state legislature.

In California, authority over bar admissions is explicitly within the realm of the judicial department's power, rather than with the legislative department. See *In re Attorney Discipline Sys., supra,* 19 Cal.4th at p. 592 ("the power to regulate the practice of law, including the power to admit . . . attorneys, has long been recognized to be among the inherent powers of

article VI courts."). To allow both the courts and the legislature to "frame rules governing admissions to the bar" would be "utterly inconsistent." *In re Cate, supra,* 273 P. at p. 620. Currently Bar licensure cannot be exercised by the state legislature or altered by state legislative statute except as a result of constitutional amendment. *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 834-835 ("If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution"); see also *McClung v. Emp. Dev. Dept.* (2004) 34 Cal.4th 467, 472 ("[I]n the absence of a constitutional provision," judicial power "cannot be exercised by any other body."). Thus, the "power to confer the privilege of practicing law upon lay persons" is part of the "inherent power of the Supreme Court" that cannot be usurped by a state legislature. *Merco Const. Engineers, Inc. v. Mun. Ct.* (1978) 21 Cal.3d 724, 729.

While recognizing that a state legislature may *recommend* reasonable rules and regulations for admission to the Bar, legislative attempts to direct the court on admissions policies is "tantamount to the vacating of judicial order by legislative mandate."[9] *Merco Const. Engineers, Inc, supra,* 21 Cal.3d at p. 728. When conflict exists between a legislative enactment and rules imposed by the judiciary, the Court remains the final authority and "the legislative enactment must give way." *Id.* at p.

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[9] The Legislature retains the ability to enact statutes regarding some inherent powers of the court that do not relate to Bar admission. See, e.g., *Obrien v. Jones*, *supra*, 23 Cal.4th 40 (statute changing the Supreme Court's authority to appoint State Bar Court judges); *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 (statute designating unpaid furlough days on which trial courts shall not be in session); *Solberg v. Superior Court* (1977) 19 Cal.3d 182 (statute allowing trial judges to be peremptorily disqualified by litigants); *In re McKinney* (1968) 70 Cal.2d 8 (statute fixing the punishment for witnesses found in contempt of court).

638. See also *In re Cate*, supra, 273 P. at p. 624 ("If the courts exercise a constitutional function in making provision for a bar," a legislature may not "divest the power through the exercise of an assumed police power" and thereby "[scrap] the salient tenets of governmental science"); *Mandel v. Myers* (1981) 29 Cal. 3d 531, 549 ("while the Legislature enjoys very broad governmental power under our constitutional framework, it does not possess the authority to review [bar applicants] ... on a case-by-case basis").

A requirement that California pass a new law to allow undocumented immigrants to practice law would strip the California Supreme Court of its authority to ultimately decide whether or not these individuals can be admitted to the Bar. Accordingly, a holding that Section 1621(c)'s prohibition on public benefits extends to Bar membership raises serious Tenth Amendment questions.

B. There is a Student-College Contract Implicating Rights Afforded under the Contracts Clause.

State case law, including California's, has long defined the student-college relationship as a contract. See, e.g., *Kashmiri v. Regents of Univ. of Cal.* (2007) 156 Cal.App.4th 809, 823-824 (relationship between student and University, whether public or private is contractual). Since contractual terms between student and university are rarely express, contracts can be implied in fact. *Id.* at p. 828; see also 1 Witkin, Summary 10th (2011 supp.) Contract, § 102, p. 19. The terms of an implied contract "ordinarily stand on equal footing with express terms," *Scott v. Pacific Gas & Electric Co.* (1995) 46 Cal.Rptr.2d 427, 463 (quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677-678), and the distinction between implied and express contracts rests "in the mere mode of proof by which they are to be respectively established," *Silva v. Providence Hosp. of Oakland* (1939) 97 P.2d 798, 804. An undocumented person's lack of immigration status does

not impair his or her ability to enter or enforce contracts. 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens"); *Takahashi v. Fish and Game Comm'n* (1948) 334 U.S. 410, 419 ("The protection of this section [1981] has been held to extend to aliens as well as citizens."); *Graham v. Richardson* (1971) 403 U.S. 365, 377 (same); see also *Plyler v. Doe*, *supra* 457 U.S. at p. 210 ("Whatever his status under the immigration laws, an [undocumented] alien is surely a 'person' in any ordinary sense of that term."). By extension, an undocumented immigrant law student enrolled in a law school in California would be covered by this student-college contractual relationship.

Some of the terms from a student-college relationship can include a promise that the successful completion of a degree program can lead to the student being qualified to practice in that field. See *Johnson v. Walden University, Inc.* (D.Conn. 2011) 839 F.Supp.2d 518, 534. Such a promise can be implied from "catalogues, bulletins, circulars, and regulations of the institution," *Kashmiri, supra,* 156 Cal.App.4th at p. 829, as long as the obligations derived from those materials "center around what is reasonable," *Id.* (quoting *Ruegsegger v. Bd. of Regents of Western N.M. Univ.* (N.M. 2006) 154 P.3d 681, 689); see also, e.g., *Zumbrun v. Univ. of Southern Cal.* (1972) 101 25 Cal.App.3d 1, 10 ("The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.").

