In the Supreme Court of the State of California

In re SERGIO C. GARCIA on Admission.	Case No. S202512

Bar Misc. 4186

BRIEF OF AMICUS CURIAE CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS IN SUPPORT OF PETITIONER

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INTRODUCTION

In response to this Court's order of May 16, 2012, and pursuant to California Rules of Court, rule 8.520, Attorney General Kamala D. Harris submits this brief as amicus curiae in support of Sergio C. Garcia's admission to practice law.

Garcia has earned this Court's full consideration of his application for admission to the practice of law, irrespective of his immigration status. Although his State Bar file is not open to us, the available information indicates that Garcia is qualified for admission. Like many undocumented immigrants, Garcia was brought to this country by his parents. His father, who has since become a citizen but was at the time a lawful permanent resident, filed a petition so that Garcia could receive an immigrant visa and also become a lawful permanent resident. The federal government approved Garcia's petition and he has been patiently waiting in line for a visa for seventeen years. In that time he has put himself through college and law school, earned a living, paid taxes, and remained a law-abiding resident of California. He has passed the California Bar Examination, thereby meeting the rigorous standards required to practice law in California, and the Committee of Bar Examiners has recommended his admission. No law or policy prevents this Court from admitting Garcia to the State Bar of California (the Bar); in fact, admitting Garcia to the Bar would be consistent with state and federal policy that encourages immigrants, both documented and undocumented, to contribute to society.

First, federal law does not prohibit this Court from admitting Garcia. By its terms 8 U.S.C. section 1621(c) does not apply to the practice of law. Further, this Court's authority to regulate attorney admission to the Bar has long been held to be a core attribute of state sovereignty. Congress understands this, and so when it has intended to legislate in ways that intrude on the states' authority to regulate the practice of law, it has done so

unequivocally. Because Congress did not unambiguously state its intention to do so, this Court should not construe section 1621 to impinge on its prerogative to regulate admission to the Bar.

Second, if licensed, there are no other legal limitations of which we are aware on Garcia's ability to practice law. The fact that, as a minor, Garcia entered the country without inspection should not be disqualifying. It is not a crime either to be present or to work in the United States without immigration status, and Garcia has never been charged with the crime of unlawful entry. In fact, Garcia has been forthright about his immigration status with federal officials, and has been approved for a visa when one becomes available. He has been waiting for seventeen years. Nothing about his immigration status renders Garcia unable either to uphold the oath required of attorneys or to comply with all ethical and professional standards. Although the nation has so far been unable to enact comprehensive immigration reform, Garcia appears to have determinedly and lawfully navigated his way. Discomfort with the many contradictions in federal immigration policy should not burden Garcia's application for admission to the Bar.

Although federal law does not currently permit an employer to hire Garcia, there are several reasons that this fact should not by itself prevent his admission. The issuance of a license to practice law does not in any way represent that the licensee may be legally employed. This is borne out by the fact that this Court does not in other contexts consider residency, citizenship, or permission to work in the United States in making admission decisions. For some time this Court has admitted to the Bar foreign nationals who may have immigration status in the form of student visas but, like Garcia, lack work authorization. In any event, the admission of foreign nationals lacking work authorization in the United States also suggests that there are ways in which Garcia could lawfully earn income as a licensed

California attorney. For example, as the British and Irish governments successfully argued, he could obtain work outside the country advising clients about state and federal law; or he could practice in California on a pro bono basis. Another reason that employability should not factor into the admission determination is that federal restrictions on the employment of undocumented workers have changed over time and may change yet again. In fact, new regulations being drafted by the United States Department of Homeland Security will make it possible for qualifying undocumented immigrants to obtain exemption from removal and permission to work. The answer to the question of whether and under what circumstances Garcia may be employed should not influence this Court's determination of whether Garcia should be admitted to the Bar.

Third, admitting an otherwise qualified undocumented immigrant to the practice of law would be consistent with the existing policy of the state, as well as with federal law. Although we are unaware of any state law that makes undocumented immigrants eligible for professional licenses, we do not draw from that absence of legislation any conclusions about state policy. The California Legislature has expanded the ability of qualified undocumented immigrants to attend colleges and universities in California by exempting them from non-resident tuition and by allowing them to receive public and private scholarships. Admitting qualified undocumented immigrants to practice law would be consistent with the Legislature's view that California is served by encouraging them to pursue an education. It also would track state policies that acknowledge and encourage the positive contributions that undocumented immigrants make to society as a whole. In addition, Congress's stated goal in adopting section 1621—to encourage immigrants to be self-reliant and to avoid burdening public resources—is not in any way at odds with admitting Garcia to the Bar. He is a model of the self-reliant and self-sufficient immigrant envisioned by federal policy.

After years of hard work, Sergio Garcia has earned this Court's full consideration of his application for admission to the legal profession. It is a profession that, by definition, is one of service. Garcia has demonstrated that he has the necessary intellectual and moral fiber to serve as an attorney. This Court should permit him to do so.

INTEREST OF THE ATTORNEY GENERAL

As the chief law officer of the State of California (Cal. Const., art. V, § 13), the Attorney General is responsible for all legal matters in which the State is interested (Gov. Code, § 12511), and thus has an interest in ensuring both that the attorneys who represent Californians, and those who may litigate cases in which the Attorney General is also involved in courts throughout the state, meet the high ethical and legal standards necessary for the effective operation of California's legal system.

