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OF THE STATE OF CALIFORNIA

IN RE SERGIO C. GARCIA ON ADMISSION

ANSWER OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA TO AMICUS BRIEF OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

The amici curiae in this matter are overwhelmingly in support of Sergio Garcia's admission to the practice of law in California. In total, 48 organizations and 53 individuals have signed on to amicus briefs urging this Court to permit Mr. Garcia entry to the bar – including law students, private practitioners, law professors and scholars, local and specialty bar associations, legal service organizations, civil rights and other advocacy groups, the California Attorney General's Office, a former Justice of the California Supreme Court, and the Latino Legislative Caucus.

Notably, only three amicus briefs were filed in opposition to Mr. Garcia's admission – one by Larry DeSha, a former State Bar Trial Counsel attorney; one by Nicholas Kierniesky, a New Jersey attorney; and the last by the United States Department of Justice ("DOJ"), which was specifically invited by this Court to participate. This Answer responds only to the arguments presented by the DOJ.[1]

II. ARGUMENT

Issuance of a law license to Mr. Garcia is not a pathway to naturalization, it has no bearing on his current immigration status or the terms and conditions under which he can remain in the United States, and, as even the DOJ concedes, it is not tantamount to work

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[1] The arguments raised by Mr. DeSha and Mr. Kierniesky, for the most part, were previously covered by the Committee in its Opening Brief or by the amici in their papers in support of Mr. Garcia's admission. Mr. Kierniesky, however, in his application for leave to file an amicus brief – but not in the brief itself – expressed concern that a license to practice law in California could be used to gain admission in another State under a pro hac vice, multi-jurisdiction, or other reciprocity-type agreement. It should be noted that California does not have reciprocity with any other State, and in any event, it is incumbent upon the respective jurisdictions to determine their own bar admissions requirements.

authorization. (See DOJ Brief, p. 14.) Rather, it is recognition of the undeniable fact that he has attained the education, demonstrated the knowledge, and evidenced the good moral character necessary for admission to the bar. Mr. Garcia has as much earned that recognition as any other applicant.

The Committee does not believe that a law license is the type of benefit intended to be covered under 8 U.S.C. section 1621, particularly in light of the plenary role of the Courts in matters pertaining to bar admissions. There are only two types of entities that issue professional licenses – agencies and Courts. Given that section 1621 specifically addresses State agencies, but makes no mention of the Courts, it logically follows that Congress did not intend the statute to apply to the latter.

Moreover, assuming arguendo that section 1621 was intended to encompass law licenses, the statute contains a savings clause that specifically permits States to make professional licensure possible for undocumented immigrants through enactment of a State law. (8 U.S.C. § 1621(d).) The primary authority of the State to regulate in this area is vested with this Court, which, in the exercise of its sovereign power, may invoke the savings clause and provide for licensure of Mr. Garcia and those similarly situated.

A. Law Licensure Is Unique And Falls Within The Ultimate Control Of The Judiciary

The fundamental difference between regulation of the legal profession and regulation of other professions is that admission to the bar is uniquely a judicial function. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582 [79 Cal.Rptr.2d 836, 967 P.2d 49]; *Ex Parte Garland* (1866) 71 U.S. (4 Wall.) 333, 378-79 [18 L.Ed. 366]

[admission to the bar is the exercise of judicial power].)

"[T]he power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the ... [C]ourts." (*In re Attorney Discipline, supra,* 19 Cal.4th 592; *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801, 636 P.2d 1139].) The power of regulation has meant that the Courts are vested with the exclusive power to control who is entitled to practice law. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300 [19 Cal.Rptr. 153, 368 P.2d 697] ["Historically, the [C]ourts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them."].)

Indeed, every State in the Union recognizes that the power to regulate lawyers and the practice of law rests in the judiciary. (See *Hustedt v. Workers' Comp. Appeals Bd., supra,* 30 Cal.3d at pp. 336-37.) This concept is universally accepted and deeply-rooted in American jurisprudence. (*In re Attorney Discipline, supra,* 19 Cal.4th 592; *Hoover v. Ronwin* (1984) 466 U.S. 558, 568-69 [104 S.Ct. 1989, 80 L.Ed.2d 590]; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 361 [97 S.Ct. 2691, 53 L.Ed.2d 810]; *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792 [95 S.Ct. 2004, 44 L.Ed.2d 572]; *In re Griffiths* (1973) 413 U.S. 717, 722-23 [93 S.Ct. 2851, 37 L.Ed.2d 910]; see also *Leis v. Flynt* (1979) 439 U.S. 438, 442 [99 S.Ct. 698, 58 L.Ed.2d 717] ["Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."].)