California's public law schools make statements implying that their schools are providing not just an education, but a pathway to a legal career. For example, the law school at the University of California at Los Angeles (UCLA) promotes a "legal education that uniquely prepares students for the

challenges and excitement of a career in law," *Admissions Information and How to Apply*, UCLA School of Law, http://www.law.ucla.edu/prospective-students/admission-information/Pages/default.aspx (last visited July 17, 2012). On its admission page, UCLA includes "the training of attorneys" as "one of its central purposes," *Admissions Policy*, UCLA School of Law, http://www.law.ucla.edu/prospective-students/admission-information/Pages/admissions-policy.aspx (last visited July 17, 2012). The University of California Board of Regents (Board), moreover, has stated that the University of California is responsible for "preparing professional degree students to enter a wide variety of careers [ ] such as law," Univ. of Cal. Office of the President, *Annual Accountability Report 2011*, 59 (2011). And in its *Annual Accountability Report 2011*, the Board included the rate of bar passage as an indicator for the success of its professional degree programs. *Id.* at 74. Further, several committees of the University of California's Academic Senate have described "high earning potential," Letter to Henry Powell, Chair of Academic Council, University of California Assembly of the Academic Senate, from Farid Chehab, Chair of Coordinating Committee on Graduate Affairs, (May 21, 2010), *available at* http://www.universityofcalifornia.edu/senate/reports/hp_lprepproposedpdfs.pdf), and an orientation toward an "ultimate certification or licensing process," Letter to Henry Powell, Chair of Academic Council, University of California Assembly of the Academic Senate, from Peter Krapp, Chair of University Committee on Planning and Budget, University of California (May 21, 2010), *available at* http://www.universityofcalifornia.edu/senate/reports/hp_lprepproposedpdfs.pdf, as defining characteristics of professional degree programs.

Similarly, the website of the University of Pacific McGeorge School of Law (Pacific McGeorge), which the Respondent graduated from, includes several statements implying that the school will help students to

become practicing lawyers. On the Pacific McGeorge website, the school advertises itself as "a great place to learn the law and become the lawyer you want to be," Video: *Tour of Sacramento,* McGeorge School of Law, http://www.mcgeorge.edu/About_McGeorge.htm (last visited July 17, 2012), and prospective students are addressed "as [ ] future lawyer[s] considering Pacific McGeorge." *Visit Pacific McGeorge*, McGeorge School of Law, http://www.mcgeorge.edu/About_McGeorge/Visit_Pacific_McGeorge.htm (last visited July 17, 2012). *Pacific Law,* an official publication of Pacific McGeorge, describes the academic program as "designed to enable its graduates to hit the ground running when they enter practice" and the school is "proud" of its efforts to attract "bright young minority students into the legal profession." *Pacific McGeorge: A Growing Reputation in an Evolving Profession*, Pacific Law, Fall 2010, at 6, 5.

Indeed, all California law schools accredited by the American Bar Association (ABA) are to confer Juris Doctorate degrees only upon students who complete a program of legal education that qualifies a student to take the California Bar Examination. See Com. of Bar Examiners, The State Bar of Cal., Guidelines for Accredited Law School Rules (2011) p. 2, *available at* http://admissions.calbar.ca.gov/Portals/4/documents/Education/Accredited_Law_ School_Guidelines-R.pdf. Further, the Bar requires accredited law schools to include a statement that "[s]tudy at, or graduation from, this law school may not qualify a student to take the bar examination or be admitted to practice law in jurisdictions *other than California* . . . ." in its course catalog and website. *Id.* at p. 4 (emphasis added). Thus, by implication, California law schools are creating an implied contract that students will be eligible to practice law in California.

Actions by the state with regard to the student-college contractual relationship are circumscribed by the Contracts Clause of the United States Constitution. U.S. Const., art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").[10] Contracts Clause violations occur when: (1) there is a contractual relationship (i.e., whether through contract in fact or contract in law); (2) there is a change in the law that impairs the contractual relationship; and (3) that the impairment is substantial. See *General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186. When a state impairs a public contract, it bears the burden of demonstrating that "the impairment is reasonable and necessary to serve an important public purpose." *State of Nev. Employees Ass'n, Inc. v. Keating* (9th Cir. 1990) 903 F.2d 1223, 1228; cf. *In re Seltzer* (9th Cir. 1996) 104 F.3d 234, 236 (holding in the case of private contracts, "the objecting party . . . carr[ies] the burden). Here, because many undocumented law students attend public law schools, in these instances the State will carry the burden of demonstrating that any impairment to these students' implied contracts with their schools are reasonable and necessary.