ARGUMENT

I. FEDERAL LAW DOES NOT PROHIBIT THIS COURT FROM ADMITTING UNDOCUMENTED IMMIGRANTS TO THE STATE BAR.

Section 1621 of title 8 of the United States Code provides that undocumented immigrants generally are not eligible for "any State or local public benefit (as defined in subsection (c) of this section)." Subsection (c) in turn defines a public benefit as "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government."

Notably, section 1621 does not simply forbid the state from granting any professional license to an undocumented immigrant; instead, the proscription is qualified. Section 1621 only restricts the state from granting "any . . . professional license . . . *provided by an agency of a State* . . . or *by appropriated funds of a State* . . . ." (8 U.S.C. § 1621(c).) These qualifications limit the federal restriction on professional licensing of undocumented immigrants, and the nature of those qualifications indicate that section 1621 is not properly construed to restrict eligibility for admission to the Bar.[1]

Section 1621 does not apply because, although admission to the Bar is surely a professional license, neither of the two statutory qualifications are met. The license to practice law is not provided by "an agency of a state," but by this Court. Nor is the license provided by "appropriated funds of the

[1] Congress enacted section 1621 as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. These two qualifications are also found in a parallel section of the Act, which defines restricted *federal* public benefits. (8 U.S.C. § 1611(c)(1)(A) ["any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States"].)

state;" instead it is funded by fees paid by its members directly to the State Bar, which are never appropriated by the Legislature.

Moreover, the lack of a simple, universal restriction on state licensing of undocumented immigrants both signifies that Congress did not intend section 1621 to apply to all professional licenses and implies that Congress did not intend section 1621 to impinge on the state's historical sovereign authority to regulate the practice of law in California. When Congress intends to regulate the practice of law, it has been explicit: either by specifically stating that it intends to regulate lawyers, or by enacting a law of such broad application that it must necessarily include lawyers. Because section 1621 does neither of these things, it should not be construed to forbid Garcia's eligibility for admission to the State Bar.

A. Section 1621 By its Terms Does Not Apply to Admission to the Practice of Law.

By its terms, section 1621 does not limit this Court's authority to grant Garcia admission to the practice of law because the statutory qualifications for restricting eligibility for a professional license are not met. First, the entity that admits attorneys to the practice of law, this Court, is not an "agency of a state." Second, appropriated funds are not used to provide the license; they are paid for by each attorney in the form of dues.

1. The Supreme Court issues the license to practice law, and it is not an "agency of the state."

Section 1621 does not prevent Garcia's admission to the Bar because a license to practice law is given not by "an agency of a State," as the statute requires, but by this Court, which is a branch of government, not a state agency. (Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and judicial"]; *id.*, art. VI, § 1 ["The judicial power of this State is vested in the Supreme Court, courts of appeal, and

superior courts"].) The judicial branch is no more a "state agency" than is the Legislature. (See *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442 [observing that the courts, like the Legislature and the Executive branches, are "a separate department in the scheme of our state government"].)

This Court exclusively decides who is admitted to and who is separated from membership in the State Bar, and how members shall be disciplined. For over 150 years the law has recognized this Court's inherent authority under article VI of the California Constitution to admit, discipline, and disbar attorneys. "In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 335, fn. 5, 336.)

The State Bar assists the Court in determining the candidates who are qualified for admission. It was created by the State Bar Act of 1927 and moved to article VI, section 9 of the California Constitution in 1966. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 590.) The State Bar has established an examination committee to "examine all applicants for admission to practice law" and thereafter to "certify to the Supreme Court for admission those applicants who fulfill the requirements" to practice law. (Bus. & Prof. Code, § 6046, subds. (a) & (c).) The State Bar's role "has consistently been articulated as that of an administrative assistant to or adjunct of the Supreme Court," but it does not make decisions to admit, disbar, suspend or discipline attorneys. (*Keller v. State Bar of California* (1989) 47 Cal.3d 1152, 1160, reversed on other grounds (1990) 496 U.S. 1) (quoting *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557).) "In the area of admission to practice, an applicant is admitted only by order of the Supreme Court . . . ." (*Ibid*.)

Section 1621 does not define the term "agency of a state,"[2] so we look to the rules of statutory construction adopted by the United States Supreme Court. (*Kilroy v. Superior Court* (1997) 54 Cal.App.4th 793, 801 [noting that when applying a federal statute, California courts follow federal rules of statutory construction].) Federal law refers us back to state law. Where, as here, a federal statute fails to define an operative term and legislative history does not inform the understanding of that term, the court assumes that local law supplies the meaning. (*Marcos v. Dir., Office of Workers' Compensation Progs., U.S. Dept. of Labor* (D.C. Cir. 1976) 548 F.2d 1044, 1047, fn. 4 [holding that state law supplied the meaning of "husband"].) Under California law, there appears to be no universal common-law or statutory definition of a "state agency" or "agency of a state." Absent a contrary statutory definition, California courts give statutory language its "usual and ordinary meaning." (*Green v. State of California* (2007) 42 Cal.4th 254, 260.) Ordinarily, the term "agency" refers to an entity within the Executive Branch of government that acts as an "agent" of the Executive to enforce and administer laws enacted through the legislative process. The part of the Government Code concerning state agencies, beginning with section 11000, is located in Division 3 of Title 2, which is titled "Executive Department." Black's Law Dictionary defines agency as "[a] governmental body with the authority to implement and administer particular legislation." (Black's Law Dict. (8th ed. 2004) p. 67, col. 2.) Similarly, it defines state agency as "an executive or regulatory body of a state." (*Id*. at p. 68, col. 1.)