When analyzing whether there is Congressional intent to pre-empt, the United States Supreme Court has acknowledged the important role of the States within our

federal system of government and paid deference to State sovereignty in the form of a presumption against pre-emption:

> [I]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

(*Wyeth v. Levine* (2009) 555 U.S. 555, 565 [129 S.Ct. 1187, 173 L.Ed.2d 51]; see also *Arizona v. United States* (2012) __ U.S. __ [132 S.Ct. 2492, 2501].)

The Committee believes such deference is appropriate here. It would be highly implausible to assume that Congress, which is presumed to know the law,[2] did not recognize and appreciate the time-honored and ubiquitous role of the Courts in issuing law licenses when it was contemplating section 1621.[3] It is highly significant that the statute mentions State agencies, but is void of any clear and manifest intent to capture the Courts.

The DOJ contends: "it is anomalous to suggest that Congress, despite explicitly including 'any professional license' within [section 1621], nonetheless did not intend to

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[2] (See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 554 [115 S.Ct. 2322, 132 L.Ed.2d 462], citing *Cannon v. University of Chicago* (1979) 441 U.S. 677, 696-99 [99 S.Ct. 1946, 60 L.Ed.2d 560].)

[3] A license to practice law is not some obscure license unknown to Congress. In fact, it is held by many members of Congress and is arguably one of the most learned and distinguished of all the professional licenses. (See *Representatives and Senators: Trends in Member Characteristics Since 1945*, prepared by the Congressional Research Services http://www.fas.org/sgp/crs/misc/R42365.pdf [Since at least 1945, law has been the most commonly cited profession of members of both the United States House of Representatives and the Senate (Figure 6) and currently 23.91% of the House and 42% of the Senate are comprised of lawyers (Tables 7 and 8).].)

include licenses to practice law." (DOJ Brief, p. 7.) To the contrary, there is nothing anomalous about concluding that Congress did not intend to disturb an area that has been within the exclusive control of the State Courts since as far back as the founding of the Republic.[4]

B. Admission To Practice Law Is Not A Public Benefit As Defined Under 8 U.S.C. Section 1621

Section 1621 does not prohibit the States from issuing "any professional license" as the DOJ intimates (see DOJ Brief, p. 7); rather, the statute addresses more narrowly only those "professional licenses" that are "provided by an agency of a State ... or by appropriated funds of a State." (8 U.S.C. § 1621(c)(1)(A).) As explained in the Committee's Opening Brief and again below, the qualifiers in the statutory language do not reach this Court – the California Supreme Court is not an agency of the State and no funds of the State are appropriated for the purpose of law licensure.

1. The Supreme Court Is Not an Agency of the State

Under section 1621, undocumented immigrants are not eligible for professional

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[4] As asserted by Mr. Garcia and some amici, section 1621 may implicate constitutional concerns under the Tenth Amendment. (See e.g., Opening Brief of Sergio Garcia, p. 16, Amicus Brief of Los Angeles County Bar Association *et al.*, pp. 15-18 [the "application [of section 1621] to attorney admissions would subordinate the Court's plenary power to the service of federal policy in an unrelated area"]; Amicus Brief Joseph A. Vail Center for Immigration Rights, p. 7; see also U.S. Const., 10th Amend.) This Court can and should, however, avoid this constitutional dilemma by construing the statute as not applying to attorney admissions, particularly since there is no clear and manifest intent by Congress to pre-empt the traditional role of the State Courts in this area. Constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." (*Clark v. Martinez* (2005) 543 U.S. 371, 380-81 [125 S.Ct. 716, 160 L.Ed.2d 734].)

licenses "provided by an agency of a State." (8 U.S.C. § 1621(c)(1)(A).) This Court is not a State "agency" – rather, it is a sovereign and co-equal branch of State government. (See Cal. Const., art. VI, § 1.) The DOJ itself acknowledges that in common federal parlance, the term "agency" does not encompass the judicial branch, and that absent contextual indications to the contrary, statutory references to a federal "agency" are generally interpreted to exclude the Courts. (DOJ Brief, pp. 7-8.)