Here, should this Court determine that undocumented students are ineligible to be admitted to the Bar, it would impair the student-law school contractual relationship by denying the student the ability to join the Bar. Further, there could hardly be a more obvious -- and substantial -- impairment of a contract than its premature termination (on the eve of admission to the profession no less). See *Bannum, Inc. v. Town of Ashland* (4th Cir. 1990) 922 F.2d 197, 202. Nor could the state meet the burden of demonstrating that such a denial was reasonable and necessary to achieve an important public purpose, given that California's public policy, as

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[10] See also Cal. Const., art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed.").

demonstrated by the passage of Assembly Bill 540 (AB 540), has been to invest in the education and productivity of undocumented students like Mr. Garcia and the members of the DBA. See Cal. Educ. Code § 68130.5 (allowing qualifying undocumented students to waive non-resident tuition in public institutions of higher education). Further, just last year, California took yet another decisive step towards investing in the productivity of this group by mitigating the financial challenges that many of these individuals face when pursuing a college education. See Assembly Bill 130 and Assembly Bill 131 codified at Cal. Educ. Code §§ 66021.6; 69508.5; & 76300.5 (allowing certain qualifying students, including undocumented immigrants, to apply for and receive state financial assistance). When California Governor Brown signed into these bills into law, he stated that "[these laws] benefit us all by giving top students a chance to improve their lives and the lives of all of us." Office of the Governor "Governor Brown Signs California Dream Act" (Oct. 8, 2011), available at http://gov.ca.gov/news.php?id=17268. Therefore, California will not be able to meet its burden of demonstrating that the impairment of the public contracts it has entered into with undocumented students attending public law schools are reasonable and necessary to serve an important public purpose because they directly contravene the State's policy of allowing undocumented students to obtain and use their education for California's social and economic advancement.

III. California Has Affirmatively Provided For Undocumented Students to Be Admitted to the Bar for Purposes of 8 U.S.C. § 1621(d).

Even if the prohibition on issuance of professional licenses in 8 U.S.C. § 1621(a) were applicable to Bar admission, the Legislature, by the passage of Cal. Bus. & Prof. Code § 6060.6 has affirmatively provided that

undocumented immigrants are eligible for law licenses, satisfying the requirements of 8 U.S.C. § 1621(d).

A. Section 1621 Only Requires That States Affirmatively Provide for Eligibility.

Under 8 U.S.C. § 1621(d), states are required to enact a law after 1996 that "affirmatively provides" for eligibility for the public benefits as defined by 8 U.S.C. § 1621(c). See Black's Law Dictionary (9th ed. 2009) (defining "affirmative" as "supporting the existence of certain facts" or "involving or requiring effort."). By its terms 8 U.S.C. § 1621(d) does not require a state legislature to "expressly" provide for eligibility and where Congress intends to require express, explicit, or specific statements it utilizes other statutory language. See, e.g., Pub. L. No 96-330, § 406, 94 Stat. 1030, 1052 (1980) (providing that no legislation restricting travel funds shall apply to eligible veterans "unless such provision is made *expressly applicable* to the travel of such veterans") (emphasis added)); 32 U.S.C. § 112(a)(3)(A) (requiring that state drug enforcement plans "*specifically recognize*[]" organizations eligible to receive assistance from the National Guard) (emphasis added). Thus, to require an "express" statement of eligibility would run contrary to Congress' drafting choices in § 1621(d). See *Kimbrough v. United States* (2007) 552 U.S. 85, 103; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 252; see also *Martinez*, *supra*, 50 Cal.4th at p. 1295-96.

This Court's decision in *Martinez* is not to the contrary. In *Martinez*, this Court held that California Education Code § 68130.5 satisfied 8 U.S.C. § 1621(d) because it included an "express[] state[ment]"—in the legislative findings—that the statute's in-state tuition rules "applied to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens." *Martinez*, *supra*, 50 Cal.4th at p. 1296. *Martinez*

thus confirmed the uncontroversial proposition that legislation expressly stating an intent to benefit unauthorized immigrants complies with 8 U.S.C. § 1621(d). However, this Court had no occasion to consider whether an enactment, like Cal. Bus. & Prof. Code § 6060.6, that unambiguously extends a benefit to unauthorized immigrants, satisfies 8 U.S.C. § 1621(d) in the absence of such an express statement. Because requiring such a statement would be contrary to the plain language of 8 U.S.C. § 1621(d), California need only affirmatively provide for eligibility to satisfy this savings clause.

