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IN THE SUPREME COURT OF CALIFORNIA

In Re Sergio C. Garcia On Admission

Bar Miscellaneous 4186

Consol. Answer to Multi Amicus

~~**REPLY BRIEF OF APPLICANT**~~

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I. INTRODUCTION

Sergio Garcia's immigration status is not a bar to his admission as a California attorney. He meets the educational and moral character requirements. Federal immigration laws do not show an express intent to preempt the states' historical role in attorney regulation. Congress would not take away the state's ability to admit and discipline attorneys by implication. There is no policy reason for this Court to create a new barrier to admission that would prevent Sergio Garcia from becoming a lawyer.

II. THE FEDERAL GOVERNMENT DOES NOT REGULATE THE ADMISSION OR DISCIPLINE OF ATTORNEYS BY THE STATES

II-A. Summary

The United States Congress has never claimed the right to regulate the admissions and discipline of attorneys in the state courts. Admission and discipline of attorneys is a historical core function of the states. When Congress regulates such core functions, it does so overtly. Yet the import of the USA's brief is that Congress acted by implication, and in a field that it never regulated before.

II-B. If Congress intended to regulate state admission and discipline of attorneys, it had to do so overtly, not by implication

"When addressing questions of express or implied pre-emption, we begin our analysis "with the assumption that the historic police powers of the

States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447. That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. *Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 77 [129 S.Ct. 538, 543, 172 L.Ed.2d 398]. As stated in the Garcia opening brief at page 11, 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 [104 S.Ct. 1989, 1996, 80 L.Ed.2d 590] (internal quotes and citations omitted).

There is certainly no express preemption of attorney regulation in Section 1621. None of the opposition amicus briefs claim there is an express preemption. Rather, each of them search in vain for some sort of implied preemption. Again, as the U. S. Supreme Court most recently stated in *Wyeth v. Levine* (2009) 555 U.S. 555, 565 [129 S.Ct. 1187, 1194-95, 173 L.Ed.2d 51], (internal punctuation and citations omitted), "in 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. "

Nor is there any preemption in any other provision of federal immigration law. *Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, holds that federal immigration law does not preempt regulation of attorney discipline by the states, remains uncontradicted by any brief in this matter. Thus, there is no

field, obstacle, or conflict preemption. Admission and discipline of attorneys are two sides of the coin of inherent state court powers.

The DeSha brief argues at page 12 that Congress could have excluded law licenses in fewer than 10 words. The brief has the principle backwards. The U. S. Supreme Court recently reiterated that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." (citations omitted) *Arizona v. U.S.* (2012) 132 S.Ct. 2492, 2501 [183 L.Ed.2d 351]. If Section 1621 intended to strip state courts of the ability to admit or discipline attorneys, it would have said so directly, not hidden the intent in a sentence designed to preclude executive branch government agencies from licensing other professions that do not require judicial branch action.

The principle of *Gonzales v. Oregon* (2006) 546 U.S. 243, 267 [126 S.Ct. 904, 921, 163 L.Ed.2d 748] applies (internal quotes and punctuation omitted): "We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." Congress has never regulated the practice of law in the states. Such regulation has always been considered uniquely the province of the states.

In speaking to this issue many years ago, the Wisconsin Supreme Court reviewed the history of judicial regulation of attorneys, and concluded in language that could apply to any state of this country:

> "For more than six centuries prior to the adoption of our Constitution, the courts of England, concededly subordinate to Parliament since the Revolution of 1688, had exercised the right of determining who should be admitted to the practice of

> the law, which, as was said in Matter of the Serjeants at Law, 6 Bingham's New Cases 235, "constitutes the most solid of all titles." If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity. It may be difficult to isolate that element and say with assurance that it is either a part of the inherent power of the court, or an essential element of the judicial power exercised by the court, but that it is a power belonging to the judicial entity cannot be denied. Our people borrowed from England this judicial entity and made of it not only a sovereign institution, but made of it a separate, independent, and co–ordinate branch of the government. They took this institution along with the power traditionally exercised to determine who should constitute its attorneys at law."
>
> *State v. Cannon* (1932) 240 N.W. 441, 450, *distinguished on other grounds in State ex rel. Reynolds v. Dinger* (1961) 14 Wis.2d 193 [109 N.W.2d 685]

Cannon was cited with approval in *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161, 163] *reh'g denied and opinion modified,* (1935) 2 Cal.2d 324 [42 P.2d 311]. It is as applicable today as it was then.

II-C. Attorney Regulation is different from other professional licenses

It is true as stated in the USA brief at page 7, that neither Garcia nor The Committee of Bar Examiners (CBX) has identified any other license than a law license that is not covered by Section 1621. That is because other government licenses emanate from the executive branch of the government. Applicants for such licenses are investigated by the executive branch agency, using appropriated funds for their activities. Decisions to grant or deny licenses are made by the same agency, without the need for court approval.