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[2] The term "agency of a state" is not defined in section 1621, nor is it defined either in 8 U.S.C. §1611, which contains the definitions for this part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, or in 8 U.S.C. § 1101(a), which is incorporated in section 1611 by reference.

This Court, however, does not implement or administer legislation, nor is it an executive or regulatory body. To be sure, there are judicial branch agencies, such as the Judicial Council and its arm, the Administrative Office of the Courts (*Los Angeles Cty. Dependency Attorneys, Inc. v. Dept. of General Servs.* (2008) 161 Cal.App.4th 230, 233 & fn. 2), and the State Bar Court (*Conservatorship of Becerra v. Becerra* (2009) 175 Cal.App.4th 1474, 1484 [describing State Bar Court as an administrative agency affiliated with the State Bar].) But when this Court admits attorneys to the Bar, it is exercising its inherent, constitutional authority as the head of the judicial branch of government and is not, in any sense, an "agency of the state;"[3] it is exercising a judicial function that is tantamount to a judicial order.[4] (*In re Lavine* (1935) 2 Cal.2d 324, 327-328 [describing Court's admission and disciplinary functions as the exercise of

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[3] The United States Supreme Court came to a similar conclusion about the federal judiciary in *Hubbard v. United States* (1995) 514 U.S. 695. In that case the Court concluded that a federal court was not an agency for purposes of 18 U.S.C. section 1001, which criminalized false statements occurring in any matter within the jurisdiction of any department or agency of the United States. The Supreme Court noted that:

> In ordinary parlance, federal courts are not described as 'departments' or 'agencies' of the Government. As noted by the Sixth Circuit, it would be strange indeed to refer to a court as an agency. See [(6th Cir. 1994] 16 F.3d [694,] at 698 n. 4 ('[T]he U.S. Court of Appeals [is not] the Appellate Adjudication Agency').

(*Hubbard v. United States, supra*, 514 U.S. at p. 699.)

[4] The United States Supreme Court has reached the same conclusion about the power of the federal courts to admit and exclude attorneys from the federal bar. (*Ex parte Garland* (1866) 71 U.S. (4 Wall.) 333, 378-379 (holding that the attorney "admission or . . . exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases"].)

a judicial function]; *id.* at p. 329 [holding that legislative encroachment upon the Court's inherent power to admit attorneys is "tantamount to the vacating of a judicial order by legislative mandate"].)

2. Appropriated funds of the state do not fund a bar license.

A bar license is also not a public benefit proscribed by section 1621 because it is not "provided . . . by appropriated funds of a state," as the statute requires.[5] Because this language qualifies the class of professional licenses for which undocumented immigrants are ineligible, it must mean something less than all professional licenses. Giving the statute a literal interpretation, it appears that professional licenses "provided . . . . by appropriated funds of a state" refers to a professional license that is paid for or subsidized by appropriated funds of state, instead of by the licensee. "Appropriated" funds generally refers to state revenues allocated by statute.[6]

The state will not pay for or subsidize Garcia's law license, and it does not do so as a general matter (save for lawyers who are state employees). Rather, each attorney is responsible for paying for the license him or herself in the form of dues. "Applicants for admission to practice shall pay such reasonable fees, fixed by the board, as may be necessary to defray the expense of administering the provisions of this chapter, relating

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[5] As with "agency of a state," see ante at footnote 2, because the Welfare Reform Act of 1996 does not define "appropriated funds of a state," we look to state law to determine its meaning. (See *Marcos v. Dir., Office of Workers' Compensation Progs.*, *supra*, 548 F.2d at p. 1047, fn. 4.)

[6] See Black's Law Dict. (8th ed. 2004) p. 110 [defining "appropriation" as "1. The exercise of control over property; a taking of possession.... 2. A legislative body's act of setting aside a sum of money for a public purpose"], cited with approval in *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 980, fn. 14.

to admission to practice." (Bus. & Prof. Code, § 6063.) Providing a professional license to Garcia would thus not be a public benefit.[7]

B. Section 1621 Should Not Be Construed to Apply to Bar Admissions Because Congress Did Not Clearly State Its Intention to Intrude on the States' Exclusive Authority to Regulate Attorney Admission and Discipline.

The regulation of admission to the bar of a state court, as well as the discipline of attorneys, has long been recognized as within the exclusive authority of the states, and specifically the state supreme courts. This rule should inform the application of section 1621 in the context of bar admissions. Congress is well aware of the traditional primacy of the state courts in regulating attorneys, so when it means to use its powers to regulate attorneys, it has done so in ways that leave no room for doubt about its intentions. Its failure to do so in crafting section 1621 leads to the conclusion that Congress did not intend that statute to restrict state bar admissions. Further, because regulation of state bar admission is a core

[7] In its brief, the Committee of Bar Examiners interprets this provision to mean that a state may not use appropriated funds when it determines whether or not to license an undocumented immigrant or to cover the cost of licensure that would be borne by the entity that issues a license. While the Attorney General believes the better interpretation is that Congress intended to prohibit states from paying the licensing fees out of appropriated funds, the Attorney General agrees with the Committee that since the licensing function is paid from bar dues, this provision is also inapplicable under the Committee's interpretation. The bar dues that fund the licensure of attorneys is deposited directly into the State Bar's treasury (not the State Treasury), and thus are not appropriated by the Legislature. (See *Keller v. State Bar of California* (1990) 496 U.S. 1, 11 [noting that the State Bar's "principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors"].) Any appropriated funds used by the California Supreme Court in making the final licensure determination are de minimis and insufficient to convert a bar license into a "public benefit" for purposes of section 1621.

sovereign function of the state, in the absence of a clear statement that it intends to do so, Congress's intention to intrude on that state prerogative will not be assumed.