Since the word "agency" is not normally understood to refer to the Courts, the obvious interpretation is that Congress meant State executive branch agencies. Absent an express desire by Congress to include Courts, such meaning should not be imported.

2. A License to Practice Law in California Is Not Provided by Appropriated Funds of a State

Section 1621 also proscribes eligibility for "any grant, contract, loan, professional license, or commercial license ... provided ... by appropriated funds of a State...." (8 U.S.C. § 1621(c)(1)(A).)[5]

Here, the State of California is not paying for Mr. Garcia's license and no public monies have been specifically appropriated or dedicated by the State for this purpose. The admissions regulatory program is fully supported by applicant fees and not by tax dollars. (See Committee Brief, pp. 12-16; see also *In re Attorney Discipline, supra,* 19 Cal.4th at p. 597 [bar license fees do not become part of the State's General Fund and are

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[5] The statute further indicates that undocumented immigrants are also not eligible for, "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 ... appropriated funds of a State...." (8 U.S.C § 1621(c)(1)(B).)

not appropriated by the Legislature].)

The DOJ takes the overly expansive view that because the California Supreme Court itself receives appropriated funding, somehow that means that when the Court issues a law license, the license is being "provided by appropriated funds."[6] Under the DOJ's reasoning, any overhead operating expense of the Court, or even time spent by Justices in deciding this matter, is enough to turn a law license – a non-appropriated item – into a "public benefit."[7] The Committee does not believe that Congress intended such

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[6] Relying on *U.S. v. Bean* (2002) 537 U.S. 71 [123 S.Ct. 584, 154 L.Ed.2d 483], the DOJ, in sweeping fashion, argues that section 1621 is a complete ban on any monies from the State coffers being used whatsoever in the process of conferring a professional license. (DOJ Brief, p. 11.) The Committee does not read *Bean* as broadly as the DOJ, and does not find it controlling here; its holding was limited to the prerequisites for judicial review in a firearms disabilities matter, where the Court concluded that an applicant must first seek and be denied relief by the Alcohol Tobacco and Firearms Agency ("ATF") to invoke federal court jurisdiction and that mere inaction by ATF was insufficient. (*U.S. v. Bean, supra,* at p. 76.) Moreover, the Committee believes that section 1621 has a more limited application than that espoused by the DOJ and only prohibits that which is actually "***provided by*** appropriated funds of a State." In the Committee's view, this clause relates to direct allocations by the State, in its budget, for a specific purpose.

[7] Taken to its extremes, under the DOJ's premise, if the Court were to adjudicate a private contract matter, to which an undocumented immigrant was a party, because the Justices' salaries are paid for by appropriated funds, any order or judgment in the case giving the undocumented immigrant the benefit of the contract would transform it into a public benefit provided by appropriated funds. This type of strained argument was flatly rejected in *Campos v. Anderson* (1997) 57 Cal.App.4th 784 [67 Cal.Rptr.2d 350], where the California Court of Appeal found that the State's active assistance in collecting child support payments did not render the payments public in nature, since the source of the payments were funded by private individuals and not by the government. (*Id.* at p. 788; accord *Rajeh v. Steel City Corp.* (Ohio Ct. App. 2004) 813 N.E.2d 697, 734-35; *City Plan Development Inc. v. Office of Labor Com'r* (Nev. 2005) 117 P.3d 182, 190.)

an attenuated and tortured application of the term "appropriated funds."[8]

The Committee contends that a more reasonable reading of the "appropriated funds" provision in 1621 is that Congress was trying to capture non-governmental entities that receive appropriated monies for the specific and designated purpose of passing those funds directly on to undocumented immigrants in the form of loans, grants, etc. To conclude otherwise would render language in the statute superfluous.[9] A State agency that issues commercial or professional licenses necessarily receives State appropriated

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[8] The word "appropriated" means "to set apart for or assign to a particular purpose or use." (See Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/appropriated; *Wilcox v. Jackson* (1839) 38 U.S. 498, 512 [10 L.Ed. 264] ["appropriation ... is nothing more nor less than setting apart the thing for some particular use"]; *White v. Davis* (2003) 30 Cal.4th 528, 538 [133 Cal.Rptr.2d 648, 68 P.3d 74] ["[A]n appropriation is a legislative act setting aside 'a certain sum of money for a specified object in such manner that ... authorize[s] ... use [of] that money and no more for such specified purpose.'"]; *Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 452 [111 Cal.Rptr.3d 822] [same]), and the Committee reads "appropriated" according to its plain meaning.