By way of contrast, lawyer applicants are investigated by the State Bar, funded by lawyer dues, not appropriated funds. The State Bar is not authorized to issue the law license. Unlike any other professional license, the license to practice law actually requires approval by the state supreme court. The USA brief has the principle backwards.

Thus, we agree with the statement in the California Attorney General's brief in footnote 16, page 24, that the admission of Garcia would have little effect on other professionals listed in Bus & Prof C 30. The structure of that section shows why. Bus & Prof C 30(a) divides its coverage to "any board, as defined in Section 22, and the State Bar and the Department of Real Estate." Section 22 distinguishes the State Bar from other boards. That State Bar Act stands alone and is the only Act that requires the judicial branch to grant the license. Furthermore, Section 22 applies to **agencies**, as contrasted to section 21, which applies to the government of the state.

"Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1. Never before in this Country's history has Congress expressed an intent to regulate the states' admission of attorneys. Nowhere in the federal immigration law does Congress state that it is preempting licensing of lawyers, a power that states have always exercised and one that Congress has never exercised. Courts ordinarily accept the reading of a statute that disfavors pre-emption. *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687; *Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 77, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398.

III. CONGRESS CANNOT DEPRIVE STATE COURTS OF THEIR POWER TO RULE ON JUSTICIABLE ISSUES

III-A. Summary

According to the USA Brief at page 11, this Court cannot grant a law license to Sergio Garcia due to *USA v Bean* (2001) 537 US 71, 74-75. But *Bean* did not purport to deny the power of a **court** to act. *Bean* simply held that the **agency** below had no power to act. The Supreme Court did not deprive the power of the state courts to rule on the propriety of the agency action.

III-B. The Courts cannot be deprived of jurisdiction to hear cases

Constitutional courts cannot be limited in discharge of functions by the legislative branch. *Vidal v. Backs* (1933) 218 Cal. 99, 21 P.2d 952. Judicial power is in courts, whose function is to declare law and determine rights of parties to controversy before court. Neither the constitutional executive nor administrative agencies can interfere with judicial powers. *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, rehearing denied, review denied.

Inherent powers of the courts are derived from State Constitution; they do not dependent on statutory permission. *People v. Castello* (1998) 65 Cal.App.4th 1242, rehearing denied, review denied. If Section 1621 attempted to strip state courts of the ability to admit or discipline attorneys, it would have said so directly, not hidden the intent in a sentence designed to preclude executive branch agencies from investigating and licensing other professions. As the U. S. Supreme Court stated in *Gonzales v. Oregon*

(2006) 546 U.S. 243, 267 [126 S.Ct. 904, 921, 163 L.Ed.2d 748] (internal quotes an punctuation omitted): "We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

III-C. The Immigration Laws show no intent to deprive state courts of the power to admit or discipline attorneys

As we stated in the Garcia opening brief, *Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934 recognizes that federal immigration statutes do not preempt the regulation of attorneys by the states. The USA brief does not even discuss *Gadda*, let alone refute it. The same omission applies to the DeSha brief and the Kierniesky brief. U.S. Supreme Court cases such as *Hoover* and *Bates* recognize that historically, admission and discipline are exercised by states at the state level. The discussion of that issue in *In Re Attorney Discipline System*, 19 Cal.4th at 603-604, cited five other state supreme court cases that reach the same conclusions – regulation of attorneys is a core state function, and the legislature is not permitted to invade the court's inherent power to perform that regulatory function. Almost every State Supreme Court has come to the same conclusion. See 144 A.L.R. 150 (updated through 2012).

The CBX opening brief at page 37 cites *LeClerc v Webb* (5th Cir 2005) 419 F.3d 405, a case with a different outcome but consistent with *Gadda*. *LeClerc* upheld a Louisiana Supreme Court interpretation of a Louisiana rule of court, to deny the right of foreign law students to apply for a state law license. *LeClerc* recognizes a basic truth in the federal system -- not every state reaches the same conclusion in the exercise of its police power.

"Contrary to the plaintiffs' contentions, the status of bar admission rules in other states is neither controlling nor persuasive." *LeClerc* at fn. 54, pg. 423.

Thus, at the same time *LeClerc* was decided, the Ninth Circuit reiterated the *Gadda* principle that federal law in general does not preempt California's discipline system. *Canatella v. California* (9th Cir. 2005) 404 F.3d 1106, 1110-11. *Canatella* also explains how the federal courts in California rely upon California's admission of attorneys to determine their own admission. Yet, the interpretation advanced by the USA would deprive this Court of its inherent jurisdiction to review applications for admission, in violation of well-established laws governing separation of powers. This Court expressed the principle in *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 603-604, stating, "Therefore, our traditional respect for legislative regulation of the practice of law, based upon principles of comity and pragmatism, is not to be viewed as an abdication of our inherent responsibility and authority over the core functions of admission and discipline of attorneys."