1. State bar admissions are a core state function.

"[T]he regulation of lawyers and the practice of law have historically been recognized as the responsibility of the states, and not the federal government." (*New York State Bar Assn. v. Federal Trade Com'n* (D.D.C. 2003) 276 F.Supp.2d 110, 128 [holding that Congress did not delegate regulation of lawyers' ethical conduct to the Federal Trade Commission when it enacted the Federal Financial Modernization Act], affirmed sub nom *American Bar Assn. v. FTC* (D.C. Cir. 2005) 430 F.3d 457.)

> 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. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

(*Leis v. Flynt* (1979) 439 U.S. 438, 442.) "[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." (*In the Matter of David A. Secombe* (1856) 60 U.S. 9, 13.) That is still the case today: "every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337.)

Not only is admission to practice law historically a state function, it is a core part of the sovereignty reserved to the states by the United States Constitution. "[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." (*Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 361 [holding that state bar rules restricting lawyer

advertising were protected by the state action doctrine and so did not violate the Sherman Act].) "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" (*Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792 [holding that state bar enforcement of county bar minimum fee schedules was not state action and therefore was price fixing in violation of the Sherman Act].) Attorneys are so integral to the administration of justice that states have a singular interest in regulating who may appear before their courts. (*Middlesex County Ethics Comm. v. Garden State Bar Ass'n* (1982) 457 U.S. 423, 434 ["The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice"].)

2. Congress knows how to convey its intention to regulate attorneys.

The long-standing and exclusive authority of state courts to regulate state bar admissions is well known to Congress, which understands how to clearly indicate when it intends to impinge on that authority. In *New York State Bar Association v. Federal Trade Commission, supra,* the District Court of the District of Columbia rejected the Federal Trade Commission's (FTC) contention that the Federal Financial Modernization Act, also known as the Gramm-Leach-Bliley Act (GLBA), authorized it to regulate the ethical conduct of attorneys engaged in financial transactions governed by the Act. In considering the arguments of the FTC, the court made two observations about the contested provision of the GLBA that are equally true of section 1621: on the one hand, it was not sufficiently broad or, on the other, sufficiently specific, to demonstrate that Congress intended to regulate attorneys. (276 F.Supp.2d at pp. 133-134, 135.) The court first

looked at federal statutes that do apply to the activities of attorneys because their scope is very broad. These included:

- 15 U.S.C. § 1692a , the Fair Debt Collection Practices Act ("The term 'debt collector' means *any person* who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of debts ....") (emphasis added);

- 15 U.S.C. § 1681n, the Fair Credit Reporting Act ("*Any person* who willfully fails to comply with any requirement imposed under this subchapter ....") (emphasis added);

- 15 U.S.C. § 1, the Sherman Antitrust Act ("*Every person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal ....") (emphasis added);

- 42 U.S.C. § 1983, the Civil Rights Act of 1964 ("*Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable ....") (emphasis added);

- 42 U.S.C. § 2000e, Title VII ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, *legal representatives*, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers") (emphasis added);

- 18 U.S.C. § 1962, the Racketeer Influenced and Corrupt Organizations Act (RICO) ("It shall be unlawful for *any person* who has received any income derived, directly or indirectly, from a pattern of racketeering activity ....") (emphasis added); and

- 15 U.S.C. § 78j, federal securities law ("It shall be unlawful for *any person,* directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails ....") (emphasis added).[8]

(*New York State Bar Association v. Federal Trade Commission, supra,* 276 F.Supp.2d at pp. 133-134.) When the district court compared these statutes to the GLBA, it concluded that Congress did not intend to regulate the conduct of lawyers through the GLBA.

> Clearly, Congress intended the scope of each of these statutes to be extremely broad, describing each of them to be applicable to "any person" or "every person." In fact, in a case on which the FTC relies heavily for the proposition that Congress can regulate the conduct of attorneys, the Supreme Court commented that the scope of the federal statute before it, the Sherman Antitrust Act, is so broad that "language more comprehensive is difficult to conceive." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (quoting *United States v. S-E Underwriters Ass'n*, 322 U.S. 533, 553, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944)) (noting that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act"). The GLBA, on the other hand, is limited in its scope to "financial institutions." This is significant because the scope of all but one of the statutes cited by the FTC contains language that is so broad that it is inconceivable that Congress did not intend for the statutes to apply to attorneys. This is clearly not the case with the GLBA.

(*New York State Bar Association v. Federal Trade Commission, supra,* 276 F.Supp.2d at p. 134.)[9] As earlier noted, section 1621 is also insufficiently

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[8] See also *Milavetz, Gallop & Milavetz v. United States* (2010) 130 S.Ct. 1324 [upholding federal regulation of attorneys who come within the definition of "debt collection agencies" as defined in the Bankruptcy Abuse Prevention and Consumer Protection Act].

[9] See also *Ellen S. v. Florida Bd. of Bar Examiners* (S.D. Fla. 1994) 859 F.Supp. 1489 [holding that the American with Disabilities Act, which expressly applies to all "public entities" (42 U.S.C. § 12132) applied to the licensing and regulation of attorneys].

broad to make it absolutely clear that Congress intended it to restrict attorney bar admissions. Congress could have simply made undocumented immigrants ineligible for any state-issued professional license, but it did not. Instead, it made them ineligible for particular kinds of state licenses: those either "provided by an agency of a State," or "provided . . . by appropriated funds of a State." (8 U.S.C. § 1621(c).) Because admission to the Bar does not fall into either of these categories, section 1621 is insufficiently broad to restrict eligibility for admission to the Bar.