[9] In interpreting legislation, Courts must "give effect, if possible, to every clause and word of a statute." (*Duncan v. Walker* (2001) 533 U.S. 167, 174 [121 S.Ct. 2120, 150 L.Ed.2d 251]; see also *Williams v. Taylor* (2000) 529 U.S. 362, 404 [120 S.Ct. 1495, 146 L.Ed.2d 389] [describing this rule as a "cardinal principle of statutory construction"]; *Market Co. v. Hoffman* (1879) 101 U.S. 112, 115-16 [25 L.Ed. 782] ["As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"].) Courts are therefore "reluctan[t] to treat statutory terms as surplusage in any setting." (*Duncan v. Walker, supra,* at p. 174; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (1995) 515 U.S. 687, 698 [115 S.Ct. 2407, 132 L.Ed.2d 597]; see also *Ratzlaf v. U.S.* (1994) 510 U.S. 135, 140 [114 S.Ct. 655, 126 L.Ed.2d 615].)

funds[10] – so to give import and meaning to the two clauses (licenses provided by "agency" ***or*** by "appropriated funds") Congress must have meant them to be distinct in nature.

C. The Court Has The Authority To Invoke The Savings Clause And Independently Enact A Law Permitting Licensure

As discussed above, there is no reason to believe that Congress intended to interfere with the Court's control over bar admissions. However, even if one can read section 1621 that way, under subsection (d), "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." (8 U.S.C. § 1621(d).)

As acknowledged by the DOJ, through section 1621(d), "Congress has accommodated [S]tate interests by allowing States to enact measures that would provide benefits to unlawfully present aliens ... and ***the State could do so here***." (DOJ Brief, p. 12 [emphasis added].) This Court has reached the same conclusion. (See *Martinez* v. *The Regents of the University of California* (2010) 50 Cal.4th 1277 [117 Cal.Rptr.3d 359, 241 P.3d 855] [analyzing section 1621(d) and upholding State law giving undocumented

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[10] Other than the law license at issue here, which is issued by the Court, no one has been able to identify any other type of commercial or professional license that is not provided by a State agency. (See DOJ Brief, p. 7.)

immigrants eligibility for in-state tuition].)[11]

There is no question that invocation of the savings clause could be used to grant undocumented immigrants eligibility for law licensure. The issue becomes the interpretation of Congressional directive that in order to achieve this result there must be an "enactment of a State law ... which affirmatively provides for such eligibility." (8 U.S.C. § 1621(d).) A plain reading of this provision requires that there be an "enactment of a State law" not an "enactment of a State statute"[12] and the Committee believes that this Court, in the exercise of its inherent authority, can satisfy the requirement.

With respect to the regulation of the legal profession, the ultimate and plenary power is committed to the judicial branch, and it is this Court, and not the Legislature, that has the final say in establishing the edicts pertaining to the admission and discipline of attorneys in this State. (*In re Attorney Discipline, supra,* 19 Cal.4th at p. 602.) In this

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[11] "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." (*Arizona v. U.S., supra,* 132 S.Ct. at pp. 2500-01; *Chamber of Commerce of United States of America v. Whiting* (2011) __ U.S. __ [131 S.Ct. 1968, 1974-75, 179 L.Ed.2d 1031].) Here, however, since Congress specifically reserved to the States the right to provide eligibility for State public benefits (see 8 U.S.C. § 1621(d)), there is no express pre-emption. In addition, the savings clause in section 1621 also eliminates any concern about implied pre-emption. (See *Martinez v. The Regents of the University of California, supra,* 50 Cal.4th at p. 1298 ["Congress did not impliedly prohibit what it expressly permitted."].)

[12] "Both this Court and the [United States Supreme Court] have cautioned against reading into a statute language it does not contain or elements that do not appear on its face." (*Martinez v. The Regents of the University of California, supra,* 50 Cal.4th at p. 1295, citing *Dean v. U.S.* (2009) 556 U.S. 568, 572 [129 S.Ct. 1849, 173 L.Ed.2d 785] and *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253 [85 Cal.Rptr.3d 466, 195 P.3d 1049].) "Enactment" means "[t]he action or process of making into law," and the term "law" means more than statutes and includes legislation, judicial precedents, rules and legal principles dealing with a specific area of the legal system. (See Black's Law Dict. (9th ed. 2009) pp. 606, 962.)