"The only constraints on the states' exclusive jurisdiction are constitutional in nature: a person may not be excluded from the practice of law in a manner or for reasons which contravene the Fourteenth Amendment, nor can the state court impose qualifications which lack "a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of New Mexico* (1957) 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796; *Brown v. Board of Bar Examiners of State of Nev.* (9th Cir. 1980) 623 F.2d 605, 609. Such historic police powers of the States are not preempted unless Congress shows a clear purpose, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407.

The USA brief at page 15 draws the wrong conclusion from the disciplinary cases involving Mr. Kanwal. He stipulated in the Immigration Court that he should be disciplined for practicing law while being an undocumented immigrant. It does not appear that any of the cited disciplinary actions considered any of the arguments that have appeared in this case. Nor does it appear that the state courts considered the long-standing lesson of *In re Ruffalo* (1968) 390 U.S. 544, 88 S. Ct. 122. 20 L.Ed.2d117. There, the Supreme Court reiterated long standing policy that discipline in a state court does not automatically lead to discipline in the federal court, because each court rules on its own admission and discipline.

"Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1. If Congress intended to invade the historic power of the state courts to rule on attorney admission and discipline, it would not have done so is such a vague way. It is thus within the province of this Court to admit Sergio Garcia in accord with the principles of *Raffaelli v Committee of Bar Examiners* (1972) 7 Cal.3d 288, (hereinafter "*Raffaelli.*")

III-D. The State Courts render decisions on alleged preemption of immigration laws

The Garcia and CBX opening briefs, along with many amicus, discuss *Martinez v The Regents* (2010) 50 Cal.4th 1277. Further discussion would be repetitive. However, we also call to the court's attention, *In re Jose C.* (2009) 45 Cal.4th 534, cited in footnote 5 of the CBX opening brief at pg. 8. *Jose C.* involved a juvenile's violation of immigration law, so it is

particularly relevant to this case. "As an independent sovereign, California generally may exercise its police power to regulate such juvenile misconduct, even when that misconduct is simultaneously the subject of federal prohibitions. "Nor is the present proceeding, which involves the alleged violation of federal immigration law, preempted by exclusive federal authority over matters pertaining to immigration." *In re Jose C.*, at p. 540. As an independent sovereign, the State of California can exercise its police power to regulate attorney admissions.

In *LeClerc, supra,* the rationale was that each of the applicants had applied for a visa that expressly indicated the immigrant had no intention of abandoning their native citizenship, and no intention to remain in the U.S.A. They are thus in a different class of immigrant than Sergio Garcia. *LeClerc* does not discuss *Raffaelli.* Louisiana simply reached a different conclusion when presented with foreign citizens who intend to remain foreign citizens, and neither *LeClerc* nor Louisiana have considered what approach to take to foreign citizens who intend to become American citizens.

LeClerc also disclaimed any relationship to *Plyler v. Doe* (1982) 457 U.S. 202. Sergio Garcia is more closely related to the immigrants in *Plyler* than he is to the non-immigrants in *LeClerc*. Like the *Plyler* immigrants, Sergio Garcia was brought here as a minor and educated here in public schools. The *Plyler* children were not likely to return to the country of their parents' birth. They were likely to remain in the U.S.A. Thus, *Plyler* discusses the rationale for educating even undocumented children – it teaches them core values, helps maintain our democratic institutions. "In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler,* at page 221.

As noted in the brief of Attorney General at page 3, the ability to utilize those educational opportunities means that many undocumented immigrants can be self-reliant and not be a burden on public resources. Public policy has insured that Sergio Garcia could attend school. He is now on the cusp of returning to the community, the fruits of that education. As the Attorney General's brief states at page 28, "Denial of admission ... would undermine state policy by shutting the door at the very moment when undocumented immigrants seeks (sic) to use that education to better themselves, their families, and others." As stated by CBX in its opening brief, "The State of California, which has expressed a desire to invest in the education of undocumented students, should be able to benefit from the contribution of these individuals as professionals, both economically and otherwise."

IV. THE STATE SUPREME COURT IS NOT A STATE AGENCY

The USA brief tacitly concedes that this Court is not an agency of the State at page 2 of its brief. It concedes at page 7 that the term 'agency of the State' does not customarily include the judicial branch of the government. That conclusion is consistent with the citations to state and federal law at page 7 of the Garcia brief.