B. California Has Affirmatively Provided For Undocumented Students to Be Able to Be Admitted to the Bar.

California has affirmatively provided for undocumented immigrants and other noncitizens to become members of the Bar for purposes of 8 U.S.C. § 1621(d) by removing the requirement that Bar applicants provide a Social Security Number (SSN) and instead allowing the applicant to provide a federal individual taxpayer identification number (ITIN). Prior to 2005, all applicants for Bar membership were required to submit a SSN with their application to ensure that they were complying with state tax and child and family support obligations. See Cal. Bus. & Prof. Code § 30(a), (j), (l); Cal. Fam. Code § 17520. Because undocumented immigrants are not eligible for SSNs, the previous rule posed a barrier to their membership in the Bar. However, California Business and Professional Code § 6060.6, enacted in 2005, removed this barrier for undocumented immigrants by waiving the requirement that Bar applicants provide a SSN by allowing applicants to provide an ITIN in instances where the applicant "[are] *not eligible for a social security account number* at the time of application and [are] not in noncompliance with a judgment or order for support pursuant to

section 17520 of the Family Code." Cal. Bus. & Prof. Code § 6060.6 (emphasis added).[11]

The majority of the seven million ITINs issued by the Internal Revenue Service by 2005 are held by undocumented immigrants,[12] and it is well-understood that they constitute a large proportion of the persons possessing ITINs. Cf. *Lauderbach v. Zolin* (1995) 35 Cal.App.4th 578, 582 (expressing doubt that noncitizens ineligible to receive SSNs were lawfully present in the U.S.); see also Dominic Berbeo, Program Will Let Undocumented File Income Tax Returns, L.A. Daily News (Feb. 18, 2000), 2000 WLNR 1562156 (explaining that the ITIN is "available for workers regardless of their residency status"). Legislature has elsewhere specifically used acceptance of ITINs in lieu of SSNs as a mechanism to potentially make undocumented immigrants eligible for driver licenses. See Sen. Bill No. 60 (2003-2004 Reg. Sess.) (proposed repeal and modification of Vehicle Code provisions to permit the DMV to accept ITINs for any individual ineligible for an SSN); see also Cal. Veh. Code § 12801.5(a) (2003).[13] This indicates that both the Legislature and the public[14] understand legislation waiving the requirement of a SSN, and

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[11] As is discussed *infra*, the Supreme Court, and not the Legislature, has ultimate control over the admission to practice law.

[12] See Individual Taxpayer Identification Numbers Can Be Improperly Obtained and Used, Hearings before Subcom. on Oversight and Social Security, Com. on Ways and Means, House of Representatives, GAO-04-529T, at p. 14, (Mar. 10, 2004), statement of Michael Brostek, Director, Tax Issues, General Accounting Office, *available at* http://www.gao.gov/new.items/d04529t.pdf.

[13] The Legislature ultimately did not change the law. After the voters recalled Governor Gray Davis, the Legislature reversed course and repealed Sen. Bill No. 60 in an extraordinary session. See Sen. Bill No. 1 (3d ex. sess.), 2003-04 Ex. Sess Stat. Ch. 1.

[14] Sen. Bill No. 60 was the subject of national media attention, and the issue of drivers' licenses for undocumented immigrants was at the forefront of the 2003 election that saw the recall of Governor Gray Davis

permitting the submission of an ITIN, as a mechanism to make undocumented immigrants eligible to apply for the public benefit at issue. Thus, by enacting this exception, the Legislature clearly and affirmatively afforded eligibility for membership in the Bar to undocumented immigrants, satisfying the requirement in 8 U.S.C. § 1621(d).[15]

IV. Public Policy Supports Admitting Undocumented Immigrants To the Practice Of Law.

The DBA, as the only national organization composed of undocumented law school students and law school graduates like Mr. Garcia, is uniquely situated in its ability to assist the Court in understanding how federal and state public policy is furthered by allowing undocumented immigrants to practice law in California. As the personal stories of DBA members demonstrate, applicants like Mr. Garcia and other DBA members overcame a myriad of challenges to pursue admission to the legal profession. These are precisely the kinds of individuals that California and the Federal Government have decided should be given opportunities to

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and the election of Governor Arnold Schwarzenegger. See, e.g., Emily Bazar, *Living Without a License: It's an Art*, Sacramento Bee (Sep. 5, 2003), 2003 WLNR 15901747; Scott S. Greenberger, *Driver's License Bill Advances: Unusual Alliance Builds for Immigrants' Rights*, Boston Globe (Oct. 26, 2003), 2003 WLNR 3433693; V. Dion Haynes, *Immigration, Safety Issues Clash: California Debate on Driver Licenses Echoes Nationwide*, Chi. Tribune (Nov. 28, 2003), 2003 WLNR 15373057; Carl Ingram, *Driver License Measure Clears First Hurdle*, L.A. Times (Apr. 2, 2003), 2003 WLNR 15144024.