The district court then looked at a federal statute that expressly regulates attorneys, the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq., which specifically provides:

> the term 'settlement services' includes any service in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, *services rendered by an attorney,* the preparation of documents ... and the handling of the processing, and closing or settlement[.]

(12 U.S.C. § 2602(3) [emphasis added].) The court noted that this statute "demonstrated that Congress knows how to include the profession of law in legislation when it desires a statute to cover attorneys." (*New York Bar Assn. v. FTC, supra,* 276 F.Supp.2d at pp. 134-135.) The court also observed that:

> in defining the scope of what constitutes "settlement services" under the RESPA, Congress listed numerous activities, including those that are performed primarily by attorneys (*i.e.,* title searches and title examinations, etc.). *Knowing that such activities are routinely performed by attorneys, and in some states can only be performed by attorneys, Congress still explicitly included attorneys within the statute's scope*. What Congress did when it drafted the RESPA is insightful because Congress could have simply listed the types of activities the RESPA was intended to cover, including those activities primarily performed by attorneys, without explicitly referencing attorneys. This is what it did when it enacted the GLBA.

> However, Congress did not do that in the RESPA, but rather was careful to explicitly include within the statute's coverage "services rendered by attorneys." This seems to be clear proof that Congress did not intend for the GLBA to extend to attorneys.

(*Id.* at pp. 135-136 [footnotes omitted, emphasis added].) Similarly in section 1621, Congress identified professional licenses generally, knowing that Bar admission is a professional license to practice law in a state, but did not explicitly include attorneys within its coverage and also qualified the restriction in a way that seems to exclude bar admissions. This signals that section 1621 should not be construed to disallow eligibility for admission to the practice of law.

In addition, adverting to Justice Scalia's memorable admonition that Congress "does not . . . hide elephants in mouseholes,"[10] the district court remarked that "in the face of approximately two hundred years of exclusive state regulation" it was "doubtful that Congress would alter a regulatory scheme that has always been under the authority of the states without even a hint that newly enacted legislation was venturing into that area." (*New York Bar Assn. v. FTC, supra,* 276 F.Supp.2d at p. 136.) For all of these reasons, section 1621 should not be construed to limit this Court's authority to admit Garcia to the State Bar.

[10] *Whitman v Am. Trucking Assns.* (2001) 531 U.S. 457, 468.

3. Even when Congress is exercising authority as broad as its authority to regulate immigration, courts will not assume that it intends to intrude into a core area of state sovereignty without a clear statement of such intent.

When the District of Columbia Circuit affirmed the decision of the district court, that the GLBA did not authorize the FTC to regulate attorneys, it did so not just on ordinary statutory construction grounds, but also for reasons of federalism:

> [I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute . . . . By now it should be abundantly plain that Congress has not made an intention to regulate the practice of law "unmistakably clear" in the language of the GLBA.

(*American Bar Assn. v. FTC, supra,* 430 F.3d at pp. 471-472 [quotations and citations omitted].)

The D.C. Circuit relied on *Gregory v. Ashcroft* (1991) 501 U.S. 452, in finding a failure of the "clear statement" rule.[11] (*American Bar Assn. v. FTC, supra,* 430 F.3d at p. 472.) In that case, Missouri state judges challenged the state constitution's mandatory age 70 retirement age, contending it violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA) and the Fourteenth Amendment's equal protection clause. In consideration of maintaining the proper balance of

[11] Following the decision of the D.C Circuit, the District for the District of Columbia subsequently applied the *Gregory v. Ashcroft* plain statement rule to invalidate another instance in which the FTC claimed the right to regulate lawyers pursuant to federal legislation. (See *American Bar Assn. v. FTC* (D.D.C. December 1, 2009) No. 09-1636, 2010 WL 985122 [invalidating application of identity theft red flags regulation to attorneys under the Fair Accurate Credit Transactions Act of 2003], vacated as moot and dismissed (D.C. Cir. 2011) 2011 WL 981116 [vacated as moot after legislative amendment excluded attorneys from regulation].)

state and federal authority, the Supreme Court noted that although Congress had the power to "legislate in areas traditionally regulated by the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." (*Gregory v. Ashcroft, supra,* 501 U.S. at p. 460.) Noting that in that case the federal law would nullify "a state constitutional provision through which the people of Missouri establish a qualifications for those who sit as their judges" (*ibid.*), and that determining the qualifications of such officials "is a power reserved to the States under the Tenth Amendment" as well as the Guarantee Clause (*id.* at p. 463), the Court noted that the applicable provision of the ADEA "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." (*Ibid.*) This "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers." (*Ibid.*) Accordingly, relying on cases taken from the Eleventh Amendment context, the Court required a "plain statement" that Congress intended to pre-empt the historic powers of the states and include appointed state judges within the ADEA. (*Id.* at p. 461.)