Garcia agrees with the statement by CBX in its opening brief at page 10, that federal courts are ordinarily not described as agencies. As noted in the DeSha opposition brief at page 11, Congress has defined an agency as a department within the Executive Branch under 5 U.S.C. 101. That brief cites two other code sections that are exceptions to this principle, but those sections do not support his argument that somehow this Court is an

"agency." Those two other code sections are exceptions to the general rule. Thus, the California Attorney General brief at page 11 correctly concludes that the term agency customarily refers to executive branch agencies, a discussion that is consistent with the Garcia opening brief at pages 7- 8, and with all of the other amicus briefs.

V. NO APPROPRIATED FUNDS ARE USED TO ADMIT GARCIA TO THE PRACTICE OF LAW

There is no argument in any brief that appropriated funds are used by the State Bar. The party briefs and the amicus briefs demonstrate that there are none. The USA brief argues only that this Court uses appropriated funds and therefore cannot admit Garcia to practice law. Neither logic nor the authorities cited support the argument.

The USA brief at page 11 erroneously claims: "Prohibition on the use of appropriated funds for a particular purpose prohibits the use of *any* appropriated funds for that purpose. See, e.g., *United States v Bean* 537 U.S. 71, 74-75.."

Actually, *Bean* only applied the appropriated funds law to the underlying **agency**, not to the Courts. *Bean* interpreted a particular section of an appropriation act that reads, "... none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." That sentence appears in the Treasury, Postal Service, and General Government Appropriations Act 1993, PL 102–393, October 6, 1992, 106 Stat 1729.

Bean thus applied the appropriated funds principle to a specific executive branch agency, the Bureau of Alcohol, Tobacco & Firearms. *Bean* did not expand the application of that appropriation act to prevent the Court from reviewing the inaction of ATF. Yet, under the USA's argument, the federal courts would have no jurisdiction to use appropriated funds to review the administrative ruling.

The United States Government Accountability Office (GAO) publishes *Principles of Federal Appropriations Law*, the relevant portions of which are at Exhibit H. (Please see new Exhibit attached hereto.) At Vol. 1, pages 2-3, it is stated, "The term "appropriation" may be defined as: "Authority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes." A footnote cites, *inter alia*, *Andrus v. Sierra Club* (1979) 442 U.S. 347, 359, where at footnote 14, the Court states, "*Appropriation,* on the other hand, is defined as: "An authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." *Andrus v. Sierra Club* (1979) 442 U.S. 347, 361 [99 S.Ct. 2335, 2343, 60 L.Ed.2d 943]. At pages 2-16, *the Principles* states, "An appropriation is a form of budget authority that makes funds available to an agency to incur obligations and make expenditures."

VI. IF A STATE STATUTE IS NEEDED UNDER 8 USC 1621(d), THEN BUS & PROF C 6060.6 QUALIFIES

The USA brief ignores Bus & Prof C 6060.6, the statute which provides the exemption under 8 U.S.C. 1621(d). Garcia reiterates the argument in the opening brief at page 18, that no superseding statute is required, a view concurred in by CBX at page 18 of its opening brief, and reiterated by CBX in its reply brief at page 2. But if a statute were required, it is Bus & Prof Code 6060.6 , for the reasons discussed at pages 18 et seq. of the Garcia opening brief. The Desha brief at page 16 agrees. So does the Los Angeles County Bar at page 23. The USA brief ignores the issue.

VII. THERE IS NO "HARBORING" ISSUE

The supporting ACLU brief at pp. 25 et. seq., and the opposing Kierniesky brief at p. 4 et seq, address the issue of "harboring" an alien who remains in the United States "in violation of law." Harboring is generally understood to relate to providing shelter and is therefore not applicable here. See, *United States v. Acosta de Evans* (9th Cir.1976) 531 F.2d 428, 430 (construing "harbor" to mean "afford shelter to"). No brief cites any case involving the prosecution of consumers who pay for goods and services. Nor has counsel located any such cases.

The Kierniesky brief cites isolated phrases in 3 unpublished cases, ignores the plethora of published cases on the subject, and ignores all the authorities in the ACLU brief. Unpublished federal cases are citable in California, but

they are deemed useful only if their reasoning is persuasive. *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096.

The Kierniesky brief cites *U.S. v. Hinojos-Mendez* (2008) 270 Fed.Appx. 368, and *U.S. v. Ramirez* (2007) 250 Fed.Appx. 80, cases in which smugglers were moving immigrants around the country and defendant helped the smugglers. It cites *U.S. v. Batjargal* (2008) 302 Fed.Appx. 188, where the defendant helped the immigrant move from Virginia to Washington to get a drivers license, a place to live, a car, car insurance, a cell phone, and gym membership. The Kierniesky brief does not demonstrate how that behavior is related to a client who hires an attorney.