[15] The there are other categories of individuals eligble for an ITIN, namely persons living abroad with U.S. tax obligations and noncitizens lawfully present in the United States who are ineligible for a SSN. The fact that Cal. Bus. & Prof. Code § 6060.6's benefits persons in addition to undocumented immigrants does not prevent it from meeting 8 U.S.C. § 1621(d)'s requirement of "affirmatively" providing for the eligibility of undocumented immigrants. C.f. *Martinez*, *supra*, 50 Cal.4th at p. 1290 (noting that "[e]very nonresident who meets section 68130.5's requirements—whether a United States citizen, a lawful alien, or an unlawful alien—is entitled to the nonresident tuition exemption").

contribute to our society and our economy. In light of the federal and state policies aimed at benefiting undocumented immigrants like Mr. Garcia, this Court should allow these individuals to continue with their careers and commitment to public service by allowing them to become members of the Bar. Moreover, allowing undocumented immigrants to practice law furthers several objectives identified by the Bar and the ABA.

A. Undocumented Law Students and Graduates Have Overcome Tremendous Barriers to Achieve Their Dreams of Becoming Attorneys.

Undocumented immigrants, in pursuing law school and a career as attorneys, face a host of barriers that compound the challenges that already reduce college attendance among immigrants and low-income groups. For example, many undocumented immigrants raised in the United States often attend low-performing schools, have parents who did not attend high school or college, lack information about post-secondary education, and until recently were ineligible in California to receive any form of state or federal financial assistance to pay for their college education.[16] See Roberto G. Gonzales, *Young Lives on Hold: The College Dreams of Undocumented Students* 10 (April 2009), The College Board <http://professionals.collegeboard.com/profdownload/young-lives-on-hold-college-board.pdf> (as of July 18, 2012).

Even if an undocumented immigrant with limited resources overcomes the challenge of funding his or her undergraduate studies, those aspiring to a career as an attorney will have to undertake significant burdens. For instance, a pre-law undocumented immigrant must apply for and then take the LSAT, often without the benefit of a for-profit preparation course, complete and pay for the application process without the benefit of fee waivers, and pay for enrollment. Increasing tuition rates at

[16] These students are still ineligible for federal financial assistance.

state and private law schools have exacerbated the challenge, often foreclosing the opportunity for students to attend law school. Last, undocumented immigrants must prepare for and pass the bar exam.

As demonstrated by the individual student profiles below, the circumstances by which DBA members find themselves living as undocumented immigrants vary: some entered the United States with valid documentation and lost their status when they overstayed their visas, while others entered the United States without inspection. However, what is true for all DBA members is that they entered the United States as children and grew up facing a myriad of obstacles, as undocumented immigrants, to attend and graduate from college, and later law school. What is also true is that they have demonstrated tremendous dedication, and drive to fulfill the requirements expected of applicants seeking admission to the legal profession.

1. "José Manuel"

On December 7, 1995, José Manuel entered the United States from Mexico, at the age of nine, with a tourist visa. That was the last time José Manuel was out of the United States. Six months later, his visa expired. José Manuel excelled in his academic and extra-curricular activities. By the age of ten, José had mastered the English language. In 2004, José graduated as valedictorian from Armwood High School in Seffner, Florida. Because of his undocumented status, José Manuel was ineligible for federal and state financial aid, private loans, and some private scholarships requiring proof of Florida residency. José Manuel candidly disclosed his undocumented status to every institution of higher learning he attended. Relying on private scholarships and family support, José Manuel entered New College of Florida. Although New College of Florida does not offer grades, former Florida Governor Bob Graham recognized José Manuel for public service upon graduation in 2008. Without the benefit of a for-profit

course, José Manuel took the LSAT, and gained entrance into Florida State University College of Law. José Manuel has never been charged with any crime or any civil infraction. No institution of higher learning has ever disciplined José Manuel for misconduct, attesting to José Manuel's good moral character.

Relying on family, friends, and private scholarship, José Manuel graduated *cum laude* from Florida State University College of Law in 2011. On his first try, José Manuel passed the Florida Bar Exam in July of 2011. In November of 2011, the Florida Board of Bar Examiners asked the Florida Supreme Court whether undocumented immigrants can become attorneys. Three former ABA presidents supported José Manuel's admission to the Florida Bar, including Martha W. Barnett, William Reece Smith, Jr., and Stephen N. Zack. Mr. Smith has taught professional responsibility for years. Mr. Zack and Ms. Barnett have chaired the Florida Commission on Ethics. The Florida Supreme Court has not answered whether undocumented immigrants are eligible to practice law in Florida. José Manuel aspires to be an immigration and international human rights lawyer.