After considering the various arguments for construing a statutory exception to the ADEA either to include or to exclude judges, the Court determined that "[i]t is at least ambiguous." (*Gregory v. Ashcroft, supra,* 501 U.S. at p. 467.) "[A] plain statement that judges are not 'employees' would seem the most efficient phrasing." (*Ibid.*) Lacking a clear statement, the Court held, "We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. . . . [I]t must be plain to anyone reading the Act that it covers judges." (*Ibid.*) In context, the relevant provision was "sufficiently broad that we cannot conclude that the

statute plainly covers appointed state judges. Therefore, it does not." (*Ibid.*)

In holding that the plain statement rule applied to purported Congressional regulation of attorneys under the GLBA, the D.C. Circuit rejected the argument that *Gregory v. Ashcroft* did not apply because the GLBA did not regulate the states:

> We see no reasons why the reasoning should not apply in the present context. The states have regulated the practice of law throughout the history of our country; the federal government has not. This is not to conclude that the federal government could not do so. We simply conclude that it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous.

(*American Bar Assn. v. FTC, supra,* 430 F.3d at p. 472.)

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens" that derives from its power to "establish an uniform Rule of Naturalization" (U.S. Const., art. I, § 8, cl. 4), and its inherent power to control and conduct foreign relations. (*Arizona v. United States* (June 25, 2012) — S.Ct. —, No. 11-182, 2012 WL 2368661 at p. *5.) But even in the context of the exercise of this comprehensive federal power, the Supreme Court noted that "[i]n preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." (*Id.* at p. *8 [internal quotations and citations omitted].) Thus, even if there is little doubt that Congress could restrict state courts from granting bar admission to undocumented immigrants, the Supreme Court requires an unambiguous statement that Congress so intends. That unambiguous statement is missing from section 1621, at least with respect to the practice of law. Section 1621 should not be construed to limit this Court's authority to admit Garcia to the Bar because it is unsupported by a plain statement

that Congress intended to intrude on state authority to regulate Bar admission.

II. IMMIGRATION STATUS HAS NO BEARING ON GARCIA'S QUALIFICATIONS FOR THE BAR.

As set forth above, admitting Garcia to the Bar is not forbidden by federal law. Further, an immigrant's entry into the country without proper documentation does not by itself indicate a lack of moral character necessary to practice law.[12] There is no indication that Garcia cannot comply with the attorneys' oath or his ethical responsibilities under the California Rules of Professional Conduct or Business and Professions Code section 6068. There are no legal limitations on his ability to practice law and any restrictions on Garcia's employment are unrelated to licensure.

A. There Are No Legal Limitations on Garcia's Ability to Practice Law.

It is important to bear in mind that Garcia has never been charged with any crime. He entered the country with his parents eighteen years ago, when he was 17. Illegal entry can be charged as a misdemeanor (see 8 U.S.C. § 1325), but Garcia is an unlikely defendant as he entered as a minor under his parents' care.[13] Although it does subject him to the civil penalty of deportation, Garcia's continued presence in the United States is not a crime of any kind. (*Arizona v. United States, supra,* 2012 WL 2368661 at p. *13.) Indeed, 17 years ago Garcia's parents applied for him to obtain a visa so that he could be lawfully present in this country. It is also not a crime for an undocumented immigrant to work, although there are penalties

[12] Certainly, the Committee of Bar Examiners did not conclude otherwise, or it would not have moved for Garcia's admission.

[13] In any event, the five year statute of limitations has long run on Garcia's improper entry. (See 8 U.S.C. § 3282.)

for employers who hire or continue to employ undocumented workers. (*Id.* at p. *11.)

There is no evidence here of moral turpitude that would prohibit Garcia from being licensed to practice law. (Bus. & Prof. Code, § 6061.) Garcia did not mislead federal officials when he entered the country; indeed he has been open about his status with federal officials since his entry, including in connection with his application for a visa, which has been approved pending availability. There is no conflict inherent in being in this country without proper documentation and the ethical practice of law.[14]

B. Issuance of a License to Practice Law Does Not Imply Lawful Employability, Nor Should the Existence or Absence of Work Authorization Influence Licensure.

Federal restrictions on the employment of undocumented immigrants do not bear on whether this Court should license Garcia to practice law in California. Issues of licensure are separate and independent from issues of employment. *Licensure* is an acknowledgment by this Court that a candidate has met the requirements for entry into the profession regardless

[14] Of course undocumented attorneys, like all attorneys, should be held to the high moral and ethical standards set by this Court and the State Bar. In contrast to Garcia, however, an undocumented immigrant who enters the country as an adult, using falsified documents, or who perjures himself to gain entry may demonstrate a moral turpitude that should disqualify him from admission to the Bar.

There are other practical concerns associated with admitting to the Bar undocumented immigrants who are less than frank about their status. For example, they might seek to avoid contact with law enforcement, courts, or other officials, which would interfere with the duties they owe to their clients. For this reason, the State Bar may wish to consider imposing a requirement similar to that imposed on undocumented immigrants seeking exemption from paying out of state college tuition: an affirmation that the candidate has filed or will when eligible file an application to legalize his or her immigration status. (Ed. Code, § 68130.5, subd. (a)(4).)

of whether the licensee ever practices law. *Employment* of an undocumented person, on the other hand, concerns whether, as a matter of federal law, a person may be employed in this country regardless of his profession. These are two independent inquiries.[15]

Indeed, many prospective members of the Bar (regardless of immigration status) may never practice law, because they wish to enter a different field in which a legal credential is not strictly necessary but may be helpful, or simply want prove to themselves and others that they can pass the most difficult bar exam in the country. The State Bar and this Court do not generally inquire about whether an individual intends to be employed as an attorney before granting a license to practice law, and should not in this case.