Compare those three unpublished cases, each with an absence of reasoning, to the published case of *U.S. v. Costello* (2012) 666 F.3d 1040, cited at page 26 of the ACLU brief. In *Costello*, the immigrant was deported and came back to the USA; his girlfriend picked him up at the bus station and brought him home. The Court discussed the entire history of the "harboring" provision in the immigration code, the relevant case law, and the often-erroneous use of dictionary definitions. *Costello* is a published case and has solid reasoning. It concluded that harboring meant some form of concealment rather than merely living with the man.

VIII. GARCIA HAS NO DUTY TO LEAVE THE COUNTRY

Sergio Garcia is a "family sponsored immigrant" under 8 U.S.C. 1153(a)(1), having been converted to that status automatically when his father became a U.S. citizen. 8 U.S.C. 1154(k)(1). In our opening brief, we stated that such

status did not confer any additional rights upon him. That statement is true as far as it went. However, Garcia does have additional rights after living here over 10 years. If the United States government seeks to remove him from this Country, he can apply for a hardship cancellation under 8 U.S.C. 1229(b)(1). That right accrues because he has been in the U.S.A. for over 10 years. 8 U.S.C. 1229(b)(1)(A), and he can ask for a cancellation if there is hardship to his parents, *ibid* (1)(C). The hardship determination must take into account both the present condition of the parent as well as the future hardship. See *Figueroa v. Mukasey* (9th Cir. 2008) 543 F.3d 487, 497.

Thus, he has an additional right, not from his status, but from his longevity. That right cannot be invoked unless the government seeks to remove him from the country. "Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. ... Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona v. U.S.* (2012) 132 S.Ct. 2492, 2499 [183 L.Ed.2d 351].

There is thus no duty to "self deport." To the contrary, the statutory scheme requires first a discretionary notice of removal by the immigration authorities, then a scheduled hearing, and thus a right by the immigrant to present his case for cancellation of removal.

IX. IMMIGRATION REGULATION AND LAWYER REGULATION SHOULD REMAIN IN THEIR OWN SPHERES

IX-A. Background

At page 16 of the USA brief, the amicus says, "The enforcement of the federal provisions governing employment by aliens is a responsibility of the federal government, and is not the proper subject of state court proceedings, particularly in the context of state licensing." That statement is consistent with the statement at page 22 of the Attorney General's brief: "Issues of licensure are separate and independent from issues of employment." Those statements echo the discussion beginning at page 19 of the CBX brief. Garcia agrees with those conclusions.

IX-B. Immigration status is transitory and should not be the basis for denying Garcia admission to practice law

Under the trend of the law, "the illegal alien of today may well be the legal alien of tomorrow," pg. 16 of the Brooks' brief,[1] in turn quoting from *Plyler*. The law changes quickly in this field. The *Martinez* case was decided while Garcia's moral character application was pending with the Bar Examiners. In between Garcia's two personal interviews at CBX, the first of the two DHS enforcement policies were promulgated; see our exhibits D and E. The second one was decided one working day before opening briefs were filed. The *Arizona* case was decided a few weeks after opening briefs were filed.

[1] We refer to amicus briefs of multiple parties by the first name listed on the brief. The Brooks Brief was lodged on behalf of the deans of 7 California law schools.

The law and public policy are changing on a daily basis. Denial of admission to practice law should not depend on transitory changes in government policy.

The *Raffaelli* case was decided as the immigration facts changed. Mr. Raffaelli was an undocumented immigrant when CBX denied his application.[2] He was a permanent resident when this Court ruled that CBX should not have denied his application due to his lack of citizenship. The rationale applies to Sergio Garcia.

IX-C. In ruling on admission to practice law, this court should not attempt to decide a contested issue of law that is not tied to education or good moral character

Having stated that this Court cannot rule on employment, the USA then goes on to argue that Garcia is unlawfully employed under a 1978 immigration court case, where it is stated, "The word "employment" is also defined as meaning the act of being employed for one's self (30 C.J.S. 682)" *Matter of Tong* (BIA 1978) 16 I. & N. Dec. 593. *Tong* has been superseded by 8 C.F.R. 274a.1 (f), and (g) and (h), defining "employee," "employer, " and "employment;" and distinguishing those terms from independent contractor in 8 C.F.R. § 274a.1(j), defining independent contractor. Those regulations are entitled to "considerable weight." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844 [104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694].

[2] At the time of the *Raffaelli* case, CBX issued the Bar results and moral character certification simultaneously. Thus, he was "undocumented" from late 1969 until he obtained permanent residence in 1971.

The Attorney General's brief at page 25 discusses the conflicting authorities on this issue in footnote 17. Neither the Attorney General's brief nor the USA's brief discuss *Bhakta v INS* (9th Cir 1981) 667 F.2d 771, which, contrary to *Tong*, holds that the term "unauthorized employment" does *not* include a self employed person who hires other people to work for him. *Bhakta* holds that the law was intended to apply to immigrants who come to this country and take away jobs from citizens, not those who create jobs. Thus, Garcia can be self employed, comply with the regulations that supersede *Tong*, and not be penalized due to *Bhatka*. These authorities are further proof that immigration status is transitory and should thus not be the basis to deny an applicant for admission to practice law.