2. "Alicia"

On November 4, 1986, Alicia emigrated with her family from Mexico to the United States on a tourist visa. She was only a year of age. Beginning in elementary school, Alicia showed her academic aptitudes and dedication to her studies, and was admitted to the Gifted and Talented Education (GATE) program. In junior high and high school Alicia continued to excel academically graduating in the top 5% of her senior class with a 4.2 GPA. Raised in a low-income household where her mother worked as a housekeeper and her father held two jobs as a maintenance worker and bus boy, Alicia applied for and received several private scholarships to pay for her undergraduate studies at a University of

California campus. Despite working as a private tutor to fund her college education, Alicia volunteered as a mentor for low-income students of color, served as a bible study leader and established a scholarship for undocumented immigrant students at her university. Alicia graduated in 2007 with a Bachelor's of Art in History and Political Science, and received the Chancellor's Award of Merit. After graduating from college, Alicia postponed attending law school for one year to raise money for her tuition and living expenses. In 2008, Alicia was admitted to several top law schools in the state of California. One law school awarded Alicia an annual scholarship of $30,000, but withdrew the scholarship because Alicia could not provide proof of lawful immigration status. Alicia enrolled in law school at a University of California campus, and received ten private scholarships to fund her first year of law school. Alicia continued to work as a private tutor and started an online pastry business to subsidize her tuition expenses. By the end of her law school career, Alicia had received over twenty scholarships, two state fellowships and one national fellowship. Despite taking a full load of courses and working to pay for her studies, Alicia started a scholarship for undocumented immigrant law school students, and served on the board of three law school organizations. With the support of her family, Alicia was able to sit for and pass the California Bar exam on her first attempt. Alicia aspires to give back to her community by working as an immigration attorney.

B. Federal Policy Supports Admitting Undocumented Immigrants to the Practice of Law.

Just as state public policy reinforces the reasons why this Court should admit Mr. Garcia and other qualified undocumented immigrants into the practice of law, federal public policy has recognized the need to educate undocumented youth, and to permit them to step out of the shadows and contribute to this society.

Federal policy has specified that policies limiting public benefits are not to be construed as limiting undocumented childrens' right to elementary and secondary education. See *League of United Latin American Citizens v. Wilson* (C.D. Cal.1997) 997 F.Supp. 1244, 1255-1256 (noting that PRWORA provides that "[n]othing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe* . . .)." Further, federal policy has recognized that now that many of these *Plyler* children have grown up, there is the need to give them the opportunity to become contributing members of this society. On June 15, 2012, the Secretary of the Department of Homeland Security (DHS) issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15th memorandum), to announce a policy of "Deferred Action for Childhood Arrivals" (DACA) that prevents the removal of certain undocumented immigrants.[17] DACA recognizes the unique position of certain undocumented immigrants who, having arrived in the United States as children, lacked intent to violate the law.[18] See *Plyler v. Doe*, *supra*, 457 U.S. at p. 219-20 (holding that to punish undocumented immigrant children "does not comport with fundamental conceptions of justice."). DACA establishes criteria,[19] which if

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[17] Janet Napolitano, Sect. of Homeland Security, mem. On Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children to David V. Aguilar, Acting Comsr., U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immig. Services, and John Morton, Director, U.S. Immig. and Customs Enforcement, June 15, 2012, at <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf> [as of July 18, 2012].

[18] *Id.* at p.1.

[19] Although the exact procedure for obtaining deferred action has yet to be released, the June 15th memorandum sets out that an individual is eligible for deferred action if he or she: (1) came to the United States under

satisfied, would allow qualifying individuals to remain in the United States without the fear of being removed, and significantly, would allow these individuals to apply for and obtain employment authorization.[20] Indeed many members of the DBA may be eligible to regularize their immigration status through the DREAM Act and become permanent members of this nation.[21] Thus, both *Plyler* and DACA demonstrate the federal expectation that many undocumented immigrants, particularly those that have attained

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the age of sixteen; (2) has continuously resided in the United States for at least five years preceding June 15, 2012, and were present in the United States on June 15, 2012; (3) Is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and (5) is not above the age of thirty. *Id.* Currently, almost all members of the DBA meet these criteria. Mr. Garcia is an exception in that he is over thirty years of age. However, Mr. Garcia is a likely candidate for prosecutorial discretion under the policy announced on June 17, 2011 by the Director of Immigration Customs Enforcement, John Morton, released in a memorandum on "Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens," commonly referred to as the "Morton Memo." John Morton, Director, U.S. Immig. and Customs Enforcement, mem. on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel of the U.S. Immig. and Customs Enforcement, June 17, 2011, at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [as of July 18, 2012].

[20] *Id.* at 3. Nearly all members of the DBA meet the criteria for deferred action set out in the June 15th memorandum, thereby creating the possibility for them to apply for and receive employment authorization. For these individuals, the limitations on employability of undocumented immigrants that this Court was concerned about with respect to its Question 3 become moot.

[21] The criteria for DACA mirror those in the latest version of the DREAM Act.

an education and who entered long ago as minors, will be regularized and expected to contribute to society.