California has historically differentiated between licensure and employment, as evidenced by the fact that this Court is authorized to admit foreign nationals to the practice of law. Prior to 2005, Business and Professions Code section 30 required that anyone applying for admission to the Bar provide a social security number or federal employer identification number. This requirement effectively prevented anyone who was ineligible to work from applying. In 2005, however, the Legislature enacted Business and Professions Code section 6060.6, which expressly allows an applicant who is not eligible for a social security number to apply for admission to

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[15] Although licensure and employment are independent inquiries, it is true that sometimes both must be satisfied. That is, to employ a lawyer in California, an *employer* must determine both that the candidate has lawful immigration status and that he is licensed to practice law. As discussed below, however, it is not the case that to work as a lawyer, both of these conditions must be satisfied.

the Bar.[16] In doing so, the Legislature expressly contemplated that individuals who were not U.S. citizens or residents—and thus not eligible to work in the United States—would be admitted to the Bar. The Legislature responded to letters from the Irish and British governments, among others, highlighting that many of their businesses had a presence in California, and that allowing their citizens to study law in California would help those businesses. Section 6060.6 establishes that foreign nationals may be admitted to practice law, even though they may not be able to be employed in the United States. The fact that an employer could not hire Garcia to work in the United States thus should not be a barrier to his admission to the practice of law.

The enactment of section 6060.6 reflects the fact that individuals who cannot be "employed" in the United States may nonetheless use their Bar license in myriad ways. Nothing prevents foreign nationals from returning to their country of origin (or any other country) to practice or teach law. Given the ease with which individuals can communicate over the internet and the global nature of the economy, it is possible to practice law from outside of the country, as do many other foreign nationals who receive a Bar license pursuant to section 6060.6.

Even within the United States, Garcia may be able to use his Bar license. The Immigration Reform and Control Act (IRCA) makes it unlawful for a person or entity to knowingly hire an unauthorized alien. (8 U.S.C. § 1324a(a)(1)(A).) Under IRCA, employers are required to verify that their employees are authorized to work by examining the employee's documentation and completing an I-9 Form. (8 C.F.R. § 274a.2 (2012).)

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[16] Section 6060.6 only applies to an application to practice law; other professional licenses remain subject to Business and Professions Code, section 30. Thus, even if the Supreme Court were to grant Garcia a law license, it would have little, if any, direct effect on other professions.

An undocumented immigrant, however, could legally provide services on a pro bono basis. And while the law is unsettled in this area, there may be other ways, consistent with IRCA, for an undocumented attorney to earn a living by practicing law in California.[17]

It is also important to keep in mind that federal law governing the employability of undocumented immigrants has changed over time. The first federal restrictions on the employment of undocumented immigrants were passed by Congress when it enacted IRCA in 1986; prior to that time states had the authority to regulate their employment. (See *Arizona v. United States, supra,* 2012 WL 2368661 at p. *10.) More change is afoot. It may soon become lawful for some undocumented immigrants to be hired. The Department of Homeland Security recently announced a new deferred-action process, whereby certain undocumented immigrants will be

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[17] The Committee of Bar Examiners argues that undocumented immigrants may legally work as independent contractors for clients, for instance in a solo practice. While the Attorney General agrees that in a relationship between an attorney in private practice and his client, the attorney should be characterized as an independent contractor rather than an employee, it is uncertain whether a client may legally enter into a contract with an undocumented immigrant. (Compare 8 C.F.R. § 274a.5 (2012) [prohibiting the contracting of services from an individual the contracting party knows to be an undocumented immigrant] with National Lawyers' Guild, 1 Immigration Law and Defense § 12:7 (2012) ["Congress evidently did not intend to make employers liable for the hiring practices of bona fide subcontractors or independent consultants; it only intended this language to cover situations where the parties use independent contractor status or engage in the barter of goods for services as a pretext to avoid penalties"].) Some commentators believe that undocumented immigrants can legally own their own businesses, a factor that some Immigration Judges have used as a justification that an undocumented immigrant should be permitted to stay in the country. (Mastman, *Undocumented Entrepreneurs: Are Business Owners "Employees" Under the Immigration Laws* (2009) 12 N.Y.U. J. of Legis. and Pub. Policy p. 225; *Matter of Gonzalez Recinas* (2002) 23 I. & N. Dec. 467, 468.)

permitted to legally remain in the United States and, in certain cases, obtain authorization to work. Individuals who meet certain criteria will be eligible to receive "deferred action," meaning that the federal government will defer removal of the individual as an act of prosecutorial discretion. This policy will apply to individuals who:

- Came to the United States under the age of sixteen;
- Continuously resided in the United States for at least five years preceding the date of the policy change and are present in the United States on the date of the policy change;
- Are in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and
- Are not above the age of thirty.[18]

Individuals who obtain deferred action may receive employment authorization provided that they can demonstrate an economic necessity for employment.[19] While Garcia would likely not receive relief under this new policy, it is undoubtedly the case that many undocumented immigrants will. There are thus a substantial number of individuals for whom federal employment restrictions would no longer pose a barrier to employment.

The fluidity of federal immigration law illustrates that IRCA's restrictions on employment of undocumented immigrants should not

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[18] http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm

[19] http://www.uscis.gov/files/form/i-765instr.pdf

influence this Court's determination of whether to license Garcia and other undocumented immigrants who meet California's rigorous requirements to be licensed to practice law.