The USA brief on self-employment also refers to 8 C.F.R. 274 (a) (5), that there are penalties for hiring independent contractors. But that section was designed to prevent employers from circumventing the employee requirements, not to punish the self employed. See the ACLU Brief at pp. 24 et seq.; the terms "employee" and "independent contractor" are mutually exclusive. Thus, "... a person or business that uses contract labor to circumvent the law against knowingly hiring unauthorized aliens, will be considered to have "hired" the alien "for employment," in violation of 1324a(a)(1)(A). [citations and punctuation omitted) *U.S. v. General Dynamics Corp.* (1993) 3 OCAHO 517 [OCAHO is the Office of the Chief Administrative Hearing Officer of United States Department of Justice Executive Office for Immigration Review.] The law was not intended to govern individual consumers who patronize local businesses, but rather to prevent covered employers from evading the law by employing labor

contractors to recruit employees and then calling those employees "independent contractors."

Finally, the immigration policies of 2011 (Exhibit D) and 2012 (Exhibit E) have now moved these sorts of employment issues out of the picture. The immigration authorities are no longer interested in people like Mr. Tong or Mr. Bhakta or Mr. Garcia. Insofar as a lawyer applicant is concerned, the issue has no moral character implications.

IX-D. Conclusion -- there are boundaries between admission and employment

The foregoing discussion of immigrant employability demonstrates why the Committee of Bar Examiners and the Los Angeles County Bar et al. were wise in suggesting that this court should maintain a boundary between attorney licensing and immigration. This Court's ruling on employment issues would be hypothetical. If there is a federal employment issue, it will be resolved by the immigration agency of the United States Government. Similarly, any action or continued inaction by the federal government will have no effect on Garcia's qualifications to practice law. As CBX points out at pp. 20 et seq. of its opening brief, this Court has not historically asked applicants how they plan to be employed if they are admitted. There is no reason to start doing so now.

There are several differences of opinion in the various briefs on what sort of work an undocumented immigrant may lawfully do. Each opinion is supported by citations to relevant authority. This Court can only speculate

how Garcia might make a living, and whether his choice will be acceptable to the immigration authorities. His past behavior indicates that his choice will be based on a good faith attempt to obey the law, and will be made above board.

The Committee of Bar Examiners currently investigates applicants for moral character implications of all issues, only one of which is employment. CBX does not currently delve into the minutiae of employment law or immigration law and try to predict how another agency might ultimately rule on arcane issues of changing law. The State Bar is ill equipped to do so, as detailed at pp. 35-41 of the Los Angeles County Bar et al. brief.

Nor does CBX make moral character decisions based on contested interpretations of legal principles. CBX evaluates whether the applicant approaches such issues in an open and honest fashion. For moral character purposes, Garcia is an openly self-employed person who attempts to comply with complex immigration laws while supporting himself. He is not part of the underground economy, nor does he try to conceal what he does.

This Court's ruling will not resolve Sergio Garcia's immigration status. Any action taken by the federal government, or its continued inaction, will have no effect on Garcia's qualifications to practice law.

X. THERE ARE NEITHER CITIZENSHIP NOR RESIDENCY REQUIREMENTS FOR ADMISSION TO PRACTICE LAW IN CALIFORNIA

The instructions for First Year Student Bar Exam Applicants (Garcia Exhibit C) informed persons such as Sergio Garcia that residence is not a requirement for admission. As stated in the Los Angeles Bar et al. brief at page 15, the former statutory requirement for residence has been taken out of the State Bar Act. That requirement was deleted in 1970, *Raffaelli,* at fn. 1, pg. 292. As cited by the La Raza brief, the U.S. Supreme Court has held the residency requirement to be unconstitutional. *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274 [105 S.Ct. 1272, 84 L.Ed.2d 205].

The rationale of *Piper* applies here. That opinion rejected arguments that nonresident members would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State. *Piper*, at p. 285 [105 S.Ct. 1272, 1279, 84 L.Ed.2d 205]. *Piper*'s rationale for rejecting those reasons apply equally to Sergio Garcia. He has obtained a law degree and passed the Bar. He is as available for court proceedings as anyone else who lives in Butte County. He has a history of *pro bono* and charitable work.

Raffaelli and *Application of Griffiths* (1973) 413 U.S. 717 also discuss why citizenship is a constitutionally improper criterion for admission to practice law. Those reasons are discussed in the opening briefs and many of the amicus briefs. There is no reason to carve out an exception to those cases at this time.