unique area, when promulgating rules and regulations, the Court functions in a quasi-legislative capacity and occupies the same position as that of a State Legislature. (*Hoover v. Ronwin, supra,* 466 U.S at p. 568; *Bates v. State Bar of Arizona, supra,* 433 U.S. at p. 360 [State Supreme Court in attorney regulatory matters acts as the State]; see also *Otworth v. The Florida Bar* (1999) 71 F.Supp.2d 1209 [State Supreme Court acts as sovereign when endorsing rules regulating the Florida Bar].) Accordingly, the Committee firmly believes that a Rule of Court would be enough to invoke the savings clause under section 1621(d). (See Cal. Rules of Court, rule 9.2 [affirming Court's inherent rule-making authority over admission and discipline of attorneys]; see also e.g., Cal. Rules of Court, rules 9.5-9.48 [bar-related Rules of Court].)

The Committee further believes that the Court's pronouncements in attorney regulatory decisions also carry the force and effect of law sufficient to meet section 1621(d). (See e.g., *Segretti v. State Bar* (1976) 15 Cal.3d 878 [126 Cal.Rptr. 793, 544 P.2d 929] [where by decision this Court mandated that all attorneys suspended from the practice of law, must, as a condition of resuming or continuing practice, pass the professional responsibility examination; prior to the decision, this was not a requirement]; see also *In re Attorney Discipline System, supra,* 19 Cal.4th 582 [where this Court, in the body of its decision, adopted a Rule of Court to impose a fee on attorneys adequate to fund the discipline system and to appoint a special master].)

Action by this Court would not in any way contravene the purpose or intent underlying section 1621(d). Presumably, Congress' concern was that the sovereignty of the State act in order to affirmatively provide for the eligibility of State public benefits to

undocumented immigrants. Here, the Supreme Court ***is*** the authority within the State responsible for enacting laws in this area.[13]

Although it is true that on occasion deference to the Legislature is given and reasonable legislative controls over the practice of law are permitted, such deference is generally based on principles of comity and pragmatism, and a respect for the Legislature's exercise of police power to set minimum qualifications and standards for the protection of the public. Nevertheless, the Legislature's role is limited and should "not to be viewed as an abdication of [this Court's] inherent responsibility and authority over the core functions of admission and discipline of attorneys." (*In re Attorney Discipline, supra,* 19 Cal.4th at p. 603.)

"[I]t is this [C]ourt and not the Legislature which is final policy maker" (see *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731 [147 Cal.Rptr. 631, 581 P.2d 636]), and the Court's original jurisdiction "is not limited in any manner." (*Hustedt v. Workers' Comp. Appeals Bd., supra,* 30 Cal.3d at p. 339.) Having "'[i]nherent power' [over] a particular subject matter or function under the separation of powers doctrine means ... that the [C]ourt, by virtue of its status as one of the three constitutionally designated branches of government, has the power to act even in the absence of explicit constitutional or legislative authorization." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 57 [51 Cal.Rptr.2d 837, 913 P.2d 1046].)

The Committee sees no greater instance than this, where the Court can, and

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[13] See footnote 4, *supra.* To conclude otherwise could also implicate Tenth Amendment concerns by interfering with the division of sovereignty within the State.

should, exercise its judicial prerogative to determine who it wants to admit to its bar. As gate-keepers to this profession, and the final arbiters in matters concerning attorney admissions, the Committee urges this Court to heed its primary role in making this important decision.

III. CONCLUSION

For the reasons set forth in the Committee's Opening Brief, in the papers of the numerous amici in support of Mr. Garcia, and the positions articulated in this Answer, the Committee respectfully submits that Mr. Garcia be duly admitted to the practice of law in California.

DATED: September 6, 2012

Respectfully submitted,

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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 **ANSWER OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA TO AMICUS BRIEF OF THE UNITED STATES OF AMERICA** contains 4,061 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: September 6, 2012

Starr Babcock, Esq.

PROOF OF SERVICE BY MAIL

I, Joan Sundt, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, California 94105.

On September 6, 2012, following ordinary business practice, I placed for collection for mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, California 94105, a copy of ANSWER OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA TO AMICUS BRIEF OF THE UNITED STATES OF AMERICA in envelopes addressed as follows:

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A courtesy copy of the above ANSWER has been provided to all other amici.

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for mailing with the U.S. Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California this 6th day of September, 2012.

Joan Sundt