Certainly, the risk that Garcia might be deported is insufficient grounds to deny him admission to the Bar. As the Committee of Bar Examiners explains in its brief, the possibility that Garcia would be deported is extremely low. (Committee's Br. at pp. 34–35.) For over a decade Garcia has been known to federal officials, who have not initiated deportation proceedings. Even if the federal government initiated deportation proceedings against Garcia, he could apply for cancellation of removal. (8 U.S.C. § 1229b, subd. (b)(1).) While there is always a risk that an undocumented immigrant might be unable to fulfill his or her obligations to a client because of deportation, similar risks exist for all attorneys, any of whom could experience a life event—an illness, accident, disability, or other emergency—that interferes with their obligations to clients. All attorneys are ethically obligated to plan for such eventualities by securing adequate representation for their clients, and courts may also intervene to protect a client. (Bus. & Prof. Code, §§ 6180, 6190.)

III. ADMITTING GARCIA TO PRACTICE LAW WOULD BE CONSISTENT WITH THE PUBLIC POLICY OF CALIFORNIA AND THE STATED POLICY OF THE FEDERAL GOVERNMENT.

A. California Encourages Law-Abiding Undocumented Immigrants to Become Educated and Improve their Economic Status.

The policy of this state as expressed in its laws is to expand the opportunities of undocumented immigrants so that they can lift themselves into a better life and be of service to their communities. Recently, the Legislature passed the California DREAM Act, which allows undocumented immigrants to obtain public and private scholarships to state colleges and universities in California. (See Stats. 2011, ch. 93 (Assem.

Bill 130) and Stats. 2011, ch. 604 (Assem. Bill 131).) Undocumented immigrants will now be afforded substantially the same opportunities to attend institutions of higher learning, including public law schools, as California residents. In this way, the California Legislature encourages undocumented immigrants to attend college in California.[20] (See *Martinez v. Regents of the University of California* (2010) 50 Cal.4th 1277.)

Admitting Garcia to practice law would be consistent with the Legislature's policies. Admission to the practice of law would complement the state's effort to encourage undocumented immigrants to attend high school, college, and indeed law school. Denial of admission, by contrast, would undermine state policy by shutting the door at the very moment when undocumented immigrants seeks to use that education to better themselves, their families, and others.

B. Admitting Garcia Would Be Consistent With Stated Federal Policy Goals As Well.

The stated primary purpose of section 1621 is to encourage immigrants to be self sufficient and to ensure that undocumented immigrants do not financially burden the states. Admitting otherwise qualified undocumented immigrants to practice law in California does not offend these concerns. Specifically, Congress stated:

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[20] California has made a concerted effort to educate undocumented immigrants. The Legislature has concluded that educating undocumented immigrants "increases the state's collective productivity and economic growth." (Stats. 2011, ch. 93 (Assem. Bill 130).) California has provided a K-12 public education to undocumented immigrants for decades, in compliance with federal law. (See *Plyler v. Doe* (1982) 457 U.S. 202, 230.) In 2001, the Legislature enacted Education Code section 68130.5, which exempts all high school graduates who attended a California high school for three or more years, including undocumented immigrant students, from paying non-resident tuition at California state colleges and universities. (Stats. 2011, ch. 814, § 2.)

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that--

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) 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.

(5) 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.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

(8 U.S.C. § 1601.)

It is of course difficult to reconcile this stated congressional policy with section 1621's restriction on professional licensing. Licensing, especially that based on fees paid by the licensed, generally increases one's ability to be self-sufficient and avoid becoming a burden on the state. It is therefore unclear what purpose the restriction was meant to serve. And there are reasons to doubt that allowing an undocumented immigrant to obtain a Bar license has any impact on illegal immigration. Admission to practice law is unlike any of the other "public benefits" listed in section 1621: the applicant must pay a yearly fee for this "benefit," which requires a college degree, three years of law school, success at a rigorous bar examination, and a moral character determination. A license to practice law is a long-term commitment that, unlike employment, food stamps, medical care, housing, or cash benefits, seems unlikely to encourage either illegal immigration or continued residence.

Admission of undocumented immigrants certainly would not undermine Congress's stated goal of ensuring self-reliance and avoiding a burden on public resources. Garcia is an example of the kind of self-sufficiency that Congress has stated should be a "basic principle" of immigration law: he put himself through college and law school, all the while earning a living and paying taxes. Admitting Garcia to the Bar would not "burden the public benefits system." This is not public welfare, it is fee for service: if admitted, Garcia would be charged the annual dues that all attorneys pay and so would subsidize the State Bar's activities, not drain its resources. By admitting Garcia to the practice of law, this Court would not violate either the letter or the spirit of section 1621.

CONCLUSION

There is no law or policy preventing Sergio Garcia from becoming a member of the State Bar. Garcia has come from a humble background and has worked hard to put himself through college and law school. He now wishes to devote himself to a life of service in one of the most important professions in our society. He has no criminal record, he has been open about his immigration status, is following the rules to gain legal status, and has contributed to his community.

As a matter of policy, state and many local governments have acted to incorporate the millions of undocumented immigrants into the social order and to improve their economic status. While the federal government has yet to enact comprehensive immigration reform, it has also begun to implement policies that recognize that millions of law abiding persons reside in this country without proper documentation, and that they can, and should, be productive members of society. Admitting Sergio Garcia to the practice of law is consistent with state and federal policy. This Court should give Garcia's application to become a member of the State Bar of California its full consideration.

Dated: July 18, 2012

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of Amicus Curiae California Attorney General Kamala D. Harris in Support of Petitioner uses a 13 point Times New Roman font and contains 9,523 words.

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