As we noted in our opening brief, Mr. Raffaelli was not yet a permanent resident nor a Citizen at the time that the State Bar recommended against his admission on the basis that he lacked citizenship. *Raffaelli,* at page 291.

By the time the Supreme Court ruled on his case, he had married an American woman, and had become permanent resident, but was not eligible for naturalization until September 1974. But this Court's ruling was based on the facts available to CBX at the time it turned him down, that is, when he was an undocumented immigrant. *Raffaelli* was thus consistent with *Brydonjack v. State Bar of California* (1929) 208 Cal. 439, *Telegdi v. State Bar of California* (1929) 208 Cal. 793, and, *Howden v. State Bar of California* (1929) 208 Cal. 604. Each of those cases used mere *intention* to apply for citizenship as the criteria for admission to practice law, when citizenship was a legal prerequisite. All three of the non-citizen attorneys Brydonjack, Telegdi and Howden were far less invested in California and the U.S.A. than Sergio Garcia, who actually applied for permanent residency and was approved pending a visa, eighteen years ago. Garcia has devoted his adult life to becoming a lawyer in California while living in California; Brydonjack, Telegdi and Howden were attorneys in other countries, who wanted to practice in California, but had not even applied for U.S. citizenship at the time they applied and were admitted in California.

Brydonjack, Telegdi, and *Howden* were also consistent with then extant Civil Code 51, which provided that "all citizens within the jurisdiction of this state are entitled to the full and equal * * * privileges of * * * subject only to the conditions and limitations established by law, and applicable alike to all citizens." In *Prowd v Gore* (1922) 57 Cal App 458, the court ruled that "citizens" included "unnaturalized residents of foreign birth,"

where were deemed citizens of California because they live here, even if they were not citizens of the United States. *Id.* at pp. 460-461.

All of the reasons to overturn citizenship as a valid criteria for admission in *Raffaelli* debunked the general, irrational fears of aliens, the "others" who have come here more recently than our own families. But now, Mr. Garcia and the "Dreamers" identify as Americans. They were brought here as children. They have no other homeland. As pointed out by the California Latino Legislative Caucus' Amicus brief at page 14, "... they have lived in California for the majority of their lives, attended California public schools, and are invested in the progress and well-being of the State." That brief goes on to cite *Sei Fujii v. State* (1952) 38 Cal. 2d 718, 733, which invalidated the California Alien Land Law, a case where this court reasoned, "having made his home here, (he) has a natural interest, identical with that of an eligible alien, in the strength and security of the country in which he makes a living for his family and educates his children."

From the time that Garcia applied for law school to this very day, the law has informed him that neither residency nor citizenship are requirements to practice law. Bus & Prof C 6060.6 permits him to apply for the Bar Exam and admission without a social security number that, under current law, he could not obtain. *Brydonjack, etc.* hold that his intent to become a citizen was sufficient, were citizenship still requisite. *Schware* holds that education and moral character are about the only relevant considerations.

XI. GARCIA CAN TAKE THE OATH OF AN ATTORNEY

The DeSha brief at page 13 et seq. argues that Garcia's presence automatically violates his duty to uphold the law. The DeSha brief at page 13, and the Kierniesky brief at pp. 8-9, erroneously claim that Garcia is in violation of 8 U.S.C. 1302 and thus cannot take the oath of an attorney. They are wrong on the law.

8 U.S.C. 1306(a) recites punishment for failure to register, inapplicable here. 8 U.S.C. 1306(b) does not apply, as Garcia has kept the DHS updated on his address. Garcia was registered by his parents nearly 18 years ago, thus complying with 8 U.S.C. 1302. The ACLU Brief at pp. 10 et seq. demonstrates that removal of an immigrant is a complex subject that does not depend on the immigrant's status at the beginning of the process.

As held in *Raffaelli* and *Brydonjack*, the intent of the immigrant to seek citizenship and legal status is sufficient to permit him to take the oath of an attorney. The same rationale applies to Garcia, who has waited in line for a period of time longer than Mr. Raffaelli lived in the USA, has expressed the same intent, and has demonstrated a concerted effort to uphold the law.

Even if there were a violation of an immigration statute, this Court has held that, " ... it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline." *In re Kelley* (1990) 52 Cal.3d 487. Furthermore, as stated in our opening brief, " ... we note that every intentional violation of the law is not, *ipso facto*, grounds for excluding an individual from membership in the legal profession." *Hallinan v. Committee of Bar Examiners of State Bar* (1966) 65 Cal.2d 447, 459. The test applied

to a violation of a particular law is whether the conduct itself shows a "lack of respect for the legal system." *Matter of Respondent I* (1993) 2 Cal State Bar Ct Rptr 260, 272.

As the CBX opening brief states at page 32, the oath is not given to aliens as a class but to individual attorneys. Garcia has made every effort to comply with the law while living here. All his actions have been above board, and he has made no effort to conceal himself or his status.