ABA President Stephen N. Zack echoed this sentiment in a letter urging Congress to support the passage of the DREAM Act stating:

> The DREAM Act is a wise economic investment. Most of the students who will benefit from the DREAM Act have been raised and educated in this country. U.S. taxpayers have already invested in the education of these children in elementary and secondary school, and it is in our national interest to ensure that they have an opportunity to realize their full potential.[22]

Thus, qualifying undocumented immigrants should be allowed to practice law so that they can contribute to society as is envisioned by federal policy.

C. Allowing Undocumented Immigrants to Practice Law Furthers the California State Bar's Goals of Creating Access to Legal Services for Marginalized Communities and Promoting Diversity Within the Legal Profession.

1. DBA Members Have Shown a Dedication to Providing Legal Services For Underserved Populations.

As one of the states with the largest low-income populations, access to basic necessities are now beyond the reach of many Californians.[23] The Bar's Commission on Access to Justice recognizes that in addition to economic barriers, other less obvious factors hinder access to the courts,

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[22] ABA President Stephen N. Zack, *ABA Urges Congress to Pass the DREAM Act* (Dec. 8, 2010), American Bar Association <http://www.abanow.org/2010/12/aba-urges-congress-to-pass-the-dream-act/ > (as of July 18, 2012).

[23] See The State Bar of California, Office of Legal Services, Action Plan for Justice: A Report of the California Commission on Access to Justice (April 2007) p. 10, at <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=2ytHUrqEBHs%3D&tabid=738> [as of July 18, 2012].

including cultural and linguistic impediments.[24] The result is that many Californians do not have the resources to obtain legal representation for the numerous legal problems affecting them. Recognizing the importance of increasing access to legal services, the Bar has identified its mission as one to "preserve and improve [the] justice system in order to assure a free and just society under the law."[25]

Applicants like Mr. Garcia and other DBA members are highly-qualified individuals who have already demonstrated their commitment to the legal profession, and the ideals expressed in the State Bar's mission. As a paralegal and later law school student, Mr. Garcia devoted a large part of his work in the area of Housing Law, providing pro bono representation to low-income families and landlords alike. During his time with CLIC (Community Legal Information Center), Mr. Garcia provided free legal services to clients numbering in the thousands. Once his directorship was over, Mr. Garcia founded the Community Outreach Program within CLIC to further expand on the work he had earlier done. As the sole director of the Community Outreach department, Mr. Garcia provided services to the underrepresented. He made contact and secured interviews with both local radio and television stations in order to secure airtime to increase awareness of the pro bono legal services CLIC offers. One of his accomplishments was securing a weekly spot for year and a half with the local Spanish radio station, through which he provided free information to countless numbers of listeners. Currently, Mr. Garcia is spearheading the campaign to increase awareness regarding Obama's deferred action policy. His efforts are aided by countless other dreamers who believe in his work and one day

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[24] *Id.* at p. 2.

[25] State Bar of California, *The State Bar of California: What Does It Do? How Does It Work?* (Revised June 2009) p. 10, at <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=SQpY73pa3F4%3D&tabid=212> [as of July 18, 2012].

hope to become attorneys themselves. Additionally, Mr. Garcia has the endorsement and support of several immigration experts who advise him so that he can better inform the community as to their rights and obligations. Other members of the DBA like Jose Manuel and Alicia have dedicated hundreds of hours to volunteering with non-profit organizations, traveling to remote communities to bring legal services to farm workers, victims of domestic violence, and the indigent.

In 2010, the Florida Bar Foundation awarded José Manuel a public service fellowship. The fellowship allowed José Manuel to continue his work with immigrant survivors of domestic violence. José Manuel began working with immigrant survivors of domestic violence during the summer of 2009 at Gulfcoast Legal Services, Inc., a Florida nonprofit offering legal assistance to working-class immigrants. José Manuel helped attorneys file U-Visas and Violence Against Women Act self-petitions for immigrant victims of crime. José Manuel continued this work during the summer of 2010 after graduating in 2011. During law school, José Manuel supported the Center for the Advancement of Human Rights' work with refugees and other immigrants escaping persecution by providing research for asylum claims and prosecutorial discretion requests. Upon graduation, José Manuel received the Distinguished Pro-Bono Service award for his time serving as a volunteer at nonprofit legal-aid organizations serving disenfranchised groups.

Like José Manuel, Alicia has shown a deep commitment to public interest work. While in law school, Alicia volunteered in five rural counties in northern California, assisting farm workers with their naturalization applications. Alicia also assisted students across the country seeking favorable grants of prosecutorial discretion. In 2008, Alicia drafted one of the earliest memorandums to DHS on deferred action for DREAM Act eligible youth. Alicia has also assisted low-income victims of domestic

violence seeking asylum in the United States. Prior to graduating, Alicia was the recipient of a public interest fellowship, and recognized for having dedicated over 1,000 hours of pro bono work to low-income and immigrant communities. A law license would allow José Manuel and Alicia to expand their pro bono work.

Applicants like Mr. Garcia, José Manuel and Alicia are more likely, as immigrants, to speak several languages and understand more than one culture. As a result, they can contribute valuable skills to the legal profession, which will further the Bar's mission of improving the justice system and ensuring that "all people have access to high-quality legal services regardless of financial, [linguistic], [cultural] or other circumstances".[26]

2. Undocumented Immigrants Can Contribute to the Diversity of the Bar.

The Bar has also identified the importance of increasing diversity in the legal profession. Its Council on Access & Fairness is charged with: "identify[ing] and encourage[ing] individuals from diverse backgrounds to enter the legal profession".[27] Like the Bar, the ABA recognizes the lack of diversity in the profession as a serious problem, calling this "a disappointment".[28] The ABA's 2010 *Presidential Diversity Initiative*

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[26] *Id.*

[27] The State Bar of California, Council on Access and Fairness, *Council on Access and Fairness' Charge*, p. 1 at <(http://cc.calbar.ca.gov/Portals/11/documents/COAF/COAFCharge.pdf> [as of July 18, 2012]. The Council on Access and Fairness serves as the State Bar's "diversity think tank" and advises the Board of Governors on advancing State Bar diversity strategies and goals. The diversity pipeline includes the early education pipeline K to 12; college, law school and bar exam prep; recruitment, hiring, retention and promotion in the profession; and judicial diversity.

[28] American Bar Association: Presidential Initiative Commission on Diversity, *The Next Steps: Report and Recommendations—Race and*

Report and Recommendations on Race and Ethnicity Gender, Sexual Orientation and Disabilities, highlighted that:

> As America races toward a future where minorities will be the majority and more marginalized groups make their voices heard, the legal profession's next steps towards advancing diversity must produce more viable, sustained outcomes. Despite our efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.[29]

Undocumented immigrants from diverse racial and ethnic backgrounds could potentially benefit from a policy allowing undocumented immigrants to be admitted to the practice of law. Indeed, up to 85 percent of undocumented youth are of Latino descent,[30] and approximately one out of ten of the 2.1 million undocumented youth[31] who would be eligible for the DREAM Act are Asian American and Pacific Islander.[32] Among potentially undocumented undergraduates who are AB 540 recipients in the UC system, "Asian and Latino students are about equal, at 45 percent and 48 percent respectively."[33] Because many of these undocumented students who graduate from college could pursue graduate and professional degrees, including going to law school, they will

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Ethnicity, Gender, Sexual Orientation, Disabilities (April 2010) p. 5, at <http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf> [as of July 18, 2012).

[29] *Id.*

[30] Jeffery Passel, *Demography of Immigrant Youth: Past, Present, and Future* (2011) 21 Immigrant Child. 19, 25.

[31] Jeanne Batalova and Margie McHugh, *DREAM vs. Reality: An Analysis of Potential DREAM Act Beneficiaries* (July 2010) Migration Policy Institute, p. 6, at <http://www.migrationpolicy.org/pubs/DREAM-Insight-July2010.pdf> [as of July 18, 2012].

[32] Asian Pacific Am. Legal Ctr. & Asian Am. Justice Ctr., Members of Asian Am. Ctr. for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States 2011* (2011) p. 22.

[33] Univ. of Calif. Office of the President, *Annual Report on AB 540 Tuition Exemptions for the 2010-2011 Academic Year* (May 2012) p. 6.

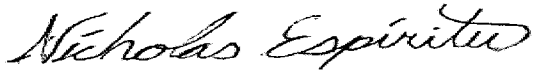
potentially make valuable contributions to the diversity of California's law schools.

CONCLUSION

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

Dated: July 18, 2012

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 8.204(c)(1)

I certify that this brief complies with the type-volume limitation of California Rule of Court 8.204(c)(1). This brief is printed in 13 point Times New Roman font, and, exclusive of the portions exempted by Rule 8.204(c)(3) contains less than 14,000 words.

Dated: July 18, 2012

Nicholas Espiritu

Nicholas Espiritu
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND

CERTIFICATE OF SERVICE

I, Nicholás Espíritu, declare that am employed in the City and County of Los Angeles, California; I am over the age of eighteen years and am not a party to this action; my business address is 634 S. Spring Street, Los Angeles, CA 90014.

On July 18, 2012, I served the following document(s): **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE DREAM BAR ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, ASIAN PACIFIC AMERICAN LEGAL CENTER, ASIAN LAW ALLIANCE, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND, AND NATIONAL COUNCIL OF LA RAZA IN SUPPORT OF SERGIO C. GARCIA** on the parties listed below, by placing a true copy thereof in an envelope addressed as shown below and mailing it to the addresses as follows:

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