XII. ADMISSION OF GARCIA ADVANCES CALIFORNIA'S PUBLIC POLICY TOWARDS UNDOCUMENTED IMMIGRANTS

Plyler prohibited states from excluding undocumented minor children from primary schools. *Martinez* upheld California's law permitting undocumented immigrants to attend college. California's recent DREAM Act permits the state to provide scholarships to undocumented children. Education C 66021.7. The recent DHS policy changes (Exhibits C and D) give a path for many children to obtain legal status in the country where they were raised, simply not born here.

The amicus brief of Community Legal Services in East Palo Alto has presented five young California immigrants who endorse Mr. Garcia's application for admission. Each of them tells a compelling life story of achievement against all obstacles, guided by mentors in the immigrant community who encouraged them to take advantage of the educational opportunities our state provides. Each of them has remarkable talent and perseverance; each of them has a passion for justice and the desire to give

back to their own communities, by becoming attorneys. Each of them took the time from long days of work and school to join with their communities in support of Mr. Garcia's admission. They signed personal declarations *prior* to President Obama's announcement of two-year work permits and a stay of deportment proceedings.

The amicus brief of Dream Team Los Angeles points out that there will be law school graduates amongst the young immigrants who are now eligible for two-year work permits under the new DHS policy. Yet, "they are still undocumented immigrants in the same way that Mr. Garcia is an undocumented immigrant. By not admitting Mr. Garcia to the State Bar, the Court would be impliedly prohibiting those undocumented immigrants with work permits..." Dream Team L.A. Brief at page 5.

The supportive *amici* have detailed the history of legislation designed to benefit society through the education and productivity of all its residents, and especially the huge younger generation, many of whom would be excluded by birthplace alone, but for affirmative legislation at the state level.

Immigrants who were brought here as children and have lived here for most of their lives will not be deterred from "illegal immigration." They are already here. To educate them is to make them more productive and independent. This is especially true of an immigrant like Sergio Garcia, who has achieved higher education through his own work, without public benefits. He has been waiting to become a permanent resident and a citizen for almost twenty years. Now he is ready to give back, although he did not partake of public benefits other than the opportunity to work hard and pursue a law degree. He was not the beneficiary of public or private funding; he

paid his own way. Yet he is appreciative of the very opportunity to pay for a higher education. He is ready to give back, both as an employer and a taxpayer. As the Attorney General's brief recites at page 30, he will not be taking a benefit; he will be paying a fee.

The Brooks amicus brief notes at page 7 that a little over 100 law school graduates in 2011 became sole practitioners. Given that an undocumented immigrant cannot work for an employer, it is likely that they will gravitate towards self-employment. Some, like Garcia, will remain in small towns, where the need is high and the availability of lawyers is not as plentiful as the big cities.

It would be foolish to deny him the license he has earned, and thereby deprive the state of jobs and tax dollars he will generate, and the example he sets for others.

XIV. CONCLUSION

This Court should note the breadth, depth, and diversity of the amici who have urged Garcia's admission. They represent established county bar associations and local community groups, law professors and deans as well as aspiring immigrants. By way of contrast, the USA brief urges a reading of federal law that is inconsistent with the entire history of State Supreme Courts' plenary control of attorney admission and discipline. California public policy is consistent with the Congressional objectives of the PRWORA, that is, minimizing the number of immigrants who require tax

dollars to support them, and encouraging everyone to become a self-sufficient, productive member of society -- just like Sergio Garcia.

For decades, this Court has consistently held that the only requirements for admission to practice law are a proper education and good moral character. From *Brydonjack* to *Raffaelli*, immigration status has been rejected as a relevant criterion; there is no reason to change that principle now. California should give a resounding welcome to the hardworking, high achieving immigrant who embodies every quality we need in the future.

FISHKIN & SLATTER LLP

By:

JEROME FISHKIN

Word Count Certification

Pursuant to Cal. Rules of Court, Rule 8.520(c)(1), I certify that this Reply Brief on Applicant Sergio C. Garcia contains fewer than 8,400 words.

JEROME FISHKIN

S202512
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DECLARATION OF SERVICE BY MAIL

I am employed in Contra Costa County, California. I am over the age of 18 years, and I am not a party to the within action. My business address is 1575 Treat Blvd., Suite 215, Walnut Creek, CA 94598. On this date, I served the

REPLY BRIEF OF APPLICANT SERGIO C. GARICA

by placing a true copy in a sealed envelope with postage fully prepaid, through the United States Postal Service at Walnut Creek, California, addressed to

SEE ATTACHMENT A

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on the date below at Walnut Creek, California.

9/13/2012

DATE

PATRICIA HOEKWATER

ATTACHMENT A

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